Law Commission
Reforming the law

Wildlife Law
Volume 1: Report

50 YEARS

Law Com No 362

The Law Commission

(LAW COM No 362)

WILDLIFE LAW
VOLUME 1: REPORT

This has been produced along with Volume 2: Draft Legislation as a combined document

Presented to Parliament pursuant to section 3(2) of the Law Commissions Act 1965

Ordered by the House of Commons to be printed on 9 November 2015

HC 585–I

Two volumes not to be sold separately

This publication is available at www.gov.uk/government/publications.

Print ISBN 9781474125796
Web ISBN 9781474125789

ID 04111508 11/15

Printed on paper containing 75% recycled fibre content minimum

Printed in the UK by the Williams Lea Group on behalf of the Controller of Her Majesty's Stationery Office

THE LAW COMMISSION

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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The text of this report is available on the Law Commission's website at http://www.lawcom.gov.uk.

1 Lord Justice Lloyd Jones was Chairman of the Law Commission at the time this report was drafted and approved in principle. He was succeeded by Lord Justice Bean on 1 August 2015.

2 Professor Elizabeth Cooke was a Law Commissioner at the time this report was drafted and approved in principle. She was succeeded by Professor Hopkins on 1 October 2015.

THE LAW COMMISSION

WILDLIFE LAW

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THE LAW COMMISSION

WILDLIFE LAW

To the Right Honourable Michael Gove MP, Lord Chancellor and Secretary of State for Justice

CHAPTER 1
INTRODUCTION

1.1 In this report we make recommendations for the reform of wildlife law in England and Wales.

1.2 As we explored in our consultation paper on wildlife law,[1] there is no homogenous purpose or theme to the vast array of wildlife legislation in England and Wales. We suggested, however, that there are four principal strands which have emerged over time[2] and now coexist in a complex set of legislative provisions giving effect to international agreements, EU law and domestic preferences.

1.3 First, the law provides the framework within which wildlife can be controlled, so that it does not unduly interfere with social or economic interests, infrastructure, biodiversity, the welfare of other animals and other environmental interests. Legislation falling within this category includes provisions to facilitate and promote the control of agricultural pests and weeds,[3] provisions on the prevention, control, eradication and long term management of invasive non-native species[4] and provisions to regulate human activities that interfere with protected wild animals or plants.[5]

1 Wildlife Law (2012) Law Commission Consultation Paper No 206, pp 2 to 4.

2 C T Reid, *Nature Conservation Law* (3rd ed 2009) pp 1 to 3.

3 Agriculture Act 1947; Pests Act 1954; Weeds Act 1959.

4 Wildlife and Countryside Act 1981, ss 14, 14ZA and 14ZB; Import of Live Fish (England and Wales) Act 1980; Destructive Imported Animals Act 1932. See also, Regulation on the prevention and management of the introduction and spread of invasive alien species (EU) No 1143/2014, Official Journal L317 of 4.11.2014 p 35.

5 See Directive on the conservation of natural habitats and of wild fauna and flora 92/43/EEC, Official Journal L 206 of 22.7.1992 p 7, art 16 (transposed in domestic legislation by the Conservation of Habitats and Species Regulations 2010, reg 53), and Directive on the conservation of wild birds 2009/147/EC, Official Journal L 20 of 26.1.2010 p 7, art 9 (transposed in domestic legislation by the Wildlife and Countryside Act 1981, s 16).

1.4 Secondly, the law allows for the exploitation of certain wild animals as valuable economic or leisure resources. An obvious example is the protection of the hunting rights of owners or occupiers of land over certain wild animals present on their land through poaching legislation dating back to the nineteenth century Game Acts.[6]

1.5 Thirdly, the law protects individual wild animals from harm in certain contexts. Certain animal welfare measures, such as the introduction of close seasons for certain huntable animals,[7] or the prohibition of certain indiscriminate methods of killing or capturing,[8] are inextricably tied to conservation purposes. Other animal welfare provisions are purely aimed at preventing animal suffering. It follows that while a number of specific animal welfare provisions relevant to wild animals are contained in free-standing regulatory structures,[9] other animal welfare provisions are scattered in a number of species-specific protection statutes.[10]

1.6 Lastly, the law seeks to conserve wild animals and plants as a fundamental part of our common natural heritage and as integral components of complex ecosystems. Most domestic provisions, in this context, are contained in the Wildlife and Countryside Act 1981, the Conservation of Habitats and Species Regulations 2010 and a number of species-specific protection provisions.[11] Domestic wildlife conservation legislation is strongly influenced by a number of important international agreements[12] and two key European Union (EU) Directives: the Wild Birds Directive and the Habitats Directive.[13]

THE RATIONALE FOR REFORMING WILDLIFE LAW

1.7 In the last two centuries wildlife legislation has developed in a piecemeal fashion, often in reaction to specific pressures on domestic legislation, whether local or international. The result is that the current legislation governing the control, exploitation, welfare and conservation of wild animals and plants in England and Wales has become unnecessarily complex and inconsistent.

6 Night Poaching Acts 1828 and 1844; Game Act 1831; Poaching Prevention Act 1862; Ground Game Act 1880.

7 See Deer Act 1991, s 2; Conservation of Seals Act 1970, s 2.

8 See Wildlife and Countryside Act 1981, s 5.

9 Animals Welfare Act 2006; Wild Mammals (Protection) Act 1996.

10 Protection of Badgers Act 1992, s 2; Deer Act 1991, s 4; Conservation of Seals Act 1970, s 1.

11 See the Protection of Badgers Act 1992; the Deer Act 1991 and the Conservation of Seals Act 1970.

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

13 Directive on the conservation of wild birds 2009/147/EC, Official Journal L 20 of 26.1.2010 p 7 (the "Wild Birds Directive") and Directive on the conservation of natural habitats and of wild fauna and flora 92/43/EEC, Official Journal L 206 of 22.7.1992 p 7 (the "Habitats Directive").

1.8 While the enactment of the Wildlife and Countryside Act 1981 was substantially driven by the Wild Birds Directive, it retained, to a large extent, the structure and policy preferences of earlier legislation, such as the Protection of Birds Act 1954. The Conservation of Habitats and Species Regulations 2010[14] implement the Habitats Directive in England and Wales through a modern regulatory framework, but overlap to a large extent with similar provisions that remain in force under the Wildlife and Countryside Act. Other species-specific laws are the result of private members' Bills, and have not necessarily been drafted with a view to fitting with the rest of domestic legislation.[15] The result is a complex patchwork of overlapping and sometimes conflicting provisions.

1.9 We accept that a certain level of complexity is, in part, an inevitable consequence of the breadth of wildlife law. The natural environment is a complex system and the law concerning it needs to apply in a range of different situations and reflect a range of (potentially competing) interests. In many cases, however, there appears to be little obvious rationale for the existing complexity.

1.10 The sort of flexibility we now require of regulatory regimes is also absent from important areas of wildlife law. This is due, in part, to the age of certain pieces of legislation that are still in force. There are, for instance, no powers to introduce or vary close seasons for game species. As the conservation status of wild species, their migratory patterns and reproductive habits may change over time as a result of direct human activities or changes to climatic conditions, a regulatory regime is only effective if it is capable of being regularly updated and reviewed to ensure that the law adequately responds to current threats and political preferences.

1.11 In the last forty years, efforts to conserve wild species of fauna and flora have acquired a significant international dimension. As of now, a large proportion of domestic wildlife protection legislation falls within the scope of a number of international agreements and EU directives. Those developments have significantly increased the pressure on the existing domestic regulatory regimes. The use of old regulatory structures as vehicles to implement new regulatory regimes, for example, has recently come under severe scrutiny from the European Commission.[16] A comprehensive reform of the existing regulatory structure is, therefore, the most effective way to ensure a harmonious coexistence between domestic political preferences and the UK's obligations under international and EU law.

1.12 Lastly, the current regime relies heavily on the criminal law, and tends therefore to stigmatise as "criminals" those found guilty of an offence. Criminalising regulatory transgressions may not always be the most appropriate or effective way of ensuring beneficial outcomes. In certain circumstances it may be better to provide the non-compliant individual or organisation with advice or guidance.

[14] SI 2010 No 490.

[15] See the Wild Mammals (Protection) Act 1996 and the Protection of Badgers Act 1992.

[16] See, in particular, Case C-6/04 *Commission v United Kingdom* [2005] ECR 1-9017.

1.13 At the other end of the scale, the criminalisation of harmful activities and the sentences available may not be severe enough to control certain serious transgressions. The available levels of fine can easily be absorbed by high profit-earning businesses, and it must be remembered that some of the actors involved in activities affecting wildlife are large economic ones.[17] On that basis, the availability of more serious sanctions and effective economic tools – such as the possibility of preventing those committing serious transgressions from continuing to carry out a particular business activity until they can prove that their future behaviour will accord with wildlife law – may be merited.

BACKGROUND TO THE WILDLIFE PROJECT

1.14 The wildlife law project was proposed by the Department for Environment, Food and Rural Affairs (Defra) for the Law Commission's eleventh programme of law reform, effective from July 2011. In March 2012, Defra asked us to include consideration of appeals in connection with wildlife licences and we agreed to do so.

1.15 The project schedule provided for a review point following consultation. In September 2013, Defra Ministers agreed that the project should continue to its final stage. Following Defra's decision, in October 2013 we decided to publish an interim statement to keep stakeholders informed about the general policy direction that the Law Commission had taken in the light of the consultation process that took place between August and December 2012.

1.16 In November 2013 Defra asked us to report earlier on our provisional proposal to introduce a regime for issuing orders to control invasive non-native species, on the basis that the Department was considering the possibility of introducing early legislation on this aspect of our final recommendations before the general elections of May 2015.

1.17 As a result, we agreed to publish an early Report recommending the introduction of a regime to issue "species control orders" in England and Wales,[18] in line with a similar power introduced in Scottish law in 2011.[19] Our recommendations have been accepted and provisions giving effect to them have been included in sections 23 to 25 of the Infrastructure Act 2015.

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

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

[19] Wildlife and Natural Environment (Scotland) Act 2011 Pt 2, s 16.

CONSULTATION PROCESS

1.18 Our consultation paper on wildlife law was published on 14 August 2012.[20] Consultation ran from that date to 30 November 2012, the normal consultation period being extended to take into account the summer and the London Olympics 2012. The deadline was further extended to 21 December 2012 for the benefit of representatives of the sea fishing industry, in the light of a desire from some consultees to extend the territorial extent of the project to include the economic zone extending to 200 nautical miles.

Consultation meetings

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

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

1.21 In Wales, we took part in meetings on the Natural Environmental Framework and gave presentations at the Wales Biodiversity Partnership annual meeting 2012 and also at regional biodiversity partnership meetings.

1.22 On a one-to-one basis, we undertook extensive consultation with a wide range of public bodies and non-governmental organisations, including Natural England, the Marine Management Organisation, the Invasive Non-native Species Secretariat, the Royal Society for the Protection of Birds, the Royal Society for the Prevention of Cruelty to Animals, the Woodland Trusts, Wildfowl and Wetlands Trust, the British Association for Shooting and Conservation, the Game and Wildlife Conservation Trust, the Country Land and Business Association, the National Gamekeepers' Organisation and the Countryside Alliance.

Relationship with Government

1.23 The Department for Environment, Food and Rural Affairs has policy responsibility for the subject-matter of the project. In line with the Protocol between the Lord Chancellor and the Law Commission agreed in March 2010,[21] members of the Law Commission's team have met regularly with the Department at each stage of the project.

1.24 As the Law Commission's recommendations extend to Wales, members of the Law Commission's team have also held regular meetings with Welsh Government officials.

[20] Wildlife Law (2012) Law Commission Consultation Paper No 206.

[21] Available at: http://lawcommission.justice.gov.uk/docs/Protocol_Lord_Chancellor_and_Law_Commission.pdf

Consultation responses

1.25 During the consultation period between August and December 2012 we received 488 consultation responses. A number were generated by campaigns (by the Royal Society for the Protection of Birds (RSPB) and the Wildlife News blog). Others were submitted by organisations which included charities, trade associations and other interest groups, private companies, Government agencies, local authorities, enforcement authorities and Defra. We also received responses from interested individuals. We heard from individuals with both professional (academics, lawyers, environmental consultants and other practitioners) and personal interest in the outcome of the project (for example, falconers, bird breeders, pigeon fanciers, landowners and gamekeepers).

GENERAL APPROACH TO THE REFORM OF WILDLIFE LAW

1.26 In consultation, certain stakeholders were concerned that the review of wildlife law was being primarily led by a deregulatory agenda. On the other side of the spectrum, other consultees raised concerns about certain reform proposals potentially imposing significant costs on landowners and businesses affected by wildlife protection legislation.

1.27 On that basis, we think it useful to reiterate the general principles that have underpinned the recommendations in this report.

Maintaining the core of current policy

1.28 One of the main purposes of this project is to make the current set of wildlife preferences work, and allow those subject to the law to understand clearly the obligations placed on them and the options available to them.

1.29 As expressly agreed in the terms of reference of this project, altering the level of protection afforded to particular species is outside the scope of this project, unless such changes are required to ensure compliance with the UK's obligations under relevant international treaties and EU law.

1.30 The rationale behind this limitation is simple. Decisions on whether a species should be protected or not, as well as decisions on the exact level of protection that a particular species should be afforded, are policy decisions that would be usually taken on the basis of sound scientific advice. The Law Commission does not have the political mandate, nor the necessary scientific expertise, to make such decisions.

1.31 Although we are persuaded that we could not have embarked in this reform project without the above conditions, during the course of the wildlife project we have realised that such restrictions significantly restrained our ability to simplify and harmonise a number of existing provisions. This problem was particularly acute in connection with provisions falling outside the scope of the UK's international and EU obligations.

1.32 We think, therefore, that before introducing legislation giving effect to our recommendations, Defra and the Welsh Government should consider whether the new regulatory framework could be further rationalised by minor alterations to species protection levels, which would have little or no effect in practice but make the law easier to understand and comply with. We have made clear in this Report the areas which would benefit from this sort of attention.

Effective, clear and transparent transposition of our EU obligations

1.33 EU law requires that the transposition of directives is effective and clear. Therefore, in transposing the regime contained in the Wild Birds and Habitats Directives, we have endeavoured to find the best way to give effect to its requirements in a way which is both clear and effective in the context of domestic legislation.[22] As a result, we have not always strictly followed a "copy-out" policy – the Government's current preferred approach to the transposition of EU directives.

1.34 As EU law has primacy over domestic legislation,[23] we have resolved all inconsistencies and overlaps between EU obligations and domestic preferences in favour of the former.

1.35 In line with our terms of reference, in cases where domestic obligations are more stringent than the corresponding obligations under EU or international law (commonly known as "goldplating"), we have generally opted in favour of the most flexible or least burdensome option. However, we have decided to approach the issue of "goldplating" on a case by case basis. We have retained certain domestic provisions that go beyond the requirements of the Directives in cases where we concluded there were good domestic policy reasons for going beyond the black letter of the Directives or in cases where retaining the domestic approach allowed us to harmonise the provisions transposing EU obligations with provisions giving effect to purely domestic preferences.

Aligning our provisionally proposed regime with other international treaties

1.36 The protection of a number of wild animals and plants also falls within the scope of a series of international treaties to which the UK is a contracting party, including the Bern and the Bonn Conventions.

1.37 We would normally expect our domestic law to reflect the obligations placed on the UK as a result of treaties it has signed up to. As a result, our recommendations are also aimed at ensuring that the UK's relevant international commitments are appropriately given effect in domestic law.

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

[23] Case C-4/64 *Costa v ENEL* [1964] ECR 585.

Improved flexibility

1.38 This is the first time that wildlife law, in its modern form, has been reviewed as a whole. It is important that the regime created is sufficiently flexible to change with developing scientific understandings (on issues such as the effects of climate change), changing political preferences or changes to the conservation status of protected species. In essence, there should be sufficient capacity for change within the new legal regime to enable it to respond effectively to future contingencies.

Using existing regulatory structures where possible

1.39 One of our objectives is to use existing regulatory approaches where possible. There is no need to invent a completely new, and untested, regime if there is a suitable one in existence that can be adopted by transposing its core provisions into our new regulatory regime.

SCOPE OF THE PROJECT

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

Devolution

1.41 The Welsh Assembly has almost fully devolved legislative competences in connection with the control, exploitation, welfare and conservation of animals and plants.[24]

1.42 In the context of wildlife law, currently there is virtually no substantive difference between primary legislation that is applicable to England and primary legislation that is applicable to Wales. For ease of presentation, therefore, we have decided to draft our recommendations, as well as the clauses of the draft Wildlife Bill[25] annexed to this Report, as being applicable to England and Wales.

1.43 This does not mean, however, that we necessarily think that our recommendations should be given effect through legislation that applies across England and Wales. That is a matter for discussion between UK and Welsh governments.

Marine extent

1.44 In consultation we asked whether the scope of the project should extend to include the offshore marine area adjacent to England and Wales (that is, the sea from the territorial limit of 12 nautical miles to 200 nautical miles over which the United Kingdom exercises sovereign rights).

[24] Government of Wales Act 2006, s 108, sch 7 part 1, paras 1 and 6.

[25] In the remainder of this Report, all references in the text to the "Wildlife Bill" should be taken as references to the draft Wildlife Bill annexed to this Report.

1.45 The United Nations Convention on the Law of the Sea 1982 divides states' sovereignty over the sea into three main categories: internal waters, territorial waters and the exclusive economic zone. Internal waters are defined as being inside the "baseline",[26] and include waters such as ports, river mouths, bays and roadsteads.[27] Territorial waters extend up to 12 nautical miles along a line perpendicular to the baseline at any given point.[28] The exclusive economic zone of a state extends out to 200 nautical miles from the baseline,[29] and gives the coastal state jurisdiction over "the protection and preservation of the marine environment".[30]

1.46 At common law, the rule is that England and Wales (and the counties thereof) extend only to the low water line.[31] "England" and "Wales" are defined in the Interpretation Act 1978 by reference to counties, which only extend to the low water line.[32] In modern terms, this would mean that, unless stated otherwise, any statute referring to England and Wales merely extends to the mean low water springs.[33]

1.47 Apart from the effect of the Offshore Marine Conservation (Natural Habitats) Regulations 2007,[34] wildlife legislation within the scope of this project only extends up to 12 nautical miles from the baseline.[35]

1.48 The Offshore Marine Conservation (Natural Habitats) Regulations 2007 were introduced in response to infraction proceedings against the United Kingdom, where the Court of Justice of the European Union ruled that the obligation of member states to give effect to the Habitats Directive extends to any area outside territorial waters over which the member state exercises sovereign rights.[36]

[26] United Nations Convention on the Law of the Sea 1982, art 5. The baseline is set in the Territorial Waters Order in Council 1964, as amended by the Territorial Sea (Amendment) Order 1998, SI 1998 No 2564.

[27] United Nations Convention on the Law of the Sea 1982, arts 8 to 12.

[28] United Nations Convention on the Law of the Sea 1982, art 3; Convention on Territorial Sea and Contiguous Zone 1957, art1; Territorial Sea Act 1987, s 1.

[29] United Nations Convention on the Law of the Sea 1982, art 57.

[30] United Nations Convention on the Law of the Sea 1982, art 56(1)(b)(iii).

[31] Halsbury's Law of England, *Water and Waterways*, vol 100 (5th ed, 2009) para 31.

[32] Interpretation Act 1978, sch 1, para 1. "Wales", however, for the purposes of the Government of Wales Act 2006 is taken to include the territorial waters adjacent to Wales (see Government of Wales Act 2006, s 158(1)).

[33] The height of mean low water springs is the average of the heights of two successive low waters during those periods of 24 hours when the range of the tide is greatest.

[34] SI 2007 No 1842.

[35] Wildlife Law (2012) Law Commission Consultation Paper No 206, para 1.30.

[36] Case C-6/04 *Commission v United Kingdom* [2005] ECR I-09017, paras 115 to 120. The Conservation of Habitats and Species Regulations 2010, SI 2010 No 249 give effect to the Habitats Directive up to 12 nautical miles from the baseline.

1.49 Some stakeholders criticised the current split between legislation giving effect to the Wild Birds and Habitats Directives within territorial waters and legislation giving effect to the Directives outside the territorial limit of 12 nautical miles on the basis that developments or other operations that cross the 12 nautical mile boundary currently need to apply for two different wildlife licences.

1.50 Other stakeholders pointed out that because many protected marine species are highly mobile, it would make little ecological sense to retain two different regimes that apply within and outside territorial waters.

1.51 We have not found the above arguments to be sufficiently persuasive to justify the extension of the scope of the project beyond territorial waters. The first argument points to a problem that could be easily dealt with at administrative level.

1.52 Similarly, the simple fact that marine species are mobile, and therefore move between legal regimes, does not of itself seem persuasive. There will always be differences in territorial regimes, especially following devolution in the UK – such that the law applicable in Wales, England, Scotland and Northern Ireland can reflect national preferences. There are many protected wild species that are highly mobile, and wildlife's movement between regimes should be expected. That such movement results in a change of protection afforded to individuals is a given and unavoidable consequence of having territorial regimes. In this particular case, in terms of substantive protection the difference between the different regimes is marginal, on the basis that they all aim to give effect to the UK's obligations under the Wild Birds and Habitats Directives.

1.53 Indeed, inconsistency is inevitable one way or another in this context. The Offshore Marine Conservation (Natural Habitats) Regulations 2007 apply across the whole of the UK's offshore marine area (the sea from the territorial limit of 12 nautical miles to 200 nautical miles). Our project relates only to England and Wales. If we chose to extend the project to include the offshore marine area adjacent to England and Wales, the implication would be the division of what is now a UK wide regulatory structure into one that applies to England and Wales, a second for Scotland and a third for Northern Ireland. We came to the view, therefore, that it was better not to disrupt the current approach by extending our proposals beyond territorial waters.

Recommendations

Recommendation 1: we recommend that the territorial extent of the new regulatory framework should be limited to territorial waters.

This recommendation is given effect in the draft Bill by clause 168**.**

Habitats

1.54 Before the start of the wildlife project we agreed with Defra that legislation concerning habitats should be excluded from the scope of the project.

1.55 In consultation many stakeholders noted the exclusion of habitats from the scope of the project. They argued that in ecological terms it was inappropriate to separate consideration of individual species from the habitats that support them. The decline of the population of a species, in fact, may often be the result of a complex combination of direct and indirect interferences with that species. Indirect interferences could include air, water and soil pollution, changes in land use, deforestation and climate change.

1.56 While that is a valid consideration, our view is that it overlooks the distinction between an area of law selected for reform and the underlying policy structure within which that area of law exists. Following the logic of the above argument, there would be no reason why the project should not have been extended to other areas of environmental law having an impact on habitats, including planning law, pollution control legislation or the domestic transposition of the Water Framework Directive.

1.57 We do not reject the view that a broader review of environmental law in England and Wales could have significant positive outcomes. We have concluded however, that the overwhelming majority of the problems with wildlife law that we have identified can be addressed independently of the wider policy framework within which they exist. There are very few overlaps, in fact, between the regulatory regimes addressing the protection of species and the regulatory regimes addressing the protection of habitats. We are satisfied, therefore, that the decision to exclude habitats protection was sensible in the light of the object and purpose of a Law Commission review of this area of law.

Hunting Act 2004

1.58 The terms of reference of the wildlife project also expressly exclude the review of the Hunting Act 2004.

1.59 Whilst a number of stakeholders from the hunting industry questioned this decision, we remain convinced that it would have been inappropriate and counter-productive for the Law Commission – an independent, non-political, advisory body – to consider an issue as politically polarised as this one. Any change to the Hunting Act 2004, in addition, would have necessarily required policy decisions that go beyond the remit of the Law Commission.

Animal welfare

1.60 In our consultation paper we provisionally proposed that Acts dedicated to animal welfare, in particular the Animal Welfare Act 2006 and the Wild Mammals (Protection) Act 1996, should not be integrated in our proposed single statute on wildlife law.[37] We argued that these complementary Acts constitute a self-contained animal welfare code, and to include them would cause unnecessary confusion. In consultation most stakeholders accepted the reasons behind this provisional proposal, and we therefore do not include Animal Welfare Act 2006 and the Wild Mammals (Protection) Act 2006 within our Wildlife Bill.

[37] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 5-2.

1.61 We were, however, persuaded not to pursue our provisional proposal to incorporate the provisions of the Wild Mammals (Protection) Act 1996 into the Animal Welfare Act 2006, so as to create a new consistent animal welfare code applicable to both animals living wild and animals within the control of man.[38]

1.62 As Defra noted during consultation, the considerable difference in the level of intentionality required to make out the relevant offences in the two Acts makes it impossible to integrate the two regimes without altering the existing levels of protection.[39] Whilst in principle we think that there is a good case for reforming the Wild Mammals (Protection) Act 1996 offences so as to allow them to dovetail better with their counterparts in the Animal Welfare Act 2006, such reform falls outside the scope of the current project as it would necessarily involve consideration of changes to the level of protection afforded to wild animals.

The Salmon and Freshwater Fisheries Act 1975 and connected regimes

1.63 In our consultation paper we included discussion of the Salmon and Freshwater Fisheries Act 1975, as it was thought worthwhile to include the species protection provisions in that Act in any new regime. On reflection, and after consultation, we have taken a different view. To remove the species protection provisions found in sections 1 to 4 of the 1975 Act and place them in a separate statutory framework would unnecessarily complicate the regulatory regime for fisheries already in place.

"Invasive non-native species"

1.64 In our consultation paper, we highlighted problems concerning the protection of the natural environment and the UK economy posed by what are commonly known as "invasive non-native species". Invasive non-native species, broadly speaking, are animal or plant species that, when introduced in a particular environment outside their natural range as a result of human intervention, are likely to cause adverse effects on biodiversity, ecosystem services, infrastructure, health or other economic interests such as agriculture or forestry.

1.65 At the time we drafted the consultation paper, negotiations at EU level in connection with an EU-wide legislative instrument for the control of invasive non-native species were already under way. Those negotiations led to the publication of a draft EU Regulation on Invasive Alien Species in September 2013,[40] and the adoption of Regulation (EU) No 1143/2014 on the prevention and management of the introduction and spread of invasive alien species in September 2014 (the 2014 Regulation).[41]

[38] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 5-3.

[39] The Animal Welfare Act 2006 requires that the defendant knew, or ought reasonably to have known, that an act, or failure to act, would result in the prohibited consequence (s 4(1)(b)). This differs significantly from the Wild Mammals (Protection) Act 1996, where the requirement is that the defendant acted "with intent to inflict unnecessary suffering" (s 1).

[40] COM (2013) 620 fin.

[41] Regulation on the prevention and management of the introduction and spread of invasive alien species (EU) No 1143/2014, Official Journal L 317/35 of 4.11.2014.

1.66 Although we could see benefits in exploring reform options in connection with the way species that should not be released into the environment are listed and defined,[42] we concluded that in the light of the ongoing negotiations it would have been inappropriate to embark in a comprehensive reform of the domestic regulatory structure on the control and management of invasive non-native species. We decided, therefore, to restrict the scope of our reform of this area of law to the regulatory and enforcement powers to deliver Government policy. This was the philosophy underlying our early Report, referred to in paragraph 1.17 above. The rationale behind this restriction is that such tools would remain necessary regardless of the new definitions or prohibitions that might be introduced by the new EU legislative instrument.

1.67 The 2014 Regulation has now come into force. It imposes a number of binding prohibitions on individuals[43] and monitoring, inspection and enforcement obligations[44] on member states in connection with an exhaustive list of invasive non-native species of "Union concern". While the Regulation allows member states to take action in connection with invasive alien species that fall outside the "Union concern" list, the control of non-native species of "member state concern" will remain primarily a matter of domestic law and policy.[45]

1.68 Whilst the formulation of policy on the control of non-native species is outside the scope of this project, we have rationalised the existing powers and prohibitions connected to the prevention, control and management of invasive non-native species with a view to providing the Secretary of State or Welsh Ministers with a regulatory toolkit that is as close as possible to the one available under the 2014 Regulation. The provisions that we recommend, in addition to those already contained in the Infrastructure Act 2015, are in clauses 94 to 101 of the draft Wildlife Bill.

THE STRUCTURE OF THIS REPORT

1.69 The structure of this Report follows as closely as possible the structure of the Wildlife Bill, so as to make it easy to read alongside the draft clauses of the Bill.

1.70 An important aspect of our reform of wildlife law, as discussed in Chapter 2, is the creation of a single set of provisions that consolidate and rationalise all relevant wildlife legislation in England and Wales. This process necessarily involved a large number of technical changes to the law. While the express recommendations of this Report cover the most important aspects of this process, we do not discuss minor or inconsequential technical changes to the language or structure of certain provisions that may be found in the Bill.

[42] See, in particular, Wildlife and Countryside Act 1981, s 14(1).

[43] Regulation (EU) No 1143/2014, arts 7 to 9.

[44] Regulation (EU) No 1143/2014, arts 14 to 20.

[45] Art 12 of Regulation (EU) No 1143/2014 simply provides that each member state should inform the Commission and other member states of the species they consider as invasive alien species of member state concern and of the relevant control measures that they have put in place. Art 12 allows member states to apply control measures similar to those they have to put in place in connection with species of Union concern, so long as the measures comply with the Treaty of the Functioning of the European Union.

Regulatory structure (Chapter 2)

1.71 Chapter 2 contains recommendations in connection with the creation of a single statute covering all aspects of wildlife law in England and Wales. In this Chapter we define the general regulatory structure of the new statutory framework and make specific recommendations in connection with the powers to add or remove species from the schedules to the Wildlife Bill, powers to introduce close seasons, obligations to monitor and review the conservation status of protected species and obligations to regularly review the schedules to the Bill.

Prohibited conduct: core international and EU obligations (Chapter 3)

1.72 As a significant part of our domestic wildlife legislation falls within the scope of the UK's obligations under EU and international law, ensuring that those obligations are adequately transposed in domestic law has been one of the main features of the wildlife law project.

1.73 In Chapter 3 we explore two complex transposition issues that cut across the domestic protection of wild birds, wild animals other than birds and wild plants.

1.74 The first issue concerns the domestic transposition of the word "deliberate" in article 5 of the Wild Birds Directive and articles 12 and 13 of the Habitats Directive. The word "deliberate" in the context of the Wild Birds and Habitats Directives defines the mental element that member states should prescribe in domestic legislation in connection with the conduct prohibited by the Directives. The problem with this term is that while the term "deliberate", in English, would generally be understood as a synonym of "intentional", two rulings of the Court of Justice of the European Union (the Court of Justice) have now extended its ordinary meaning beyond the understanding of intentionality in the law of England and Wales.

1.75 The second issue concerns the transposition of the concept of "disturbance" in domestic law. Transposition problems are linked to the use of inconsistent formulations of this concept at EU and international level on the one hand and at domestic level on the other hand.

1.76 The third concerns the extent of the United Kingdom's obligation, as a matter of EU law, to comply with provisions of the Bern Convention against which the UK has entered reservations.

Prohibited conduct: protection of wild birds (Chapter 4)

1.77 In Chapter 4 we make recommendations in connection with the protection of wild birds. Those recommendations are given effect in Part 1 of the Wildlife Bill. They cover changes to the definition of "wild birds" and the transposition of the prohibitions under article 5 of the Wild Birds Directive, changes to the domestic regulation of recreational hunting in line with article 7 of the Wild Birds Directive, the rationalisation of the list of prohibited methods of killing or capture and the simplification and modernisation of the prohibitions in connection with the possession and trade of protected wild birds, in line with article 6 of the Wild Birds Directive.

Prohibited conduct: protection of wild animals (Chapter 5)

1.78 In Chapter 5 we make recommendations in connection with the protection of wild animals other than birds. Those recommendations are given effect in Parts 2 and 4 of the Wildlife Bill. They cover technical changes to the definition of certain protected animals, specific problems with the current transposition in domestic law of prohibitions under article 12 of the Habitats Directive and article 6 of the Bern Convention, the rationalisation of existing disturbance offences, the harmonisation of the mental element of a number of domestic prohibitions and the simplification of the prohibitions connected to the possession and trade of protected wild animals and other prohibited items.

1.79 Chapter 5 also makes recommendations on complex transposition issues in connection with the UK's international and EU obligations to prohibit certain methods of killing or capture under the Habitats Directive, the Bern Convention and the Agreement on Humane Trapping Standards between the European Union, Canada and the Russian Federation.

Prohibited conduct: protection of wild plants (Chapter 6)

1.80 In Chapter 6 we make recommendations in connection with the protection of wild plants and other organisms including algae and fungi, which are given effect in Part 3 of the Wildlife Bill. They cover, in particular, the harmonisation of the language of domestic offences with the language of the prohibitions in article 13 of the Habitats Directive and other definitional issues.

Permitted activity: licensing and defences (Chapter 7)

1.81 In Chapter 7 we recommend changes to the existing licensing regimes and criminal defences.

1.82 In connection with the reform of existing licensing regimes, Chapter 7 makes recommendations to ensure that the provisions for issuing wildlife licences to authorise otherwise prohibited activities are both compliant with EU law and flexible enough to enable the licensing authority to respond to the broadest possible range of circumstances. This Chapter also recommends a radical harmonisation and simplification of the licensing regimes for activities affecting species protected for primarily domestic policy reasons, such as badgers, deer, seals and wild animals listed in schedule 5 to the Wildlife and Countryside Act 1981.

1.83 This Chapter also makes recommendations in connection with the complex array of criminal defences to the prohibited activities discussed in Chapters 4, 5 and 6. As regards defences that are currently applicable to activities prohibited by EU law, this Chapter makes specific recommendations to ensure compliance with the derogation regimes in article 9 of the Wild Birds Directive and article 16 of the Habitats Directive. As regards defences to activities affecting other protected species, recommendations focus on ensuring that existing defences are replicated in the new regulatory framework in a coherent and consistent form.

Poaching: substantive prohibitions (Chapter 8)

1.84 The existing law on poaching dates back to 1828 and is contained in a number of nineteenth century Acts.[46] The language of the substantive poaching offences under the various Game Acts is inconsistent and unclear and the existing enforcement powers are significantly outdated. Chapter 8, therefore, makes recommendations connected to the creation of a single poaching offence and the general simplification and modernisation of the current law on poaching.

Control of non-native species, pests and weeds (Chapter 9)

1.85 In this Chapter we recommend the introduction of a general power to require particular persons or classes of persons to notify the competent authority about the presence of an invasive non-native species.

1.86 Provisions related to the control of invasive non-native species have been inconsistent, sector specific, and scattered across a number of Acts dating back to the Destructive Imported Animals Act 1932. As clearly mentioned, our recommendations on species control orders have been published in a separate Report (Wildlife Law: Control of Invasive Non-native Species (2014) Law Com No 342) and implemented in England and Wales through the Infrastructure Act 2015. This Chapter contains recommendations aimed at rationalising and harmonising existing provisions with the aim of creating a coherent, effective and modern regulatory toolkit covering the prevention, control, eradication and long term management of invasive non-native species.

1.87 This Chapter will also include recommendations aimed at integrating a number of powers to control agricultural pests and weeds into the new regulatory framework and updating the enforcement provisions connected to those powers, in line with the powers to control and eradicate invasive non-native species.

Criminal liability, enforcement and sanctions (Chapter 10)

1.88 In Chapter 10 we make recommendations in connection with enforcement powers and sanctions. This Chapter includes recommendations aimed at extending criminal liability to the ultimate beneficiaries of wildlife crime, simplifying and consolidating the existing enforcement regime, increasing existing criminal sanctions for wildlife crime and creating a consistent regime to allow relevant regulators to issue civil sanctions in connection with the whole range of wildlife offences.

[46] Night Poaching Act 1828.

CHAPTER 2
REGULATORY STRUCTURE

INTRODUCTION

2.1 In Chapter 1 we highlighted a number of general problems with wildlife legislation that should be addressed by law reform. Wildlife law is scattered around a large number of statutes. As a result, the existing regulatory framework is complex, inaccessible and internally inconsistent. A number of Acts, in addition, are insufficiently flexible to respond to new external challenges.

2.2 Our recommendations in this Chapter have, as their central objective, the creation of a modern statutory framework that accommodates all relevant wildlife legislation in a consistent, logical, transparent and flexible structure that will be capable of accommodating future changes in policy and scientific understanding.

2.3 The main recommendations in this Chapter relate to the creation of a single code for all wildlife legislation, powers to alter the level of protection of species through scheduling or through the creation of close seasons, obligations to regularly review the lists of species under the statute and obligations to monitor the conservation status of certain protected species.

A SINGLE STATUTE

2.4 Many problems with the current regulatory landscape arise because the applicable provisions are scattered around a number of different enactments. Some of those enactments do not have a pure wildlife focus. The Wildlife and Countryside Act 1981, for example, has parts dedicated to public rights of way that are entirely unrelated to the species-specific protection provisions in Part 1 of the Act. Other enactments, such as the Protection of Badgers Act 1992, focus on specific activities affecting only one species. Certain activities that affect badgers, however, are also prohibited under other enactments, such as the Wildlife and Countryside Act.[1] This makes it difficult for individuals to discover the full legislative regime that applies to a particular species.

2.5 In consultation, stakeholders overwhelmingly agreed that a single statute for wildlife law would have definite benefits. A single statute would allow for increased consistency in terms of language, definitions and policy. Importantly, it would also improve the transparency and accessibility of the existing framework. Rather than having to trawl through the profusion of existing statutes, those who are interested or directly affected by wildlife legislation would only have one comprehensive code to consult.

[1] Wildlife and Countryside Act 1981, s 11.

2.6 We have concluded, therefore, that the new regulatory regime should take the form of a single statute, or a pair of materially identical statutes,[2] incorporating all legislation on the protection, control and exploitation of wild fauna and flora in England and Wales. The regulatory structure of the new single statute would supersede and, therefore, enable the repeal of a large number of existing regulatory regimes, including:

(1) the Conservation of Habitats and Species Regulations 2010;[3]

(2) the Protection of Badgers Act 1992;

(3) the Deer Act 1991;

(4) the Wildlife and Countryside Act 1981;[4]

(5) the Import of Live Fish (England and Wales) Act 1980;

(6) the Conservation of Seals Act 1970;

(7) the Weeds Act 1959;

(8) the Pests Act 1954;

(9) the Agriculture Act 1947;

(10) the Prevention of Damage by Rabbits Act 1939;

(11) the Destructive Imported Animals Act 1932; and

(12) the Hares Preservation Act 1892.

2.7 For the reasons explained in Chapter 1, a limited number of self-contained statutes relevant to wildlife law, including the Hunting Act 2004, the Animal Welfare Act 2006, the Wild Mammals (Protection) Act 1996 and the Salmon and Freshwater Fisheries Act 1975, would continue to operate alongside the recommended single statute.

Recommendations

Recommendation 2: we recommend that the new regulatory regime should take the form of a single statute, or a pair of materially identical statutes, incorporating legislation on the protection, control and exploitation of wild fauna and flora in England and Wales.

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

[3] Parts 3, 4, 5 and 7.

[4] Part 1 other than sections 8 and 15 (insofar as it applies to England and Wales).

Recommendation 3: we recommend that the new regulatory regime should exclude the Hunting Act 2004, the Animal Welfare Act 2006, the Wild Mammals (Protection) Act 1996 and the Salmon and Freshwater Fisheries Act 1975.

STATUTORY FACTORS

2.8 In our consultation paper we suggested that one criticism of the current regime is a lack of sufficient transparency as to decision-making. This can lead some to think that when competent authorities take decisions priority is given to a particular interest.[5]

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

2.10 The statutory factors we suggested were:

(1) conservation of the species with which the decision is concerned;

(2) preservation and conservation of biodiversity;

(3) economic implications;

(4) wider social factors; and

(5) the welfare of animals potentially affected by the decision.

2.11 In the light of the consultation responses, and after having given further thought to its practical implications, we have decided to drop this proposal. We found it impossible to draft a list of factors which was neither so general as to be ineffective, nor so specific as to interfere with the domestic implementation of the Wild Birds and Habitats Directives by either "gold-plating" or breaching their requirements.

2.12 As we highlighted in Chapter 1 of this Report, a significant proportion of domestic wildlife protection legislation falls within the scope of the Wild Birds and Habitats Directives. Both the Wild Birds and the Habitats Directives contain factors to be taken into account when implementing the Directives.

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

2.13 The Wild Birds Directive requires that member states take measures to maintain the population of EU wild birds "at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements".[6] Measures taken pursuant to the Directive, in addition, must not lead to the "deterioration in the present situation as regards the conservation of the species of birds" falling within the scope of the Directive.[7]

2.14 The Habitats Directive requires that member states take measures "designed to maintain or restore, at favourable conservation status,[8] natural habitats and species of wild fauna and flora of Community interest".[9] When taking measures implementing the Habitats Directive, member states should "take account of economic, social and cultural requirements and regional and local characteristics".[10]

2.15 What is clear in both of the Directives is that primacy is given to the conservation of the species covered by the Directive. It is equally clear, however, that conservation is not to be addressed in a policy vacuum and other factors should be considered when implementing the aims of the Directive. The effect of other factors differs considerably between the two Directives.

2.16 Given the differences between the Wild Birds and Habitats Directive as to their overarching aims, it became clear in consultation that a single list of factors would be unworkable. The introduction of a non-hierarchical list of factors, in particular, could have been regarded as a breach of EU law given the primacy of the "conservation" factor under the two Directives.

2.17 Transparency in decision-making, our primary reason for introducing statutory factors, is in our view a prerequisite of any modern regulatory regime. We have concluded, therefore, that the potential benefits of statutory factors in terms of transparency could be matched, to some extent, by an express duty to give reasons in writing in connection with decisions to grant or refuse a licence.

2.18 In certain circumstances it would be possible to rely on general administrative law principles to ensure that decision makers give reasons for their decisions, and any failure to give reasons could constitute a ground for review.[11] There is, however, no universal duty to give reasons. A clear statutory obligation to give reasons, therefore, has the benefit of ensuring that the practice is carried out consistently.

6 Directive on the conservation of wild birds 2009/147/EC, Official Journal L 20 of 26.1.2010, art 2.

7 Directive 2009/147/EC, art 13.

8 Directive on the conservation of natural habitats and of wild fauna and flora 92/43/EEC, Official Journal L 206 of 22.7.1992, art 1(e) defines the conservation status of a species as "the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in article 2".

9 Directive 92/43/EEC art 2(2).

10 Directive 92/43/EEC, art 2(3).

11 See generally, Right Hon Lord Harry Woolf and others, *De Smith's Judicial Review* (7th ed 2013) paras 7-095 to 7-101.

GENERAL REGULATORY APPROACH

2.19 In the consultation paper, we analysed the existing law and identified that the basic regulatory approach is to prohibit certain behaviour, permit limited exceptions and otherwise license desirable activity affecting defined lists of species. We provisionally proposed that this approach should be retained in any new regulatory regime for wildlife.

2.20 Given both the overwhelming level of support in consultation for the basic regulatory approach (prohibit, permit, licence) and the close relationship between this approach and that adopted in the Wild Birds and Habitats Directives, we maintain the proposal.

2.21 In the consultation paper, we also provisionally proposed that the new regime 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. This generally reflects the current approach in the relevant EU directives and the latest domestic wildlife protection legislation.[12]

2.22 There are exceptions to the current approach in existing legislation. Certain activities, for instance, are prohibited generally, irrespective of the species affected. For instance, the use of spring traps is prohibited, except in certain circumstances, irrespective of the species the user intends to trap. Similarly, the use of leghold traps is prohibited by Council Regulation (EEC) No 3254/91[13] irrespective of the targeted species or conditions of use.

2.23 The general rule, however, is that wildlife law lists the species, or groups of species, it is intended to protect. If not listed specifically, or covered by the general definition of a protected group of species, a species will not be subject to the regime we are recommending. This does not necessarily mean that those species necessarily remain unprotected, as other protective regimes may still apply, such as those contained in the Animal Welfare Act 2006, the Wild Mammals (Protection) Act 1996 or broader habitats protection legislation.

2.24 We have concluded, therefore, that in line with the current approach the new regulatory framework should be generally organised, subject to the current exceptions, into schedules containing lists of species that should be protected or controlled, so as to allow different provisions to apply to individual species or groups of species. In the context of our recommended single statute, this approach will ensure that the level of protection of each species will be capable of being tailored to the list of prohibited conduct that best reflects the protection needs of that species.[14]

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

[13] Regulation prohibiting the use of leghold traps in the Community and introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards (EEC) No 3254/91, Official Journal L 308 of 9.11.1991, p 1.

[14] Wildlife Law (2012) Law Commission Consultation Paper No 206, paras 5.73 to 5.76.

Recommendations

Recommendation 4: we recommend that, subject to existing exceptions, the new regulatory regime should be organised into schedules containing lists of species that should be protected or controlled, so as to allow different provisions to apply to individual species or groups of species.

MONITORING OBLIGATIONS

2.25 Monitoring the conservation status of certain species of concern and reviewing the relevant schedules to ensure that the level of protection of those species adequately responds to existing threats are two intertwined activities that enable competent authorities to ensure that the legal regime adequately responds to existing threats to wildlife.

Monitoring obligations under the Habitats Directive

2.26 The Habitats Directive places an express obligation on member states to:

> undertake surveillance of the conservation status of the natural habitats and species referred to in article 2 with particular regard to priority natural habitat types and priority species.[15]

2.27 Article 14(1) of the Habitats Directive further provides that if in the light of the surveillance provided for in article 11 member states deem it necessary, they should take measures to ensure that:

> the taking in the wild of specimens of species of wild fauna and flora listed in annex 5, as well as their exploitation, is compatible with their being maintained at a favourable conservation status.[16]

2.28 Where measures under article 14(1) are deemed necessary, they should include continuation of the surveillance provided for in article 11. Such measures may also include, among other things, the introduction of close seasons, the regulation of the trade in those species and reintroduction programmes.

2.29 Lastly, the regime of strict protection in article 12(4) of the Habitats Directive requires member states to establish a system to monitor the incidental capture and killing of the animal species listed in annex 4(a) to the Directive. In the light of the information gathered, member states should undertake further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned.

[15] Directive 92/43/EEC, art 11.

[16] Directive 92/43/EEC, art 14(1).

2.30 Article 16(2) of the Habitats Directive provides that when a member state has permitted an otherwise generally prohibited activity by derogating in line with article 16(1) of the Directive, it has to report this to the European Commission. The reports should be sent every two years and include a justification for each derogation granted including, where relevant, any scientific data that the competent authority has relied upon.[17] In addition member states must report on the implementation of the Habitats Directive within their territory, including on the conservation status of species protected under the Directive, every six years.[18]

The Wild Birds Directive

2.31 In terms of monitoring obligations, the Wild Birds Directive lacks the detailed provisions of the Habitats Directive.

2.32 The principal obligation placed on member states by the Wild Birds Directive, as mentioned above, requires that:

> Member States shall take the requisite measures to maintain the population of the species referred to in article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level.[19]

2.33 This should be read in conjunction with the obligation in article 13 of the Directive, which requires that the application of the measures taken pursuant to this Directive must not lead to deterioration in the present situation as regards the conservation of the species of birds referred to in article 1.[20]

2.34 Other parts of the Directive require the member state to ensure compliance with the headline obligation in article 2. Permitted hunting and falconry under article 7 of the Directive, for instance, is subject to the following restriction:

> Member states shall ensure that the practice of hunting, including falconry if practised, as carried on in accordance with the national measures in force, complies with the principles of wise use and ecologically balanced control of the species of birds concerned and that this practice is compatible as regards the population of these species, in particular migratory species, with the measures resulting from article 2.

[17] Directive 92/43/EEC, art 16(2).

[18] Directive 92/43/EEC, art 17.

[19] Directive 2009/147/EC, art 2.

[20] Directive 2009/147/EC, art 13.

2.35 There is a reporting obligation in article 9 of the Wild Birds Directive, such that each year member states should report to the European Commission on how they have granted permission for the conduct of an activity which would otherwise be prohibited.[21] Furthermore, member states must report on their general implementation of the Wild Birds Directive every three years.[22]

Domestic transposition of EU law

2.36 In the context of the Habitats Directive, in Case C-6/04 *Commission v United Kingdom*, the Court of Justice of the European Union held that:

> member states are under a particular duty to ensure that their legislation intended to transpose that Directive is clear and precise, including with regard to the fundamental surveillance and monitoring obligations, such as those imposed on national authorities by articles 11, 12(4) and 14(2) of the Directive.[23]

2.37 The Court of Justice, in other words, concluded that the fact that relevant surveillance programmes had, in practice, been undertaken by the UK did not negate the fact that the absence of clear obligations to do so in domestic law constituted a failure to transpose the Directive clearly and precisely.

2.38 In the light of the above infraction proceedings, the Conservation of Habitats and Species Regulations 2010 (the 2010 Regulations) now include comprehensive provisions requiring the Secretary of State or Welsh Ministers to arrange – on the basis of the advice provided by Natural England (in relation to England) and Natural Resources Wales (in relation to Wales) – for the regular surveillance of the conservation status of natural habitat types of Community interest and species of Community interest, and in particular priority natural habitat types and priority species.[24]

2.39 In line with article 14(1) of the Directive, regulation 49 of the 2010 Regulations further provides that on the basis of the information derived from relevant surveillance programmes, the Secretary of State or Welsh Ministers must ensure that measures are taken for the purpose of ensuring that the capture of specimens of a species listed in annex 5 to the Habitats Directive,[25] and the exploitation of such specimens, are compatible with the maintenance of that species at a favourable conservation status.

[21] Directive 2009/147/EC, art 9(3).

[22] Directive 2009/147/EC, art 12(1).

[23] Case C-6/04 *Commission v UK* [2005] ECR I-9017 at [26] to [28].

[24] SI 2010 No 490, reg 48.

[25] Annex 5 lists animals and plant species of Community interest whose taking in the wild and exploitation may be subject to management measures.

2.40 Article 12(4) of the Habitats Directive is now transposed by regulations 50 and 51 of the 2010 Regulations, which provide for the monitoring of the incidental capture and killing of animals listed in annex 4(a) to the Habitats Directive and for additional conservation measures to be taken to ensure that the incidental capture or killing of animals of a species listed in annex 4(a) to the Habitats Directive does not have a significant negative impact on that species.[26]

2.41 As the Wild Birds Directive does not include any express obligation to monitor the conservation status of particular birds of concern, there are currently no domestic provisions expressly requiring the Secretary of State or Welsh Ministers to do so.

Other relevant domestic legislation

2.42 In England and Wales, the relevant conservation bodies (Natural England in relation to England and Natural Resources Wales in relation to Wales), broadly speaking, have a general obligation to carry out research in connection with matters relevant to their general functions,[27] including the function of promoting nature conservation.[28] In discharging their monitoring functions in connection with nature conservation, both Natural England and Natural Resources Wales must have regard to the common standards established by the UK conservation bodies through the Joint Nature Conservation Committee under section 34 of the Natural Environment and Rural Communities Act 2006.[29]

Discussion

2.43 The core monitoring and surveillance obligations under the Habitats Directive have now been appropriately transposed by regulations 48 to 51 of the Conservation of Habitats and Species Regulations 2010. Those surveillance obligations, however, do not extend to any wild bird, on the basis that the Wild Birds Directive does not include any express requirement to establish an effective monitoring and surveillance regime in domestic legislation.

2.44 It is worth noting, however, that the basic aims of the Directives are similar. The obligations in article 2 of the Wild Birds Directive and the Habitats Directive require the consideration of populations and their changes. More importantly, the obligation in article 13 of the Wild Birds Directive can only be fulfilled if member states monitor and conduct surveillance as to the effects of the legal regime.[30]

2.45 Similarly, the obligation to ensure that the recreational hunting of wild birds does not jeopardise conservation efforts and complies with the principles of "wise use" and "ecologically balanced control", implicitly requires some form of monitoring, potentially combined with more specific reporting requirements on users.

[26] SI 2010 No 490, regs 51(1) and (2).

[27] See Natural Environment and Rural Communities Act 2006, s 3 and Natural Resources Body for Wales (Establishment) Order 2012, art 10C.

[28] See Natural Environment and Rural Communities Act 2006, s 2(2)(a) and the Natural Resources Body for Wales (Establishment) Order 2012, art 5A.

[29] See Natural Environment and Rural Communities Act 2006, s 3(4) and Natural Resources Body for Wales (Establishment) Order 2012, art 10C(3).

[30] Art 13 requires that measures taken pursuant to the Directive must not lead to deterioration in the conservation status of birds protected by the Directive.

2.46 Under both Directives, in addition, member states have obligations to submit implementation reports to the European Commission regularly.

2.47 As the Wild Birds Directive does not expressly require the creation of a specific regime to make sure that the conservation status or incidental killings of wild birds of concern are regularly monitored, the absence of any express reference to the monitoring of populations of wild birds in domestic law does not constitute, in itself, a transposition failure.

2.48 Nevertheless, we have taken the view that in principle there is no reason why the same surveillance framework that applies to species of Community interest may not be extended to certain wild bird species of concern. This could be a way to improve the transparency of monitoring programmes and to set clear priorities to ensure that the implied monitoring obligations of the Wild Birds Directive are given effect in practice.

2.49 We have concluded, therefore, that consideration should be given to the possibility of including wild bird species of concern – including those subject to recreational hunting – within the same monitoring and surveillance framework that currently applies to species of Community interest.

Recommendations

Recommendation 5: we recommend that existing monitoring and surveillance obligations under regulations 48 to 51 of the Conservation of Habitats and Species Regulations 2010 should be replicated under the new regulatory framework.

Recommendation 6: we recommend that consideration should be given to the possibility of extending the existing monitoring and surveillance obligations to other species of concern, including, in particular, wild bird species protected under the Wild Birds Directive.

These recommendations are given effect in the draft Bill by clauses 148 to 155.

GENERAL ORDER-MAKING PROCEDURE UNDER THE WILDLIFE BILL

2.50 In consultation we provisionally proposed that section 26 of the Wildlife and Countryside Act 1981 (the 1981 Act) should be adopted as the model for the procedure that the Secretary of State or Welsh Ministers should follow to make regulations under the Wildlife Bill.[31]

[31] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 5-8.

2.51 Section 26 of the 1981 Act requires that any order or regulation, including orders to update the schedules to the 1981 Act be in the form of statutory instruments and, except for those under sections 2(6), 3, 5 and 11 of the Wildlife and Countryside Act 1981, be subject to annulment in pursuance of a resolution of either House of Parliament (if the statutory instrument contains regulations made by the Secretary of State) or a resolution of the Welsh Assembly (if the statutory instrument contains regulations made by the Welsh Ministers).[32]

2.52 Before making any order the Secretary of State or Welsh Ministers:

(1) must give to any local authority affected and any other person affected, by such means as they may think appropriate, an opportunity to submit objections or representations with respect to the subject matter of the order;[33]

(2) except when responding to the advice of JNCC to update schedules 5 and 8, must consult with whichever one of the "advisory bodies" they consider is best able to advise them as to whether the order should be made; and

(3) may, if they think fit, cause a public inquiry to be held.[34]

2.53 For the purpose of the consultation obligations under section 26(4)(b) of the 1981 Act, an "advisory body" is a body established by the Secretary of State or Welsh Ministers under section 23(1)(a) of the 1981 Act or a body to which an advisory duty defined by section 23(4) of the 1981 Act has been assigned to.

2.54 In the light of the general support in consultation for this provisional proposal, we have concluded that, as a general rule, regulation-making powers under the new Wildlife Bill should be exercisable by statutory instrument[35] and subject to annulment in pursuance of a resolution of either House of Parliament (if the statutory instrument contains regulations made by the Secretary of State) or a resolution of the National Assembly for Wales (if the statutory instrument contains regulations made by the Welsh Ministers).[36]

2.55 In line with section 26 of the Wildlife and Countryside Act 1981 the Secretary of State or Welsh Ministers – as a general rule – should be able to make regulations under the Wildlife Bill as long as:

(1) they have consulted a relevant advisory body established or nominated in line with a procedure reflecting section 23 of the 1981 Act;[37] and

[32] Wildlife and Countryside Act 1981, ss 26(1) and (2).

[33] As discussed below, certain exceptions apply to orders under ss 2(6) and 3 of the Wildlife and Countryside Act 1981.

[34] Wildlife and Countryside Act 1981, ss 22(3) and 26(4)(a) to (c).

[35] Statutory instruments are subject to the publication procedures laid down under the Statutory Instruments Act 1946.

[36] Wildlife and Countryside Act 1981, ss 26(1) and (2).

[37] Wildlife and Countryside Act 1981, s 26(4)(b).

(2) they have consulted any local authority or any other person who, in their opinion, may be affected by, or have an interest in, the regulations.[38]

2.56 In line with the discussion in the section below, regulations adding, amending or removing an entry to a schedule to the Wildlife Bill may also be issued when a review of that schedule has been carried out by the Joint Nature Conservation Committee (JNCC) under the quinquennial review procedure and the Secretary of State or Welsh Ministers, as above, have consulted any local authority or any other person who, in their opinion, may be affected by the order.

Recommendations

Recommendation 7: we recommend that section 26 of the Wildlife and Countryside Act 1981 should be adopted as the general model for the procedure to make secondary legislation under the new framework.

This recommendation is given effect in the draft Bill by clause 166.

REVIEW OF SPECIES LISTS

2.57 We explored above the need to monitor changes in the natural world,[39] in particular to see whether further protection for species naturally occurring in Great Britain is necessary, and whether it is necessary to take additional steps to deal with emerging threats to biodiversity.

2.58 In this section, we consider a mechanism for reviewing and updating the schedules to the proposed wildlife Bill to ensure that the provisions of the new Bill adequately reflect, at all times, changes to wildlife protection or management priorities.

2.59 In line with our general approach to the reform of wildlife law, our recommendations in this section build on existing mechanisms, particularly the quinquennial review process currently undertaken by the JNCC in relation to schedules 5 and 8 to the Wildlife and Countryside Act 1981.[40] The aim of our recommendations in this section is to ensure that under the new regulatory framework all relevant schedules will be regularly kept up to date through a consistent review procedure.

Relevant legislation

The Wildlife and Countryside Act 1981

2.60 Most provisions in Part 1 of the Wildlife and Countryside Act 1981 (the 1981 Act) are dependent on schedules that list the species of fauna and flora to which the provisions apply.

[38] Wildlife and Countryside Act 1981, s 26(4)(a). In line with current practice, we have taken the view that the consultation requirements should expressly extend to persons – including, for instance – non-governmental organisations, that have an interest in the regulations.

[39] Chapter 2, paras 2.25 to 2.49.

[40] Wildlife and Countryside Act 1981, s 22(3).

QUINQUENNIAL REVIEW OF SCHEDULES 5 AND 8

2.61 Section 24(1) of the 1981 Act provides that the GB conservation bodies[41] acting through the Joint Nature Conservation Committee (JNCC)[42] may at any time and shall five years after 30th October 1991 and every five years thereafter, review schedules 5 and 8 to the 1981 Act[43] and advise the Secretary of State and Welsh Ministers as to whether any animal should be added to, or removed from, schedule 5 or whether any plant should be added to, or removed from, schedule 8.

2.62 Following representations from the GB conservation bodies acting through the JNCC the Secretary of State or Welsh Ministers may:

(1) add to schedule 5 or schedule 8 any animal or plant which, in their opinion, is in danger of extinction in Great Britain or is likely to become so endangered unless conservation measures are taken; and

(2) remove from schedule 5 or schedule 8 any animal or plant which, in their opinion, is no longer so endangered or likely to become so endangered.[44]

2.63 The process follows the provisions of part 2 of the Natural Environment and Rural Communities Act 2006,[45] which require that the giving of advice for the purposes sections 22(3) and 24(1) of the 1981 Act can only be conducted through the JNCC.[46]

OTHER SCHEDULES

2.64 The remainder of the schedules to Part 1 of the 1981 Act are not subject to the regular review procedure attached to the power to update schedules 5 and 8.

2.65 In relation to schedules concerning the protection of wild birds, the Secretary of State or Welsh Ministers may, by order, add or remove any bird from any part of schedules ZA1 to 4. The Secretary of State or Welsh Ministers may also prescribe close seasons for birds added to part 2 of schedule 1 and part 1 of schedule 2 to the 1981 Act.[47]

[41] The GB conservation bodies are Natural England, Natural Resources Wales and Scottish Natural Heritage (Natural Environment and Rural Communities Act 2006, s 32).

[42] The JNCC was established by the Natural Environment and Rural Communities Act 2006, s 31 and sch 4, and acts as the principal advisor to the UK Government on UK and international matters. It also organises the joint submissions for reviews of some of the existing schedules to the Wildlife and Countryside Act 1981.

[43] Schedules 5 and 8 list, respectively, the species of animals or plants protected by ss 9 (offence of killing or taking animals) and 13 (offence of picking, uprooting or destroying plants) of the Wildlife and Countryside Act 1981.

[44] Wildlife and Countryside Act 1981, s 22(3).

[45] Wildlife and Countryside Act 1981, s 24(1).

[46] Natural Environment and Rural Communities Act 2006, ss 36(1) and (2).

[47] Wildlife and Countryside Act 1981, ss 22(1) and (2).

2.66 Schedule 6, which lists animal species protected from prohibited methods of killing or capture may only be updated for the purpose of complying with an international obligation.[48]

2.67 Lastly, the Secretary of State or Welsh Ministers may, either generally or with respect to particular areas of Great Britain, add to or remove any animal species from part 1 of schedule 9 and add to or remove any plant species from part 2 of that schedule. Part 1 of schedule 9 lists animal species that may not be released into the wild. Part 2 of schedule 9 lists plant species that may not be planted or caused to grow in the wild.

2.68 Lists of prohibited methods of killing or capturing wild birds are also capable of amendment. However, such amendment cannot prohibit methods involving the use of a firearm, save for the purpose of complying with an international obligation.[49] Prohibited methods of killing or capturing other protected wild animals are capable of review, but only in pursuance of an international obligation.[50]

Conservation of Habitats and Species Regulations 2010

2.69 The Conservation of Habitats and Species Regulations 2010 have been enacted under section 2(2) of the European Communities Act 1972 (the 1972 Act) for the purpose of giving effect to the UK's obligations under the Habitats Directive. Its schedules, as a result, may only be amended by regulations enacted under section 2(2) of the 1972 Act. Section 2(2) of the 1972 Act empowers any designated Minister to make orders, rules, regulations or schemes for the purpose of implementing the UK's obligations under EU law or dealing with any matter arising out of or related to any such obligation.

Review of species lists under the new framework

2.70 As discussed in the sections above, most provisions of our proposed regulatory framework are connected to a relevant schedule listing the species of fauna or flora – or the prohibited methods of killing or capture – to which that provision applies. Effective and flexible processes to ensure that schedules are regularly kept up to date, therefore, are key to the proper functioning of the regulatory regime.

[48] Wildlife and Countryside Act 1981, s 22(4). The power to update schedules for the purpose of complying with an international obligation extends to sch 5 and 8. When exercising that power, the Secretary of State or Welsh Ministers are not bound to act under the advice of the GB conservation bodies.

[49] Wildlife and Countryside Act 1981, ss 5(2) and (3).

[50] Wildlife and Countryside Act 1981, s 11(4).

2.71 In the consultation paper we provisionally proposed that the requirement to regularly review the schedules under the new regime should be extended to all relevant schedules under the new regime.[51] We also suggested that in line with the existing quinquennial review process that currently applies to schedules 5 and 8 to the Wildlife and Countryside Act 1981, the review process should be carried out, at the very least, every five years.[52] Lastly, we proposed that, while the Secretary of State or Welsh Ministers should be free to depart from the advice of the relevant conservation bodies in connection with the review of a list, they should be bound to issue a public statement giving reasons for that decision.[53]

2.72 Consultees generally expressed overwhelming support for the above proposals, although there was some disagreement between stakeholders in connection with the maximum period between reviews. Defra and Natural England, for instance, suggested that the period between reviews should be extended to ten years, as a comprehensive review every five years could raise resource concerns. Others suggested, on the other hand, that all lists should be kept constantly under review or reviewed every three years.

Maximum period between reviews

2.73 On balance, we have concluded that the current five-year period between reviews should be adopted as the model for the general obligation to periodically review the schedules to our proposed statutory framework. A ten-year period between reviews appeared to us to be excessively long to ensure that schedules adequately reflect real management and conservation priorities on an ongoing basis. Over-frequent changes to the schedules, on the other hand, may cause considerable uncertainty for those engaging in regulated activities and impose significant burdens on all those interested in wildlife protection, not just those administrating the listing process.

2.74 The five-year review process, therefore, should take place either at any time within five years after the new statute comes into force (and each successive five years) or within any shorter period specified in regulations issued by the Secretary of State or Welsh Ministers. This will make it possible to stagger the review of certain schedules in case the Secretary of State or Welsh Ministers consider that the review of all the schedules at the same time may be, for instance, administratively inconvenient.

[51] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 5-9.

[52] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 5-11.

[53] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 5-10.

Recommendations

Recommendation 8: we recommend that all schedules listing animal or plant species that should be protected by wildlife legislation, prohibited methods of killing or capturing and prohibited times during which particular animals may not be killed or captured should be reviewed every five years.

This recommendation is given effect in the draft Bill by clause 158(1) and (2).

The quinquennial review process

2.75 In line with Part 2 of the Natural Environment and Rural Communities Act 2006, the quinquennial review of the schedules to the Wildlife Bill should be carried out by the GB conservation bodies acting through the Joint Nature Conservation Committee (JNCC). Following the review process, the GB conservation bodies acting through the JNCC should advise the Secretary of State or Welsh Ministers as to the amendments, if any, they consider should be made to the schedules under review. The advice should be accompanied by a statement of reasons.

2.76 Environmental law is devolved in Wales and Scotland. However, under the current review procedure, each GB nature conservation body, acting through the JNCC, has an obligation to advise (jointly with the other two conservation bodies) all three Governments.[54] Our understanding is that the rationale behind this approach is that, because certain species may be highly mobile, it is important that the review takes account of the conservation status of species across the whole of Great Britain.

2.77 If this approach is to be retained, then, in this regard alone, a legislative consent motion would be needed in the Scottish Parliament in respect of the requirement that Scottish Natural Heritage take part in reviews. But in practice, the extension of the current process to all schedules could be problematic. It could result in a requirement for Scottish Natural Heritage to participate in the review of a number of schedules that are only relevant to England and Wales.

2.78 We have concluded, therefore, that the three Governments should cooperate to re-define the involvement of the three GB conservation bodies in the quinquennial review process.

Recommendations

Recommendation 9: we recommend that quinquennial review of the schedules to the new Wildlife Act should be carried out by the GB conservation bodies acting through the Joint Nature Conservation Committee.

This recommendation is given effect in the draft Bill by clause 158(1).

[54] Wildlife and Countryside Act 1981, s 24; Natural Environment and Rural Communities Act 2006, s 32.

Recommendation 10: we recommend that following the review of the relevant schedules, the Joint Nature Conservation Committee should advise the Secretary of State and Welsh Ministers as to the amendments, if any, they consider should be made to the schedules under review.

This recommendation is given effect in the draft Bill by clauses 158(4) and (5).

Recommendation 11: we recommend that the UK Government, the Welsh Government and the Scottish Government consider cooperating for the purpose of re-defining the involvement of the three GB conservation bodies in the quinquennial review process.

Obligation to give reasons

2.79 The fact that the quinquennial review process under the new statutory framework will extend to a broader range of schedules will, in our view, increase the likelihood of future divergences between expert advice and political decision-making. We remain convinced that an express requirement for the Secretary of State or Welsh Ministers to give reasons for departing from the expert advice would guarantee the transparency of the decision-making process and clarify the interface between science and policy.

2.80 We have concluded, therefore, that if the Secretary of State or Welsh Ministers decide not to make a relevant amendment to a schedule that the JNCC has advised should be made, or to make a relevant amendment to a schedule that the Committee has not advised should be made, they should be under an express duty to make a statement giving reasons for that decision.

Recommendations

Recommendation 12: we recommend that if the Secretary of State or Welsh Ministers decide not to follow the advice of the Joint Nature Conservation Committee in connection with the amendment of a relevant schedule, they should have a duty to make a statement giving reasons for that decision.

This recommendation is given effect in the draft Bill by clauses 158(6) and (7).

Power to update schedules outside the quinquennial review

2.81 In considering the process of updating the schedules, we turned our attention to what should happen between required reviews. The need to amend a list between the regular reviews could arise as a result of a change in the natural range or identity of a species listed in annex 4 to the Habitats Directive. The desire to amend a list could also be due to other international obligations, or purely domestic conservation concerns.

2.82 Consequently, we see merit in a simplified process for altering lists between reviews: one that is less burdensome than a formal review and that does not disrupt the general review process.

2.83 We have concluded, therefore, that the Secretary of State or Welsh Ministers should have the power to update a schedule by regulations outside the quinquennial review process. In that case, in line with the general order-making procedure discussed in the section above, the Secretary of State or Welsh Ministers should consult whichever of the advisory bodies they consider is best able to advise them as to whether the schedule should be updated. If the Secretary of State or Welsh Ministers decide to make a relevant amendment to a schedule that is not in line with the advice of the relevant advisory body, they should be under an express duty to make a statement giving reasons for that decision.

Recommendations

Recommendation 13: we recommend that when updating the schedules of the new regulatory framework outside the quinquennial review process, the Secretary of State or Welsh Ministers should consult whichever ones of the advisory bodies they consider is best able to advise them as to whether the schedule should be updated.

This recommendation is given effect in the draft Bill by clauses 159 and 160.

Recommendation 14: we recommend that if the Secretary of State or Welsh Ministers decide not to follow the advice of the relevant advisory body, they should have a duty to make a statement giving reasons for that decision.

This recommendation is given effect in the draft Bill by clauses 159(5) and (6).

Criteria for adding or removing entries to the relevant schedules

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

2.85 Section 22(3)(a) of the Wildlife and Countryside Act 1981 currently provides that the Secretary of State or Welsh Ministers may only add to schedules 5 or 8 an animal or plant which, in their opinion, is in danger of extinction in Great Britain or is likely to become so endangered unless conservation measures are taken.[55] A species may only be removed from schedule 5 or 8 if, in the opinion of the Secretary of State or Welsh Ministers that species is no longer so endangered, or likely to become so endangered.

2.86 An animal or, where relevant, a plant may otherwise be added to or removed from schedules 5, 6 or 8 for the purpose of complying with an international obligation.[56]

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

[56] Wildlife and Countryside Act 1981, s 22(4). Sch 6 lists animal species protected against prohibited means of killing or capture.

2.87 In line with our policy of enhancing the flexibility of wildlife law, we have concluded that some of the conditions in sections 22(3) and 22(4) of the 1981 Act should be removed.

Schedules 5 and 8 to the Wildlife and Countryside Act 1981

2.88 Our view is that the Secretary of State or Welsh Ministers should be able to list animals and plants in the schedules replicating schedules 5 and 8 to the Wildlife and Countryside Act 1981 for reasons other than the risk of extinction of a species. It should be possible, for instance, to protect an animal or plant because it is an essential component of an ecosystem and the exploitation of that animal or plant threatens the ecological balance of a certain habitat. We think, therefore, that the current restriction unnecessarily prevents the development of different criteria in the future.

2.89 As a result, we have concluded that the Secretary of State or Welsh Ministers should be able to add any animal or plant to the above schedules for any reason.

2.90 We have concluded, however, that the Secretary of State or Welsh Ministers should not be able to remove an animal or plant from those schedules unless in their opinion:

(1) the animal or plant is not endangered or unlikely to become endangered;

(2) the listing of that animal or plant in a schedule is unnecessary for the protection of the animal or plant in question (by reason of an equivalent entry added, or proposed to be added, to any other schedule); or

(3) the removal of the plant or animal from that schedule is necessary in order to comply with an international obligation.[57]

2.91 The reason behind this approach is that removing the first precondition would constitute a policy shift that arguably goes beyond the scope of the Law Commission's review of this area of law. The problem with retaining that as the sole precondition, however, is that it could prevent the Secretary of State or Welsh Ministers from moving an endangered species from the above schedules to schedules affording a higher level of protection. Retaining the possibility to remove an animal from the relevant schedules so as to comply with an international obligation, or by reason of another entry added, or proposed to be added, to another schedule will make sure that an animal or plant species that becomes protected by an international agreement, or an animal or plant species that requires a higher level of protection, may be moved into a different protection regime, such as the provisions of the new framework that give effect to articles 12 and 13 of the Habitats Directive.

[57] A species may already be added or removed from those schedules for the purpose of complying with an EU obligation through an order issued under s 2(2) of the European Communities Act 1972.

Recommendations

Recommendation 15: we recommend that the Secretary of State or Welsh Ministers should be able to add species to the schedules replicating schedules 5 and 8 to the Wildlife and Countryside Act 1981 for any reason. Species should only be capable of being removed if, in their opinion:

(1) the animal or plant is not endangered or unlikely to become endangered;

(2) the listing of that animal or plant in a schedule is unnecessary for the protection of the animal or plant in question (by reason of an equivalent entry added, or proposed to be added, to any other schedule); or

(3) the removal of the plant or animal from that schedule is necessary in order to comply with an international obligation.

This recommendation is given effect in the draft Bill by clause 160(8).

Schedule 6 and the lists of prohibited methods of killing or capture

2.92 We have concluded that the current restriction on the review of schedule 6 to the 1981 Act (it may only be updated in pursuance of an international obligation) is anomalous and overly restrictive. An animal should be capable of being protected from prohibited methods of killing or capture for conservation or animal welfare reasons that are unconnected to the UK's international obligations.

2.93 We have also noted that similar restrictions apply in connection to the power to update the list of prohibited methods and means under sections 5 and 11 of the 1981 Act.

2.94 Currently the Secretary of State or Welsh Ministers may update the list of prohibited methods of killing or capture of wild birds for any reason. This power, however, may not be exercised in respect of methods involving a firearm save for the purpose of complying with an international obligation.[58]

2.95 The power to alter the list of prohibited methods of killing or capturing protected wild animals other than birds may only be exercised for the purpose of complying with an international obligation.[59]

2.96 Orders amending the above lists, in addition, are subject to the affirmative resolution procedure. In other words, an order amending the lists does not come into force unless a draft of the order has been laid before and approved by a resolution of each House of Parliament (if the order was made by the Secretary of State) or laid before and approved by a resolution of the Welsh Assembly (if the order was made by the Welsh Ministers).

[58] Wildlife and Countryside Act 1981, ss 5(2) and (3). In practice the power to remove any prohibited method from that list is significantly restricted by EU law, on the basis that the list of prohibited methods constitutes the domestic transposition of art 8 (read together with annex 4) of Directive 2009/147/EC.

[59] Wildlife and Countryside Act 1981, s 11(4).

2.97 We have concluded that the substantive restrictions on the exercise of the power to amend the lists of prohibited methods in connection with wild birds and protected wild animals other than birds unnecessarily restrict the scope to add prohibited methods of killing or capture for domestic conservation or animal welfare reasons. The Secretary of State or Welsh Ministers, in other words, should be able to update the list of prohibited methods for any reason. Their discretion, in any event, is already significantly fettered by article 8 of the Wild Birds Directive, article 15 of the Habitats Directive and other EU obligations.

2.98 Similarly, the procedural requirement for an affirmative resolution under section 26(3) of the 1981 Act is, in our view, anomalous and unnecessary. There is no reason why the addition or removal of a prohibited method from a list should involve a more stringent procedure than the addition or removal of a species from a schedule. In line with our general policy, therefore, amendments to schedules containing methods and means should be conducted under the same procedure as currently applies in connection with all the other schedules.

Recommendations

Recommendation 16: we recommend that the Secretary of State or Welsh Ministers should have the power to alter schedules containing prohibited methods of killing or capture of animals for any reason and in accordance with the standard procedure prescribed by section 26 of the Wildlife and Countryside Act 1981.

This recommendation is given effect in the draft Bill by clause 160.

Emergency listing of invasive non-native species

2.99 Invasive non-native species are considered to be one of the main drivers of biodiversity loss across the globe.[60] As we explored at length in our Report on the control of invasive non-native species,[61] while only a fraction of non-native species turn out to be invasive, all species which establish themselves in a new area outside their natural range carry the threat of causing harm to local biodiversity and other environmental, social or economic interests.[62] Because of the tendency of invasive non-native species to propagate rapidly, the scale and costs of eradication programmes may increase significantly if quick preventive measures are not adopted.

2.100 In the consultation paper, therefore, we provisionally proposed that there should be a mechanism allowing for the emergency listing of invasive non-native species in the schedule to the Wildlife Bill that replaces schedule 9 to the Wildlife and Countryside Act 1981.

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

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

[62] F Williams and others, *The Economic Cost of Invasive Non-native Species on Great Britain* (2010), p 11.

Current law

2.101 Section 14(1) of the Wildlife and Countryside Act 1981 (the 1981 Act) makes it an offence for a person to release or allow to escape into the wild any animal which is of a kind which is not ordinarily resident in and is not a regular visitor to Great Britain in the wild state or is included in part 1 of schedule 9 to the 1981 Act. Part 1 of schedule 9, therefore, primarily lists animals (native or non-native) that should not be released in the wild even if they are already "ordinarily resident" in Great Britain.

2.102 Section 14(2) of the 1981 Act makes it an offence to plant or cause to grow in the wild any plant included in part 2 of schedule 9.

2.103 Currently the Secretary of State or Welsh Ministers may update part 1 or 2 of schedule 9 for any reason.[63] The order-making procedure to update schedule 9 is currently in line with the general procedure that we have recommended in the section above.[64]

Discussion

2.104 Despite the broad support in consultation for the provisional proposal to create a mechanism to "emergency list" potential invasive non-native species in schedule 9, we have decided not to pursue this proposal for three interrelated reasons.

2.105 The first reason why we concluded that an "emergency listing" mechanism would not be necessary is that – after giving further thought to the existing procedure for updating schedules – it does not appear to us that the current statutory procedure is incapable of accommodating emergency situations. Section 26 of the Wildlife and Countryside Act 1981 does not prescribe a particular timeframe for consulting local authorities and other interested parties. The timeframe for complying with the consultation requirement under section 26(4) of the 1981 Act, therefore, is subject only to general public law principles of fairness. While "adequate time" should be given to ensure that consultees have a realistic opportunity to respond,[65] the urgency of the situation is a relevant factor in considering the adequacy of the timeframe of a consultation requirement.[66]

[63] Wildlife and Countryside Act 1981, s 22(5).

[64] Wildlife and Countryside Act 1981, s 26.

[65] *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213, at [108].

[66] See, for instance, *R (on the application of Anvac Chemical UK Ltd) v Secretary of State for Environment, Food and Rural Affairs* [2001] EWHC Admin 1011, [2002] ACD 34 (while a period of 2 days was held to be too short, the urgency of the situation prior to suspension of use of a pesticide was taken into consideration).

2.106 As discussed in Chapter 4 below, a statutory emergency procedure – such as the one currently used for extending the close season for huntable wild birds for a maximum of 14 days – may be necessary to respond quickly to immediate, unforeseeable threats. In the context of invasive non-native species, however, nothing prevents the Secretary of State or Welsh Ministers from taking a more pre-emptive approach to schedule 9 and expressly prohibiting the release of animals or plants that are either not yet present in Great Britain or that are present in Great Britain and may create threats in the future if uncontrolled. An emergency listing procedure would carry the risk of removing the incentive for taking a precautionary approach to the listing of species of concern.

2.107 Lastly, criminalising the release of a non-native species, in many cases, may not necessarily constitute a very effective measure to react to an "urgent" threat. This is because in most cases a situation will be "urgent" either because of there is imminent risk that a species is likely to be introduced in Great Britain or because the relevant species has already been introduced and is causing extensive damage. In the first case, effective measures to react to the threat of introduction would more likely include the use of powers to ban the import or the possession of the relevant species, together with the introduction of effective controls to enforce the relevant bans; in the second case more effective measures would include, among other things, the issuing of emergency species control orders for the purpose of eradicating or controlling the spread of the relevant species.

GENERAL POWER TO INTRODUCE CLOSE SEASONS

2.108 While activities that interfere with many endangered or threatened species tend to be generally prohibited throughout the year unless expressly authorised by a licence, a number of species that are commonly hunted are currently protected by provisions restricting the period during which they may be killed or captured.

2.109 As we explored in the consultation paper, close seasons may be imposed for a number of different reasons. A close season may be imposed for animal welfare reasons, on the basis that during certain periods of the year the young of a huntable animal may starve if the mother is killed. Close seasons also have a role in population maintenance, as the protection of a species during the breeding and rearing season is a way of preventing hunting activities from having an unsustainable impact on population numbers. Close seasons may also be used as part of a comprehensive species management programme. Lengthening the close season of a species and reducing it for another similar species may give an advantage to the former.

International and EU obligations

2.110 A number of international and EU instruments provide for the introduction of close seasons for the purpose of ensuring that the exploitation of certain animals is carried out in a sustainable way.

Bern Convention

2.111 Article 7 of the Bern Convention provides that each contracting party should take appropriate and necessary legislative and administrative measures to ensure the protection of the wild fauna species specified in appendix 3. Any exploitation of wild fauna specified in appendix 3, in addition, should be regulated in order to keep the populations out of danger, taking into account the requirements of article 2 of that Convention. Measures to be taken in accordance with this article should include, but are not limited to:

(1) close seasons and/or other procedures regulating the exploitation;

(2) the temporary or local prohibition of exploitation, as appropriate, in order to restore satisfactory population levels;

(3) the regulation as appropriate of sale, keeping for sale, transport for sale or offering for sale of live and dead wild animals.

2.112 Appendix 3 includes all species of deer, the brown hare, the mountain hare, a number of species of seal and almost all birds that are not listed in appendix 2.[67]

Wild Birds Directive

2.113 The Wild Birds Directive, broadly speaking, provides that species of birds listed in annex 2 to the Directive may be hunted in member states as long as the domestic regulation of hunting is compliant with the principles of "wise use" and "ecologically balanced control" and does not take place during the rearing season, the various stages of reproduction and – in the case of migratory birds – during their return to their rearing grounds.

Habitats Directive

2.114 As discussed above, the Habitats Directive imposes a number of surveillance obligations.[68] Article 14, in addition, specifically provides that if in the light of the surveillance provided for in article 11 member states deem it necessary, they should take measures to ensure that the taking and exploitation of wild specimens of species of fauna and flora listed in annex 5 to the Directive is compatible with their being maintained at a favourable conservation status. Such measures may include, among other things, the introduction of close seasons.

2.115 Species listed in annex 5 include the mountain hare and all species of seal that have a natural range that includes Great Britain.

Current close seasons and prohibited periods in domestic law

2.116 Domestic law currently imposes statutory close seasons in connection with a number of huntable species.

[67] Appendix 2 to the Bern Convention lists the species that fall within the strict protection regime of the Convention.

[68] See, in particular, Directive 92/43/EEC, art 11.

2.117 The Wildlife and Countryside Act 1981 allows the killing and capture of wild bird species listed in part 1 of schedule 2 to the Act outside the close season.[69] The close season for particular species can be varied by an order made under sections 2(5) and 26 of the 1981 Act. However, there is no power to amend the "default" close seasons that apply under the Act in the absence of a variation order.

2.118 One of the main functions of the Game Act 1831 is to prohibit the killing or taking of game birds[70] during the prescribed close seasons defined in the statute. For example, the close season for partridge is "between the first day of February and the first day of September in any year" and for pheasant is "between the first day of February and the first day of October in any year". For reasons which may not necessarily be relevant to the twenty-first century, the Game Act 1831 also prohibits the killing or capture of game birds and hares on a Sunday and on Christmas day.[71]

2.119 The Conservation of Seals Act 1970 establishes close seasons for common and grey seals, making it an offence to kill those seals during their close season.[72] The Secretary of State or Welsh Ministers may make orders prohibiting the killing of seals at other times.[73] However, there is no power to amend the statutory close season.

2.120 The Deer Act 1991 similarly regulates the killing and capture of deer through close seasons. It is an offence to kill or take certain deer listed in schedule 1 to the Deer Act during the close season prescribed in the schedule.[74] There is, again, no power in the Deer Act 1991 to vary schedule 1.[75] Section 3 of the Act also generally prohibits the killing of any deer at night.

Discussion

2.121 In the consultation paper, we provisionally proposed that there should be a general power to introduce, remove or amend close seasons by order.[76]

[69] Wildlife and Countryside Act 1981, s 2(1). The close seasons are listed in s 2(4) of Wildlife and Countryside Act 1981.

[70] Game birds protected by s 3 of the Game Act 1831 are pheasants, partridges, grouse, heath or moor game, and black game.

[71] Game Act 1831, s 3.

[72] Conservation of Seals Act 1970, s 2.

[73] Conservation of Seals Act 1970, ss 2 and 3.

[74] Deer Act 1991, s 2.

[75] The close seasons for deer were last amended by the Regulatory Reform (Deer) (England and Wales) Order 2007, SI 2007 No 2183.

[76] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 5-12.

2.122 We thought that such a power would be useful for two reasons. First, existing close seasons for game species can only be altered by an Act of Parliament. This does not seem either sensible or sufficiently flexible to ensure that the close season set in the face of the statute reflects the conservation or welfare needs of the species in question. Secondly, it may well be necessary in the future to impose a close season on a species that does not currently have one. Effective measures – including the introduction of close seasons – to ensure that the population of certain species is maintained at a favourable conservation status, for instance, are expressly required by article 7 of the Bern Convention and article 14 of the Habitats Directive.

Close seasons for wild birds protected by the Wild Birds Directive

2.123 Article 7 of the Wild Birds Directive is significantly more prescriptive than article 7 of the Bern Convention and article 14 of the Habitats Directive. As a result, the adequacy of the current domestic transposition of article 7 through statutory close seasons was discussed at length in a separate section of the consultation paper.[77] Given the specificity of the hunting regime for wild birds required by the Wild Birds Directive, the reform of close seasons for huntable wild birds listed in annex 2 to the Directive is discussed in a separate section in Chapter 4 of this Report.

Power to introduce close seasons for animals other than wild birds protected by the Wild Birds Directive

2.124 Consultees, including Defra and Natural England, generally expressed strong support for the proposal to introduce a general power to introduce, remove or alter close seasons. We have concluded, therefore, that under the new framework there should be a general power to introduce, remove or alter close seasons in any specified area and for any animal, other than wild birds listed in annex 2 to the Wild Birds Directive.

2.125 The close seasons that currently apply to deer and seals should, we consider, be brought into this regime. The hunting of wild birds falling within the scope of the Wild Birds Directive, as discussed above, will be subject to a specific regime to give effect to article 7 of the Wild Birds Directive in domestic legislation. We propose that the new order-making power be available for the purpose of protecting birds that fall outside the protection regime of the Wild Birds Directive.[78]

[77] Wildlife Law (2012) Law Commission Consultation Paper No 206, paras 6.83 to 6.101.

[78] The scope of the Wild Birds Directive protection regime is discussed in detail in Chapter 4 below.

2.126 We have noted that the killing or capture of deer and hares is also generally prohibited during shorter timeframes. As mentioned above, hares may not be killed on a Sunday or Christmas day; deer may not be killed at night. In line with our general policy of retaining existing species protection levels, we have concluded that – whether or not the protection of hares on Sunday and on Christmas day reflects existing conservation needs – these prohibited periods should be replicated in the new framework. In line with our policy to create a general power to introduce, remove or alter close seasons, we are recommending that under the new framework there should be a parallel power to introduce, remove or alter shorter "prohibited periods" for the purpose of protecting any animal other than a bird protected by the Wild Birds Directive.

2.127 The schedules listing close seasons, prohibited periods and the animals to which they apply should be subject to the same procedure as applies to the review of all other relevant schedules to the Wildlife Bill. It follows that close seasons should be subject to the quinquennial review carried out by the GB conservation bodies acting through the Joint Nature Conservation Committee (JNCC). The Secretary of State or Welsh Ministers may, alternatively, alter the above lists of their own motion after having complied with the consultation requirements described above in this Chapter.

2.128 In consultation, both conservation and pro-hunting groups raised concerns about the risk that the power to alter close seasons may be used to further the political objectives of a particular group rather than being exercised according to a sound set of principles.

2.129 It is worth noting that the exercise of the power to introduce close seasons will be, in practice, underpinned by the surveillance obligations and conservation imperatives flowing from articles 11 and 14 of the Habitats Directive. In line with article 14 of the Habitats Directive, the Secretary of State and Welsh Ministers will have to ensure that – in the light of the surveillance programmes required by article 11 – effective measures are taken to ensure that the exploitation of such specimens is compatible with the maintenance of that species at a favourable conservation status. The introduction or amendment of a close season or prohibited period will clearly be measures that the Secretary of State or Welsh Ministers will have to consider to ensure compliance with the above obligation.

2.130 In addition, because any decision to impose a close season would have to go through the same order-making process that applies to the amendment of any other schedule under the new Act, there will be ample opportunity for the views of interested parties to be considered and taken into account. As the Secretary of State and Welsh Ministers will be under an express obligation to give reasons in the event they decide not to follow the expert advice from the relevant conservation bodies (the JNCC, Natural England or Natural Resources Wales), we expect that any decision to depart from the scientific advice will be based on sound principled reasons.

Recommendations

Recommendation 17: we recommend that under the new regulatory framework the Secretary of State or Welsh Ministers should have the power to introduce, alter or remove close seasons or prohibited periods by regulation in connection with any animal species (other than a bird listed in annex 2 to the Wild Birds Directive).

Recommendation 18: we recommend that the power to introduce, alter or remove close seasons should be capable of being exercised in relation to specific areas in England and Wales.

Recommendation 19: we recommend that the existing close seasons and prohibited periods in connection with animals (other than birds) should be replicated under the new regulatory framework and subjected to the same regulation-making powers.

These recommendations are given effect in the draft Bill by clause 160.

Other powers to introduce temporal or geographical restrictions

Areas of special protection

2.131 Under section 3 of the Wildlife and Countryside Act 1981 (the 1981 Act) the Secretary of State or Welsh Ministers may designate – with the consent of the owners and occupiers of the land in question – "areas of special protection" for any wild bird. This power replicates the effect of section 3 of the Protection of Birds Act 1954 (the 1954 Act), which provided the Secretary of State with the power to create "bird sanctuaries".

2.132 The creation of areas of special protection allows the Secretary of State or Welsh Ministers to prohibit the killing, capture or disturbance of wild birds during times of the year when doing so would not otherwise be an offence under section 1 of the 1981 Act.[79] Most importantly, section 3 of the 1981 Act provides the Secretary of State or Welsh Ministers with the power to prohibit or regulate the access to any relevant area of special protection.[80]

2.133 Section 3 of the Conservation of Seals Act 1970 (the 1970 Act), similarly, allows the Secretary of State or Welsh Ministers to make orders prohibiting the killing or capture of grey or common seals in particular geographical areas.

[79] Wildlife and Countryside Act 1981, s 3(1)(a).

[80] Wildlife and Countryside Act 1981, s 3(1)(b).

2.134 Whilst a relatively large number of "areas of special protection" for birds (or "bird sanctuaries") have been established through orders issued under sections 3 of the 1954 and the 1981 Acts,[81] the last time an area was designated as an area of special protection in pursuance of an order issued under section 3 of the 1981 Act was in 1995.[82] As we have not consulted on the extent to which the power under section 3 of the 1981 Act may still be of use in the future,[83] we have concluded, on balance, that it should be retained under the new framework. As discussed in Chapter 4, however, other than regulating the access to particular areas, hunting regulations that may be issued under the new framework will be capable of imposing different restrictions in connection with different areas of England and Wales. We suggest, therefore, that consideration should be given as to whether retaining a power replicating the effect of section 3 of the 1981 Act would add anything useful to the new regulatory regime.

2.135 In line with our general policy of improving the flexibility of the existing regulatory regime, we have concluded that the effect of section 3 of the 1970 Act should be replicated under the new framework by providing the Secretary of State or Welsh Ministers with the power to prohibit the capture, killing or injuring of any wild animal in a geographical area designated by the Secretary of State or Welsh Ministers by regulations.

Recommendations

Recommendation 20: we recommend that the power to create areas of special protection for wild birds under section 3 of the Wildlife and Countryside Act 1981 should be replicated under the new framework.

This recommendation is given effect in the draft Bill by clauses 18 and 19.

Recommendation 21: we recommend that in the light of our recommendations on the reform of the powers to regulate hunting activities in connection with wild birds, consideration should be given as to whether retaining a power replicating the effect of section 3 of the 1981 Act adds anything useful to the new regulatory regime.

Recommendation 22: we recommend that the effect of section 3 of the Conservation of Seals Act 1970 should be replaced by a general power to prohibit, by regulation, the killing, capturing or injuring of any wild animal in a particular geographical area.

This recommendation is given effect in the draft Bill by clauses 60 and 160(1).

[81] Since 1954 more than thirty bird sanctuaries have been designated in England and Wales through the above order-making power.

[82] The Gibraltar Point (Area of Special Protection) Order 1995, SI 1995 No 2876.

[83] It is worth noting that s 3 of the Wildlife and Countryside Act 1981, insofar as it applied to Scotland, was recently repealed by the Wildlife and Natural Environment (Scotland) Act 2011, s 4(2).

Power to prohibit the use of particular methods of killing or capture in certain areas or times of the year

2.136 To ensure that the new regulatory framework is flexible enough to effectively accommodate future policy preferences, we have concluded that it should also be possible to restrict the application of a ban on the use of a particular method of killing, injuring or capturing to particular geographical areas or particular periods of time. The use of a particular method could be indiscriminate, or capable of causing serious disturbance to the local population of a protected species, only when used in a certain area, during a particular time of the day or during a particular period of the year.

2.137 We have concluded, therefore, that under the new framework the Secretary of State or Welsh Ministers should have the power to prohibit the use of a particular method of killing, injuring or capturing a protected species with respect to particular areas of England and Wales, particular times of the day or particular times of the year.

Recommendations

Recommendation 23: we recommend that the Secretary of State or Welsh Ministers should have the power to prohibit the use of a particular method of killing, injuring or capturing a protected species with respect to particular areas of England and Wales, particular times of the day or particular times of the year.

This recommendation is given effect in the draft Bill by clause 160(1) and (4).

NOMENCLATURE

2.138 In consultation meetings and in a number of consultation responses, problems were identified with listing species by name, on the basis that the name of a protected species could change as a result of a species being re-categorised in the light of subsequent scientific findings.

2.139 The effect of a "split" in the taxonomic classification of a species is that specimens that were thought to be part of the same species are subsequently re-categorised as belonging to two or more different species. Species may also be "joined"; in other words, specimens previously thought of as belonging to different species are subsequently re-categorised as belonging to the same species.

2.140 In this context, a number of stakeholders suggested that the effect of the re-classifications of a species in scientific literature on the legal protection of a listed species is far from clear. In simpler terms, if a protected species A is subsequently reclassified in scientific literature as species A and B, would specimens belonging to species B continue to be protected? Similarly, if unprotected species C is joined with protected species A, would specimens belonging to species C be protected?

2.141 Given the absence of an internationally recognised body which has the final word as to the taxonomic classification of all animal and plant species, a certain degree of fluidity in species classification is inevitable. For long periods of time, scientific opinion may also be split. As a result, we have taken the view that it would almost certainly be the case that a domestic court interpreting a wildlife statute would interpret the name of a listed species as referring to all specimens covered by that name at the time of listing, whatever their current classification, as doing otherwise would cause potential legal uncertainty or fail to give effect to the intention of Parliament.

2.142 We considered whether the creation of an express statutory presumption clarifying that a species should be interpreted by reference to the body of scientific opinion at the time the species was listed, or by reference to the last time the species list was reviewed by the Joint Nature Conservation Committee (JNCC), could bring added clarity to the new framework. We concluded, on balance, that a statutory presumption to that effect could potentially create more problems than it solves, particularly in cases where a list of protected species includes species protected by the Habitats or Wild Birds Directive.

2.143 As the Court of Justice of the European Union confirmed in *Waddenzee*,[84] for example, the Habitats Directive and, by analogy, the Wild Birds Directive must be interpreted by reference to the precautionary principle.[85] While the application of the precautionary principle in this context has never been tested, it cannot be excluded that the Court of Justice might come to the conclusion that, in all cases where there is scientific uncertainty as to the identification of a species protected by the Habitats or Wild Birds Directive, member states should interpret the name of the relevant species by reference to its broadest meaning. This approach could potentially clash with the pragmatic approach that a domestic court may adopt in cases covering species protected for domestic reasons.

2.144 In the light of the obligation to review all relevant schedules of the Wildlife Bill every five years, our view is that it will be unlikely that the problems described above will materialise on a regular basis under the new framework. Whenever they materialise, the starting point is that it should be the responsibility of the Secretary of State and Welsh Ministers to amend the schedules to clarify whether additional species should be added or removed in the light of recent taxonomic reclassifications.

[84] Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] ECR I-7405 at [44].

[85] Treaty on the Functioning of the European Union, art 191(2).

CHAPTER 3
PROHIBITED CONDUCT: CORE INTERNATIONAL AND EU OBLIGATIONS

INTRODUCTION

3.1 As mentioned in the chapters above, a significant proportion of domestic wildlife law is underpinned by international and EU law rules. As discussed in this and the following chapters, however, the current transposition of the United Kingdom's external[1] obligations in England and Wales remains unsatisfactory in certain areas of wildlife law. This has come about, in part, through the use of outdated regulatory structures and definitions to transpose new regulatory regimes and in part, through a failure to keep the law up to date with the case-law of the Court of Justice of the European Union and other relevant developments at international and EU level. While some inadequate transpositions of international and EU obligations arise for technical reasons that have little substantive policy impact, other transposition gaps have a significant effect on the domestic level of protection of a number of species.

3.2 At the other end of the spectrum, the domestic regulation of certain activities within the scope of the UK's international and EU obligations is unnecessarily inflexible or more stringent than is required by the external standards which the UK is required to give effect to. While the protection of certain animals to an extent going beyond international requirements is often the result of clear domestic policy choices, the current inability, for instance, to license the killing or capture of game birds during the close season appears to be simply an anomaly. Similarly, the current definition of "wild bird" in section 1 of the Wildlife and Countryside Act 1981 protects a number of non-native birds that may in fact require control or eradication measures. As discussed in Chapter 4 below, the automatic protection of potentially invasive birds is not required by the Wild Birds Directive and is not necessarily the most effective way to accommodate domestic protection preferences in connection with non-native birds.

3.3 Given the range of transposition issues that we have encountered in domestic legislation, a significant part of this reform project has been dedicated to ensuring that the new recommended framework gives effect to the UK's obligations under international and EU law in a clear, consistent and effective manner.

[1] We use the term "external" to refer to obligations arising as a matter of international (including EU) law; we use the term "domestic" to refer to obligations or policies that are internal to the United Kingdom. Though EU law is a form of international law, it is necessary to distinguish between obligations arising as a matter of EU law and those arising as a matter of other international law instruments such as the various international conventions referred to in this Chapter. We therefore use the term "international law" to refer to international law apart from EU law.

3.4 While the usual approach to the transposition of EU directives in England and Wales is, save in exceptional circumstances, to "copy-out" the requirements of the directives,[2] in this report we have taken a more strategic and comprehensive approach to the transposition of EU law. The Law Commission's role is to keep the law under review with a view, in particular, to making recommendations for the purpose of simplifying and modernising it.[3] Modern and simple legislation needs to be accessible, effective and enforceable. Those principles also apply to the transposition of EU directives. We have followed a "copy-out" approach to transposition, therefore, only when we considered it the most effective, accessible and simple means of transposing the obligations of the directives; in other cases we have sought to encapsulate the requirements of a directive in more accessible language.

3.5 In this Chapter we make recommendations on the most appropriate way to transpose in domestic legislation some of the core external obligations that are common to the Wild Birds Directive, the Habitats Directive and the Bern Convention. The first part of this Chapter provides a general summary of the core substantive protection provisions under relevant international agreements and EU directives.

3.6 The second part of this Chapter discusses in more detail three complex transposition issues: the extent of the UK's obligations under EU law arising out of the Bern Convention; the correct mental element in criminal offences concerned with wildlife to give effect to the Court of Justice's case law on the meaning of the word "deliberate" in the context of the Habitats and Wild Birds Directives; and the prohibitions connected to the disturbance and harassment of protected wild flora species.

3.7 Specific transposition issues connected with the domestic protection of wild birds, wild animals other than birds and wild plants respectively are discussed in Chapters 4, 5 and 6 of this report.

[2] HM Government *Transposition Guidance: How to Implement European Directives Effectively* (2013), para 1.3. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229763/bis-13-775-transposition-guidance-how-to-implement-european-directives-effectively-revised.pdf (last visited 26 October 2015).

[3] Law Commissions Act 1965, s 3(1).

CORE INTERNATIONAL AND EU OBLIGATIONS

European environmental policy

3.8 The United Nations Conference on the Human Environment held in Stockholm in 1972 culminated in the Stockholm Declaration, affirming that "man has acquired the power to transform his environment … on an unprecedented scale" and that "the protection and improvement of the human environment is a major issue which affects the well-being of people and economic development throughout the world". The declaration was accompanied by statements of principle and an action plan. Later that year the heads of state or government of the European Economic Community (which later became known as the European Union) plus the acceding member states (Denmark, Ireland and the UK) issued a communiqué – the "Paris Declaration" – inviting the Community institutions to establish a programme of environmental action.[4]

3.9 In November 1973 the European Council and the member states published a first programme of action of the Communities on the environment,[5] followed by a second programme in May 1977[6] and a third in December 1987,[7] together with an additional action programme on marine pollution by hydrocarbons.[8]

EU environmental competence

3.10 At that time, the Treaty establishing the European Economic Community (the EEC Treaty) contained no provision empowering the Community to take action in relation to the environment as such. The declaration on the first environmental action programme referred only to the then article 2 of the EEC Treaty, which defined the Community's task as including promoting "a harmonious development of economic activities" and "a continuous and balanced expansion". The legislative content[9] of the environmental programmes depended on a miscellany of existing treaty powers in fields such as agriculture, regional, social and transport policy and what came later to be known as the "single market". The only single market power that existed at that stage was article 100 EEC (which survives as article 115 of the Treaty of the Functioning of the European Union), giving the European Council, acting unanimously, power to enact Directives harmonising national laws that "directly affect the establishment or functioning of the common market".

3.11 Legislation could also be enacted under the reserve power then contained in article 235 (now article 352 of the Treaty on the Functioning of the European Union) which empowers the European Council, acting unanimously, to take measures to "attain … one of the objectives of the Community" where "this Treaty has not provided the necessary powers".

[4] See Halsbury's Laws of England, 3rd ed, Vol 51 *European Communities* (1986) para 8.02.

[5] Official Journal 1973 C 112/1.

[6] Official Journal 1977 C 139/1.

[7] Official Journal 1987 C 328/1.

[8] Official Journal 1978 C 162/1.

[9] Much of the programmes did not require legislation, having to do with studies of environmental impacts.

3.12 Explicit competence in environmental matters did not exist until the insertion of title 7, and articles 130r to 130t, into the EEC Treaty by the Single European Act of 1986.[10] Following subsequent treaty changes, the environmental competence is currently located in Title 20, articles 191 to 193 of the Treaty on the Functioning of the European Union (TFEU), which are similar though not identical to the original provisions.

3.13 The provisions do not set out an environmental policy but provide for the formulation of policy. Article 191 of the TFEU states, among other things, the objectives to be pursued; article 191(4), which is materially identical to the original article 130r(5), requires the EU and the member states to cooperate with third countries and the competent international organisations and empowers the Union to make arrangements for such cooperation. This provision is expressed to be "without prejudice to member states' competence to negotiate in international bodies and to conclude international agreements", presumably to avoid any suggestion that participation in international environmental treaties has become an exclusive EU competence.

3.14 Article 192 TFEU empowers the European Parliament and Council to decide what action is to be taken by the EU to achieve the objectives of article 191, but reserves to the Council, acting unanimously, powers in areas including taxation, town and country planning and energy policy. The institutions are required to adopt general action programmes setting out priority objectives. The predecessor to article 192 was used as the legal basis for the Habitats Directive[11] and the current version of the Wild Birds Directive.[12]

EU Treaty-making powers

3.15 The original EEC Treaty contained procedural provisions governing the European Community's entry into international agreements,[13] but conferred few express treaty-making powers. Early case-law of the Court of Justice of the European Union developed what is sometimes called the *in foro interno, in foro externo* principle, which holds that member states lose their own treaty-making power (with the consequence that treaty-making power shifts to the EU) in areas where the EU has legislated internally, on the grounds that member states may no longer enter into international commitments that might impinge on the common internal rules.[14]

3.16 In areas in which Community treaty-making power could not be inferred because of the absence of internal legislative competence, the Community could enter into and ratify treaties pursuant to article 235 EEC (referred to in paragraph 3.11 above).

[10] Single European Act 1986, art 25.

[11] Directive 92/43/EEC, Official Journal L 206 of 22.07.1992 p 7.

[12] Directive 2009/147/EC, Official Journal L 020 of 26.1.2010, p 7. The original Wild Birds Directive, Directive 79/409/EEC, was based on article 235 of the EEC Treaty.

[13] Art 228, now art 218 TFEU.

[14] See Halsbury's Laws of England, 3rd ed, Vol 51 *European Communities* (1986) paras 4.02 and 4.10.

3.17 A commonly used technique was the making of what came to be called "mixed agreements" to which the member states were parties along with the EEC and one or more third countries.[15] This avoided the need to define the extent of the Community's treaty-making power.[16] In Ruling 1/78 on the mixed agreement provisions of the Euratom Treaty, the Court of Justice observed:

> It is further important to state, as was correctly pointed out by the Commission, that it is not necessary to set out and determine, as regards other parties to the convention, the division of powers in this respect between the Community and the Member States, particularly as it may change in the course of time. It is sufficient to state to the other contracting parties that the matter gives rise to a division of powers within the Community, it being understood that the exact nature of that division is a domestic question in which third parties have no need to intervene.[17]

The relationship between international and EU obligations

3.18 Article 216 TFEU provides that "agreements concluded by the Union are binding upon the institutions of the Union and its member states". Article 216 makes the European Union a "monist" jurisdiction, in which international agreements, when approved, automatically become part of the Union legal order. It follows that depending on the nature of the obligations,[18] parts of the agreement, when ratified by the EU, may become directly applicable to Union institutions and member states without the need of any implementing instrument either at EU or member state level.[19]

European treaties on environmental matters

3.19 Following the emergence of a Community policy and programme of action on the environment, the Community participated along with the member states in a number of treaties with third countries relating to pollution, wildlife and other environmental matters.

[15] Express provision for these was made in art 102 of the Euratom Treaty, though not in the EEC Treaty.

[16] Paragraph 4.10 of Halsbury's Laws of England, 3rd ed, Vol 51 *European Communities* (1986) described mixed agreements as reflecting a wish to avoid discussion of the scope of the Community's power and observed (in 1986) that "it remains to be seen whether this approach will actually solve problems or merely defer them". The writer noted strong resistance on the part of the representatives of the Community to "attempts to have the division of powers dealt with explicitly in the text" of a mixed agreement.

[17] Case 1/78 [1978] ECR 2151, at [35].

[18] The international obligation must be clear and unambiguous.

[19] K Lenaerts and P Van Nuffel, *European Union Law*, (3rd ed 2011), pp 861-2; Case 181/73 *Haegeman* [1974] ECR 449, at [5]; Case 104/81 *Kupferberg* [1982] ECR 3641, at [11] to [13]; Opinion 1/91 *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area* [1991] ECR I-6079.

Convention on the Conservation of European Wildlife and Natural Habitats

3.20 The Bern Convention is an international agreement for the conservation of fauna, flora and natural habitats. The European Economic Community participated in its negotiation.[20] It entered into force on 1 September 1982 and was ratified in the same year by the United Kingdom and the European Economic Community. Other EU member states are also parties.

3.21 The Bern Convention is given effect in the EU legal order through the Wild Birds Directive and the Habitats Directive. As international law has primacy over secondary EU legislation, any discrepancy between the prohibitions under the Habitats and Wild Birds Directives on the one hand and the Bern Convention on the other hand, must be resolved in favour of the latter in the event that an obligation under the Convention is more extensive or stringent than the equivalent obligation under one of the Directives.[21]

Core obligations under the Bern Convention

3.22 The Bern Convention provides for the "special protection" of a list of plants (appendix 1), wild birds and other wild animals (appendixes 2 and 3).

3.23 The basic obligation upon contracting states to prohibit certain activities that affect wild plants is contained in article 5 of the Convention, which provides that:

> Each contracting party shall take appropriate and necessary legislative and administrative measures to ensure the special protection of the wild flora species specified in appendix 1. Deliberate picking, collecting, cutting or uprooting of such plants shall be prohibited. Each contracting party shall, as appropriate, prohibit the possession or sale of these species.

3.24 The basic obligation upon contracting parties to prohibit certain activities that affect wild birds and other wild animals is contained in article 6, which provides that:

> Each contracting party shall take appropriate and necessary legislative and administrative measures to ensure the special protection of the wild fauna species specified in appendix 2. The following will in particular be prohibited for these species:
>
> (a) all forms of deliberate capture and keeping and deliberate killing;
>
> (b) the deliberate damage to or destruction of breeding or resting sites;
>
> (c) the deliberate disturbance of wild fauna, particularly during the period of breeding, rearing and hibernation, insofar as disturbance would be significant in relation to the objectives of this Convention;

[20] See the preamble to the Conservation of European Wildlife and Natural Habitats Decision 82/72/EEC, Official Journal L 38 of 10.2.1982, p 1.

[21] Case C-308/06 *Intertanko* [2008] ECR I-4057 at [42]; Case C-69/89 *Nakajima* [1991] ECR I-2069.

(d) the deliberate destruction or taking of eggs from the wild or keeping these eggs even if empty;

(e) the possession of and internal trade in these animals, alive or dead, including stuffed animals and any readily recognisable part or derivative thereof, where this would contribute to the effectiveness of the provisions of this article.

3.25 As discussed in Chapter 2, article 7 imposes a general obligation on contracting parties to take appropriate and necessary legislative and administrative measures to ensure the protection of wild fauna listed in appendix 3, regulating exploitation so as to keep the species out of danger.[22]

3.26 Article 8 generally prohibits the use of indiscriminate methods in connection with the killing or capture of fauna species listed in appendixes 2[23] and 3 to the Convention. Appendix 4 lists specific methods of killing or capturing wild animals that contracting parties must prohibit.

3.27 Article 9 allows for derogations from the protection provisions of the Convention for limited purposes. The transposition of this provision in domestic law is discussed in detail in Chapter 7.

Other relevant international agreements

3.28 Beside the Bern Convention, there are at least three other international agreements that are relevant to the specific protection of wild animal species in England and Wales: the Bonn Convention, the Agreement on the Conservation of African-Eurasian Migratory Waterbirds and the Agreement on the Conservation of Albatrosses and Petrels.

Bonn Convention

3.29 The Bonn Convention was ratified by the European Union in 1982[24] and entered into force in 1983. It was subsequently ratified by the UK in 1985.[25] The Bonn Convention requires contracting parties that are "range states"[26] of a migratory species listed in appendix 1 to prohibit the "taking" of them, defined as "taking, hunting, fishing, capturing, harassing, deliberate killing, or attempting to engage in any such conduct".[27]

[22] Chapter 2, para 2.111.

[23] To the extent that they may be taken or killed compatibly with the Convention, eg pursuant to an exception made by a contracting party pursuant to art 9.

[24] Conservation of Migratory Species of Wild Animals Decision 82/461/EEC, Official Journal L 2010 of 19.7.1982 p 1.

[25] See http://www.cms.int/about/partylist_e.pdf (last visited 26 October 2015).

[26] "Range" is defined in art 1 as "all the areas of land or water that a migratory species inhabits, stays in temporarily, crosses or overflies at any time on its normal migration route". "Range state" means any state that exercises jurisdiction over any part of the range of that migratory species, or a state, flag vessels of which are engaged outside national jurisdictional limits in taking that migratory species.

[27] Bonn Convention, arts 1 and 3(5).

3.30 Appendix 1 to the Bonn Convention includes a number of species that have a natural range including the UK. As far as we are aware, most of them are already protected under domestic legislation and listed as protected species under the Habitats and Wild Birds Directives:

(1) the common sturgeon;

(2) the turtle *(Caretta caretta)*;

(3) the basking shark;[28]

(4) the white-tailed eagle.[29]

3.31 Article 4(3) of the Bonn Convention also requires contracting parties that are range states of migratory species listed in appendix 2 to "endeavour to conclude agreements[30] where these would benefit those species, giving priority to those species that have an unfavourable conservation status."

3.32 That provision has led to a number of subsequent agreements concluded by "range states", including the Agreement on the Conservation on African-Eurasian Migratory Waterbirds and the Agreement on the Conservation of Albatrosses and Petrels. The African-Eurasian Waterbirds Agreement was ratified by the UK and came into force in 1999.[31] It was subsequently ratified by the European Union in 2006.[32] The Agreement on the Conservation of Albatrosses and Petrels came into force in February 2004. It was subsequently ratified by the UK in July 2004 but has never been ratified by the EU.

Agreement on the Conservation of African-Eurasian Migratory Waterbirds

3.33 Article 3(2)(a) of the Agreement requires contracting parties to afford the same strict protection to "endangered" migratory waterbird species in the agreement area as is provided for under articles 3(4) and 3(5) of the Bonn Convention.[33]

[28] The EU entered a reservation as regards the listing of the basking shark in annex 1 to the Convention (the basking shark, in fact, is not currently protected under the Habitats Directive). As a result, the UK is only bound to protect the basking shark as a matter of international law. The basking shark is currently protected in domestic law by s 9 of the Wildlife and Countryside Act 1981.

[29] The white-tailed eagle has been re-introduced in Scotland.

[30] The Bonn Convention, art 1, provides that "agreement" means an international agreement relating to the conservation of one or more migratory species as provided for in arts 4 and 5 of the Convention.

[31] See http://www.minbuza.nl/en/key-topics/treaties/search-the-treaty-database/1996/8/007342.html (last visited 26 October 2015).

[32] The Agreement on the Conservation of African-Eurasian Migratory Waterbirds Decision 2006/871/EC, Official Journal L 345 of 8.12.2006 p 24.

[33] The Bonn Convention (which applies to the African-Eurasian Waterbirds Agreement by virtue of art 1(2) of the African-Eurasian Waterbirds Agreement), art 1, provides that "endangered" in relation to a particular migratory species means that the migratory species is in danger of extinction throughout all or a significant portion of its range.

3.34 Protected waterbirds listed in annex 2 to the Agreement include a number of birds that have a natural range including the UK. Those include, for example

(1) the mute swan;

(2) the barnacle goose;

(3) the mallard; and

(4) the Kentish plover.

3.35 However, only those that are listed in annex 2 *and* are endangered should be subjected to the strict protection obligations of article 3(2)(a) of the Agreement. The mallard, for instance, is not an endangered species.[34] As a result the obligations under article 3(2)(a) do not apply to that species.

3.36 It is currently unclear to us whether any waterbird species listed in annex 2 to the African-Eurasian Waterbirds Agreement having a natural range including the UK are endangered so as to qualify for strict protection under article 3(2)(a).

Agreement on the Conservation of Albatrosses and Petrels

3.37 The only wild bird covered by this convention that has a natural range including the United Kingdom, as far as we are aware, is the Balearic shearwater (*Puffinus mauretanicus*).[35] The Balearic shearwater, having a natural range including the European territory of an EU member state, is also protected under the Wild Birds Directive.

3.38 Similarly to the Bonn Convention, article 3(2) of the Agreement requires contracting parties to prohibit the taking, hunting, fishing, capturing, harassing, deliberate killing or attempting to engage in any such conduct of, or other harmful interference with albatrosses and petrels, their eggs, or their breeding sites.

The Habitats and Wild Birds Directives

3.39 In terms of wildlife protection, the UK's core obligations under EU law derive from the Wild Birds Directive and the Habitats Directive. The species-specific protection provisions under the two directives have slightly different objectives.

3.40 Under the Wild Birds Directive, member states are required to establish a "general system of protection" for all wild bird species that occur naturally in the European territory of member states to which the TFEU applies.[36] The protection provisions of the Habitats Directive have a narrower focus, requiring member states to establish a "strict system of protection" in connection with an exhaustive list of animal or plant species of concern.[37]

[34] The IUCN Red List of Threatened Species, available at http://www.iucnredlist.org/details/22680186/0 (last visited 26 October 2015).

[35] The IUCN Red List of Threatened Species, available at http://www.iucnredlist.org/details/22728432/0 (last visited 26 October 2015)

[36] Directive 2009/147/EC, art 5.

[37] Directive 92/43/EEC, art 12(1).

3.41 As further explored below, there are also important differences in the derogation regimes of the two directives. While the Habitats Directive expressly authorises member states to derogate from the strict protection provisions for reasons of "overriding public interest", the same derogation ground is not available in connection with the general system of protection of wild birds. It follows that development and other key economic activities having direct effects on protected species, such as the operation of wind farms or railways, may be licensed when they are likely to affect species protected under the Habitats Directive but may not be licensed when they are likely to affect bird species generally protected under the Wild Birds Directive.

3.42 Despite the above structural differences, the Court of Justice and European Commission have generally considered the Habitats and Wild Birds Directives as "twins", with case law from one Directive being regularly used to interpret obligations in the other.[38] Both Directives, in fact, constitute the building blocks of the implementation of the Bern Convention in the EU legal order. The terminology used in the two directives, as a result, is extremely similar as in both cases it seeks to give effect to the same international obligations in connection with different species.

The Wild Birds Directive

3.43 The Wild Birds Directive establishes a protection regime for "all species of naturally occurring birds in the wild state in the European territory of the member states to which the Treaty applies".[39]

3.44 Under the Wild Birds Directive, member states have a general obligation to take the requisite measures to

> maintain the population of the species referred to in article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level.[40]

3.45 The application of those measures, as provided by article 13, may not lead to the deterioration of the current conservation status of the species of birds referred to in article 1.

3.46 The basic obligation to prohibit certain activities that affect wild birds is contained in article 5 of the Wild Birds Directive, which provides that

> Without prejudice to articles 7 and 9, member states shall take the requisite measures to establish a general system of protection for all species of birds referred to in article 1, prohibiting in particular:
>
> (a) deliberate killing or capture by any method;

[38] See, for example, Case C-6/04 *Commission v United Kingdom* [2005] ECR I-9017.

[39] Directive 2009/147/EC, art 1.

[40] Directive 2009/147/EC, art 2.

> (b) deliberate destruction of, or damage to, their nests and eggs or removal of their nests;
>
> (c) taking their eggs in the wild and keeping these eggs even if empty;
>
> (d) deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive;
>
> (e) keeping birds of species the hunting and capture of which is prohibited.[41]

3.47 Article 6 prohibits trade in protected wild bird species, except for those listed in annex 3 to the Directive. In line with article 8 of the Bern Convention, article 8 of the Wild Birds Directive prohibits the use of indiscriminate methods in connection with the killing or capture of wild birds protected by the Directive.

3.48 Article 7 authorises the hunting of species listed in annex 2 to the Wild Birds Directive as long as hunting activities do not take place during the prescribed close seasons and comply with the principles of "wise use" and "ecologically balanced control".

3.49 Article 9 allows for derogations. As highlighted above, for unclear reasons, the list of permitted derogations under the Wild Birds Directive is more restricted than the list of derogations authorised by article 9 of the Bern Convention, as the former does not allow member states to derogate from the general obligations of the Directive on the grounds of "overriding public interest".

The Habitats Directive

3.50 The aim of the Habitats Directive is to "contribute towards ensuring biodiversity through the conservation of natural habitats and of wild faunal and fauna in the European territory of member states to which the Treaty applies".[42]

3.51 Similarly to the Wild Birds Directive, measures taken in pursuance of the Directive must be designed to "maintain or restore, at a favourable conservation status, natural habitats and species of wild fauna or flora of Community interest" and "shall take account of economic, social and cultural requirements and regional and local characteristics".[43]

3.52 A similar provision to article 5 of the Wild Birds Directive is contained in article 12 of the Habitats Directive. Article 12(1) provides that

> Member states shall take the requisite measures to establish a system of strict protection for the animal species listed in annex 4(a) in their natural range, prohibiting:

[41] Directive 2009/147/EC, art 5.

[42] Directive 92/43/EEC, art 2(1).

[43] Directive 92/43/EEC, arts 1(2) and 1(3).

> (a) all forms of deliberate capture or killing of specimens of these species in the wild;
>
> (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;
>
> (c) deliberate destruction or taking of eggs from the wild;
>
> (d) deterioration or destruction of breeding sites or resting places.[44]

3.53 Article 12(2) prohibits the keeping of and trade in specimens of species listed in annex 4(a) to the Directive taken from the wild.

3.54 The Habitats Directive also protects certain plants. The activities that must be prohibited are specified in article 13(1) of the Directive, which provides that

> Member states shall take the requisite measures to establish a system of strict protection for the plant species listed in annex 4(b), prohibiting:
>
> > (a) the deliberate picking, collecting, cutting, uprooting or destruction of such plants in their natural range in the wild.[45]

3.55 Annex 4(a) to the Habitats Directive contains a list of wild animal species of EU concern that require strict protection; annex 4(b) contains the same for wild plants.

3.56 In line with article 8 of the Bern Convention, article 15 of the Habitats Directive prohibits the use of indiscriminate means – including, in particular, the methods listed in annex 6 – capable of causing the local disappearance of or serious disturbance to wild fauna species listed in annexes 4(a) and 5 to the Directive.

3.57 Article 16 allows member states to derogate from the general prohibitions imposed by the Directive. The list of derogations, broadly speaking, is in line with article 9 of the Bern Convention and is discussed in Chapter 7 of this report.

[44] Directive 92/43/EEC, art 12(1).

[45] Directive 92/43/EEC, art 12(1).

THE EXTENT OF THE UNITED KINGDOM'S EU LAW OBLIGATIONS ARISING OUT OF THE BERN CONVENTION

3.58 When implementing its instrument of ratification, the UK made a number of reservations, later amended by a letter of March 1987, in relation to the prohibitions in appendix 4 to the Bern Convention. Reservations currently relate to particular methods of killing and capture prohibited under appendix 4 in respect of hares, stoats, weasels, deer and seals. Several other states that already were or have subsequently become EU member states have signed or ratified the Bern Convention subject to reservations or have objected pursuant to article 17 of the Convention to additions of species to the appendices, with the result that the amendments do not apply to them.[46]

3.59 Reservations are entered pursuant to article 22 of the Convention, which provides that:

> (1) Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, make one or more reservations regarding certain species specified in Appendices 1 to 3 and/or, for certain species mentioned in the reservation or reservations, regarding certain means or methods of killing, capture and other exploitation listed in Appendix 4. No reservations of a general nature may be made.
>
> (2) Any Contracting Party which extends the application of this Convention to a territory mentioned in the declaration referred to in paragraph 2 of Article 21 may, in respect of the territory concerned, make one or more reservations in accordance with the provisions of the preceding paragraph.
>
> (3) No other reservation may be made.
>
> (4) Any Contracting Party which has made a reservation under paragraphs 1 and 2 of this article may wholly or partly withdraw it by means of a notification addressed to the Secretary General of the Council of Europe. Such withdrawal shall take effect as from the date of receipt of the notification by the Secretary General.

3.60 The (then) European Economic Community – which was the only contracting party that was not a state – did not enter any reservations upon ratification.

3.61 Of the species listed in the UK's reservations, the Habitats Directive only protects seals and mountain hares. Both of those species are already protected under national law.

3.62 On the other hand, there are a number of species protected by the Bern Convention (regarding which the UK has not entered reservations) that are not currently protected under EU legislation or domestic law.

[46] Reservations have been entered by Bulgaria (1991), Croatia (2000), Cyprus (1988), the Czech Republic (1997), Finland (1985), France (1990) Hungary (1989), Latvia (1997), Lithuania (1996), Malta (1993), Poland (1995), Slovakia (1994), Slovenia (1999), Spain (1979) and the UK (1982). Objections have been made by Denmark (1992), France (1992) and Malta (1998).

3.63 For example, article 8 of the Convention applies to species listed in appendices 2 and 3. Appendix 3 includes all reptiles and amphibians not listed in appendix 2 (and protected from any deliberate capture or killing). So all reptiles and amphibians are to be protected from the means of capture and killing prohibited by article 8. It appears that domestic legislation does not currently achieve this. Secondly, appendix 4 lists explosives and poisons as prohibited means in respect of crayfish. Currently, domestic law does not regulate the killing or capture of crayfish.

3.64 Under general international law, as expressed in the Vienna Convention on the Law of Treaties 1969, a valid reservation modifies for the reserving State, in its relations with the other parties, the provisions of the treaty to which the reservation relates to the extent of the reservation, and modifies those provisions to the same extent for the other parties in their relations with the reserving State.[47] Since the UK's reservations appear to be compliant with article 22(1) of the Convention, the UK is not bound – as a matter of general international law, leaving aside the position under EU law – to comply with the obligations of the Bern Convention to the extent of those reservations.

3.65 The question arises, however, whether the UK is under an EU law obligation to comply with the Bern Convention in full, despite the reservations.

3.66 Under article 216 TFEU, referred to above, "agreements concluded by the Union are binding upon the institutions of the Union and its member states". Article 216 TFEU replicates earlier provisions in previous EEC/EC Treaties.[48] It follows that, where an international agreement is entered into solely by the EU, and not by member states, the EU can enforce the terms of that agreement against member states.[49]

[47] Vienna Convention on the Law of Treaties 1969, art 21(1). The corresponding provisions of the Vienna Convention on the Law of Treaties between States and International Organisations are materially identical.

[48] Art 228(2) of the original EEC Treaty.

[49] That would be the case, for example, with the Agreement on International Humane Trapping Standards between the European Community, Canada and the Russian Federation.

3.67 However, the Bern Convention is a "mixed agreement".[50] Our research into the case-law of the Court of Justice of the European Union on the extent of the EU obligations of member states under such agreements – not all of which is presented in this report – reveals two strands in that case-law. One, exemplified by *Merck Genéricos v Merck & Co*,[51] holds that there is an EU law obligation of member states to comply with those terms of a mixed agreement that the EU was competent to enter into, its competence depending on whether the international obligation in question falls in a field in which the EU has already legislated internally. Another, exemplified by *Commission v France*,[52] holds that there is an EU obligation to comply in full with a mixed agreement that falls in a field covered in large measure by EU law, on the grounds that the EU has an interest in compliance by both the EU and its member states with the commitments entered into under the agreement:

> 25. In accordance with case-law, mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements in so far as the provisions fall within the scope of Community competence (see, to that effect, Case 12/86 *Demirel* [1987] ECR 3719, paragraph 9, and Case C-13/00 *Commission v Ireland* [2002] ECR I-2943, paragraph 14).
>
> 26. From this the Court has inferred that, in ensuring compliance with commitments arising from an agreement concluded by the Community institutions, the Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement (*Demirel*, cited above, paragraph 11, and *Commission v Ireland*, cited above, paragraph 15).
>
> 27. In the present case, the provisions of the Convention and the Protocol without doubt cover a field which falls in large measure within Community competence.
>
> 28. Environmental protection, which is the subject-matter of the Convention and the Protocol, is in very large measure regulated by Community legislation, including with regard to the protection of waters against pollution (see, in particular, Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment (OJ 1991 L 135, p 40), Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ 1991 L 375, p 1) and Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p 1)).

[50] Described in para 3.17 above.

[51] Case C-431/05 [2007] ECR I-7026.

[52] Case C-239/03 [2004] ECR I–9325.

> 29. Since the Convention and the Protocol thus create rights and obligations in a field covered in large measure by Community legislation, there is a Community interest in compliance by both the Community and its Member States with the commitments entered into under those instruments.
>
> 30. The fact that discharges of fresh water and alluvia into the marine environment, which are at issue in the present action, have not yet been the subject of Community legislation is not capable of calling that finding into question.[53]

3.68 That case concerned an environmental treaty, the Barcelona Convention for the Protection of the Mediterranean Sea against Pollution of February 1976. In terms of subject-matter, it is therefore closer to the Bern Convention than the cases exemplifying the other strand of case-law that we have identified. On the other hand, there was no suggestion in that case that France had entered any reservations against the relevant Barcelona Convention obligations. The issue that arises in this project is whether the Court of Justice would apply the *Commission v France* reasoning so as to find an EU obligation of a member state to comply with provisions of a mixed agreement against which it had entered reservations, although the EU had not.

3.69 Whilst appreciating that the matter is not free from doubt, we have concluded, on balance, that the UK is not under an EU law obligation to give effect to the Bern Convention to the extent of the UK's reservations. That is principally because we do not consider that the EU is itself under an international obligation to secure compliance with the Convention in the UK to the extent that the UK has entered reservations. Consequently, one of the features relied on by the Court of Justice in the *Commission v France* judgment[54] – namely that compliance with an international convention is an obligation of the member state "to the [EU], *which has assumed responsibility for the due performance of the agreement*" – is to that extent absent.

3.70 We appreciate that this view of the position in international law is not in accordance with the general rule encapsulated in article 21(2) of the Vienna Convention on the Law of Treaties, which provides that a reservation entered by a contracting party to a treaty does not modify the provisions of the treaty as between the other parties to the treaty. Nevertheless, we find strong indications in the text of the Bern Convention that are inconsistent with the EU being under a treaty obligation in effect to over-ride the reservations entered into by its member states.

3.71 First, there are clear indications in the text of the Convention that all parties were aware that the EEC did not have full internal competence to enter into the Convention. Though the Convention is silent as to the extent of the (then) EEC's competence to enter into or obligation to comply with it, an oblique reference to the limited extent of the Community's competence is found in article 13(2), which provides for the Community to exercise the votes of its member states on the Convention Standing Committee "within the areas of its competence".

[53] Case C-239/03 [2004] ECR I–9325, at [25] to [30].

3.72 Secondly, article 18(3) provides a procedure for determining (by agreement between the Community and the relevant member state) whether the Community or a member state is to be a party to arbitration of disputes involving a member state. Its effect is that if the Community and a particular member state agree that the member state should be party to the arbitration in place of the Community, the Community drops out of the arbitration and no award can be made against it.

3.73 Thirdly, in including article 22, not only the member states and the other contracting states, but also the EEC itself, were agreeing that the United Kingdom could enter reservations. To interpret the absence of a reservation on the part of the EEC as amounting to a promise by it to secure compliance in the UK (whether immediately or in the future) with provisions against which the UK had entered reservations would be to attribute to the EEC a state of mind inconsistent with its acceptance that the UK could enter reservations.

3.74 Fourthly, the terms of article 22 of the Convention did not enable the EEC to enter any reservations upon its ratification.[55] Only a state might do so. The article only enabled the EEC to enter reservations as and when it lodged a declaration extending the application of the Convention to an additional territory. We consider that the explanation for this feature of the drafting of article 22 is that it catered for the eventuality that the EEC might later acquire exclusive treaty-making competence in the environmental field; in that event, extending the Convention to any country newly acceding to the EEC that was not already a party to the Convention would be a matter for the EEC.[56] The parties to the Convention cannot, in our view, have regarded the absence of reservations on the part of the EEC upon ratification – for which article 22 makes no provision – as creating an obligation of the EEC to secure full compliance with the Convention within the member states. The power of contracting parties that were EU member states to enter reservations would be rendered nugatory if that were so.

3.75 We would add, however, that reflecting the Bern Convention reservations in the Wildlife Bill, as further discussed in Chapter 5, has complicated its drafting (making it necessary to draft additional schedules for the species covered by the reservations, detailing particular means of killing or capture that differ as between the species). The view that we have taken of the position in international law means that we cannot recommend over-riding the reservations, since levels of protection of species are outside the scope of the project except to the extent necessary to comply with international obligations, but we suggest that the Government might consider with stakeholders whether there remains a case for continuing not to prohibit the means of killing or capture detailed in the reservations.

[54] Case C-239/03 [2004] ECR I–9325 at [26].

[55] Art 22 is set out at para 3.59 above.

[56] The European Economic Community's subsequently acquired environmental treaty-making competence is in fact shared with the member states: see paras 3.10 to 3.17 above.

Recommendations

Recommendation 24: we recommend that consideration should be given as to whether there remains a case for continuing not to prohibit the means of killing or capture detailed in the UK's reservations to the Bern Convention.

TRANSPOSING "DELIBERATE"

3.76 The Bern Convention, the Wild Birds Directive and the Habitats Directive consistently couch their primary prohibitions[57] by reference to "deliberate" action. The same term is also used with respect to the killing of species protected under the Bonn Convention, the African-Eurasian Waterbirds Agreement and the Agreement on the Conservation of Albatrosses and Petrels.[58]

3.77 The word "deliberate", in its ordinary English meaning, is generally understood as a synonym of "intentional".[59] In our consultation paper, we noted that relevant guidance and subsequent jurisprudence from the Court of Justice of the European Union had expanded the meaning of the word "deliberate" significantly beyond its ordinary meaning in the law of England and Wales.[60]

3.78 The first extended definition of the word "deliberate" was formulated by the Bern Convention Standing Committee in the context of the interpretation of article 6(b) of the Bern Convention:

> "deliberate damage to or destruction of breeding or resting sites" means, subject to relevant provisions of the law of each Contracting Party, any act committed with the intention of destroying or causing harm to breeding or resting sites as defined in paragraph a above, and any act committed without the intention to cause damage or destruction but in the knowledge that such would probably be the consequences of the act.[61]

[57] The expression "primary prohibition", in this report, refers to all prohibitions related to activities directly interfering with protected animals, such as killing, injuring, capturing and disturbance. By "methods and means" prohibitions, we refer to the prohibitions connected to the use of particular methods of killing or capturing protected fauna species. The expression "secondary prohibition" refers to all prohibitions connected with activities – such as trade or possession – that provide the reason or incentive for the commission of activities prohibited by the "primary prohibitions".

[58] See, for example, arts 1 and 3(5) of the Bonn Convention.

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

[60] Wildlife Law (2012) Law Commission Consultation Paper No 206, para 6.36.

[61] Resolution No 1 (1989) of the Standing Committee on the provisions relating to the conservation of habitats.

3.79 The meaning of the term "deliberate" was subsequently discussed by the Court of Justice of the European Union in the context of two infraction proceedings against Greece and Spain[62] brought by the European Commission for alleged failures to comply with article 12 of the Habitats Directive.[63]

3.80 While both cases concerned the Habitats Directive, both the Habitats and Wild Birds Directives correspond to obligations under the Bern Convention. As the word "deliberate" is used in article 6 of the Bern Convention, we have concluded that – despite certain differences between the two Directives – it is unlikely that the Court of Justice would ever come to the conclusion that that the word "deliberate" in articles 12 and 13 of the Habitats Directive should be interpreted differently from the same word in article 5 of the Wild Birds Directive. We have concluded, therefore, that for the purpose of transposing the above obligations in domestic law, the meaning of "deliberate" should generally accord with *Commission v Spain*, the latest Court of Justice ruling on this issue.

3.81 In *Commission v Spain*, the infringement concerned the issuing of permits to allow the trapping of foxes in areas where, allegedly, otters might be affected. Otters are a species listed in annex 4(a) of the Habitats Directive within their natural range, and thereby strictly protected by article 12 of that Directive.

3.82 In giving judgment, the Court of Justice ruled that:

> For the condition as to "deliberate" action in article 12(1)(a) of the Directive to be met, it must be proven that the author of the act intended the capture or killing of a specimen belonging to a protected animal species or, *at the very least, accepted the possibility of such capture or killing* [emphasis added].[64]

3.83 Following the Court of Justice's ruling in *Commission v Spain*, the European Commission published a guidance document on article 12 of the Habitats Directive suggesting that:

> "Deliberate" actions are to be understood as actions by a person who knows, in light of the relevant legislation that applies to the species involved, and the general information delivered to the public, that his action will most likely lead to an offence against a species, but intends this offence or, if not, consciously accepts the foreseeable results of his action. In other words, not only a person who fully intends to capture or kill a specimen of an animal commits an offence: an offence is also committed by a person who might not intend to

[62] Case C-103/00 *Commission v Greece* [2002] ECR I-1147 and Case C-221/04 *Commission v Spain* [2006] ECR I-4515.

[63] Art 12 of the Habitats Directive expressly transposes part of the obligations under art 6 of the Bern Convention in EU law.

[64] Case C-221/04 *Commission v Spain* [2006] ECR I-4515 at [71]. The action failed because the Commission had failed to prove the presence of otters in the area to which the permits related and thus any knowledge by the Spanish authorities that the trapping permits could endanger otters. It is worth noting that a new infringement proceeding concerning "deliberate" actions has been brought in November 2014 against Greece; the Court of Justice of the European Union has not yet ruled on the matter (see Case C-504/14 *European Commission v Greece*).

> capture or kill a specimen but is sufficiently informed and aware of the consequences his action will most likely have and nevertheless performs the action, leading to the capturing or killing of specimens (eg as an unwanted but accepted side-effect), with reckless disregard of the known prohibitions (conditional intent). It goes without saying that negligence is not included in the meaning of "deliberate".[65]

Current domestic transposition of "deliberate"

3.84 The term "deliberate" is currently transposed differently in the Wildlife and Countryside Act 1981 and the Conservation of Habitats and Species Regulations 2010.

3.85 Section 1 of the Wildlife and Countryside Act 1981 – the provision intended to transpose article 5 of the Wild Birds Directive – transposes "deliberate" with the term "intentional". In domestic criminal law, a defendant acts intentionally with regard to a result if he or she acted in order to bring about that result. A jury may also find that the defendant intended the result if it was a virtually certain outcome of his or her conduct and that he or she foresaw that as being the case.[66]

3.86 Regulations 41 and 45 of the Conservation of Habitats and Species Regulations 2010, which respectively transpose articles 12 and 13 of the Habitats Directive use the word "deliberate", which is defined as having the same meaning as in the Directive.[67]

Consultation

3.87 In the light of the Court of Justice's case law, in consultation we suggested that the transposition of the word "deliberate" in section 1 of the Wildlife and Countryside Act 1981 is excessively narrow. The word "intentional", in fact, does not cover activities where the defendant merely "accepted the possibility" of harm to a protected wild bird.[68]

3.88 We also suggested that the "copy-out" approach adopted under the Conservation of Habitats and Species Regulations 2010 fails to transpose the Habitats Directive's prohibitions clearly and unambiguously. Using the word "deliberate" would mislead most readers, on the basis that the ordinary English meaning is significantly narrower than the Court of Justice's definition in *Commission v Spain*.[69]

[65] European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007), p 36, para 33. This formulation was adopted by the Supreme Court in *R (Morge) v Hampshire County Council* [2011] UKSC 2 at [2011] 1 WLR 268 at [14].

[66] *R v Woollin* [1998] UKHL 28, [1999] 1 AC 82. Strictly, this definition only relates to murder.

[67] SI 2010 No 490, reg 3(3).

[68] Wildlife Law (2012) Law Commission Consultation Paper No 206, para 6.42.

[69] Wildlife Law (2012) Law Commission Consultation Paper No 206, para 6.43.

3.89 We provisionally proposed adopting the expression "intentionally or recklessly" to transpose the term "deliberately" in the Wild Birds and Habitats Directive,[70] on the grounds that recklessness is a well established concept in the law of England and Wales that would cover the type of conduct that the Court of Justice intended to address. As defined in *R v G*,[71] in domestic law a person is reckless with respect to:

(1) a circumstance when they are aware of a risk that it exists or will exist; [or]

(2) a result when they are aware of a risk that it will occur;

and it is, in the circumstances known to them, unreasonable to take the risk.[72]

Discussion

3.90 After careful thought, we have concluded that our provisional proposal was not adequate. The concept of "recklessness" covers a wider range of knowledge and attitudes than the term "deliberate" as defined by the Court of Justice in *Commission v Spain.* Its adoption could result in the criminalisation of a number of legitimate economic activities, such as forestry, agriculture or the operation of wind farms. On one reading, "recklessness" could criminalise all instances where it is established that the defendant knew about a risk of harm to a species and carried out the activity despite that knowledge (in circumstances where the court considers that it was unreasonable for the defendant to do so). The operator of a wind farm, for instance, knows that the operation of the wind turbines will eventually cause the death of a protected bird. Similarly a train operator would generally know that the use of rail tunnels may result in the disturbance of local populations of bats.[73] Either operator would face the risk of a court deciding that it had not been reasonable, from the point of view of wildlife conservation, for them to take the risk.

3.91 Whilst in the context of the Habitats Directive those activities could be authorised on grounds of "overriding public interest" (in line with the derogation regime set out in article 16(1)), the Wild Birds Directive does not allow member states to derogate from its general protection regime on such grounds. Transposing "deliberate" with "recklessness", therefore, could potentially give rise to criminal liability without it having been possible for the operator to seek a licence.[74] We have concluded that such a result would be unacceptable, and could not possibly reflect the original object and purpose of either directive.

[70] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 6-5.

[71] *R v G* [2003] UKHL 50, [2004] 1 AC 1034.

[72] *R v G* [2003] UKHL 50, [2004] 1 AC 1034, at [41].

[73] Most species of bat are strictly protected under the Habitats Directive (see art 12 and annex 4(a)).

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

The Advocate General's Opinion in Commission v Spain[75]

3.92 What, then, is the correct understanding of "deliberate" for the purpose of the Directives? A useful starting point for further analysis is the Opinion of Advocate General Kokott, which laid the foundations of the Court of Justice of the European Union's ruling in *Commission v Spain*.

3.93 The Advocate General's Opinion begins with an analysis of different language versions of the Habitats Directive which concludes, in essence, that the domestic interpretation of the word "deliberate" in the criminal law of most member states only covers activities carried out with the desire to cause harm to a protected species. Despite the ordinary meaning of "deliberate" in the language of most member states, the Advocate General's Opinion concludes that in order to fulfil the object and purpose of the Habitats Directive, the notion of "deliberate" should, in certain circumstances, be understood as encompassing the knowledge that the actions will "probably lead" to a prohibited result. The Opinion goes on to say that, when applying article 12(1) of the Habitats Directive in a preventive context for individuals, "deliberate" should be taken to cover:

(1) intending the capture or killing of a specimen belonging to a protected animal species; or

(2) accepting the possibility of such capture or killing.[76]

3.94 Even in the context of an extended meaning of deliberate, nevertheless, the Advocate General's Opinion stresses that a central element of intentionality should be retained, on the basis that "in all three language versions examined the concept of deliberateness includes a very strong element of will".[77]

The concept of "dolus eventualis"

3.95 In the light of a comparative analysis of the different approaches to intentionality in criminal law, we reached the conclusion that the Advocate General's Opinion appears to have brought the extended definition of "deliberate" into line with the concept of "*dolus eventualis*", as understood in a number of continental legal systems and international courts and tribunals.[78]

3.96 In those jurisdictions, an individual may be treated as having intended a prohibited result when, having foreseen a serious risk that a prohibited event may occur, he or she takes steps that bring about the prohibited result whilst consciously accepting the potentially harmful consequences of his or her activity.

[75] Opinion of Advocate General Kokott, Case C-221/04 *Commission v Spain* [2005] ECR I-4518.

[76] See Opinion of Advocate General Kokott, Case C-221/04 *Commission v Spain* [2005] ECR I-4518 at [54], which says: "Deliberate harm to protected species of fauna is therefore to be assumed if the harm is the result of an act whereby the perpetrator was aware of the risk to the protected species and also accepted that risk."

[77] Opinion of Advocate General Kokott, Case C-221/04 *Commission v Spain* [2005] ECR I-4518 at [49].

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

3.97 While the exact meaning of *dolus eventualis* is subject to considerable academic debate in civil law jurisdictions, it is generally accepted that it includes two central elements:

(1) A cognitive element of "foresight of a risk of harm"; and

(2) A volitional element of "conscious acceptance of the prohibited consequences".

COGNITIVE ELEMENT

3.98 The cognitive element of *dolus eventualis* is framed in similar terms to the cognitive requirement of "recklessness" in domestic criminal law. While the level of foresight of risk in the domestic definition of "recklessness" is left unqualified, however, in the context of *dolus eventualis* the necessary threshold of foresight of risk is generally defined in terms of "real" or "serious" risk. [79]

3.99 In Advocate General Kokott's Opinion, the cognitive element of "deliberate" is described in terms of "realisation" or "awareness"[80] by the defendant of a risk of harm to a protected species. The Court of Justice's judgment required the Commission to establish the presence of otters in the area where trapping was licensed.[81] From those paragraphs we deduced that to satisfy the cognitive test of "deliberate", a person should be aware that at the time the potentially harmful act is done the risk of harm is a real possibility.

3.100 Our deduction is in line with the European Commission's understanding of the above ruling. In the guidance document on article 12 of the Habitats Directive, the Commission interprets the cognitive element of "deliberate" as the defendant's knowledge that his actions "will most likely lead to an offence against a species".[82]

3.101 We have concluded, therefore, that requiring a higher threshold of "foresight of risk" than the English law concept of "recklessness as to a circumstance" would be in line with the Court of Justice's extended definition of "deliberate".

EXISTENCE OF A RISK

3.102 It is arguable that *dolus eventualis* is an entirely subjective concept, with the consequence that it is entirely a matter of a defendant's subjective perception of risk rather than of the objective reality of a risk. On that approach a defendant could be guilty of an offence with a fault element based on *dolus eventualis* as a result of over-estimating a risk or its seriousness. That was not, however, the approach of the Court of Justice in *Commission v Spain*.

[79] German and Italian courts, for example, require a minimum threshold of foresight of risk to satisfy the cognitive element of *dolus eventualis*. While in Germany the threshold is generally expressed in terms of "more than an entirely distant possibility", in Italy the threshold is generally higher and is often described in terms of "serious" or "concrete" possibility.

[80] Opinion of Advocate General Kokott, Case C-221/04 *Commission v Spain* [2005] ECR I-4518 at [49] and [54].

[81] Case C-221/04 *Commission v Spain* [2006] ECR I-4536 at [73].

[82] European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007), p 36, para 33.

3.103 After reminding itself of the member states' obligation under the Directive to prohibit deliberate capture or killing, the Court held in *Commission v Spain* that "in order to assess the validity of the complaint put forward by the Commission the presence of the otter in the area concerned must be ascertained, and the circumstances under which the capture or killing of that species is deliberate must be established".[83] It found that the Commission had not proved that otters were present in the relevant area.[84] Turning to whether the Spanish authorities had deliberately endangered otters, the Court held that "the presence of otters in the area concerned has not been formally established, so that it has also not been established that by issuing the contested permits the Spanish authorities knew that they risked endangering otters".[85]

3.104 We infer from this that the objective existence of a risk is an ingredient in *dolus eventualis* as understood in EU law. The wildlife Bill is drafted on that basis.

VOLITIONAL ELEMENT

3.105 What substantively distinguishes *dolus eventualis* from recklessness is the requirement for an additional "volitional element". We have taken the view that the requirement for an additional volitional component would be in line with Advocate General Kokott's suggestion that the extended understanding of the concept of deliberate would have to retain a "strong element of will" and that

> Deliberate harm to protected species of fauna is therefore to be assumed if the harm is the result of an act whereby the perpetrator was aware of the risk to the protected species and also *accepted that risk*.[86]

3.106 The expression "acceptance of risk" is different from and goes beyond mere appreciation of the existence of a risk. The European Commission's guidance document referred to above describes the concept in terms of "conscious acceptance [by a person] of the foreseeable results of his action".

[83] Case C-221/04 *Commission v Spain* [2005] ECR I-4518, at [49].

[84] Case C-221/04 *Commission v Spain* [2005] ECR I-4518, at [63].

[85] Case C-221/04 *Commission v Spain* [2005] ECR I-4518, at [73].

[86] Opinion of Advocate General Kokott, Case C-221/04,*Commission v Spain* [2005] ECR I-4518 at [54]. While in English the expression "acceptance" of risk could be interpreted as mere "appreciation" of the existence of a risk, this is not the case for other language versions of the text of AG Kokott's Opinion. The French version for example, uses the expression "*s'accommoder*". Larousse Online Dictionary defines "*s'accommoder*" as either reconciling oneself with something or accepting a state of affairs, whether desired or not, and making the best out of it.

3.107 In the context of *dolus eventualis*, the concept of "acceptance of the prohibited consequences" introduces a volitional component that is absent in the definition of recklessness. The defendant, in other words, not only foresees the risk of harm, but to avoid renouncing the activity and its eventual advantages decides to act "whatever the cost", thus calculating in the equation the serious risk of harm.[87] In practice the "volitional element" is linked with the "cognitive element". The higher the risk foreseen, the lower would be the threshold for establishing that the defendant "accepted" the prohibited consequences.[88]

3.108 A defendant, on the other hand, will not be found to have "accepted" the prohibited consequences, if he was acting under the "reasonable hope" that he would be capable of avoiding the prohibited result.[89] German courts use the concept of "earnest reliance on the non-occurrence of the event".[90]

Transposition of "deliberate" in domestic law

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

3.110 As a matter of EU law, member states must transpose faithfully the meaning of terms and concepts used in directives, so as to ensure uniformity in their interpretation and application across member states. Most importantly, the transposition of EU law needs to work in the domestic legal context.

3.111 We have concluded that simply importing the terminology used by continental legal systems and international tribunals of *dolus eventualis*, including the volitional limb of "acceptance of risk", would not meet the requirements of clear and comprehensible transposition, on the basis that it would be an entirely unfamiliar concept to domestic courts and legal practitioners. In the absence of existing models, we have adopted an independent definition that seeks to give effect to the concept of *dolus eventualis* in the specific context of the two directives by, as far as possible, adopting terminology and concepts which are commonly used in the law of England and Wales.

[87] Marinucci and Dolcini E *Manuale Di Diritto Penale. Parte Generale* (8th ed 2012) p 367. In one of the latest leading cases on the concept of *dolus eventualis*, the Italian Supreme Court described the concept as being characterised by the foresight of a concrete possibility of an accessory result to the primary scope pursued by the defendant, and the acceptance of the risk of such accessory result (Cass. Pen. Sez. I. 01.2.11 (dep. 15.3.11), n. 10411).

[88] *Prosecutor v Lubanga Dyilo* (Confirmation Decision) ICC/01/04-01/06, PT Ch I (29 January 2007) at [351] to [355].

[89] Cass. Pen. Sez. I, 01.2.11 (dep. 15.3.11), n. 10411.

[90] NStZ-RR 2000, 165 (judgment of 22 February, 2000) at [166] in M Bohlhander, *Principles of German Criminal Law* (2009) p 64.

CORE ELEMENTS OF THE TRANSPOSITION OF "DELIBERATE"

3.112 Taking the transposition of "deliberate" in the context of article 12(1) of the Habitats Directive, we have concluded that a person should be held liable if the prosecution establishes that his or her action (or, in some circumstances, inaction) caused the death, injury or capture of a protected animal, and

(1) he or she intended to kill, injure or capture that animal; or

(2) his or her actions presented a serious risk to animals of the relevant species unless reasonable precautions were taken and he or she was aware that that was the case but failed to take reasonable precautions; or

(3) his or her actions presented a serious risk to animals of the relevant species whether or not reasonable precautions were taken, and he or she was aware that that was the case.

THRESHOLD OF RISK

3.113 In line with the Court of Justice's ruling in *Commission v Spain* read together with the European Commission's guidance on article 12 of the Habitats Directive, we have concluded that the threshold of risk to be foreseen by the defendant in order to incur liability in domestic legislation should be defined in terms of "serious risk".

3.114 While the European Commission's guidance defines the threshold of risk in terms of "likelihood", we have concluded that a multidimensional understanding of "risk" would be more in line with the object and purpose of the two Directives. Advocate General Kokott's Opinion, in fact, suggested that:

> When determining the risks associated with authorising hunting with snares account also had to be taken, in addition to the probability of the existence of otters, of the objective risk of the hunting method and the seriousness of any damage.[91]

3.115 We have concluded, therefore, that whether the risk perceived by the defendant was "serious" should be determined by reference to the defendant's knowledge of the probability of one or more protected birds or animals being affected by the act in question, the potential effects of the activity on the distribution or abundance of the local population of a species of a protected bird or animal that may be affected by the act in question, or a combination of the two factors.

[91] Opinion of Advocate General Kokott, Case C-221/04 *Commission v Spain* [2005] ECR I-4518 at [74].

3.116 The problem with conceptualising "risk" uniquely in terms of probability would be that that it would fail to cover activities that have a relatively low probability of harm but might have very serious impacts – such as the extinction of the local population of a protected bird – in the event that the risk materialised.[92]

3.117 As in the context of this criminal offence the Court will be looking at the subjective perception of risk by the defendant, we considered that a multidimensional understanding of risk would also better reflect a person's common sense understanding of the types of risks that should not be taken in the context of activities having potential effects on protected species.

ACCEPTANCE OF THE RISK

3.118 The concept of "acceptance of risk" is a characteristic of the relationship between the defendant's state of mind and the prohibited result that he or she has created. The central question, therefore, is whether the defendant's conduct demonstrated that he or she embraced or, at the very least, reconciled him or herself to the eventual occurrence of the prohibited event as an undesired side effect of his or her primary purpose. This is a purely subjective test that can be contrasted with the second limb of recklessness as defined in *R v G*,[93] which requires an objective determination of whether the defendant had been unreasonable in taking the known risk.

3.119 We have concluded that the conceptually most appropriate way to give effect to the above concept in the context of the transposition of the Wild Birds and Habitats Directive in the law of England and Wales is by reference to the steps that the defendant had taken or failed to take to prevent the activity in question from causing the prohibited result that he or she foresaw.

3.120 A person who took all precautions that were reasonable in the circumstances known to him or her to prevent the prohibited result could not, we consider, be held to have "accepted" the prohibited result. Such a defendant did everything that he or she could to prevent the prohibited activity from happening, and reasonably relied, therefore, on the non-occurrence of the prohibited event.

3.121 The third limb of our proposed definition covers cases where the defendant clearly knew that the serious risk of harm would persist irrespective precautions. In that case, whether or not a person took precautions should be irrelevant to the determination of whether the defendant "accepted" the prohibited consequences.

[92] In the domestic transposition of the "deliberate disturbance" prohibition under article 5(d) of the Wild Birds Directive and article 12(1)(b) of the Habitats Directive, the impact of the activity on the distribution or abundance of the local population of the relevant species is already a key element of the prohibited activity. In that context, therefore, referring to the impact of the activity on the population of the relevant species as part of the defendant's assessment of the seriousness of the risk would have been redundant. It follows that in the context of this offence, the defendant should be only required to know that, unless precautions were taken, the act in question "would be likely" to cause the prohibited effect.

[93] *R v G* [2003] UKHL 50, [2004] 1 AC 1034 at [41].

REASONABLE STEPS

3.122 We have concluded that the steps taken to prevent the prohibited result upon which a defendant may rely should be "reasonable". Logically, the reasonableness of the steps will depend on a combination of factors dependent on the circumstances, including the nature of the risk, the level of knowledge and expertise of the defendant and the type of activity in question. We have decided, in addition, to list expressly a number of factors that a court should be able to take into account in determining whether the steps taken by the defendant were reasonable in the circumstances.

3.123 As the European Commission's guidance on the implementation of article 12 of the Habitats Directive suggests, the preventive regulation of specific activities through planning permissions or guidance should be an integral part of the overall transposition of the prohibitions in article 12 of the Directive.[94] As the state is ultimately responsible for ensuring overall compliance with article 12 of the Habitats Directive and article 5 of the Wild Birds Directive, we considered that, in principle, reasonable reliance on relevant guidance issued by competent authorities, or permits that regulate the operation of a certain economic activity, should be relevant considerations in determining the reasonableness of the steps taken to prevent the occurrence of the prohibited result.[95]

3.124 In the current domestic transposition of the Wild Birds and Habitats Directives in England and Wales, the role of public authorities in ensuring compliance with the Wild Birds and Habitats Directives varies depending on the identity of the public authority and the nature of the specific regulated activity in question.

3.125 Under regulation 9(1) of the Conservation of Habitats and Species Regulations 2010, the appropriate authority,[96] the nature conservation bodies[97] and, in relation to the marine area, a competent authority[98] must exercise their functions in relation to nature conservation so as to "secure compliance with the requirements of the [Wild Birds and Habitats] Directives". Those functions include, in particular, the functions under the enactments listed in regulation 9(2). The list includes functions under the 2010 Regulations, parts 1 and 2 of the Wildlife and Countryside Act 1981 and the Planning Act 2008, as well as marine licensing and fisheries management functions under the Marine and Coastal Access Act 2009.

[94] European Commission, *Guidance Document on the Strict Protection of Animal Species of Community Interest under the Habitats Directive 92/43/EEC* (2007), pp 28 to 32.

[95] See also Opinion of Advocate General Kokott, Case C-221/04 *Commission v Spain* [2005] ECR I-4518 at [58], which suggested that because the prohibited activity was carried out under a permit, the hunters, in that context, were "entitled to assume that no breach of the law was to be expected".

[96] The Secretary of State in relation to England and the Welsh Ministers in relation to Wales and any person exercising any function of the Secretary of State or Welsh Ministers (Conservation of Habitats and Species Regulations 2010, reg 3(1)).

[97] Natural England in relation to England and Natural Resources Wales in relation to Wales (The Conservation of Habitats and Species Regulations 2010 SI 2010 No 490, reg 5(1)).

[98] Any Minister of the Crown, government department, statutory undertaker, public body of any description or person holding a public office, the Welsh Ministers and any person exercising the functions of any of those bodies (The Conservation of Habitats and Species Regulations 2010 SI 2010 No 490, reg 7(1)).

3.126 In exercising other functions, competent authorities must merely "have regard" to the requirements of the Wild Birds and Habitats Directives, insofar as they may be affected by the exercise of those functions.[99] In connection with the exercise of local authorities' functions under the Town and Country Planning Act 1990, for instance, a majority in the Supreme Court concluded that local authorities granting development consent were not bound to be satisfied that the authorised development would not result in a breach of article 12 of the Habitats Directive. They should grant planning permission unless they conclude that the proposed development would both be likely to offend article 12 and be unlikely to be licensed pursuant to the derogation regime authorised by the Directive.[100]

3.127 We have concluded, therefore, that the express list of factors that the court should be able to take into account should be limited to guidance, permits or directions issued by public authorities falling (currently) within the scope of regulation 9(1) in pursuance of their nature conservation functions listed, in particular, under regulation 9(2) of the 2010 Regulations. Relevant guidance documents and permits issued under the new Wildlife Bill should also be expressly listed as relevant considerations. The list of factors should not, on the other hand, expressly include guidance, permits or directions issued by public authorities in circumstances falling within the scope of regulation 9(3) of the 2010 Regulations, on the basis that their relevance to ensuring compliance with the Directive would be too tenuous.

THE DEFENDANT'S KNOWLEDGE OF THE CIRCUMSTANCES OF THE OFFENCE

3.128 In considering criminal offences, it is necessary to establish both the "external elements" and the "mental elements" which the prosecution must prove in order to convict a defendant of the particular offence.

3.129 The "external elements" of an offence are the elements of the offence other than those relating to the defendant's fault. They divide into:

(1) conduct elements: what the defendant must do or fail to do;

(2) consequence elements: any result that must be proved to be caused by the defendant's conduct (for example, in murder, that the victim dies); and

(3) circumstance elements: other facts relating to the conduct or the victim which affect whether the defendant is guilty or not (for example, in rape, that the victim does not consent).

3.130 The "mental element" (or "fault element") is the state of mind which must be established to show that the defendant is culpable, such as intention, recklessness, negligence, knowledge or belief or the lack of it.

[99] SI 2010 No 490, reg 9(3).

[100] *R (Morge) v Hampshire County Council* [2011] UKSC 2; [2011] 1 WLR 268, by Lord Brown at [29] - [30]. See also *R (on the application of Christopher Prideaux) (Claimant) v Buckinghamshire County Council (Defendant) & FCC Environment UK Ltd (Interested Party)* [2013] EWHC 1054 (Admin); and *R (on the application of Westerleigh Group Ltd) v Aylesbury Vale DC* [2015] EWHC 885.

3.131 Most of these elements are relatively straightforward when it comes to the transposition of "deliberate" offences. However, establishing the necessary mental element as to the circumstances throws up some difficulties. For example, does the prosecution need to establish that the defendant had knowledge of, or was reckless as to, the identity of the species concerned?

3.132 In the context of our recommended transposition of "deliberate", we considered whether the prosecution would have to establish the defendant's knowledge that his or her activity posed a (serious) risk of harm to specimens of the species that were in fact killed, captured or injured (and for the killing, capture or injuring of which the defendant is being prosecuted).

3.133 In the light of our recommended construction of the offence, we have concluded that that is indeed the principled and practical approach. If the defendant's activity caused the death of an otter, the prosecution will need to establish that the defendant knew that his or her activity posed a (serious) risk of harm to otters.

3.134 If it were otherwise, the offence would criminalise a person for prohibited results that he or she did not foresee. For example, a person who, in the knowledge that that his or her activity poses a (serious) risk of harm to otters, takes all reasonable precautions to prevent that from happening, could be successfully prosecuted if the activity results in the death of another protected species despite the defendant's lack of awareness that the activity would pose any risk of harm to that other species.

Conclusion

3.135 Formulating an appropriate definition of "deliberate" in the law of England and Wales to give effect to the Court of Justice's case law is difficult. Our view is that the recommendations discussed in this section represent the best balance between the numerous competing objectives that we have tried to accommodate through a single definition: ensuring a clear, accessible and workable transposition of the Wild Birds and Habitats Directives and ensuring that the end result does not unnecessarily criminalise legitimate economic activities, whilst legislating in terms compliant with EU law.

3.136 The European Commission is planning to undertake a comprehensive review of the Wild Birds and Habitats Directives in the next few years.[101] In the light of the current jurisprudence of the Court of Justice, we suggest that the current member states' inability to derogate from article 9 of the Wild Birds Directive on grounds of "overriding public interest" is an anomaly which should be addressed by the European Commission and the member states in the context of the forthcoming review of the Directives.

[101] President of the European Commission, Mission Letter (1 November 2014) http://ec.europa.eu/commission/sites/cwt/files/commissioner_mission_letters/vella_en.pdf (last visited 26 October 2015).

Recommendations

Recommendation 25: we recommend that the term "deliberate" in the context of the Bern Convention, the Habitats Directive and the Wild Birds Directive should be defined in domestic criminal law in line with the Court of Justice's ruling in *Commission v Spain.*

Recommendation 26: we recommend that under the new regulatory framework a person should be found to have acted "deliberately" if

(1) he or she intended to commit the prohibited result;

(2) his or her actions presented a serious risk to animals of the relevant species unless reasonable precautions were taken and he or she was aware that that was the case but failed to take reasonable precautions; or

(3) his or her actions presented a serious risk to animals of the relevant species whether or not reasonable precautions were taken, and he or she was aware that that was the case.

Recommendation 27: we recommend that the concept of "serious risk" should be understood by reference to the probability of one of more animals or plants being affected by the actions in question, the effect of the actions on the distribution or abundance of the local population of the relevant species, or a combination of the two factors.

Recommendation 28: we recommend that in determining whether the steps taken by the defendant for the purpose of preventing a prohibited activity from happening were reasonable, a court should be capable of taking into account relevant guidance, permits or directions issued by public authorities subject to the duty under regulation 9(1) of the Conservation of Habitats and Species Regulations 2010 (duties relating to compliance with the Directives) in pursuance of their nature conservation functions listed under regulation 9(2) of the 2010 Regulations (as well as relevant guidance, permits and directions issued by any relevant pubic authority under the new regulatory framework).

These recommendations are given effect in the draft Bill by clauses 2, 7, 8, 9, 11, 18, 29, 34, 49, 51, 72 and 161**.**

TRANSPOSING "DISTURBANCE" AND "HARASSMENT"

The disturbance prohibitions under the Bern Convention, the Wild Birds Directive and the Habitats Directive

3.137 The Bern Convention, the Wild Birds Directive and the Habitats Directive prohibit activities causing "disturbance" to relevant protected species.

3.138 While in those three instruments the meaning of "disturbance" is left undefined, the European Commission's guidance on article 12 of the Habitats Directive explains that "disturbance" should be understood in general terms as including any activity which is detrimental to a protected species. Prohibited interferences include activities that reduce the survival chances, breeding success or reproductive ability of a species or lead to a reduction of the area occupied by it.[102]

3.139 As one of the purposes of this project is to make wildlife law simpler and more accessible, the starting point is that the disturbance prohibitions in the relevant international and EU instruments should be transposed – as far as possible – in a clear, coherent and consistent manner.

3.140 The first issue is that the disturbance prohibitions under the directives are worded differently. While the Wild Birds Directive, in line with the Bern Convention, prohibits disturbance of "birds" which is "significant having regard to the object and purpose of the Directive",[103] the Habitats Directive simply prohibits the "disturbance" of protected "species".[104] The first fundamental question we address in this section, therefore, is whether the different wording of the disturbance prohibitions under the Wild Birds and Habitats Directive require a differentiated transposition in domestic law.

3.141 The above obligations are currently transposed differently in domestic law. In transposing the disturbance prohibition under article 12(1) of the Habitats Directive, the Conservation of Habitats and Species Regulations 2010 provide further guidance: disturbance is to be taken to include activity which is likely to affect a species' ability to survive, to breed or reproduce, or to rear or nurture their young, or (in the case of animals of a hibernating or migratory species) to hibernate or migrate; disturbance, in addition, includes activities which may "affect significantly the local distribution or abundance of the species".[105] The Wildlife and Countryside Act 1981, on the other hand, does not attempt to define the concept of "disturbance" for the purpose of transposing article 5(d) of the Wild Birds Directive.

3.142 In consultation we took the provisional view that any definition or clarification of the term "disturbance" was unnecessary, as the term was capable of being understood through its plain and ordinary meaning. We posited that if we were incorrect on that assumption, then its meaning should be determined by the courts (most importantly the Court of Justice).[106] We asked consultees whether a statutory definition of "disturbance" would bring any added value to the new regime.[107]

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

[103] Directive 2009/147/EC, art 5(d).

[104] Directive 92/43/EEC, art 12(1)(b).

[105] SI 2010 No 490, reg 41(2).

[106] Wildlife Law (2012) Law Commission Consultation Paper No 206, para 6.53.

[107] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 6-7.

3.143 The last question we explore in this section is whether – in line with our policy of making wildlife law simpler and more consistent – disturbance prohibitions currently designed to give effect to domestic preferences may be harmonised with the disturbance prohibitions designed to give effect to the obligations under the Wild Birds and Habitats Directive.[108]

Rationalising the obligations to prohibit disturbance under EU law

INTERNATIONAL AND EU OBLIGATIONS

3.144 Article 6(c) of the Bern Convention requires contracting parties to prohibit

> the deliberate disturbance of wild fauna, particularly during the period of breeding, rearing and hibernation, insofar as disturbance would be significant in relation to the objectives of this Convention.

3.145 Article 5(d) of the Wild Birds Directive is virtually identical. It requires member states to prohibit the

> deliberate disturbance of [protected wild] birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive.[109]

3.146 Article 12(1)(b) of the Habitats Directive requires member states to prohibit the

> deliberate disturbance of species [listed in annex 4(a) to the Directive], particularly during the period of breeding, rearing, hibernation and migration.

DISCUSSION

3.147 Article 5(d) of the Wild Birds Directive requires member states to prohibit the deliberate disturbance of wild birds only when such disturbance would be "significant having regard to the objectives of [the] Directive". While this is in line with the formulation of the disturbance prohibition in article 6(c) of the Bern Convention, the words "significant having regard to the objectives of [the] Directive" are omitted from article 12(1)(b) of the Habitats Directive. Article 12(1)(b), however, requires member states to prohibit the disturbance of "species" rather than the disturbance of individual specimens.

3.148 We have taken the view that those two alternative formulations express the same general principle. Broadly speaking, what the two directives intend to prohibit are not, in most cases, activities that negatively affect a particular specimen. The general intention of both provisions, in essence, is to prohibit activities that are likely to have a negative effect on the conservation status of a protected species.

3.149 The EU guidance on article 12 of the Habitats Directive describes the general scope of the prohibition in article 12(1)(b) of the Directive as follows:

[108] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 6-8.

[109] The word "hibernation" was probably omitted from article 5(d) of the Wild Birds Directive on the basis that birds do not normally hibernate.

> In order to assess a disturbance, consideration must be given to its effect on the conservation status of the species at population level and biogeographic level in a member state […]. For instance, any disturbing activity that affects the survival chances, the breeding success or the reproductive ability of a protected species or leads to a reduction in the occupied area should be regarded as a "disturbance" in terms of article 12. On the other hand, sporadic disturbances without any likely negative impact on the species, such as for example scaring away a wolf from entering a sheep enclosure in order to prevent damage, should not be considered as disturbance under article 12.[110]

3.150 We have concluded that it is difficult to see what the term "significant" in article 5(d) of the Wild Birds Directive adds to the above understanding of disturbance. The most plausible conclusion, in our view, is that the phrase "disturbance of a species" in the Habitats Directive was intended to express the same concept as "disturbance of [specimens] which is significant having regard to the objectives of this Directive" in the Wild Birds Directive. When the disturbance of individual specimens becomes "significant" having regard to the object and purpose of the Wild Birds Directive, it is because it will negatively affect the conservation status of the local population of a protected species. The object and purpose of the Directive is, indeed, the "long term protection and management of natural resources as an integral part of the heritage of the peoples of Europe".[111]

3.151 The directives, therefore, aim to produce the same result and should be transposed in the same way.

3.152 In line with the European Commission's guidance on article 12 and the formulation in regulation 41(2)(b) of the Conservation of Habitats and Species Regulations 2010,[112] we have concluded that the domestic transposition of the disturbance prohibitions under the Habitats and Wild Birds Directives should prohibit any "deliberate" disturbance affecting a *population of a protected species in the area in which the act is carried out*. This is because, as suggested by the European Commission's guidance, the reference to disturbance of "a species" in article 12(1)(b) of the Directive could not possibly have been intended to be a reference to the entire European population of that species. Such a broad approach would also be unworkable in terms of domestic transposition as a criminal offence requiring proof of "disturbance of a species" would be virtually unenforceable.

[110] European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007) p 38. See, also, *R (Morge) v Hampshire County Council* [2011] 1 WLR 268 at [19].

[111] Directive 2009/147/EC, preamble.

[112] Reg 41(2)(b) provides that disturbance of animals includes, in particular any disturbance which is likely to "affect significantly the local distribution or abundance of the species to which they belong".

Defining "disturbance"

3.153 What constitutes disturbance of a local population, as the European Commission's guidance suggests, is something that would have to be established on a case by case basis.

3.154 We remain of the view, therefore, that it would be impossible to create a statutory definition of "disturbance" that, on the one hand, does not run the risk of unduly restricting the meaning of "disturbance" in the Habitats and Wild Birds Directives and, on the other hand, is not so general as to be meaningless.

3.155 The transposition of article 12(1)(b) of the Habitats Directive in regulation 41 of the Conservation of Habitats and Species Regulations 2010, however, currently provides additional guidance on the meaning of "disturbance" through a non-exhaustive list of prohibited results of human activities that would, in most cases, constitute disturbance.

3.156 As mentioned above, regulation 41(2) provides that the disturbance of protected animals includes, in particular, any disturbance which is likely

> (a) to impair their ability –
>
> > (i) to survive, to breed or reproduce, or to rear or nurture their young, or
> >
> > (ii) in the case of animals of a hibernating or migratory species, to hibernate or migrate; or
>
> (b) to affect significantly the local distribution or abundance of the species to which they belong.

3.157 The above list of prohibited results is in line with the European Commission's guidance and, in our view, significantly improves the clarity of the transposition of the disturbance prohibition in article 12(1)(b) of the Habitats Directive. As we established in the section above, for the purpose of domestic transposition the disturbance prohibitions under the two directives should be treated as requiring an equivalent level of protection. We have concluded, therefore, that the existing non-exhaustive list of results in regulation 41(2) of the Conservation of Habitats and Species Regulations 2010 should be retained in the new framework and extended to the domestic transposition of article 5(d) of the Wild Birds Directive.

3.158 Under the new framework, therefore, a reference to an action that causes disturbance to the population of a species protected under the Bern Convention, the Wild Birds or Habitats Directive in an area, should expressly include, in particular, a reference to

> (1) Any action that is likely to impair the ability of specimens of the relevant species
>
> > (a) to survive;
> >
> > (b) to breed or rear their young;
> >
> > (c) in the case of a migratory species, to migrate;

(d) in the case of a hibernating species, to hibernate; and

(2) Any action that is likely to have a significant effect on the distribution or abundance of the population of the species in the area.

GUIDANCE

3.159 Regulation 41(9) of the Conservation of Habitats and Species Regulations 2010 currently allow the Secretary of State or Welsh Ministers (or the appropriate conservation body with the approval of the Secretary of State or Welsh Ministers) to issue guidance as to the application of the offences in paragraphs (1)(b) or (d) in relation to particular species of animals or particular activities.[113] Regulation 41(10) provides that in proceedings for one of the above offences, any relevant guidance published under regulation 41(9) would have to be taken into account by the relevant court.

3.160 As the European Commission's guidance suggests, what constitutes disturbance often depends on the particular context and characteristics of the species concerned.[114] The above provisions ensure the possibility of further defining disturbance by reference to more specific circumstances. In this context, well drafted codes of practice could significantly assist users in complying with primary legislation and ensure a more preventive approach to the regulation of human activities affecting protected animals. We have concluded, therefore, that the power to issue codes of practice providing practical guidance in connection with the "disturbance" of animals strictly protected under the Habitats Directive should be retained. In line with the decision to harmonise the domestic transposition of "disturbance" under the Wild Birds and Habitats Directive, we have concluded that the power to issue codes of practice should be extended to the transposition of article 5(d) of the Wild Birds Directive.

Harmonisation of EU and domestic disturbance prohibitions

3.161 Alongside the transposition of the disturbance prohibitions under the Bern Convention, the Wild Birds Directive and the Habitats Directives, domestic law further prohibits the "disturbance" of a number of other animals in order to give effect to domestic conservation preferences or other international commitments. Section 9(4) of the Wildlife and Countryside Act 1981, for instance, prohibits the intentional or reckless disturbance of

> any […] animal [listed in schedule 5] while it is occupying a structure or place which it uses for shelter or protection.[115]

[113] The Conservation of Habitats and Species Regulations 2010, reg 41(1)(b) prohibits the deliberate disturbance of protected wild animals; reg 41(1)(d) prohibits any damage or destruction of a breeding site or resting place of such an animal.

[114] European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007), p 38, para 39.

[115] The Protection of Badgers Act 1992, s 3(1) includes a virtually identical provision.

3.162 Section 9(4) currently protects both animals protected under article 6 of the Bern Convention or article 12 of the Habitats Directive and animals protected as a matter of purely domestic policy. As discussed above, however, animals protected under the Habitats Directive are also protected from disturbance under regulation 41(1) of the Conservation of Habitats and Species Regulations 2010. In consultation we suggested that those overlaps should be removed and provisionally proposed that the disturbance prohibitions giving effect to the directives in domestic law could be harmonised with the disturbance prohibitions giving effect to domestic policy choices.[116]

3.163 We have since taken the view, however, that the domestic disturbance prohibitions have a significantly different focus. As discussed above, under the Bern Convention and the Habitats and Wild Birds Directives, "disturbance" describes interferences that have negative effects on the conservation status of the population of a protected species. In the context of domestic disturbance prohibitions, on the other hand, "disturbance of an animal" has a straightforward meaning. It does not require any evidence of broader impacts on the conservation status of the protected species. We have concluded, therefore, that the disturbance prohibitions that give effect to domestic conservation preferences should not be simply subsumed into the "disturbance" prohibitions designed to give effect to the UK's international and EU obligations.

3.164 Subject to the discussion of "harassment" below, we have concluded that in the draft Wildlife Bill all species protected under the Bern Convention, the Wild Birds Directive and Habitats Directive should be protected by the disturbance prohibitions giving effect to the obligations under the directives. Other species currently protected as a matter of domestic policy should be protected against individual disturbance.

3.165 We recommend, however, that consideration be given to whether any or all of the species protected under the Bern Convention and the directives (and in particular those of them that are currently protected by section 9(4)) should be given additional individual protection through "individual disturbance" prohibitions. From an enforcement perspective, "individual disturbance" prohibitions may sometimes be easier to prosecute. In some cases, therefore, it may well be that protecting individual animals from individual disturbance may constitute a more effective means of preventing activities that, cumulatively, have broader negative effects on the local population of that species.

Recommendations

Recommendation 29: we recommend that the transposition of the prohibition on "disturbance" under the Bern Convention, the Wild Birds Directive and the Habitats Directive should be uniform.

[116] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 6-8.

Recommendation 30: we recommend that under the new framework a person should be guilty of "deliberate disturbance" in connection with wild birds and other animals protected under the Bern Convention, the Wild Birds Directive or the Habitats Directive if the person's actions caused disturbance to the population of the relevant protected species in the area in which the action was carried out.

Recommendation 31: we recommend that any reference to causing disturbance to the population of a protected species in an area should include, in particular

(1) actions that are likely to impair the ability of the relevant species to survive, breed or rear their young, hibernate or migrate; or

(2) actions that are likely to have a significant effect on the distribution or abundance of the population of the species in the area.

Recommendation 32: we recommend that other species currently protected against individual disturbance under section 9(4) of the Wildlife and Countryside Act 1981 be protected from individual disturbance.

Recommendation 33: we recommend that consideration should be given to whether species protected under the Bern Convention, the Wild Birds Directive and the Habitats Directive should be protected against individual disturbance.

Recommendation 34: we recommend that the Secretary of State or Welsh Ministers should have the power to issue codes of practice for the purpose of providing practical guidance in respect of the application of the disturbance provisions in relation to specific species or geographical areas.

These recommendations are given effect in the draft Bill by clauses 11, 51, 52 and 127.

The "harassment" prohibitions under the Bonn Convention, the Agreement on the Conservation of African-Eurasian Migratory Waterbirds and the Agreement on the Conservation of Albatrosses and Petrels

3.166 The Bonn Convention, the African-Eurasian Waterbirds Agreement and Agreement on the Conservation of Albatrosses and Petrels additionally require contracting parties to prohibit the "harassment" of the species strictly protected by those international agreements.

3.167 The "harassment" of a species is not expressly prohibited in England and Wales. The criminal offence of "intentional or reckless" harassment of certain protected birds and animals (the basking shark, cetaceans and the white-tailed eagle) was, however, introduced in Scotland in 2004.[117]

[117] Nature Conservation (Scotland) Act 2004, sch 6, paras 2 and 8; Wildlife and Countryside Act 1981 (as it applies to Scotland), ss 9A, 1(5B) and sch 1A.

3.168 We considered the option of creating a free-standing harassment offence to give effect to the UK's international obligations. After discussions with Parliamentary Counsel, however, we reached the view that the introduction of such an offence would simply add an unnecessary layer of complexity to domestic legislation. The "harassment" prohibition, in fact, would add very little to the existing "individual disturbance" prohibition. Both provisions aim at prohibiting conduct which causes distress to an individual specimen, regardless of the potential or actual consequences on the survival of the species.

3.169 We have concluded, therefore, that under the new framework animals protected from "harassment" under the above international agreements should be protected from "individual disturbance", in line with section 9(4A) of the Wildlife and Countryside Act 1981.[118]

Recommendations

Recommendation 35: we recommend that animals (including birds) which are currently protected against "harassment" under relevant international treaties should be protected against individual disturbance of specimens of that species.

These recommendations are given effect in the draft Bill by clauses 10 and 52**.**

[118] In line with the harmonisation of the mental element of certain offence recommended in Chapter 5, the offence under s 9(4A) of the Wildlife and Countryside Act 1981 is replicated under the new framework in terms of "deliberate" disturbance rather than "intentional or reckless" disturbance.

CHAPTER 4
PROHIBITED CONDUCT: PROTECTION OF WILD BIRDS

INTRODUCTION

4.1 In this Chapter we make recommendations for the simplification and reform of the prohibitions connected with the protection of wild birds.

4.2 As we mentioned in Chapter 3, the protection of wild birds in England and Wales is strongly influenced by international and European Union law. Most recommendations in this Chapter, therefore, are aimed at ensuring that the domestic protection regime gives effect to the United Kingdom's international and EU obligations through a clear, consistent and flexible regulatory framework.

4.3 Recommendations in this Chapter cover, in particular, the definition of "wild bird", the domestic transposition of the primary prohibitions under article 6 of the Bern Convention and article 5 of the Wild Birds Directive, the reform of the domestic regulation of hunting activities to give effect to the principles laid down in article 7 of the Directive, changes to the prohibitions in connection with the use of indiscriminate methods of killing or capturing wild birds in line with article 8 of the Directive and the reform of the regime regulating trade in and possession of protected wild birds.

DEFINITION OF "WILD BIRD"

4.4 The protection of wild animals and plants under domestic law is primarily based on schedules listing the individual species or sub-species to which a specific prohibition applies. The protection of wild birds departs from that general approach, in that the core prohibitions apply to an open-ended definition of "wild bird" rather than a list of protected species.

Wild bird species protected under the Wild Birds Directive

4.5 The Wild Birds Directive places an obligation on member states to establish a general system of protection for "all species of naturally occurring birds in the wild state on the European territory of the member states to which the Treaty applies".[1] The specific protection obligations under articles 5, 6 and 8 of the Wild Birds Directive apply to birds in this category.

4.6 As discussed in the consultation paper, the expression "naturally occurring", in essence, excludes birds that are not indigenous to the relevant European territories and whose presence is dependent on direct or indirect introduction by man.[2]

4.7 The phrase "European territory of the member states to which the Treaty applies" excludes birds indigenous to territories to which the Treaty on the Functioning of

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

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

the European Union (TFEU) applies that are geographically located outside Europe[3] and birds indigenous to territories of member states that are geographically located in Europe, but to which the TFEU does not apply.[4]

4.8 What the definition does not clearly address is whether the expression includes birds that have been bred in captivity. This issue was considered by the Court of Justice of the European Union in *Didier Vergy*. In that case the Court ruled that the Directive did not extend to captive-bred birds, on the basis that extending the protective regime of the Wild Birds Directive to that category of birds serves neither the need "for the conservation of the natural environment" nor the objective of ensuring "the long-term protection and management of natural resources as an integral part of the heritage of the peoples of Europe".[5]

Wild bird species protected under the Wildlife and Countryside Act 1981

4.9 The Wildlife and Countryside Act 1981 currently defines protected "wild birds" as:

> Any bird of a species which is ordinarily resident in or is a visitor to the European territory of any member State in a wild state but does not include poultry or, except in sections 5 and 16, any game bird.[6]

4.10 "Poultry" is defined as "domestic fowls, geese, duck, guinea-fowls, pigeons and quails, and turkeys". Game birds are defined as "any pheasant, partridge, grouse (or moor game), black (or heath) game or ptarmigan".[7]

Discussion

Transposition of article 1 of the Wild Birds Directive

4.11 In the consultation paper we suggested that the current definition in the Wildlife and Countryside Act 1981 extends the domestic protection regime to species which the Wild Birds Directive was not intended to cover.[8]

4.12 The key problem we identified was that the current definition protects all species that have established self-sustaining wild populations in the European territory of member states to which the Treaty applies, irrespective of how the population was established. Consequently, non-native populations which may need to be controlled, such as the monk parakeet, currently fall within the domestic protection regime. There are generally no conservation reasons for protecting such species. As a result, we provisionally proposed bringing the domestic definition in line with the scope of the Wild Birds Directive, by replacing the

[3] These include Guadeloupe, French Guiana, Martinique, Reunion, Saint-Barthélemy, Saint-Martin, the Azores, Madeira and the Canary Islands (arts 349 and 355(1) TFEU).

[4] The Faeroe Islands are an example of this category of territories (art 355(5)(a) TFEU).

[5] Case C-149/94 *Didier Vergy* [1996] ECR I-299, para 13.

[6] Wildlife and Countryside Act 1981, s 27(1).

[7] Wildlife and Countryside Act 1981, s 27(1).

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

expressions “ordinarily resident” and “visitor” with “naturally occurring”.[9]

4.13 In the light of the general support for this provisional proposal in consultation, we have concluded that the definition of “protected wild bird” under the new framework should be based around the term “naturally occurring”. This approach would bring our transposition into line with the definition contained in the Wild Birds Directive and exclude from the general domestic protection regime non-native species whose protection, in most cases, would not serve any conservation purpose.

4.14 To adopt such a definition would mean that species changing their natural range to include the European territory of a member state in response to changing ecological conditions or climate change would fall within the general protection regime. On the other hand, species present in the European territory of member states uniquely as a result of human intervention would fall outside the general protection regime.

4.15 “Visitors” – birds that do not normally occur in the EU that are present exceptionally due to natural events (such as storms) – would also be automatically caught by this definition, as their presence in the wild is not dependent on an “introduction” by man but will be taken to have occurred “naturally”, even if such a natural occurrence is not normal. We have concluded, therefore, that replicating the express reference to “visitors” would be unnecessary.

Recommendations

Recommendation 36: we recommend that protected wild bird species should be protected by reference to the definition of “wild bird” under article 1 of the Wild Birds Directive.

This recommendation is given effect in the draft Bill by clause 1(2)(a).

Birds that do not naturally occur in the European territory of a member state to which the Treaty applies

4.16 As a number of consultation responses pointed out, adopting a definition of “wild bird” in line with article 1 of the Wild Birds Directive will automatically remove a number of non-native birds that are present in the wild in England and Wales from the domestic protection regime. Our view, nevertheless, is that any effective regulatory regime should be capable of allowing the Secretary of State or Welsh Ministers to protect those bird species present in the wild for reasons that are not necessarily connected to conservation, such as animal welfare. As discussed below, specifically listing certain species may also serve the purpose of removing uncertainties as to the natural range of certain species.

4.17 We have therefore concluded that under the new framework the Secretary of State or Welsh Ministers should have the power to list specific bird species that fall outside the general definition of “wild bird” for the purpose of protecting them through the same set of prohibitions.

[9] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 6-1.

Recommendations

Recommendation 37: we recommend that the Secretary of State or Welsh Ministers should have the power to list specific bird species that fall outside the general definition of "wild bird" for the purpose of protecting them from the same set of prohibitions.

This recommendation is given effect in the draft Bill by clauses 1(2)(b) and 160.

Exclusion of captive-bred birds

4.18 In the light of the Court of Justice's ruling in *Vergy*,[10] it is now clear that the domestic transposition of the obligations under the Wild Birds Directive does not need to extend to specimens of a species "born and reared in captivity", on the basis that, as a general rule, to extend the protective regime to captive-bred birds would not serve any conservation purpose.

4.19 Under the Wildlife and Countryside Act 1981, captive-bred birds are only excluded from the definition of "wild bird" in connection with the prohibitions giving effect to article 5 (general system of protection) of the Wild Birds Directive.[11] Section 1(6) currently provides that:

> For the purposes of [section 1] the definition of "wild bird" in section 27(1) is to be read as not including 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.[12]

4.20 In consultation we asked whether the exclusion of captive-bred birds from the new general definition of "wild bird" would be best transposed by solely referring to the definition of "wild bird" in article 1 of the Directive, or by express reference to the exclusion.[13] A large majority of consultees supported the option of expressly excluding captive-bred birds from the definition of "wild bird", on the basis that it would make the law more certain and accessible.

4.21 In *Vergy*, the Court of Justice was asked to clarify the scope of the definition of "wild bird" under article 1 of Wild Birds Directive on the basis that the wording of article 1 was ambiguous in that regard. We have concluded, therefore, that to prevent legitimate misunderstandings as to the scope of the definition, an express reference to the exclusion of captive-bred birds from its scope would bring clarity to the regulatory regime.

4.22 The judgment did not address the status of specimens that were born and reared in captivity but subsequently re-introduced into the wild as part of re-introduction or re-population programmes. We have concluded that the rationale of the Court of Justice's ruling in *Vergy* – that the protection of captive-bred birds would fall

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

[11] Wildlife and Countryside Act 1981, s 1.

[12] "Re-population" and "re-introduction" have the same meaning as in the Wild Birds Directive (Wildlife and Countryside Act 1981, s 1(6A)).

[13] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 6-4.

outside the conservation objectives of the Wild Birds Directive – does not extend to birds that have been bred in captivity and released into the wild for those purposes.

4.23 Article 2 of the Wild Birds Directive requires member states to take the requisite measures to maintain the population of wild birds at a level which corresponds in particular to ecological, scientific and cultural requirements. Our view is that re-population and re-introduction programmes undoubtedly qualify as "conservation measures" falling within the ambit of the member states' general obligations under article 2 of the Directive.[14] It follows that the protection of captive-bred birds that have been released into the wild as part of a population or re-introduction programme falls squarely within the scope of the Directive.

4.24 We have concluded, therefore, that the new framework the definition of "wild bird" should expressly exclude captive-bred birds, unless they have been lawfully released into the wild as part of a re-population or re-introduction programme.

Recommendations

Recommendation 38: we recommend that the definition of "wild bird" should expressly exclude captive-bred birds, unless they have been lawfully released into the wild as part of a re-population or re-introduction programme.

This recommendation is given effect in the draft Bill by clauses 1(3) and (5).

REVERSE BURDEN OF PROOF

4.25 Under section 1 of the Wildlife and Countryside Act 1981, a bird of a protected species is presumed to be "wild" unless it can be shown that it was bred in captivity.[15] A bird, moreover, will not be treated as captive-bred unless the defendant shows that its parents were lawfully in captivity when the egg was laid.[16] In other words, the burden of proving that a bird is captive-bred rests on the defendant – this is called a reverse burden.

4.26 A reverse burden of proof may, in some circumstances, be incompatible with article 6(2) of the European Convention on Human Rights, which guarantees the presumption of innocence in criminal proceedings.[17] Relevant case law suggests, however, that a reverse legal burden of proof will be justified where it is proportionate and is reasonably necessary in all the circumstances. Any shift in the burden should be confined "within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence".[18]

[14] Under art 9, re-population and re-introduction programmes are also an express ground for derogating from the general prohibitions of the Directive.

[15] Wildlife and Countryside Act 1981, s 1(6).

[16] Wildlife and Countryside Act 1981, s 27(2).

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

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

4.27 The justification for a reverse burden of proof on the defendant, in this context, is the significant information imbalance between defence and prosecution. In the absence of a reverse burden of proof, the prosecution would have to prove beyond reasonable doubt that the bird had not been bred in captivity. This may be reasonably easy with a golden eagle but it is far more difficult with certain more popular traded birds, such as peregrine falcons, as in most cases there is no obvious genetic difference between a wild and a captive-bred bird. As the defendant would be reasonably expected to know the provenance of the bird that was found in his or her possession, in most cases the burden of proof would not be a heavy one.

4.28 We have concluded, therefore, that the reverse burden requiring the defendant to show that the bird in question is not a wild bird should be retained. In other words, it should be for the individual relying on the identity of the bird being "captive-bred" to show that the bird was hatched in captivity.

4.29 In line with section 27(2) of the Wildlife and Countryside Act 1981, we have also concluded that a bird of a protected species should not be treated as captive-bred unless the defendant shows that its parents were lawfully in captivity when the egg was laid. This provision is consistent with the object and purpose of the regulatory regime, which is to create a complete system of protection for the wild population of birds of species that naturally occur in the EU. Removing the young of wild birds that have been illegally captured from the wild from the scope of the protection regime would encourage the illegal capture of wild birds for the purpose of breeding and subsequently selling the young. The possession or sale of the young, in fact, would become legal on the basis that they could technically qualify as birds bred in captivity.

4.30 Certain stakeholders argued that the above provisions impose an unreasonable burden on people who breed or possess captive-bred birds belonging to species protected under the Wild Birds Directive. It has been argued, in particular, that the requirement to prove that the parents were lawfully in captivity at the time the egg was laid could potentially extend to all previous generations of captive-bred birds of that species. Even when a bird is ringed, the presence of the ring only proves that the bird was hatched in captivity; it does not necessarily prove that its parents were necessarily lawfully in captivity when the egg was laid.

4.31 We were not persuaded by the argument that a requirement to show that the parents of a bird were lawfully in captivity when the egg was laid is wrong in principle. As further discussed in the sections on secondary prohibitions below, we have accepted, nevertheless, that in certain circumstances such a requirement may create legal uncertainty in connection with the trade and possession of certain birds, particularly where the parents of the bird in question originate from another member state with different documentary requirements in

place.[19] We have concluded, therefore, that while the above reverse burden should be retained, the Secretary of State or Welsh Ministers should have the power to make regulations specifying particular ringing, marking or other registration requirements that, if complied with by the defendant, would restore the burden of proof to the prosecution, both in the context of trade and in the context of possession offences.

4.32 A bird that is ringed, marked or registered in accordance with the above regulations, in other words, should be presumed to be a captive-bred bird unless the prosecution proves that:

(1) the bird was not captive-bred (or the parents of the bird in question were not lawfully in captivity when the egg was laid); and

(2) the defendant knew, or had reason to believe at the time of the alleged offence that it was not captive-bred.

4.33 The second requirement aims to protect, for instance, good faith purchasers of birds who relied on the seller's compliance with the relevant ringing, tagging or registration requirements.

Recommendations

Recommendation 39: we recommend that a bird of a protected species should be presumed to be wild unless the defendant shows that it was captive-bred, but a bird should not be treated as captive-bred unless the defendant shows that its parents were lawfully in captivity when the egg was laid.

This recommendation is given effect in the draft Bill by clause 1(4).

Recommendation 40: we recommend that the Secretary of State or Welsh Ministers should have the power to make regulations specifying particular ringing, marking or other registration requirements. A bird ringed, marked or otherwise registered in accordance with the regulations should be presumed to be captive-bred unless the prosecution proves that the bird was not captive-bred and that the defendant knew, or had reason to believe at the time of the alleged offence that it was not captive-bred.

This recommendation is given effect in the draft Bill by clause 27.

[19] See Wildlife and Countryside (Ringing of Certain Birds) Regulations 1982 SI 1982 No 1220, General Licence WLM – 18 (for England) and General Licence WLM – 10 (For Wales). As discussed in the consultation paper "Captive-bred birds: changing how we regulate trading in England, Scotland and Wales" published by the Defra, the Welsh Government and the Scottish Government in January 2015 (available at: https://www.gov.uk/government/consultations/captive-bred-birds-changing-how-we-regulate-trading-in-england-scotland-and-wales (last visited 26 October 2015)), a review of the regulation of the trade in live captive-bred birds is under way for the purpose of addressing concerns that the current strict approach to ringing requirements constitutes an unlawful barrier to the import of birds bred in other EU member states.

Poultry

4.34 The current definition of "wild bird" under the Wildlife and Countryside Act 1981 expressly excludes poultry. In consultation we asked whether this express exclusion should be retained.[20] Whilst an overwhelming majority of consultees agreed with retaining an express exclusion of "poultry" from the definition of "wild bird", a large number of responses to this question, both positive and negative, noted that the distinction that really matters is whether or not a bird of the "poultry" species in question is captive-bred, and whether or not the "poultry" species in question is domesticated.

4.35 We have concluded, on balance, that the express exclusion of "poultry" from the definition of "wild bird" should not be retained. If the current exclusion applies to all the members of a species naturally occurring in the EU that has been domesticated, it goes further than what is permitted by the Court of Justice's ruling in *Vergy*. If the exclusion only applies to those members of a species born and reared in captivity, then there seems to be no need for a specific exclusion: the general exclusion of an individual born and reared in captivity would suffice.

Recommendations

Recommendation 41: we recommend that the current express exclusion of "poultry" from the definition of "wild bird" should not be retained.

The common pheasant and the Canada goose

4.36 An interesting question is whether the Directive requires member states to protect the common pheasant (*Phasianus colchicus*) – a bird originally native to Asia that has been artificially introduced in Europe in large numbers – and the Canada goose (*Branta Canadensis*) – a species originally native to North America that has been introduced, and is commonly hunted, in a number of European countries.

4.37 Despite the fact that the common pheasant and the Canada goose can hardly be defined as species that naturally occur in a wild state in the European territory of the member states to which the Treaty applies, we have noted that they are expressly listed as huntable bird species under annex 2 to the Directive. The only logical conclusion from their presence in annex 2 to the Directive, in our view, is that the common pheasant and the Canada goose should be deemed to be wild bird species falling within the ambit of the protection provisions of the Directive. To clarify the issue, we have concluded that the common pheasant and the Canada goose should, therefore, be deemed to be "wild birds" of a protected species by being expressly listed in the schedule dedicated to wild birds that fall outside the scope of the new definition.[21]

Recommendations

Recommendation 42: we recommend that the common pheasant and the Canada goose should be deemed to be wild birds falling within the scope of

[20] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 6-2.

[21] Wildlife Bill, schedule 1.

the protection provisions available to all other bird species falling within the scope of the definition of article 1 of the Wild Birds Directive.

This recommendation is given effect in the draft Bill by clause 1(2)(b) and schedule 1.

Game birds

4.38 The current domestic definition of "wild bird" expressly excludes "game birds",[22] except for the purpose of the methods and means prohibitions under section 5 of the Wildlife and Countryside Act 1981.[23] The definition of "game bird" includes a number of huntable bird species the killing, capture and sale of which is primarily regulated by sections 3 and 3A of the Game Act 1831. The current protection prohibitions that apply to game birds do not distinguish between wild and captive-bred birds. This is because a number of those species are commonly bred in captivity and subsequently released in the wild for recreational hunting purposes. For the purpose of regulating those hunting activities, therefore, creating a distinction between wild and non-wild populations of game birds would be extremely artificial.

4.39 As discussed below, under our recommended new framework the prohibitions under sections 3 and 3A of the Game Act 1831 will be integrated and consolidated with the generally applicable protection provisions flowing from article 5 of the Wild Birds Directive. In consultation, therefore, we asked whether for the purpose of those offences, "game birds" should be deemed to be "wild birds".[24] A large majority of consultees, including representatives of the shooting industry, agreed that they should.

4.40 We have concluded that – in line with the current protection policy – under the new framework game birds should continue to be protected by killing, capture and sale offences irrespective of their "wild" or "captive-bred" status. Potential alternatives that were considered included removing the concept of "game bird" and protecting only wild "game" species that fall within the scope of the Directive or restricting the above protection provisions to game birds that have been permanently released in the wild. While those alternatives could make the law look neater, in line with the consultation responses from representatives of the shooting industry, we have concluded that due to current "breeding and release" practices, both options could potentially create more practical and definitional problems than they would solve.

4.41 It is also worth noting that the current exclusion of wild "game bird" species from the scope of section 1 of the Wildlife and Countryside Act 1981 constitutes a failure to transpose article 5 of the Wild Birds Directive. Beside the prohibition on deliberate killing or capture of wild birds, article 5 of the Wild Birds Directive also requires member states to prohibit, for instance, damage to or destruction of the

[22] "Any pheasant, partridge, grouse (or moor game), black (or heath) game or ptarmigan" (Wildlife and Countryside Act 1981, s 27).

[23] Wildlife and Countryside Act 1981, s 27(1). The use of certain methods of killing or capturing wild birds is prohibited under s 5.

[24] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 6-3.

nests of wild birds falling within the scope of article 1 of the Directive. This prohibition is currently given effect in domestic law under sections 1(1)(aa) and (b) of the Act. As discussed above, all wild "game bird" species fall within the scope of the protection provisions of the Directive. The failure to prohibit damage to or destruction of their nests, therefore, constitutes a breach of article 5 of the Directive.

Recommendations

Recommendation 43: we recommend that "game birds" should continue to be protected by killing, capture and sale offences irrespective of their "wild" or "captive-bred" status.

This recommendation is given effect in the draft Bill by clause 2(1)(a)(ii) and schedule 2.

PRIMARY ACTIVITY PROHIBITIONS

4.42 Primary activity prohibitions – prohibitions that regulate activities that have a direct effect on wildlife – constitute the backbone of the species-specific protection regime for wild birds in England and Wales.

4.43 In the context of the protection of wild birds, the expression "primary activity prohibitions" refers, in particular, to the activities prohibited under article 5(a) to (d) of the Wild Birds Directive and their implementing provisions in England and Wales.

4.44 Our recommendations in this section focus on ensuring that the UK's international and EU obligations are correctly transposed in a simple and coherent structure.

Mental element of the new offences

4.45 For the reasons explained in Chapter 3, the Court of Justice's ruling in *Commission v Spain* indicates that the use of the word "intentional" in section 1 of the Wildlife and Countryside Act 1981 is an inadequate transposition of the term "deliberate" as used in article 5 of the Wild Birds Directive. [25] We have concluded, therefore, that as a general rule the mental element of the new domestic offences giving effect to article 6 of the Bern Convention and article 5 of the Wild Birds Directive should be in line with the definition of the word "deliberate" discussed in Chapter 3.

Recommendation 44: we recommend that the terms "intentional" and "intentional or reckless" in the context of wild bird offences be replaced with the term "deliberate" as defined in recommendations 25 to 28.

This recommendation is given effect in the draft Bill by clauses 2, 7, 8, 11 and 12.

[25] Case C-221/04 *Commission v Spain* [2006] ECR I-04515.

Deliberately killing, injuring or capturing birds of a protected species

International and EU obligations

4.46 As mentioned in Chapter 3 of this Report, article 5(a) of the Wild Birds Directive requires member states to prohibit, subject to articles 7 and 9, the deliberate killing or capture of wild birds of the protected species referred to in article 1 of the Directive. Article 6 of the Bern Convention imposes an equivalent obligation on contracting parties in connection with all wild birds listed in appendix 2 to the Convention.[26]

Domestic transposition

4.47 Article 5(a) of the Wild Birds Directive is primarily transposed in domestic law through section 1(1)(a) of the Wildlife and Countryside Act 1981, which provides that, subject to the provisions of Part 1 of the Act, any person who "intentionally kills, injures or takes any wild bird" shall be guilty of an offence.

4.48 As discussed above, "game birds" are currently subject to a separate protection regime under the Game Act 1831. Section 3 of the Game Act 1831 prohibits the "killing or taking" of any game birds during specific close seasons.

Simplification

4.49 Earlier in this Chapter we recommended that "game birds" should be protected in the same way as all other protected "wild birds" for the purpose of this prohibition. We have concluded, therefore, that under the new framework there should be a single offence that applies to the following categories of birds:

> (1) birds of species naturally occurring in a wild state within the European territory of any member state to which the TFEU applies (excluding captive-bred birds, unless lawfully released into the wild as part of a re-population or re-introduction programme);
>
> (2) the common pheasant and Canada goose, subject to the same exclusion;
>
> (3) birds of other species that are expressly listed by the Secretary of State or Welsh Ministers, subject to the same exclusion; and
>
> (4) the pheasant, partridge, grouse (or moor game), black game (or heath game) and ptarmigan.

Replacing the word "take" with "capture"

4.50 In section 1, the Wildlife and Countryside Act 1981 adopted the term "take", rather than "capture" – which is the term used in article 5(a) of the Wild Birds Directive. The word "take" has been used for a long time in wildlife law, and appears in a number of other wildlife protection statutes, including the Protection of Badgers Act 1992, the Deer Act 1991 and the Conservation of Seals Act 1970. The Conservation of Habitats and Species Regulations 2010, on the other hand, use the term "capture" to transpose the equivalent prohibition under article

[26] The Bonn Convention, the AEWA and ACAP impose compatible obligations.

12(1)(a) of the Habitats Directive.

4.51 In line with the judicial interpretation of the term "take", we have concluded that it should be replaced in the new legislation by the term "capture", on the basis that the latter term better portrays the act of taking a live bird.[27] It also clarifies that the offence is about "taking a bird from the wild", rather than, for instance, stealing a bird that is already in another person's possession. The word "capture", in addition, mirrors the language of the Directives.

Injuring

4.52 Section 1(1)(a) of the Wildlife and Countryside Act 1981 also prohibits acts causing "injury" to a wild bird even though this is not expressly required by the Wild Birds Directive. The same approach was taken under the Conservation of Habitats and Species Regulations 2010. [28]

4.53 We have concluded that the prohibition should be retained. It would be against the object and purpose of the Wild Birds Directive to prohibit the deliberate capture or killing of a wild protected animal whilst allowing the deliberate injuring of such an animal in the same circumstances. In terms of conservation, injuring a specimen has often identical effects to the killing of the same specimen, as it may prevent a bird from successfully breeding or feeding or protecting its young.

Recommendations

Recommendation 45: we recommend that the prohibition of "deliberate" killing, capture or injury should extend to:

(1) birds of species naturally occurring in a wild state within the European territory of any member state to which the TFEU applies (excluding captive-bred birds, unless lawfully released into the wild as part of a re-population or re-introduction programme);

(2) the common pheasant and Canada goose, subject to the same exclusion;

(3) birds of other species that are expressly listed by the Secretary of State or Welsh Ministers, subject to the same exclusion; and

(4) the pheasant, partridge, grouse (or moor game), black game (or heath game) and ptarmigan.

This recommendation is given effect in the draft Bill by clause 2.

[27] In *Robinson v Everett* [1988] Crim LR 699, the Divisional Court clarified that the word "take" in the context of s 1(3)(a) of the Wildlife and Countryside Act 1981 means "to capture a live bird", and that any reference to "taking" in the Wildlife and Countryside Act 1981 and prior legislation equated to "capturing". The same position is reflected in the Wild Birds Directive, where the word "capturing" is used in relation to live wild birds (art 5(a)) while the word taking is only used in relation to eggs (art 5(c)).

[28] SI 2010 No 490, reg 41(1)(a).

Protection of nests, eggs, breeding sites and resting places

The Bern Convention

4.54 Article 6 of the Bern Convention requires each contracting party to prohibit, in relation to animals listed in appendix 2:

> (b) the deliberate damage to or destruction of breeding or resting sites; [and] …
>
> (d) the deliberate destruction or taking of eggs from the wild or keeping these eggs even if empty.

The Wild Birds Directive

4.55 Articles 5(b) and (c) of the Wild Birds Directive provide that, without prejudice to Articles 7 and 9, member states should prohibit, in relation to protected wild birds, the:

> (b) deliberate destruction of, or damage to, their nests and eggs or removal of their nests; [and]
>
> (c) taking their eggs in the wild and keeping these eggs even if empty.[29]

Domestic transposition

4.56 The obligations relating to damage, destruction and taking are currently transposed in domestic law by section 1(1)(aa), (b) and (c) of the Wildlife and Countryside Act 1981, which provide that a person is guilty of an offence if he or she intentionally:

> (aa) takes, damages or destroys the nest of a wild bird included in Schedule ZA1; or
>
> (b) takes, damages or destroys the nest of any wild bird while that nest is in use or being built; or
>
> (c) takes or destroys[30] an egg of any wild bird.

Transposition problems

4.57 The Wild Birds Directive requires member states to prohibit the destruction, damage to or removal of the nests of wild birds of a protected species. While the word "nest" is not defined in the Directive, our view is that it should be broadly understood – in line with its ordinary meaning – as including any "structure made or a place chosen by a bird for laying and incubating its eggs and for sheltering

[29] Prohibitions in connection with the "keeping" of protected bird eggs are discussed in the section on secondary prohibitions at the end of this Chapter.

[30] The Wildlife and Countryside Act 1981, s 27(1), provides that "destroy", in relation to an egg, includes doing anything to the egg which is calculated to prevent it from hatching, and "destruction" shall be construed accordingly.

its young".[31]

4.58 As the scope of article 6 of the Bern Convention is not limited to the protection of wild birds, it does not expressly refer to the damage or destruction of nests, but prohibits, more generally, the "deliberate damage to or destruction of breeding or resting sites" of animals listed in appendix 2.

4.59 The European Commission's guidance on article 12 of the Habitats Directive defines "breeding sites" as:

> the areas needed to mate and to give birth in and covers also the vicinity of the nest or parturition site, where offspring are dependent on such sites. For some species, a breeding site will also include associated structures needed for territorial definition and defence.[32]

4.60 The guidance defines resting places as "the areas essential to sustain an animal or group of animals when they are not active".[33]

4.61 The above definitions make clear that the expressions "breeding sites" and, in particular, "resting places" are broader than the ordinary meaning of "nest". The word "nest", moreover, does not cover places such as roosts, where birds settle to rest or sleep. In this context, therefore, it would appear that the Wild Birds Directive does not fully give effect to the EU and UK's international obligations under the Bern Convention. We have concluded, therefore, that the obligation to prohibit deliberate damage to or destruction of breeding or resting sites of wild birds listed in appendix 2 to the Bern Convention should be transposed in domestic law through a separate offence.

4.62 In general terms, therefore, we have concluded that the above obligations should be given effect in domestic law through the following prohibitions:

> (1) an offence of "deliberate" damage to destruction or removal of a nest of wild birds of a species that naturally occurs in a wild state within the European territory of any member state to which the TFEU applies, common pheasants and Canada geese;
>
> (2) an offence of "deliberate" damage to or destruction of protected breeding sites or resting places of wild birds listed in appendix 2 to the Bern Convention that have a natural range including Great Britain; and
>
> (3) an offence of taking, or deliberate damage to the eggs of wild birds in subparagraph (1) above.

[31] Oxford English Dictionary.

[32] European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007), p 46.

[33] European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007), p 46.

Protection of nests

BIRDS THAT RE-USE THEIR NESTS

4.63 Read literally, article 5(b) of the Wild Birds Directive requires member states to ban the destruction, damage or removal of nests of wild birds of a protected species, whether or not those nests are in use. We have concluded, however, that this could not possibly have been the intention of the drafters of the Directive, as the protection of nests which have been permanently abandoned serves no conservation purpose. It would also, arguably, impose unreasonable burdens on the forestry sector, as it would require users to seek a licence every time they have to interfere with a nest, even though their operations are carried out outside the breeding season of the relevant birds and all the nests are abandoned.

4.64 In order to comply with article 5(b) of the Wild Birds Directive, we think it necessary to prohibit the deliberate destruction of, damage to, or removal of, the nests of any wild bird while the nest is being built or is in use and the deliberate commission of any of the prescribed interferences in relation to nests which are not in use but are nests of wild birds that may re-use such nests in the future, as any interference of this kind may have an impact on the conservation of those species.[34]

4.65 We believe, therefore, that retaining the current approach in sections 1(1)(aa) and 1(1)(b) of the Wildlife and Countryside Act 1981 will correctly transpose article 5(b) of the Directive as long as the provision of the new framework replicating section 1(1)(aa) and schedule ZA1 to the Wildlife and Countryside Act 1981 expressly extends to the nests of all wild birds of a protected species that re-use their nests.

REMOVAL OF THE NEST

4.66 Article 5(b) of the Wild Birds Directive prohibits the "removal" of the nests of protected birds. Sections 1(1)(aa) and 1(1)(b) of the Wildlife and Countryside Act 1981 transpose the above obligation by prohibiting the "taking" of the nests of protected birds. We have concluded that the expression used in the Directive should be used. The nest of a wild bird could be "removed" from where it was built, causing disturbance to the bird without it necessarily being "taken" into the person's possession.

4.67 In line with the above approach, it should be an offence to remove the nest of any wild bird while the nest is in use or is being built. It should also be an offence to remove the nest of a scheduled wild bird (wild birds which re-use their nests) whether or not the nest is in use or is being built.

"DAMAGE" AND "DESTRUCTION"

4.68 In line with the European Commission's guidance on article 12 of the Habitats Directive in relation to the "deterioration" and "destruction" of a breeding site or

[34] The term "in use" should not be understood as a synonym of "in occupation". A nest may well be in use even if it is unoccupied for a limited period of time. See, by analogy, European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007), p 41, para 53.

resting place,[35] we have concluded that the terms "damage" and "destruction" should not be limited to physical damage or destruction of the nest. The offence must cover, for example, activities which prevent a bird from using a nest. We have concluded, therefore, that it should also be an offence to prevent a bird from obtaining access to a protected nest, whether or not the nest itself is physically destroyed or damaged.

Protection of breeding sites or resting places

4.69 As the European Commission's guidance suggests, the aim of this prohibition is to "safeguard the ecological functionality of breeding sites and resting places". This is because resting places and breeding sites "are crucial to the life cycle of animals and are very important parts of a species' entire habitat, needed to ensure its survival". Their protection, therefore, "is directly connected with the conservation status of a species".[36]

"DESTRUCTION", "DAMAGE" OR "DETERIORATION"

4.70 The English version of the Bern Convention prohibits "damage" or "destruction". The French version of the Bern Convention, on the other hand, adopted the term "*détérioration*" (deterioration) rather than, for instance, "*endommagement*" (damage). A similar inconsistency was highlighted by the European Commission's guidance in the context of the transposition of article 6(b) of the Bern Convention in EU law. The English version of article 12(1)(d) of the Habitats Directive prohibits the "deterioration" or "destruction" of breeding sites and resting places. The European Commission's guidance explains that the terms used in the German, Danish, Dutch and Swedish versions of that article, however, are closer to the word "damage" than "deterioration".[37]

4.71 The object and purpose of this offence, as the European Commission's guidance suggests, is to protect "the essential function of these sites, which must continue to provide all the elements required by a specific animal (or group of animals) to breed or to rest". In the light of the object and purpose of this offence, the guidance suggests that the term "deterioration" is meant to prohibit activities that gradually reduce the functionality of the site or place:

> Deterioration may therefore not immediately lead to a loss of functionality of a site/place, but would adversely affect functionality in terms of quality or quantity and might over a certain period of time lead to its complete loss. [38]

4.72 The above suggests that although some physical damage would have to be proved to establish that a certain breeding site has been caused to deteriorate by a particular activity, to establish "deterioration" it is unnecessary to prove that the

[35] European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007), p 46.

[36] European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007), p 41, para 53.

[37] European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007), p 46, para 69.

[38] European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007), p 47, para 70.

damage was such as to significantly impair the functionality of the site. To show that a breeding site or resting place has been caused to deteriorate, the damage does not need to be pinned to a specific episode in time and space, as long as a clear cause-effect relationship is established between the operation of a certain activity and the gradual deterioration of a relevant breeding site or resting place.

4.73 We have concluded that in the light of the object and purpose of this offence, and the use of the words "damage" and "deterioration" interchangeably in the different language versions of the Bern Convention and the Habitats Directive, the clearest way to transpose the above obligation in domestic law is by expressly referring to both "damage" and "deterioration". Under the new framework, therefore, it should be an offence "deliberately" to damage, destroy or cause the deterioration of a protected breeding site or resting place.

OBSTRUCTING ACCESS TO A PROTECTED BREEDING SITE OR RESTING PLACE

4.74 As the purpose of this offence is to protect the ecological functionality of breeding sites and resting places, we have concluded that it should also be an offence to obstruct access to a breeding site or resting place of a bird listed in appendix 2 to the Bern Convention.

GUIDANCE

4.75 While the European Commission guidance provides a general description and some useful examples on the scope of the terms "breeding site" and "resting place",[39] it acknowledges that:

> It is not possible to provide a rigid definition of "breeding site" and "resting places" that will apply to all taxa. Any interpretation of the terms "breeding sites" and "resting places" must therefore take into account this variety and reflect different prevailing conditions.[40]

4.76 In line with the current transposition of article 6(b) of the Bern Convention (and article 12(1)(d) of the Habitats Directive) in domestic law, we have concluded that under the new framework the Secretary of State or Welsh Ministers (or Natural England and Natural Resources Wales with the approval of the Secretary of State or Welsh Ministers respectively) should have the power to issue codes or practice giving practical guidance as to the application of this offence under the new legislation. The codes of practice could usefully clarify, for instance, how the terms "breeding site" and "resting place" should be interpreted in the context of specific bird species.

Protection of eggs

DELIBERATE DESTRUCTION OF OR DAMAGE TO EGGS OF WILD BIRDS

4.77 Article 5(b) of the Wild Birds Directive prohibits the "deliberate destruction of, or damage to, their […] eggs". Article 6(b) of the Bern Convention prohibits the "deliberate destruction […] of eggs from the wild".

[39] This part of the guidance has already been cited above in the context of the discussion on the transposition of article 5(b) of the Wild Birds Directive.

[40] European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007), p 41, para 55.

4.78 The Wildlife and Countryside Act 1981 currently only prohibits the destruction of the eggs of wild birds. "Destruction", however, is defined as including anything done to an egg which is calculated to prevent it from hatching.

4.79 To ensure full compliance with article 5(b) of the Wild Birds Directive, we have concluded that the offence under the new framework should prohibit both deliberate "damage" to and the deliberate "destruction" of the egg of a wild bird. We have concluded that, in line with the current definition, "destruction" and "damage" should be understood as including anything done to an egg that prevents it from hatching.[41]

Taking the egg of a wild bird

4.80 Article 5(c) of the Wild Birds Directive prohibits the "taking" of the eggs of a wild bird in the wild and the keeping of those eggs even if empty. In this context, the Wild Birds Directive does not require the action to be carried out "deliberately". The reason for this approach is obvious: it is unclear how a person may ever take the egg of a wild bird from the wild unintentionally. The offence under the new framework should, therefore, follow the same approach.[42]

Recommendations

Recommendation 46: we recommend that the existing international and EU obligations in connection with the protection of nests, eggs, breeding sites and resting places should be transposed in domestic law through the following offences:

(1) An offence prohibiting the taking of eggs of a "wild bird" from the wild and "deliberate" damage to or destruction of eggs of a "wild bird" (including anything done which prevents the egg from hatching);

(2) An offence prohibiting "deliberate" damage to, destruction or removal of, and obstruction of access to, a nest of a "wild bird" whilst the nest is being used or being built, or a nest of a listed wild bird of a species that re-uses its nests;

(3) An offence prohibiting the "deliberate" damage to, destruction or deterioration of, or obstruction of access to, a breeding site or resting place of a wild bird of a species listed in annex 2 to the Bern Convention that has a natural range including Great Britain.

This recommendation is given effect in the draft Bill by clauses 7, 8 and 9.

Recommendation 47: we recommend that the Secretary of State or Welsh Ministers should have the power to issue codes of practice for the purpose of providing practical guidance in respect of the application of the provisions in connection with damage to, destruction or deterioration of

[41] Unless otherwise stated, any reference to the term "deliberate" should be read in line with the recommended domestic definition of deliberate discussed in Chapter 3.

[42] The "keeping" prohibition under article 5(c) of the Wild Birds Directive is discussed below in the context of secondary offences.

breeding places or resting sites of wild birds listed in appendix 2 to the Bern Convention that have a natural range including Great Britain.

This recommendation is given effect in the draft Bill by clause 127.

Disturbance and harassment

4.81 The transposition of the prohibitions on deliberate disturbance and harassment has been discussed at length in Chapter 3 above. In sum, we have concluded that there should be two separate offences under the new framework to give effect to the UK's international and EU obligations under the Bern Convention, the Bonn Convention, the African-Eurasian Migratory Waterbirds Agreement, the Agreement on the Conservation of Albatrosses and Petrels and the Wild Birds Directive.

4.82 The first offence should prohibit the deliberate disturbance of individual specimens of listed species. As this offence gives effect to the harassment prohibitions under the Bonn Convention, the African-Eurasian Migratory Waterbirds Agreement and the Agreement on the Conservation of Albatrosses and Petrels we have concluded that it should apply to the white-tailed eagle (strictly protected under the Bonn Convention), the Balearic shearwater (strictly protected under the Agreement on the Conservation of Albatrosses and Petrels) and any other bird species strictly protected under the above international agreements that have a natural range including Great Britain. As the current domestic disturbance prohibitions under section 1(5) of the Wildlife and Countryside Act 1981 are also framed in terms of direct interference with individual specimens, this offence may also be used to replicate the existing protection of bird species to which the current disturbance prohibitions apply.

4.83 The second offence should prohibit the deliberate disturbance of the local populations of all wild birds falling within the scope of article 1 of the Wild Birds Directive. The prohibition should expressly provide that a reference to an action that causes disturbance to the population of wild birds or a protected species in an area should include, in particular, a reference to any action likely to impair the ability of birds of that species to survive, breed or rear their young and – in the case of a migratory species – migrate, or any act that is likely to have a significant effect on the distribution or abundance of the population of the species in the area.

4.84 The Secretary of State or Welsh Ministers (or Natural England and Natural Resources Wales with the approval of the Secretary of State or Welsh Ministers respectively) should have the power to issue codes of practice giving practical guidance as to the application of the above offences.

4.85 Our recommendations to this effect are in Chapter 3.

THE REGULATION OF HUNTING ACTIVITIES

4.86 Article 7 of the Wild Birds Directive expressly provides that member states may authorise the recreational hunting of certain wild bird species "owing to their population level, geographical distribution and reproductive rate throughout the Community". There are a number of restrictions: hunting must not "jeopardise conservation efforts" and member states must ensure that hunting "complies with

the principles of wise use and ecologically balanced control of the species of birds concerned" and is compatible with the species' sustainable population levels. Article 7 also requires member states to introduce close seasons during the breeding season, the various stages of reproduction and, in the case of migratory birds, the return to their breeding areas. During the close seasons, huntable birds should fall within the complete system of protection that the other birds falling within the scope of article 1 of the Directive enjoy throughout the year.

Article 7 of the Wild Birds Directive: key principles

Ensuring that hunting activities do not jeopardise conservation efforts in the distribution area of the huntable birds

4.87 According to the European Commission, article 7(1) essentially requires that "the practice of hunting must not represent a significant threat to efforts for the conservation of both huntable as well as non-huntable species."[43] The European Commission guidance refers, as an example, to the ferruginous duck: a non-huntable bird species which is globally threatened. This species has a late reproduction period, which can make it vulnerable to the opening of hunting seasons for other species in areas where it is still breeding. As regards the area of distribution of species, the Commission guidance adds that for most species

> this is not restricted to the area of the member state concerned with hunting but applies to the species range. This is particularly relevant to migratory species. If species are subject to excessive hunting along their migration route it may impinge on conservation efforts elsewhere, including those outside the European Union.[44]

"Wise use"

4.88 The principle of "wise use" is left undefined in the Directive but its origins and scope have been comprehensively explored in the European Commission's guidance on sustainable hunting. The guidance suggests that, in essence, the principle of "wise use" implies "sustainable consumptive use with an emphasis on maintaining populations of species at a favourable conservation status". [45] The guidance suggests that "wise use" essentially corresponds to the concept of "sustainable utilisation" as defined in the Convention on Biological Diversity, "the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations."[46]

4.89 Compliance with the principle of "wise use", according to the European Commission's guidance, should be assessed comprehensively, taking into

[43] European Commission, *Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds* (2008) p 18.

[44] European Commission, *Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds* (2008) p 18.

[45] European Commission *Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds* (2008), p 19.

[46] Convention on Biological Diversity, art 2.

account, for instance, the positive conservation functions of game management.[47] It follows that the decline of the population of a huntable species – whilst an important factor to take into account – does not necessarily require a member state to ban hunting activities, as long as the hunting and management activities are sustainable on a long term basis.

Ecologically balanced control

4.90 The European Commission's guidance on sustainable hunting suggests that "ecologically balanced control" implies that the measures taken should be ecologically sound and proportionate to the problem to be solved, taking into account the conservation status of the species involved. While population control measures may be necessary in connection with certain huntable species, for other huntable species management measures may have to be aimed at the increase or the restoration of population numbers in view of both conservation and hunting interests.[48] "Ecologically balanced control", according to the Commission, includes ensuring that the exploitation of a species is demographically balanced and that impacts on populations harvested do not result in imbalances in the ecosystem.[49]

Compatibility with measures resulting from article 2

4.91 Article 7(4) further requires member states to ensure that hunting activities are compatible, as regards the population of these species, with the measures resulting from article 2 of the Wild Birds Directive. Article 2 of the Wild Birds Directive requires member states to take the requisite measures to maintain or adapt the population of wild bird species falling within the scope of the Directive at a level that corresponds, in particular, to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements.

Close seasons

4.92 Article 7(4) of the Wild Birds Directive requires member states to ensure that the species listed in annex 2 to the Directive are not hunted during the "rearing season", during the "various stages of reproduction" and – in the case of migratory species to which hunting regulations apply – "during their return to their rearing grounds".

4.93 In *Association pour la Protection des Animaux Sauvages and others*, the Court of Justice highlighted the problems related to the staggering of close seasons.[50] The

[47] European Commission, *Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds* (2008), pp 22-23. The guidance recognises that "some of the most important wildlife sites in Europe have survived the pressures of development and destruction due to the interests of game management. For example the United Kingdom has the largest areas of heather moorland anywhere in Europe largely due to its value for grouse hunting, which provided a strong basis from preventing the loss of this habitat from commercial afforestation and other threats."

[48] European Commission *Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds* (2008), p 25.

[49] European Commission *Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds* (2008), p 26.

[50] Case C-435/92 [1994] *Association pour la Protection des Animaux Sauvages and others v Préfets de Maine-et-Loire and Loire-Atlantique* ECR I-69

Court, in particular, pointed to the risk of confusion between different species, which may lead to the shooting of species whose hunting season is already closed, and the risk of disturbance caused by hunting activities to other bird species whose hunting season is already closed.[51]

4.94 The Court held that while a fixed date for the closing of hunting equivalent to the date fixed for the species which is the earliest to migrate guarantees the realisation of the objectives laid down in article 7(4) of the Wild Birds Directive, the staggering of close seasons is possible, as long as it does not impede the complete protection of the species liable to be affected by such staggering. In other words, the burden is on the member state to prove, on the basis of scientific evidence, that the setting of hunting seasons that vary according to the species of bird does not impede the overall protection of those species.[52]

4.95 In the light of the above ruling, the Commission and the Committee of Representatives of Member States for the Adaptation to Technical and Scientific progress[53] have recognised the need to establish a clear and harmonised interpretation of the principles laid down in article 7(4) of the Wild Birds Directive. The Committee has therefore produced a guidance document on the key concepts of article 7(4) of the Wild Birds Directive[54] and provided a detailed description the reproductive and migratory patterns of a large number of European bird species.[55]

Domestic regulation of hunting

4.96 Article 7 of the Wild Birds Directive is currently transposed in the following ways: first, by protecting game birds from killing or capture during statutory close seasons; secondly, by listing certain wild birds in part 1 of schedule 2 to the Wildlife and Countryside Act 1981 (ducks and other water fowl), excluding them

[51] In the *Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds* (2008), p 35, the European Commission notes that "as regards the risk of disturbance there is a need to demonstrate a balance between the intensity, frequency and duration of hunting, and the availability and proximity of sufficient undisturbed areas offering adequate feeding and roosting areas. There needs to be adequate enforcement measures to ensure that the above provisions are respected. Finally, in areas which may be subject to staggered hunting seasons, integrated planning that takes full account of hunting and other potential disturbances on the birds and their use of the natural resources would appear to be a valuable management tool. Such planning should incorporate scientific monitoring to evaluate the potential impacts on the bird species concerned".

[52] Case C-435/92 *Association pour la Protection des Animaux Sauvages and others v Préfets de Maine-et-Loire and Loire-Atlantique* [1994] ECR I-67, at [16-22].

[53] The Committee was established under article 16 of the Wild Birds Directive to assist the Commission in the implementation of the Wild Birds Directive. While the scientific opinions of the Committee are not binding, they have been given significant weight by the Court of Justice (see, for example, Case C-344/03 *Commission v Finland* [2003] ECR I-11033, at [54]).

[54] European Commission and ORNIS Committee (2009) *Key Concepts of Article 7(4) of Directive 79/409/EEC*, available at http://ec.europa.eu/environment/nature/conservation/wildbirds/hunting/docs/reprod_intro.pdf (last visited 26 October 2015).

[55] Available at: http://ec.europa.eu/environment/nature/conservation/wildbirds/hunting/key_concepts_en.htm (last visited 26 October 2015).

from the protection of section 1 outside the close season; thirdly, through the use of general licences based on one of the existing licensing grounds in section 16 of the 1981 Act, such as the prevention of damage to crops (pigeons, crows).[56]

4.97 This means of transposition is problematic for a number of reasons. The Game Act 1831,[57] for instance, requires the amendment of primary legislation to vary the dates of close seasons, a process which is arguably too inflexible to ensure that huntable species are appropriately protected in line with changes to their population level and external climatic conditions, as required by article 7(4) of the Wild Birds Directive.

4.98 The hunting regime established under section 2 of the Wildlife and Countryside Act 1981 is more flexible than section 3 of the Game Act 1831. While close seasons are set in primary legislation, they may be amended by an order issued by the Secretary of State or Welsh Ministers.[58] The regulatory powers under section 2 of the 1981 Act remain insufficient, however, to effectively transpose article 7 of the Wild Birds Directive. Under sections 2(5) and 2(6), for instance, it is impossible to impose additional conditions which may be necessary to ensure "wise use" as required by the Directive, such as reporting requirements or quotas on the number of birds that may be hunted in an area.

4.99 The recreational hunting of a number of birds falling outside the scope of section 2 of the Wildlife and Countryside Act 1981 is currently allowed through general licences issued for the purpose of protecting crops and preventing the spread of diseases; the current licence conditions require that the licence can only be relied on where methods of resolving the problem such as scaring and proofing are either ineffective or impracticable.[59] This is not a requirement for hunting wild birds falling within the scope of article 7 of the Wild Birds Directive. It follows that – outside the close season required by article 7(4) – the current regime also goes to some extent beyond the requirements of the Wild Birds Directive for certain huntable wild bird species.

Discussion

4.100 In discussing the transposition of article 7 of the Wild Birds Directive, the Court of Justice pointed out that

> a faithful transposition [of EU Directives] becomes particularly important in a case such as this in which the management of the common heritage is entrusted to the member states in their respective territories.[60]

4.101 As discussed in the section above, our view is that the current transposition prevents the effective application of the conditions imposed by article 7. The current domestic regime is excessively inflexible and includes insufficient

[56] See, for example, General Licence GL – 04 (in England).

[57] Game Act 1831, s 3.

[58] Wildlife and Countryside Act 1981, ss 2(5) to (7).

[59] General Licence GL- 04, para 1.

[60] Case C-247/85 *Commission v Kingdom of Belgium* [1985] ECR 3989, [9].

regulatory powers to ensure compliance with the principles described above.

4.102 In the consultation paper we provisionally proposed that article 7 of the Wild Birds Directive should be expressly transposed in the new framework.[61] In the light of the consultation responses, however, we have accepted that our original proposal to satisfy this requirement by means of codes of practice was unnecessarily burdensome and could run the risk of creating legal uncertainty.

4.103 In the interim statement published in October 2013, we suggested that the hunting of wild birds falling within annex 2 to the Wild Birds Directive, including "game birds", could be more easily regulated by means of general and class licences authorising the hunting of annex 2 birds during the open season.[62] The use of licences would introduce the necessary element of flexibility to ensure compliance with article 7. Licences can be easily and quickly issued, revoked or updated to reflect changes in population levels, migratory patterns or climatic conditions. Through the licensing regime, in addition, the Secretary of State or Welsh Ministers would have the ability to introduce additional conditions to make sure that the hunting activities do not jeopardise conservation efforts and comply with the principles of "wise use" and "ecologically balanced control".

4.104 After further discussions with stakeholders, however, we realised that while the creation of a licensing regime would introduce the necessary level of flexibility in the regulatory regime, it would not necessarily constitute the most appropriate mechanism to regulate a large economic sector such as the shooting industry.

4.105 We have concluded that a more appropriate balance between flexibility and political accountability could be achieved through a system based entirely on regulation-making powers. In line with our general policy of retaining, as far as possible, the existing regulatory structures, such a system would also constitute a significantly less radical departure from the way hunting activities have been regulated until now under the 1981 Act.

4.106 Under the new regime, therefore, the Secretary of State or Welsh Ministers should have the power to introduce open seasons for huntable birds by regulation, derogating from the general protection regime described above in this Chapter. The power to introduce open seasons, however, should be conditional on the Secretary of State or Welsh Ministers being satisfied that hunting activities authorised under the regulations will not jeopardise the conservation efforts in the distribution area of the relevant bird, will comply with the principles of "wise use" and "ecologically balanced control" and will be compatible with the measures resulting from article 2 of the Wild Birds Directive.

4.107 To ensure that hunting activities carried out during the open season comply with the conditions in article 7, the Secretary of State or Welsh Ministers should have the power to restrict hunting activities carried out during the open season by prohibiting the killing or capture of specified species in certain areas, during certain periods or through particular hunting methods, or by making hunting activities conditional upon compliance with relevant monitoring or reporting

[61] Wildlife Law (2013) Law Commission Interim Statement, Provisional Proposals 6-13 to 6-17.

[62] Wildlife Law (2013) Law Commission Interim Statement, paras 1.57 to 1.61.

obligations.

4.108 In line with article 7(4) of the Wild Birds Directive, the Secretary of State or Welsh Ministers should also be under an express obligation to ensure that the specified period during which the relevant birds may be hunted does not include any part of the breeding season, the time when birds of the species undergo the various stages of reproduction and, for migratory species, the time when birds of the species return to their breeding areas.

4.109 Section 2(6) of the 1981 Act currently allows the Secretary of State or Welsh Ministers to issue emergency regulations commonly known as "severe weather orders". Through this power, the Secretary of State or Welsh Ministers can prohibit the hunting of the relevant birds during the open season for a maximum period of 14 days with respect to the whole or any specified part of England or Wales. We understand that this power is routinely used to extend the protection of wildfowl during exceptionally cold winters. As orders under section 2(6) are designed to react quickly to unforeseeable weather events, the exercise of this power is not subject to any Parliamentary scrutiny. We have concluded that the power to make "severe weather orders" should be replicated under the new framework, and integrated in the regulatory regime giving effect to article 7 of the Wild Birds Directive.

4.110 Under the new framework, bird species subject to the above regulatory regime should include all wild birds currently listed in part 1 of schedule 2 to the 1981 Act and "game birds" listed in section 2 of the Game Act 1831, on the basis that those are currently the birds with a natural range including England and Wales that may currently be hunted outside the close season. We do not see any reason why other wild birds listed in annex 2 to the Directive that may currently be killed or captured in accordance with general licences, such as crows or woodpigeons, should not also be subjected to the same regulatory regime.[63]

4.111 Section 3 of the Game Act 1831 includes a close season for the bustard, which is not a huntable species under annex 2 to the Wild Birds Directive. The great bustard (*Otis tarda*) has been extinct in Great Britain for a long time but occurs naturally in the European territory of other EU member states and is currently subject to reintroduction programmes in Great Britain.[64] It follows that under the new framework the bustard should not be subject to the new hunting regime for birds.[65]

4.112 In line with the general policy discussed in Chapter 2 of this Report, we have concluded that – except for "severe weather orders" – regulations to introduce close seasons and regulate hunting activities should be subject to a negative resolution procedure and the general consultation requirements which replicate

[63] We have decided not to list those birds under the Wildlife Bill, as the way those birds are controlled under the new framework is a policy question that falls outside the remit of this review.

[64] See http://www.iucnredlist.org/details/22691900/0 (last visited 26 October 2015).

[65] The provision establishing a close season for the bustard under section 3 of the Game Act 1831 has been impliedly repealed by section 1 of the Wildlife and Countryside Act 1981, which currently imposes a general protection regime throughout the year for all species of birds that are ordinarily resident in or visitors to the European territory of member states to which the TFEU applies.

section 26 of the 1981 Act. Close seasons should be listed in a schedule and regularly reviewed in line with the quinquennial review procedure discussed in Chapter 2 of this Report.

Recommendations

Recommendation 48: we recommend that hunting activities in connection with birds of a species listed in annex 2 to the Wild Birds Directive (including game birds) which is currently huntable in domestic legislation outside the close season should be regulated by a single provision giving effect to article 7 of the Wild Birds Directive.

Recommendation 49: we recommend that the effect of the new provision should be to authorise any activity otherwise prohibited by the primary activity prohibitions in connection with wild birds as long as the hunting is undertaken

(1) outside the close season specified for that species in a dedicated schedule;

(2) outside any period (not exceeding 14 days) designated by regulation as a period of special protection; and

(3) in compliance with any provision made by regulations.

These recommendations are given effect in the draft Bill by clause 21 and schedule 11.

Recommendation 50: we recommend that the Secretary of State and Welsh Ministers should be under a positive obligation to amend the close seasons in connection with protected birds if it appears to them necessary to do so to ensure that the period include

(1) the whole of the breeding season for the species concerned;

(2) the times when birds of the species undergo the various stages or reproduction; and

(3) in connection with migratory species, the times when birds of those species return to their breeding area.

This recommendation is given effect in the draft Bill by clause 21(5).

Recommendation 51: we recommend that regulations introducing periods of special protection (not exceeding 14 days) should not be subject to parliamentary scrutiny and should not require prior consultation in line with section 26(4)(a) of the Wildlife and Countryside Act 1981 (other than consultation of representatives of persons interested in the hunting of birds to which the regulation relates).

This recommendation is given effect in the draft Bill by clauses 21(4), 166(6) and 166(11).

Recommendation 52: we recommend that the Secretary of State and Welsh

Ministers should have a positive obligation to ensure that the hunting of birds of relevant bird species

(1) does not jeopardise conservation efforts in their distribution area;

(2) complies with the principles of "wise use" and "ecologically balanced control"; and

(3) is compatible with any measures resulting from article 2 of the Wild Birds Directive.

This recommendation is given effect in the draft Bill by clause 21(6).

Recommendation 53: we recommend that regulations should be capable of imposing conditions for the purpose of enabling the Secretary of State or Welsh Ministers to monitor the hunting of birds of the species to which the regulation relates.

This recommendation is given effect in the draft Bill by clause 22.

PROHIBITED METHODS OF KILLING, INJURING OR CAPTURING BIRDS

4.113 As discussed in the section above, and as further discussed in Chapter 7, in a number of circumstances the killing or capture of wild birds may be authorised. Separate restrictions, however, apply in connection with the methods and means that may be used for the killing or capture of protected birds.

4.114 Particular methods of killing, injuring or capturing wild birds are generally prohibited for two, often overlapping reasons. First, certain methods of killing or capture are prohibited primarily for conservation reasons. Certain methods of killing or capture, for instance, are indiscriminate and capable of having significant adverse effects on the local distribution or abundance of certain protected species. Secondly, methods of killing or capture are sometimes prohibited primarily for animal welfare reasons, on the basis that they may cause undue suffering.[66]

4.115 Currently most prohibited methods of killing or capturing wild birds in domestic legislation reflect the protection provisions of the Bern Convention and the Wild Birds Directive.[67] As the primary aim of those instruments is to ensure the conservation of particular animals or plants, most relevant prohibitions under them are aimed at preventing the use of methods and means that may have negative impacts on the conservation status of the protected species concerned. The use of bird lime, for instance, is not primarily prohibited because it is a painful way to bring about the end of a wild bird's life but because it could equally kill a bird of a target species and a bird of an endangered species. That said, and the use of limes is a good example, the conservation imperative of those prohibitions also has welfare benefits.

[66] The Animals (Cruel Poisons) Act 1962, for instance, empowers the Secretary of State or Welsh Ministers to prohibit the use of specified poisons if satisfied that a poison cannot be used for destroying animals without causing undue suffering.

[67] Bern Convention, art 8 and appendix 4; Directive 2009/147/EC, art 8 and annex 4.

4.116 The current list of prohibited methods of killing or capture of wild birds and game birds in domestic law is located in section 5 of the Wildlife and Countryside Act 1981.[68] In Chapter 2 we suggested that the current regulatory regime in connection with prohibited methods lacked the necessary flexibility to accommodate future preferences in connection with conservation or animal welfare standards. As a result, we made recommendations to ensure that the new regulatory framework will be flexible enough to accommodate future policy preferences. We recommended, in particular, that the list of prohibited methods of killing or capture should be regularly reviewed and capable of being updated by order for any reason.

4.117 In this section our recommendations are primarily aimed at ensuring that the language and structure of the new domestic regulatory regime will be in line with the UK's international and EU obligations in connection with prohibited methods of killing or capture.

Bern Convention

4.118 Article 8 of the Bern Convention provides that:

> In respect of the capture or killing of wild fauna species specified in appendix 3 and in cases where, in accordance with article 9, exceptions are applied to species specified in appendix 2, contracting parties shall prohibit the use of all indiscriminate means of capture and killing and the use of all means capable of causing local disappearance of, or serious disturbance to, populations of a species, and in particular, the means specified in appendix 4.

4.119 Prohibited means of killing or capturing wild birds specified in appendix 4 include traps, snares,[69] nets, limes, hooks, live birds used as decoys which are blind or mutilated, tape recorders, electrical devices capable of killing and stunning, artificial light sources, devices for illuminating targets, mirrors and other dazzling devices, sighting devices for night shooting, explosives, poison and poisoned or anaesthetic bait, semi-automatic or automatic weapons with a magazine capable of holding more than two rounds of ammunition, motor vehicles in motion and aircraft.

Wild Birds Directive

4.120 In line with the international obligations of the European Union under the Bern Convention, article 8(1) of the Wild Birds Directive provides that

> in respect of the hunting, capture or killing of birds under the Directive, member states shall prohibit all means, arrangements or methods used for the large scale or non-selective capture or killing of birds or capable of causing the local disappearance of [wild birds of a protected] species, in particular those listed in annex 4(a).

[68] As discussed at para 4.9 of this Chapter, for the purpose of s 5 of the Wildlife and Countryside Act 1981 the expression "wild bird" is defined as including "game birds" (Wildlife and Countryside Act 1981, s 27(1)).

[69] Except for *Lagopus* north of latitude 58° N.

4.121 The specified methods for the capturing or killing of wild birds to be prohibited under article 8(1) are, broadly speaking, in line with the list of prohibited methods under appendix 4 to the Bern Convention.[70]

4.122 Article 8(2) further requires member states to prohibit hunting from aircraft, motor vehicles and "boats driven at a speed exceeding five kilometres per hour".[71]

Domestic legislation

4.123 As mentioned at the beginning of this section, in domestic law the prohibited means of capturing, killing or injuring "wild birds" and "game birds" are listed under section 5 of the Wildlife and Countryside Act 1981.

4.124 Section 5(1)(a) prohibits the setting in position of a number of listed articles that are of a nature and so placed "as to be calculated to cause bodily injury to any wild bird [or game bird] coming into contact therewith". Listed articles include traps (including snares and spring traps), hooks and lines, any electrical device for killing, stunning or frightening and any poisonous, poisoned or stupefying substance.[72]

4.125 Section 5(1)(b) further prohibits the use, for the purpose of killing or taking any wild bird or game bird of any article mentioned in section 5(1) and of any net, baited board, bird-lime or any substance of a like nature to bird-lime.[73]

4.126 Section 5(1)(c) prohibits, for the purpose of killing or taking any wild bird or game bird, the use of any bow or crossbow, any explosive other than ammunition for a firearm, any automatic or semi-automatic weapon, shotguns of which the barrel has an internal diameter at the muzzle of more than one and three-quarter inches, any device for illuminating a target or any sighting device for night shooting, any form of artificial lighting or any mirror or other dazzling device and any gas, smoke or chemical wetting agent.

4.127 Section 5(1)(d) prohibits the use, as a decoy, of any sound recording or any live bird or other animal whatever which is tethered, or which is secured by means of braces or other similar appliances, or which is blind, maimed or injured.

4.128 Section 5(1)(e) further prohibits the use of any mechanically propelled vehicle in immediate pursuit of a wild bird for the purpose of killing or taking that bird.

[70] See Directive 2009/147/EC, annex 4.

[71] Directive 2009/147/EC, annex 4, further provides that "on the open sea, member states may, for safety reasons, authorise the use of motor-boats with a maximum speed of 18 kilometres per hour. Member states shall inform the Commission of any authorisations granted."

[72] The use of poison for the purpose of killing any game bird is also prohibited under section 3 of the Game Act 1831.

[73] The Protection of Birds Act 1954 contained virtually identical provisions to ss 5(1)(a) and 5(1)(b) of the Wildlife and Countryside Act 1981. In *Robinson v Whittle*, the High Court clarified in relation to s 5(1)(b) of the Protection of Birds Act 1954, that it is the placing or operation of the prohibited article which constitutes the offence, not the killing of the bird resulting from the use of that prohibited article (*Robinson v Whittle* [1980] 1 WLR 1476, 1481 by Donaldson LJ).

Discussion

Scope of the prohibition under the new framework

4.129 Under the Wildlife and Countryside Act 1981, methods and means prohibitions currently apply to game birds, including captive-bred game birds.

4.130 In line with the discussion at the beginning of this Chapter, we have concluded that the same approach should be replicated in the new framework. Methods and means prohibitions under the new framework, therefore, should apply to:

(1) wild birds (excluding captive-bred birds) of a species falling within the scope of article 1 of the Wild Birds Directive;

(2) common pheasant and Canada geese;

(3) wild birds (excluding captive-bred birds) falling outside the scope of article 1 that have been expressly listed by the Secretary of State or Welsh Ministers; and

(4) game birds.

Mental element

4.131 Section 5 of the Wildlife and Countryside Act 1981 prohibits the "use" of prohibited methods for the purpose of killing or taking a protected wild bird and, as a separate offence, the "setting in position" of a limited number of items of such a nature and so placed as to be calculated to cause bodily injury to a protected wild bird.

4.132 Article 8 of the Wild Birds Directive requires member states to prohibit the use of prohibited methods and means "in respect of the hunting, capture or killing of birds under [the] Directive". As discussed in Chapter 3, the capture or killing of wild birds under the Wild Birds Directive is not only prohibited when carried out intentionally but also when carried out "deliberately" – in line with the Court of Justice's interpretation of the word "deliberate" in *Commission v Spain*.[74]

4.133 As a result, we have concluded that the required mental element in connection with the use of indiscriminate methods of killing or capture should be in line with the mental element required for convicting a person for the "deliberate" killing or capture of a wild bird.

Article 8 of the Wild Birds Directive

4.134 In line with article 8 of the Wild Birds Directive, article 15 of the Habitats Directive requires member states to prohibit the use of "all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of [protected species]".

4.135 Article 15 of the Habitats Directive is currently transposed by regulation 43(2)(c) of the Conservation of Habitats and Species Regulations 2010, which generally prohibits the use, for the purpose of killing or capturing any animal of a protected

[74] Case C-221/04 *Commission v Spain* [2006] ECR I-4515.

species, of

> any […] means of capturing or killing which is indiscriminate and capable of causing the local disappearance of, or serious disturbance to, a population of any species of animal listed in schedule 4 or any European protected species of animal.

4.136 Regulation 43(2)(c) was introduced as a result of the Court of Justice's ruling in *Commission v United Kingdom*. In that ruling the Court of Justice held that the failure to transpose expressly the general prohibition on use of all indiscriminate means of capturing or killing protected species constituted a breach of article 15 of the Habitats Directive, despite the fact that the lists of specifically prohibited methods in domestic legislation could be updated by order.[75]

4.137 Currently the general prohibition in article 8 of the Wild Birds Directive on the use of any method which is indiscriminate or capable of causing the local disappearance of the population of a species falling within the scope of article 1 of the Directive is not expressly transposed in domestic law. Article 8 of the Wild Birds Directive uses almost identical wording to article 15 of the Habitats Directive, and both obligations derive from article 8 of the Bern Convention. We have concluded, therefore, that the failure to expressly transpose the general prohibition under article 8 in domestic law would be almost certainly considered a breach of article 8 of the Wild Birds Directive for the reasons explained in *Commission v United Kingdom.*

4.138 Under the new framework, as a result, there should be a general prohibition of the use of any method of killing or capture that is indiscriminate or capable of causing serious disturbance, or having a significant effect on the distribution or abundance of the local population of protected species of birds.

4.139 It is worth noting that we do not think that the transposition of this general obligation is in itself sufficient to give effect to article 8 of the Wild Birds Directive clearly and effectively. It may not always be clear whether a method which is not expressly listed in domestic legislation is indiscriminate or capable of causing the local disappearance of a protected species. In line with the recommendations in Chapter 2, we have concluded that the transposing of this general prohibition should not absolve the competent authorities from periodically reviewing the lists of specifically prohibited methods and means, with a view to ensuring effective compliance with the general obligation under article 8 of the Wild Birds Directive.

Expressly prohibited methods and means

4.140 Section 5 of the Wildlife and Countryside Act 1981 prohibits a number of methods that are not expressly covered by appendix 4 to the Bern Convention and annex 4 to the Wild Birds Directive. In this context, it is important to keep in mind that the lists of prohibited methods under appendix 4 to the Bern Convention and annex 4 to the Wild Birds Directive are non-exhaustive. The key obligation upon member states, in fact, is to prohibit any indiscriminate method used for the large-scale or non-selective capture or killing of birds or capable of causing the local disappearance of a species. We have concluded, therefore, that any method

[75] Case C-6/04 *Commission v United Kingdom* [2005] ECR I-9017*,* [94-98].

prohibited under domestic law that is not expressly listed in the relevant lists of prohibited methods under the Bern Convention and the Wild Birds Directive should not be regarded as "gold-plating" the UK's international or EU obligations.

4.141 In general terms, therefore, the list of prohibited methods under the new framework should include all methods prohibited under the Bern Convention, the Wild Birds Directive and the 1981 Act. For this reason, partial overlaps between methods prohibited under international and EU law, or between external obligations and domestic law, have been generally resolved in favour of the broadest prohibition. The two most relevant examples of this approach are discussed below.

POISON AND STUPEFYING OR ANAESTHETIC SUBSTANCES

4.142 Section 5(1) of the 1981 Act prohibits the use of "poisonous, poisoned or stupefying" substances in connection with the killing or capture of a protected bird. This is, broadly speaking, in line with the Bern Convention's prohibition on the use of "poisons", as well as "poisoned" or "anaesthetic" bait. Annex 4 to the Wild Birds Directive, on the other hand, merely prohibits the use of "poisoned" or "anaesthetic" bait.

4.143 In line with the approach to transposition that we have adopted in this context, we have concluded that the schedule of prohibited methods under the new framework should prohibit the use of poison and the use of anaesthetic or stupefying substances. Prohibiting the use of poison is simply an easier way to refer to "poisonous" or "poisoned" substances. As the words "anaesthetic" and "stupefying" do not fully overlap, we have concluded that both should be included. As the word "substance" is broader than "bait" we have concluded that the former should be adopted.

EXPLOSIVES

4.144 The Wild Birds Directive and the Habitats Directive ban the use of "explosives" in connection with the killing or capture of wild birds. Section 5 of the 1981 Act prohibits the use of "any explosive other than ammunition for a firearm". The word "firearm" has the same meaning as in section 57(1) of the Firearms Act 1968, which defines it as including "a lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged".

4.145 We have concluded that the exclusion of "ammunition for a firearm" should be omitted. The expression was probably intended to prevent the unintentional ban of standard cartridges on the basis that they may contain propelling charges. Because "firearm" is defined extremely broadly under the Firearms Act 1968, however, the unintended effect of excluding ammunition for firearms is, essentially, to allow the use of explosives, such as grenades or rockets, whenever they are propelled by a firearm. Our view is that from the general context of the new framework it will be clear to any reader that the word "explosive" does not extend to the propelling charge of a cartridge. The express exclusion of "ammunition for a firearm" is therefore unnecessary.

The use of vehicles in the course of hunting birds

4.146 Article 8(2) of the Wild Birds Directive prohibits "any hunting from the modes of transport and under the conditions mentioned in annex 4(b)". Article 8(2) is

transposed in domestic legislation by section 5(1)(e) of the Wildlife and Countryside Act 1981, which prohibits the use of "any mechanically propelled vehicle in the immediate pursuit of a wild bird for the purpose of killing or taking that bird".

4.147 In this context we have concluded that in terms of ensuring compliance with the Directive, the use of an expression which is closer to the wording of the Directive would be safer than replicating the wording of the existing offence. This is primarily because "immediate pursuit" is not an express requirement of the Directive. We have concluded, therefore, that it should simply be an offence to use a prohibited vehicle "in the course of hunting" protected birds.

4.148 In terms of prohibited vehicles, the Bern Convention prohibits the use of aircraft or motor vehicles in motion. The Wild Birds Directive refers to "aircraft", "motor vehicles", and "boats" driven at a certain speed.

4.149 As regards motor vehicles, we have adopted the Bern Convention's approach, on the basis that it is obvious that the purpose of the prohibition is not to prohibit hunting activities from vehicles that are stationary.

4.150 Prohibited hunting from boats should also only cover boats that are moving, as opposed to boats that are anchored or are merely drifting. We have concluded, however, that the specific speed limits prescribed by the Directives could be regulated more appropriately by means of general licences.[76]

Recommendations

Recommendation 54: we recommend that the list of prohibited methods giving effect to article 8 of the Wild Birds Directive and article 8 of the Bern Convention should apply to "wild birds", the common pheasant and Canada goose, other birds that have been specifically listed by the Secretary of State or Welsh Ministers and "game birds".

This recommendation is given effect in the draft Bill by clause 5(4).

Recommendation 55: we recommend that a person should be guilty of an offence if he or she used a prohibited item or substance, or carried out a prohibited activity for the purpose of or in connection with killing, injuring or capturing a protected bird. In line with the definition of "deliberate", a person should also be guilty of an offence if

(1) His or her actions presented a serious risk to protected birds unless reasonable precautions were taken and he or she was aware that that was the case, but failed to take reasonable precautions.

(2) His or her actions presented a serious risk to protected birds

[76] The main reason for this is that whilst the Wild Birds Directive only prohibits hunting from boats driven at a speed exceeding five kilometres per hour, it also provides that member states may, for safety reasons, authorise the use of motor boats with a maximum speed of 18 kilometres per hour in the open sea. In such cases, member states should inform the Commission for any authorisation granted. Given the complexity of this obligation, we have taken the view that a class or general licence would be a more flexible and appropriate mechanism to regulate the speed of boats used in the course of hunting wild birds.

whether or not reasonable precautions were taken and he or she was aware that that was the case.

This recommendation is given effect in the draft Bill by clause 5(3).

Recommendation 56: we recommend that the use of a device which is indiscriminate or capable of having a significant effect on the abundance of, or causing serious disturbance to, the population of a protected bird species in the area in which it is used should constitute a stand-alone offence.

This recommendation is given effect in the draft Bill by clause 5(2)(b).

Recommendation 57: we recommend that the list of prohibited methods under the new framework should reflect and consolidate the lists in annex 4 of the Wild Birds Directive, appendix 4 to the Bern Convention and section 5 of the Wildlife and Countryside Act 1981 by giving precedence, as a general rule, to the most stringent formulation of the prohibition.

This recommendation is given effect in the draft Bill by clause 5(2)(a) and schedule 4.

SECONDARY ACTIVITY PROHIBITIONS

4.151 The aim of secondary activity prohibitions is to regulate activities that constitute an important driver of certain direct interferences with wild birds: the possession or sale of protected birds (whether dead or alive), eggs of protected birds and anything derived from those birds. The regulation of secondary activities, therefore, constitutes a key part of the protective regime for wildlife, as it seeks to control the source of many unlawful activities that negatively affect populations of protected birds.

4.152 As in the context of primary activity and methods and means prohibitions, the domestic regulation of secondary activity prohibitions in connection with wild birds is strongly influenced by the requirements of the Wild Birds Directive. The influence of EU law on the domestic regulation of secondary activity prohibitions, however, is not confined to the provisions of the Wild Birds Directive. As the Wild Birds Directive authorises trade in a number of bird species across the EU, the free movement of goods principles under the EU Treaties also come into play.[77]

4.153 The international prohibitions on trade in certain endangered species of fauna and flora under the Convention on the International Trade in Endangered Species 1973, in addition, constitute one of the central building blocks of the international efforts to tackle wildlife crime worldwide. In that context, it is worth noting that a number of wild bird species protected by the trade, possession and transport prohibitions of the Wild Birds Directive, such as the peregrine falcon, are also protected by trade and movement restrictions giving effect to the requirements of the Convention.

[77] Arts 34-36 TFEU.

4.154 As the Convention is now primarily given effect across the EU through a self-contained set of EU Regulations,[78] we have decided that it should be excluded from the scope of the current project on the basis that there would be virtually no scope for reforming its implementation in England and Wales. For the same reasons, we have also concluded that certain overlaps between the two regimes are inevitable, and could not be removed by domestic law reform.

International and EU law

Bern Convention

4.155 Article 6 of the Bern Convention requires that contracting parties prohibit the possession of eggs of animals listed in appendix 2 and the possession of and internal trade in these animals, alive or dead, including stuffed animals and any readily recognisable part or derivative thereof, where this would contribute to the effectiveness of the primary prohibitions in article 6.

4.156 Article 7 of the Bern Convention, in addition, requires that contracting parties take appropriate legislative and administrative measures to ensure the protection of the wild fauna species specified in appendix 3. Measures to be taken should include the regulation of sale, keeping for sale, transport for sale and offering for sale of live and dead wild animals of those species.

Agreement on the Conservation of Albatrosses and Petrels

4.157 In furtherance of the obligations on the contracting parties to take measures to achieve and maintain a favourable conservation status for albatrosses and petrels, article 3(6) of this Agreement requires contracting parties progressively to implement the action plan in annex 2 to the Agreement. The action plan, among other things, requires contracting parties to prohibit the "use of, and trade in, albatrosses and petrels or their eggs, or any readily recognisable parts or derivatives thereof".

Wild Birds Directive

4.158 In line with the Bern Convention, article 5 of the Wild Birds Directive requires member states to prohibit the possession of eggs of protected birds, even if empty, and the possession of birds of species "the hunting and capture of which is prohibited".

4.159 In terms of trade restrictions, article 6 of the Wild Birds Directive provides that:

> (1) Without prejudice to paragraphs 2 and 3, member states shall prohibit, for all the bird species referred to in article 1, the sale, transport for sale, keeping for sale and the offering for sale of live or dead birds and of any readily recognisable parts or derivatives of such birds.
>
> (2) The activities referred to in paragraph 1 shall not be prohibited in respect of the species referred to in annex 3, part A, provided that the birds have been legally killed or captured or otherwise legally acquired.

[78] Principally, Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein and Commission Regulation (EC) No 865/2006 laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97.

(3) Member states may, for the species listed in annex 3, part B, allow within their territory the activities referred to in paragraph 1, making provision for certain restrictions, provided that the birds have been legally killed or captured or otherwise legally acquired.

4.160 Article 6(3), in addition requires member states wishing to authorise the trade in birds listed in annex 3, part B to consult the Commission with a view to examining jointly whether the marketing of such species may endanger the conservation status of such birds. If that is the case, the Commission is required to forward a reasoned recommendation to the member state in question stating its opposition to the marketing of the species in question. Should the Commission consider that no such risk exists, it should inform the member state accordingly.

Possession of wild birds and their eggs

Current domestic law

4.161 The prohibition in article 5 of the Wild Birds Directive in relation to the possession of birds and eggs of protected species is given effect in domestic law under sections 1(2), (3) and (3A) of the Wildlife and Countryside Act 1981.

4.162 Section 1(2) makes it an offence to be in possession or in control of any live or dead wild bird, any part of, or anything derived from, such a bird or any egg of a wild bird or part of such an egg.

4.163 A person is not guilty of an offence under section 1(2) above, however, if he or she shows that the bird or egg had not been killed or taken, had been lawfully killed or taken, or the bird, egg or other thing in his possession or control had been lawfully sold (whether to him or any other person).[79]

4.164 By virtue of section 27(1) of the Wildlife and Countryside Act 1981, the possession of species of birds falling within the definition of "game bird", whether "wild" or "captive-bred" is not regulated by the above prohibitions.[80]

Possession offences under the new framework

POSSESSION OF WILD BIRDS AND EGGS: PROHIBITED ACTIVITIES

4.165 In line with the discussion at the beginning of this Chapter, we have concluded that under the new framework the "keeping" prohibition giving effect to articles 5(c) and (e) of the Wild Birds Directive should apply to (live or dead) "wild birds" of a protected species as defined in line with article 1 of the Wild Birds Directive, including any part of such a bird, to anything derived from such a bird and to an egg, or any part of an egg, of such a bird.

4.166 In addition, we have concluded that beside "possession" and "control", the new

[79] Wildlife and Countryside Act 1981, s 1(3). "Lawfully" means without any contravention of (a) Part 1 of the Wildlife and Countryside Act 1981, (b) the Protection of Birds Acts 1954 to 1967 and orders made under those Acts, (c) any other legislation which implements the Wild Birds Directive and extends to any part of the United Kingdom (including areas outside the territorial waters) and (d) the provisions of the law of any member state (other than the United Kingdom) implementing the Wild Birds Directive.

[80] The Game Act 1831, s 3A, only prohibits the possession of game birds "for the purpose of sale".

offence should also prohibit the "transport" of a protected wild bird, in line – as discussed in the next Chapter – with the prohibition giving effect to article 12(2) of the Habitats Directive. There is no reason, in fact, why a person who transports, or arranges the transport of a protected wild bird, should not be liable simply because the relevant bird, at the time it was found, was not, strictly speaking, in possession or in control of the defendant.

RETAINING THE REVERSE BURDEN OF PROOF

4.167 Currently the possession prohibitions under article 5 of the Wild Birds Directive are transposed in domestic law through a reverse burden of proof. In other words, in proceedings for an offence under section 1(2) of the Wildlife and Countryside Act 1981, it is for the defendant to show that the bird (or egg) had not been killed or taken, had been legally killed or taken or otherwise lawfully obtained.

4.168 With regard to the reverse burden imposed on the defendant in proceedings in connection with the possession of a wild bird of a protected species or its eggs, in the consultation paper we provisionally proposed that retaining the reverse burden would be justified for two reasons.[81] First, it is very difficult for the prosecution to prove the provenance of a bird or its eggs. In contrast, the burden on the accused to account for their possession of a protected bird, or egg of a protected bird, is not a heavy one. Secondly, the offence is designed to prevent damaging interferences with the population of wild, and often rare, birds. Reversing the burden on the defendant, we suggested, is a proportionate measure for the effective achievement of that aim.[82]

4.169 In consultation, a minority of stakeholders suggested that this reverse burden may result in the unjust conviction of bird keepers merely because of their inability to prove that the bird in their possession had not been taken from the wild. On balance, we have concluded – in line with the views of the vast majority of stakeholders, including all regulators – that the current reverse burden should be retained. This is because it would be excessively burdensome for the prosecution to gather sufficient evidence to prove that a certain bird, or egg, had been obtained illegally. On the other hand, people legitimately in possession of wild birds or eggs should be capable of demonstrating how they obtained the relevant birds or eggs.

4.170 In line with the discussion earlier in this Chapter,[83] in addition, under the new framework it will be possible for the Secretary of State or Welsh Ministers to issue regulations prescribing tagging, marking or registration requirements. As a bird tagged, marked or registered in accordance with the regulations will be presumed a captive-bred bird, a bird keeper in possession of a bird tagged, marked or registered in accordance with the regulations will have a strong defence in proceedings in connection with the possession of a wild bird.

[81] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 7-11.

[82] In *Kirkland v Robinson* (1987) 151 JP 377, [1987] Criminal Law Review 643, Brown LJ considered such provisions of the Wildlife and Countryside Act 1981 to constitute an "absolute prohibition against the doing of certain acts which undermine the welfare of society".

CUT-OFF DATE FOR POSSESSION OFFENCES

4.171 Before 2004, a person charged with the possession of a wild bird or an egg only had to show that the bird or egg had not been taken in contravention of the Wildlife and Countryside Act 1981. This means that a person had a defence if he or she could show that the egg or bird had been taken or killed, whether lawfully or unlawfully, before 1981.

4.172 After an amendment introduced in 2004 aimed at bringing certain provisions of the Wildlife and Countryside Act 1981 into line with the requirements of the Wild Birds Directive,[84] to establish that a bird or egg in possession of the defendant had been "lawfully" killed or taken from the wild, the defendant now has to demonstrate the lawfulness of any such activity if carried out after 1954. A defendant, in other words, is not guilty of the offence of possessing a wild bird of a protected species or an egg of a wild bird of a protected species if he or she can show that the egg or bird in question had been taken, captured or killed before the Protection of Birds Act 1954 came into force or that the egg or bird in question had been taken, captured or killed in compliance with the provisions of the 1954 or the 1981 Acts.

4.173 We have concluded that the requirement to prove the legality of the killing or taking of a bird or egg after 1954 gold-plates the Wild Birds Directive without providing any conservation benefit and imposes unnecessary burdens on museums or individuals holding historical egg collections.

4.174 As the implementation deadline of the original Wild Birds Directive was 7 April 1981, we have concluded that under the new framework the defendant should not be required to prove that the egg or bird in question had been taken, captured or killed "legally" if these events happened before 7 April 1981 as, in any event, there is no conservation purpose in prohibiting the keeping of eggs taken over 30 years ago.[85] Unlike article 12(2) of the Habitats Directive,[86] the Wild Birds Directive does not in fact require member states to regulate the possession of eggs that have been taken before the implementation date.[87]

POSSESSION OF WILD BIRDS: PERMITTED ACTIVITIES

4.175 As mentioned above, article 5(e) of the Wild Birds Directive prohibits the keeping of "birds of species the hunting and capture of which is prohibited". This means that the keeping of birds of species the hunting or capture of which was in accordance with legislation giving effect to the Wild Birds Directive may be

[83] Para 4.31.

[84] Wildlife and Countryside Act 1981 (England and Wales) (Amendment) Regulations 2004 SI 2004 No 1487, reg 3.

[85] As Part 1 of the Wildlife and Countryside Act 1981 came into force after the implementation date of the Wild Birds Directive (see Wildlife and Countryside Act 1981 (Commencement No 5) Order 1982 SI 1982 No 1217), a defendant should still have to show that any egg collection that took place between 7 April 1981 and 28 September 1982 was lawful under the Protection of Birds Act 1954.

[86] Directive 92/43/EEC, art 12(2).

[87] Defra and the Welsh Government have recently held a public consultation (the consultation ran from 14 October to 9 December 2014) on whether the "pre-1981" defence should be re-introduced.

allowed in domestic legislation.

4.176 We have concluded, therefore, that a person should not be guilty of a possession offence in respect of a live or dead wild bird, part of a bird, or anything derived from a bird if he or she shows that the bird;

(1) had not been killed or captured;

(2) had been lawfully killed or captured in the European territory of a member state to which the Treaty applies;

(3) had been killed or captured in the European territory of a member state to which the Treaty applies before the implementation date of the Wild Birds Directive; or

(4) had been killed or captured otherwise than within the European territory of a member state to which the TFEU applies.

4.177 The first defence replicates section 1(3)(a) of the Wildlife and Countryside Act 1981 and ensures that possessing a feather picked up from the ground, or a wild bird that died of natural causes, does not constitute an offence if the defendant can show that the bird, or bird part, was taken in such circumstances.

4.178 The second defence, in line with sections 1(3)(a) and 1(3A) of the 1981 Act, ensures that a person is not guilty of an offence if he or she can show that the bird in question had been captured or killed in accordance with legislation giving effect to the Wild Birds Directive (whether in England and Wales or in any other European territory of member states to which the Treaty applies). An obvious example is the possession of birds of a huntable species that have been captured or killed outside the close season imposed by domestic legislation.

4.179 The third defence, discussed above, sets a cut-off date for possession offences, on the basis that the Wild Birds Directive does not require member states to regulate the keeping of birds that have been killed or captured before the implementation date of the Directive.

4.180 Because the territorial scope of the Wild Birds Directive is limited to the European territories of member states, and the object and purpose of the Directive is to protect European populations of wild birds, we have also concluded that birds that have been killed or captured outside the European territory of a member state to which the Treaty applies fall outside the scope of the Directive and, as a result, should also fall outside the scope of the new regulatory regime.

4.181 Section 1(3)(b) of the 1981 Act currently makes it a defence to show that the bird in question had been lawfully sold to the defendant. As further discussed below, article 6 of the Directive has the effect that a bird may only be lawfully sold if it was lawfully killed or captured (or killed or captured outside the European territory of a member state to which the Treaty applies or before the implementation date). We have concluded, therefore, that retaining this defence in the new framework would be unnecessary.

POSSESSION OF EGGS OF PROTECTED WILD BIRDS: PERMITTED ACTIVITIES

4.182 In accordance with section 1(3) of the Wildlife and Countryside Act 1981, a person is not currently guilty of an egg possession offence under section 1(2)(b) if he or she shows that the egg (or part of such egg) had not been taken from the wild.

4.183 This defence is in line with the Wild Birds Directive on the basis that article 5(c) only prohibits the keeping of wild birds' eggs taken from the wild. In other words, the taking of an egg that a wild bird has laid in captivity after it was captured is not prohibited by article 5(c) of the Wild Birds Directive. We have concluded, therefore, that this defence should be retained under the new framework, on the basis that it both compliant with the Wild Birds Directive and may have some application in connection with the artificial breeding of huntable birds that have been captured outside the close season.

4.184 For the reasons we have explained in the sections above, we have further concluded that it should be a defence to show that the egg, or part of the egg of a wild bird of a protected species:

(1) had been taken from the wild in the European territory of a member state to which the treaty applies before the implementation date of the Wild Birds Directive; or

(2) had been taken from the wild otherwise than within the European territory of a member state to which the treaty applies.

4.185 Section 1(3) of the Wildlife and Countryside Act 1981 further provides that a person should not be guilty of an offence if he or she shows that the egg:

(1) had been lawfully taken from the wild; or

(2) had been lawfully sold to the defendant.

4.186 We have concluded that those two defences should not be retained, on the basis that they are both unnecessary and potentially in breach of article 5 of the Directive.

4.187 As discussed above, the possession of wild birds that have been hunted or captured in accordance with legislation giving effect to the Wild Birds Directive is impliedly permitted by article 5(e). The possession of eggs, on the other hand, is generally prohibited by article 5(c) unless they have not been taken from the wild. Under article 5(c), in other words, whether the eggs have been taken from the wild lawfully or unlawfully is irrelevant to whether or not the possession of those eggs is authorised by the Directive. It follows that the first defence under section 1(3) of the 1981 Act is not supported by the wording of article 5(c) of the Wild Birds Directive.

4.188 As discussed in the section below, the only eggs of wild birds of a protected species that may be lawfully sold under the new framework are those that have not been taken from the wild (or have been taken from the wild outside the European territory of a member state to which the Treaty applies or before the implementation date). We have concluded, therefore, that retaining a provision

authorising a person to possess an egg of a wild bird that had been lawfully sold to him or her would be unnecessary, as it would require the defendant to show, in any event, that the egg in his possession had not been taken from the wild.

Recommendations

Recommendation 58: We recommend that the "keeping" prohibitions giving effect to articles 5(c) and (e) of the Wild Birds Directive should be drafted by reference to the possession, control or transport of any live or dead "wild bird", common pheasant, Canada goose or other bird that has been specifically listed by the Secretary of State or Welsh Ministers, any part of such a bird, anything derived from such a bird or an egg, or any part of an egg, of such a bird.

This recommendation is given effect in the draft Bill by clause 12.

Recommendation 59: we recommend that a person should not be guilty of a possession offence in respect of a live or dead wild bird, part of a bird, or anything derived from a bird if he or she shows that the bird:

(1) had not been killed or captured;

(2) had been lawfully killed or captured in the European territory of a member state to which the Treaty applies;

(3) had been killed or captured in the European territory of a member state to which the Treaty applies before the implementation date of the Wild Birds Directive; or

(4) had been killed or captured otherwise than within the European territory of a member state to which the Treaty applies.

This recommendation is given effect in the draft Bill by clauses 13(1) and (4).

Recommendation 60: we recommend that a person should not be guilty of a possession offence in respect of an egg of a protected wild bird if he or she shows that the egg:

(1) had not been taken from the wild;

(2) had been taken from the wild in the European territory of a member state to which the treaty applies before the implementation date of the Wild Birds Directive; or

(3) had been taken from the wild otherwise than within the European territory of a member state to which the treaty applies.

This recommendation is given effect in the draft Bill by clauses 13(3) and (4).

Sale of wild birds and their eggs

4.189 Whilst the provisions regulating trade in wild birds under article 6 of the Wild Birds Directive are relatively simple, the domestic regime that regulates that trade is exceptionally difficult to navigate. In domestic legislation express distinctions are

drawn between live and dead birds, wild and captive-bred birds, "game birds" and "wild birds", and different times of the year during which certain birds may be traded. The complexity of the domestic legislation is compounded by the presence of a number of general licences aimed, in part, at addressing problems with the primary legislation.

Current domestic legislation: sale of live birds and eggs

4.190 Section 6(1)(a) of the Wildlife and Countryside Act 1981 makes it an offence to sell,[88] offer or expose for sale, or have in one's possession or transport for the purpose of sale, any live wild bird other than a bird included in part 1 of schedule 3, or an egg of a wild bird or any part of such an egg.[89]

4.191 Section 6(1)(b) of the Wildlife and Countryside Act 1981 provides that a person shall also be guilty of an offence if he or she publishes or causes to be published any advertisement[90] likely to be understood as conveying that he buys or sell, or intends to buy or sell, any of the above things.

4.192 According to section 6(5) of the Wildlife and Countryside Act 1981, "part 1 of schedule 3" is a reference to any bird included in that part which:

(1) was bred in captivity;[91]

(2) has been ringed or marked in accordance with regulations made by the Secretary of State or Welsh Ministers;[92] and

(3) has not been lawfully released into the wild as part of a repopulation or reintroduction programme.

4.193 In sum, the prohibitions in sections 6(1)(a) and (b) of the Wildlife and Countryside Act 1981 apply to all live birds or eggs of a species ordinarily resident in or a visitor to the European territory of a member state except poultry and game. They do not apply to birds of those species listed in part 1 of schedule 3 which were bred in captivity and ringed or marked.[93] They apply, however, to birds of the species listed in part 1 of schedule 3 that have not been ringed or marked in accordance with the 1982 Regulations.

[88] According to s 27 of the Wildlife and Countryside Act 1981, "sale" includes "hire, barter and exchange and cognate expressions shall be construed accordingly".

[89] The current definition of "wild bird" in s 27 of the Wildlife and Countryside Act 1981 includes captive-bred birds (unless expressly excluded) and excludes game birds (except for ss 5 and 11 of the 1981 Act).

[90] According to s 27 of the Wildlife and Countryside Act 1981, "advertisement" includes a catalogue, a circular and a price list.

[91] According to s 27(2) of the Wildlife and Countryside Act 1981, a bird shall not be treated as bred in captivity for the purposes of Part 1 of the Wildlife and Countryside Act 1981 unless its parents were lawfully in captivity when the egg was laid.

[92] The relevant regulations are the Wildlife and Countryside (Ringing of Certain Birds) Regulations 1982 SI 1982 No 1220, which require that birds listed in part 1 of schedule 3 to the Wildlife and Countryside Act 1981 be ringed according to specified ring sizes set out in the regulations and supplied by two listed suppliers (both based in England).

[93] According to s 27(2) of the Wildlife and Countryside Act 1981, a bird shall not be treated as bred in captivity for the purposes of Part 1 of the Wildlife and Countryside Act 1981 unless its parents were lawfully in captivity when the egg was laid.

4.194 General Licence 18 (in England) and General Licence 010 (in Wales), nevertheless, authorise the trade in virtually any other live captive-bred bird when the conditions specified in the licence are satisfied.[94] For many species, with the exception of those listed in appendix 2 to General Licence 18 (in England) and General Licence 010 (in Wales), the individual may only be traded if ringed with an individually numbered metal close ring which cannot be removed from the bird when the bird's leg is fully grown. The ring also needs to comply with the ringing requirements of the state within which the bird was bred. The obligation to comply with the ringing requirements of the state where the bird was bred, however, does not appear to displace the requirement for a continuous closed ring which complies with the technical specifications of the licences.

4.195 To avoid any interference with EU Regulations giving effect to the Convention on the International Trade in Endangered Species, the above general licences clarify that nothing in the licence authorises the trade in species listed in annex A to Council Regulation (EC) No 338/97,[95] unless a certificate for sale under article 10 of that Regulation has been obtained. Bird species listed in annex A to Council Regulation (EC) No 338/97 include, for instance, the peregrine falcon (*Falco peregrinus*).

4.196 In addition, General Licence 18 (in England) and General Licence 010 (in Wales) do not apply to those species listed in appendix 1 to the two licences. Appendix 1 includes the mute swan (*Cygnus olor*), for conservation reasons, and the ruddy duck (*Oxyura jamaicensis*) and Egyptian goose (*Alopochen aegyptiacus*), to prevent their spread.

Current domestic legislation: sale of dead birds

4.197 Section 6(2)(a) of the Wildlife and Countryside Act 1981 makes is an offence to sell, offer or expose for sale,[96] or have in one's possession or transport for the purpose of sale, any dead wild bird other than a bird included in part 2 or 3 of schedule 3, or any part of, or anything derived from, such a wild bird. Part 2 of schedule 3 lists the species of dead birds that may be sold all year round. Part 3 of schedule 3, on the other hand, lists the species of dead birds that may only be sold between 1 September and 28 February.[97]

4.198 Section 6(2)(b) of the 1981 Act provides that a person shall also be guilty of an offence if he or she publishes or causes to be published any advertisement[98] likely to be understood as conveying that he buys or sell, or intends to buy or sell, any of the above things.

[94] A captive-bred bird, for the purposes of General Licence GL–18 (in England) and General Licence GL–012 (in Wales), is one whose parents were lawfully in captivity when the egg from which it was hatched was laid. Documentary evidence is required to support the establishment that an individual was bred in captivity.

[95] Regulation on the protection of species of wild fauna and flora by regulating trade therein (EC) No 338/97 Official Journal L61 of 3.3.1997, p 1.

[96] According to s 27 of the Wildlife and Countryside Act 1981, "sale" includes "hire, barter and exchange and cognate expressions shall be construed accordingly".

[97] Wildlife and Countryside Act 1981, s 6(6).

[98] According to s 27 of the Wildlife and Countryside Act 1981, "advertisement" includes a catalogue, a circular and a price list.

4.199 Despite the above prohibitions, General Licence 17 and General Licence 012 in Wales authorise, subject to certain conditions, the trade at all times of any dead bird of a protected species, except dead birds the sale of which is already authorised in primary legislation, the barnacle goose (*Brancta leucopis*) and white-fronted goose of the Greenland race (*Anser albifrons flavostis*).

4.200 This licence only applies to the sale of small numbers of dead birds, or any part or product of such dead birds that:

> (1) were bred in captivity (with documentary evidence showing that they were bred in captivity accompanying any sale);
>
> (2) were taken from the wild in accordance with legal provisions in force in the United Kingdom (with documentary evidence showing that they were legally taken from the wild accompanying any sale); or
>
> (3) are listed in Annex A of Council Regulation (EC) No 338/97, and, where appropriate, an Article 10 certificate has first been obtained.[99]

Current domestic legislation: sale of game birds

4.201 The trade in game birds[100] is regulated by section 3A of the Game Act 1831, which makes it an offence to sell, offer or expose for sale, or have in one's possession or transport for the purpose of sale any game bird taken or killed in circumstances which constitute an offence under the Game Act 1831, the Night Poaching Act 1828, the Poaching Prevention Act 1862 or part 1 of the Wildlife and Countryside Act 1981 and which the person concerned knows or has reason to believe has been so taken or killed. In other words, a person who sells a game bird (whether wild or captive-bred) is not guilty of an offence unless the prosecution shows that they had been illegally captured or killed and the person knew or had reason to believe that the bird had been taken in circumstances that constitute an offence under domestic legislation.

Problems with domestic legislation

4.202 As anticipated above, the current regulatory regime is, in our view, excessively complex and difficult to access, in that it unnecessarily creates a large number of categories of birds to which different prohibitions apply in primary legislation. The prohibitions in primary legislation, moreover, have been substantially re-shaped by two sets of general licences. The current sets of general licences, in essence, authorise the trade – subject to certain conditions – of all captive-bred birds and all dead birds the trade of which is prohibited by primary legislation. This excessive reliance on general licences to address the excessively stringent conditions of the underlying legislative regime, in our view, is a clear indication that the primary legislation is not fit for purpose.

4.203 The current regulatory framework, in addition, presents a number of problems in

[99] To rely on General Licence 17 (in England) and General Licence 012 (in Wales), sales have to be recorded for a minimum of two years and returns made to Natural England (in England) or Natural Resources Wales (in Wales).

[100] Birds of game to which the above subsection applies are pheasants, partridges, grouse, heath or moor game, black game (Game Act 1831, s 2).

terms of compliance with EU law.

COMPLIANCE WITH ARTICLE 6 OF THE WILD BIRDS DIRECTIVE

4.204 It appears that domestic law does not appropriately give effect to the obligations in article 6 of the Directive for a number of technical reasons.

4.205 First, whilst the sale of game birds – in line with article 6(2) of the Directive – is authorised as long as the birds have been lawfully killed or captured,[101] the sale of live wild mallards (*Anas platyrhynchosi)* and common woodpigeons (*Columba palumbus*) is generally prohibited by section 6(1) of the Wildlife and Countryside Act 1981 despite the express obligation on member states to authorise the sale of such bird species unless they have been illegally captured or killed.[102]

4.206 Secondly, the sale of dead wild birds listed in part 2 or 3 of schedule 3 is authorised regardless of whether the bird in question was legally killed or captured. This is arguably at odds with articles 6(2) and 6(3) of the Wild Birds Directive, which provide that the trade in live or dead wild birds of the species listed in part A of annex 3 must be authorised – and the trade in live or dead wild birds of the species listed in part B of annex 3 may be authorised – provided that the birds have been legally killed or captured, or otherwise lawfully acquired.

4.207 Lastly, the general licences that authorise the sale of certain dead wild birds must currently be issued under section 16(4) of the Wildlife and Countryside Act 1981. As discussed in Chapter 7 below, section 16(4) of the Act does not comply with the conditions of the derogation regime established in article 9(1) of the Wild Birds Directive in that it does not require the licensing authority to be satisfied that there is "no other satisfactory solution" and that the licence is only granted on the basis of one of the reasons listed in article 9(1) of the Wild Birds Directive.

4.208 In this context, the failure to correctly transpose article 9(1) of the Wild Birds Directive is linked to the fact that sections 6(1) and (2) of the 1981 Act control trade in a broader category of birds than are protected by the Wild Birds Directive. While the licensing regime in section 16(4) may be used to authorise trade in captive-bred birds which – as was established in *Vergy* – fall outside the scope of the Wild Birds Directive, the same licensing regime should not be used to authorise the trade in wild specimens.

COMPLIANCE WITH ARTICLE 34 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

4.209 As discussed at the beginning of this Chapter, in *Vergy* the Court of Justice ruled that captive-bred birds are excluded from the ambit of the Wild Birds Directive.[103] The Court of Justice, however, went on to hold that, absent action by the EU, member states were able to regulate the trade in captive-bred birds, provided that the domestic measures did not amount to a quantitative restriction on imports or

[101] Game Act 1831, s 3A.

[102] Directive 2009/147/EC, art 6(2).

[103] See paras 4.18 to 4.24.

exports or a measure having equivalent effect to a quantitative restriction.[104]

4.210 Quantitative restrictions on import and export of goods between member states are prohibited by articles 34 and 35 TFEU, unless they are justified on the basis of one of the grounds listed in article 36. According to article 36, however, such prohibitions or restrictions may not, in any event, constitute a means of arbitrary discrimination, or a disguised restriction on trade between member states. Quantitative restrictions, therefore, must be proportionate to the aim sought. The interest being protected should not, in other words, be capable of being "as effectively protected by measures which do not restrict intra-Community trade so much".[105]

4.211 The current law controls the marketing of both wild and captive-bred birds, justifying the intervention into the market in captive-bred birds on the basis that that market can be used to pass off birds illegally taken from the wild. In principle, therefore, it could be argued that there is a valid conservation reason for controlling the market in captive-bred birds.

4.212 The way the regime is currently regulated in practice by the general licences described above, however, raises certain concerns. For instance, section 6(5) of the Wildlife and Countryside Act 1981 only authorises trade in live birds listed in part 1 of schedule 3 to the 1981 Act that comply with UK ringing requirements. Since the ring must be fitted while the bird is very young, probably before a customer has been identified, this makes it very difficult to sell in England and Wales birds bred in captivity in another member state.[106] General Licence 18 (in England) and General Licence 010 (in Wales), which only apply to certain live birds not listed in schedule 3, require a ring of a certain specification, which must also meet the ringing requirements of the country in which the bird was bred. This potentially causes problems if another member state does not have ringing requirements, or has requirements that are incompatible with the specification in the General Licences.[107]

4.213 Similarly, General Licence 17 (in England) and General Licence 012 only authorise the trade in dead birds lawfully taken from the wild in the UK, thus requiring the sale of birds lawfully taken in the wild in other member states to be authorised on a case by case basis by individual licences.

[104] Case C-149/94 *Didier Vergy* ECR I-299, [14]. Quantitative restrictions on import and export of goods between member states are prohibited by articles 34 and 35 TFEU, unless they are imposed on the basis of the grounds listed in article 36. According to article 36, however, such prohibitions may not constitute a means of arbitrary discrimination, or a disguised restriction on trade between member states.

[105] Case C-104/75 *De Peijper* [1976] ECR 613, [17].

[106] This is particularly difficult for birds listed under part 1 of sch 3 to the Wildlife and Countryside Act 1981. The Wildlife and Countryside (Ringing of Certain Birds) Regulations 1982 SI 1982 No 1220, in fact, provide that authorised rings for birds listed in part 1 of sch 3 may only be obtained from two British authorised suppliers.

[107] As discussed in the consultation paper "Captive-bred birds: changing how we regulate trading in England, Scotland and Wales" published by the Defra, the Welsh Government and the Scottish Government in January 2015, a review of the regulation of the trade in live captive-bred birds is under way for the purpose of addressing concerns that the current strict approach to ringing requirements constitutes an unlawful barrier to the import of birds bred in other EU member states.

Reform of domestic legislation

4.214 Currently, domestic legislation expressly prohibits the sale of certain captive-bred birds despite the fact that, as the Court of Justice ruled in *Vergy*, captive-bred birds fall outside the scope of the Wild Birds Directive. Primary legislation also expressly prohibits the sale of other wild birds except game birds and certain dead wild birds. The effect of General Licences 17 and 18 (in England) and General Licences 010 and 012 (in Wales), however, is that the trade in most live or dead captive-bred birds is currently authorised, but subject to conditions that birds from other member states may well not be able to satisfy.

4.215 We accept the basic conservation imperative that requires the boundary between captive-bred birds and birds from the wild to be policed. Our view, however, is that the most straightforward way of policing this boundary is to control the market in birds from the wild and their eggs rather than the market in captive-bred birds. As the Court of Justice pointed out in *Vergy*, the negative impacts on conservation created by the trade in birds of protected species derive from the trade in birds from the wild, not from the trade in captive-bred birds.[108] It follows that the only reason why the market in captive-bred birds should be controlled is because, unless documentary or ringing requirements are imposed on traders, it would often be impossible for the regulators to distinguish between captive-bred birds and protected wild birds.

4.216 In line with the discussion at the beginning of this Chapter, under our new recommended framework any bird which has not been ringed, marked or registered in accordance with regulations issued by the Secretary of State or Welsh Ministers will be presumed to be a wild bird. A bird that has been ringed, marked or registered in accordance with regulations, on the other hand, will be presumed to be a captive-bred bird unless the prosecution proves that it was not captive-bred and that the defendant knew, or had reason to believe at the time of the alleged offence that the bird was not captive-bred.

4.217 In other words, under the new framework the boundary between the market in captive-bred birds and the market in wild birds will be effectively policed by the presence of a reverse burden of proof on the defendant and the possibility of making regulations, compliance with which would allow the trade in the relevant birds on the ground that they would be presumed to be captive-bred. It follows that the new framework will avoid the cumbersome model of a prohibition of trade in all birds of the protected species subject to exceptions, themselves subject to conditions, for captive-bred birds spread between the primary legislation and licences. This will allow the requirements of article 6 of the Wild Birds Directive to be effectively transposed in a significantly simpler fashion.

Regulating the trade in wild birds and their eggs under the new framework

A GENERAL PROHIBITION ON TRADE IN WILD BIRDS

4.218 In line with article 6(1) of the Wild Birds Directive, we have concluded that under the new framework sections 6(1)(a) and 6(2)(a) of the Wildlife and Countryside Act 1981 should be replaced by a general prohibition making it an offence to sell, offer for sale, expose for sale, be in possession for the purpose of sale any wild

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

bird of a protected species, any part of such a bird or anything derived from such a bird.

4.219 In line with the discussion at the beginning of this Chapter, "wild bird" should exclude any bird which was captive-bred, unless lawfully released into the wild as part of a re-population or re-introduction programme. In addition, in proceedings for an offence, a bird of a protected species should be presumed to be a wild unless the defendant shows that the bird was captive-bred, or was ringed, marked or registered in accordance with regulations issued by the Secretary of State or Welsh Ministers.

THE REGULATION OF THE TRADE IN WILD BIRDS LISTED IN PART A OF ANNEX 3 TO THE WILD BIRDS DIRECTIVE

4.220 To give effect to article 6(2) of the Wild Birds Directive, we have concluded that under the new framework the trade in birds listed in part A of annex 3 to the Wild Birds Directive should not be prohibited, unless the bird, parts of bird or anything derived from the bird in question was killed, captured or acquired illegally.

4.221 As discussed above, article 6(2) of the Directive is currently given effect by section 3A of the Game Act 1831. As pointed out above, the only problem with the current transposition of article 6(2) is that the trade in two bird species listed in part A of annex 3 is currently prohibited by section 6(1) of the Wildlife and Countryside Act 1981.

4.222 We have concluded, therefore, that section 3A of the Game Act 1831 should be replicated under the new framework by providing that the general prohibition of trade in wild birds does not apply to species listed in part A of annex 3 to the Wild Birds Directive, unless the prosecution shows that:

(1) the bird had been killed or captured in contravention of domestic legislation or the law of other member states giving effect to the Wild Birds Directive and the defendant knew or had reason to believe that this was the case; or

(2) the bird had been sold to the defendant in the European territory of a member state in contravention of domestic legislation or the law of other member states giving effect to the Wild Birds Directive, and the defendant knew, or had reason to believe that the sale was unlawful.

4.223 We have also concluded that "game birds" that have been captive-bred should also be excluded from the general prohibition, on the basis that – for the reasons explained at the beginning of this Chapter – certain primary activity prohibitions under the new framework apply to game birds regardless of their "wild" or "captive-bred" status.

WILD BIRDS LISTED IN PART B OF ANNEX 2 TO THE DIRECTIVE

4.224 Section 6(2) of the 1981 Act currently authorises the trade in a number of dead wild birds that are listed in part B of annex 3 to the Wild Birds Directive. Similarly, section 3A of the Game Act 1831 authorises the sale of the black grouse (*Tetrao tetrix britannicus)* – a species listed in part B of annex 3 to the Wild Birds Directive – unless it was killed or captured in circumstances that constitute an offence under domestic law.

4.225 Article 6(3) of the Wild Birds Directive allows member states to authorise the sale in birds of species listed in part B of annex 3 to the Directive after consulting the European Commission "with a view to examining jointly with the latter" whether authorising the trade in species listed in part B of annex 3 could adversely affect the conservation status of those species. Article 6(3) further provides that following the consultation the Commission should forward a reasoned recommendation to the relevant member state.

4.226 As we were unable to access sufficient evidence showing that such consultation ever took place in connection with most of the above species, we have concluded that we are not in a position to recommend that the trade in wild birds of such species should continue to be authorised under the new framework. If such consultations did take place or do take place in the future, however, the new framework allows the Secretary of State or Welsh Ministers to authorise the trade in those bird species by scheduling them together with species listed in part A of annex 3 to the Directive.

PROHIBITION ON THE TRADE IN EGGS OF WILD BIRDS

4.227 Section 6(1) of the Wildlife and Countryside Act 1981 expressly prohibits the trade in eggs of wild birds. Article 6 of the Wild Birds Directive, on the other hand, does not refer expressly to the eggs of wild birds.[109]

4.228 In the light of the conservation imperative of the Directive, however, we have concluded that the existing prohibition should be retained. Illegal egg collection is an activity which may be as damaging to conservation as the capture of wild birds for the purpose of sale. Prohibiting the sale of eggs of wild birds that have been taken from the wild is a perfectly reasonable way to tackle the potential economic driver of illegal collection. In addition, because the possession of eggs of wild birds that have been taken from the wild – in line with article 5(c) of the Wild Birds Directive – will be generally prohibited under the new framework, there is no reason why their sale should not also be prohibited, unless expressly authorised by a licence.

ADVERTISING THE SALE OR PURCHASE OF BIRDS OR THINGS THAT MAY NOT BE SOLD

4.229 In line with sections 6(1)(b) and 6(2)(b) of the Wildlife and Countryside Act 1981, we have also concluded that under the new framework it should remain an offence for a person to publish or cause to be published any advertisement likely to be understood as conveying that the person buys or sells or intends to buy or sell things the sale of which is prohibited.

TEMPORAL AND TERRITORIAL RESTRICTION OF THE PROHIBITIONS

4.230 In the light of the temporal and territorial restrictions of the Wild Birds Directive discussed above in the context of the possession prohibitions, we have concluded that a person should not be guilty of an offence of selling a wild bird of a protected species, a part a such a bird, anything derived from such a bird, an

[109] Although article 6(1) refers to "any recognisable parts or derivatives of such birds", our view is that reading that expression as including a reference to eggs would significantly stretch the ordinary meaning of the word "derivative", particularly because section 5(c) of the Wild Birds Directive expressly refers to eggs.

egg, or any part of an egg of such a bird if he or she can show that the bird or egg in question was killed, captured or taken from the wild before the implementation date of the Wild Birds Directive or outside the European territory of a member state to which the TFEU applies.

Recommendations

Recommendation 61: we recommend that the current regulatory regime for controlling the trade in protected bird species and their eggs should cease to expressly prohibit the trade in captive-bred birds. The existing regime should be replaced by a general prohibition making it an offence to sell, offer for sale, expose for sale, be in possession for the purpose of sale any wild bird of a protected species (including "game birds"), any part of such a bird, anything derived from such bird or the egg, or any part of an egg, of such bird.

This recommendation is given effect in the draft Bill by clauses 14(1) and (2).

Recommendation 62: we recommend that the boundary between the market in captive-bred birds and the market in wild birds should be policed by the presence of a reverse burden of proof. Any person involved in trade in birds, in other words, should be presumed to be trading in wild birds unless the bird is ringed, marked or otherwise registered in accordance with regulations made by the Secretary of State or Welsh Ministers.

This recommendation is given effect in the draft Bill by clause 27.

Recommendation 63: we recommend that, in line with section 6(2) of the Wild Birds Directive, the general prohibition on the trade in wild birds should not apply to wild birds (any part of such a bird, anything derived from such bird or the egg, or any part of an egg, of such bird) of a species listed in part A of annex 3 to the Wild Birds Directive, including "game birds", unless the prosecution shows that

(1) the bird had been killed or captured in contravention of domestic legislation or the law of other member states giving effect to the Wild Birds Directive and the defendant knew or had reason to believe that this was the case; or

(2) the bird had been sold to the defendant in the European territory of a member state in contravention of domestic legislation or the law of other member states giving effect to the Wild Birds Directive, and the defendant knew, or had reason to believe that the sale was unlawful.

This recommendation is given effect in the draft Bill by clauses 14(3) to (8).

Recommendation 64: we recommend that a person should not be guilty of an offence of selling a wild bird of a protected species, a part a such a bird, anything derived from such a bird, an egg, or any part of an egg of such a bird if he or she shows that the bird or egg in question was killed, captured or otherwise taken from the wild

(1) before the implementation date of the Wild Birds Directive; or

(2) outside the European territory of a member state to which the TFEU applies.

This recommendation is given effect in the draft Bill by clause 15.

Recommendation 65: we recommend that it should remain an offence for a person to publish or cause to be published any advertisement likely to be understood as conveying that the person buys or sells or intends to buy or sell things the sale of which is prohibited.

This recommendation is given effect in the draft Bill by clause 16.

OTHER PROHIBITIONS IN SECTIONS 6(3), 7 AND 8 OF THE WILDLIFE AND COUNTRYSIDE ACT 1981

4.231 Sections 6(3), 7 and 8 of the Wildlife and Countryside Act 1981 include a number of prohibitions that primarily give effect to domestic policy in connection with the conservation and welfare protection of certain birds.

4.232 Section 6(3) of the Wildlife and Countryside Act 1981 makes it an offence for a person to show or cause or permit to be shown for the purposes of any competition or in any premises in which a competition is being held:

> (a) any live wild bird other than a bird included in part 1 of schedule 3;[110] or
>
> (b) any live bird one of whose parents was such a wild bird.

4.233 Section 7 of the Wildlife and Countryside Act 1981 provides that the possession of certain endangered bird species is prohibited unless the birds are registered and ringed or marked in accordance with regulations. The possession of those birds, in addition, is prohibited if the person in possession of the bird had previously been convicted of certain conservation or animal welfare offences.

4.234 Lastly, section 8 of the Wildlife and Countryside Act 1981 makes it an offence to confine birds in any cage or receptacle which is not sufficient in height, length or breadth to permit the bird to stretch its wings freely. Section 8 also makes it an offence to take part in any event in the course of which captive birds are liberated by hand or by any other means for the purpose of being shot immediately after their liberation.

4.235 As changing the level of protection of species protected for domestic reasons falls outside the scope of the current review, we have concluded that there is no reason why the above prohibitions under sections 6(3) and 7 of the Wildlife and Countryside Act 1981 should not be replicated under the new framework. We have concluded, on the other hand, not to replicate section 8 of the Wildlife and

[110] As discussed above, under section 6(5) of the Wildlife and Countryside Act 1981, "part 1 of schedule 3" is a reference to any bird included in that part which: (a) was bred in captivity; (b) has been ringed or marked in accordance with regulations made by the Secretary of State; and (c) has not been lawfully released into the wild as part of a re-population or re-introduction programme.

Countryside Act 1981 under the Wildlife Bill on the basis that it is unconnected to the protection of wild birds and falls, therefore, outside the scope of the wildlife project.

Recommendations

Recommendation 66: we recommend that the effect of sections 6(3) and 7 of the Wildlife and Countryside Act 1981 should be replicated under the new regulatory regime.

This recommendation is given effect in the draft Bill by clauses 17 and 20.

CHAPTER 5
PROHIBITED CONDUCT: PROTECTION OF WILD ANIMALS

INTRODUCTION

5.1 In this Chapter we make recommendations for the simplification and reform of the existing prohibitions connected with the protection of wild animals.

5.2 In contrast with the current regulatory regime for the protection of wild birds, which is primarily located in Part 1 of the Wildlife and Countryside Act 1981, provisions for the protection of wild animals are scattered across a large number of often inconsistent and overlapping legal instruments. For example, most protected wild animals are currently protected under Part 3 of the Conservation of Habitats and Species Regulations 2010[1] and sections 9 and 11 of the Wildlife and Countryside Act 1981. The 2010 Regulations were made for the sole purpose of giving effect to the UK's obligations under the Habitats Directive. Sections 9 and 11 of the 1981 Act were enacted for the purpose of consolidating existing domestic protection preferences and implementing the UK's international obligations under the Bern Convention. Because of the failure to integrate the two regimes, however, a number of species are currently protected by similar (and sometimes, though not always, identical) provisions under both regulatory frameworks. This makes it difficult for a person to discover what his or her obligations are, what defences he or she could rely on and on what grounds he or she would be able to apply for a wildlife licence.

5.3 A number of other wild animals continue to be protected under species-specific protection regimes, such as the Protection of Badgers Act 1992, the Deer Act 1991 and the Conservation of Seals Act 1970. Some of those protection regimes are the result of private member's Bills; others build upon legislation dating back to the beginning of the twentieth century. It follows that the language and structure of the prohibitions under those Acts are often inconsistent with the more modern and comprehensive regulatory regimes mentioned above.

5.4 In the light of the intricate nature of the current legislative landscape, recommendations in this Chapter are primarily focused on the rationalisation and harmonisation of the current regulatory regime. The aim is to remove unnecessary overlaps and ensure that the new regulatory framework is consistent and, as far as possible, easily accessible to users.

[1] SI 2010 No 490. The 2010 Regulations replaced the Conservation (Natural Habitats and c.) Regulations 1994 SI 1994 No 2716 to give effect to the Court of Justice of the European Union's ruling in Case C-6/04 *Commission v UK* [2005] ECR I-9017.

5.5 Recommendations in this Chapter cover, in particular, the definition of "wild animal", the domestic transposition of the primary activity prohibitions under article 6 of the Bern Convention and article 12 of the Habitats Directive, the harmonisation of the mental element of certain offences, the rationalisation of different disturbance prohibitions, changes to the prohibitions in connection with the use of indiscriminate methods of killing or capturing wild animals and the rationalisation of the current regime regulating the trade in and possession of protected wild animals.

DEFINITION OF "WILD ANIMAL"

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

5.7 As one of the main purposes of this Chapter is the creation of a consistent and accessible regulatory framework incorporating all existing wildlife protection provisions, in this section we explore the extent to which the definition of "wild animal" may be harmonised across the new Wildlife Bill without substantively changing the level of protection that animals of protected species currently enjoy.

The Bern Convention and the Habitats Directive

5.8 Article 1(1) of the Bern Convention and article 2(2) of the Habitats Directive make clear that the underlying purpose of their respective provisions is the conservation of "wild fauna and flora". The species-specific obligations under the two instruments, however, are framed in slightly different terms. Article 6 of the Bern Convention requires member states to take appropriate legislative and administrative measures to ensure the special protection of "wild fauna species". Article 12(1)(a) to (c) of the Habitats Directive, on the other hand, requires member states to prohibit activities interfering with protected animal species "in the wild". Similarly article 12(2) of the Habitats Directive prohibits the possession and trade in specimens "taken from the wild".[2]

Domestic legislation

Conservation of Habitats and Species Regulations 2010

5.9 The Conservation of Habitats and Species Regulations 2010 take a slightly different approach from article 12(1) of the Habitats Directive. Under regulations 41(1) and 43 it is an offence to carry out relevant prohibited activities against "wild animals", rather than animals "in the wild". Regulation 41(6), in addition, provides that unless the contrary is shown, in proceedings for an offence under regulation 41(1) the animal in question will be presumed to have been a wild animal.

[2] Art 12(3) of the Habitats Directive provides that the prohibitions referred to in arts 12(1)(a), (b) and 12(2) apply to all stages of life of the animals to which those sections apply. For the purpose of art 12(2), in addition, "specimen" refers to any animal, alive or dead, any part or derivative thereof, as well as any other goods which appear to be parts or derivatives of animals or plants of those species (art 1(m)).

5.10 As regards secondary activity prohibitions under regulation 41(3), on the other hand, regulation 41(4) of the 2010 Regulations replicates the approach of article 12(2) of the Habitats Directive, providing that paragraph (3) only applies to any live or dead animal of a protected species, or part of an animal, which "has been taken from the wild". Regulation 41(7), in line with regulation 41(6), provides that in any proceedings for an offence under regulation 41(3) where it is alleged that an animal was taken from the wild, it will be presumed that the animal in question was taken from the wild unless the contrary is shown.

5.11 Lastly, in line with article 12(3) of the Habitats Directive, regulation 41(5) provides that paragraphs (1) and (3) apply regardless of the stage of the life of the animal in question. The exact meaning of "wild animal", however, is left undefined.

Wildlife and Countryside Act 1981

5.12 The prohibitions in relation to wild animals under the Wildlife and Countryside Act 1981 consistently apply to "wild animals" of the species listed in schedules 5 and 6. In line with the 2010 Regulations, the 1981 Act provides that in proceedings for an offence, the animal in question is presumed to have been a wild animal unless the contrary is shown.[3] The 1981 Act, in addition, generally defines "wild animal" as "any animal (other than a bird) which is or (before it was killed or taken) was living wild" and specifies that any reference to an animal of any kind includes, unless the context otherwise requires, a reference to an egg, larva, pupa, or other immature stage of an animal of that kind.[4]

Badgers, seals and hares

5.13 The Protection of Badgers Act 1992, the Conservation of Seals Act 1970 and the Game Act 1831 do not expressly distinguish "wild" from "captive" animals. The Protection of Badgers Act 1992, for instance, simply defines badgers to which the prohibitions of the Protection of Badgers Act 1992 as "any animal of the species *Meles meles*".[5]

Deer

5.14 The Deer Act 1991 differs somewhat from the above Acts, in that section 2(3) of the 1991 Act expressly provides that the prohibition of killing or taking deer during the prescribed close season does not apply to deer that are kept by a person, by way of business, "on land enclosed by a deer-proof barrier for the production of meat or other foodstuff or skins or other by-products, or as breeding stock" and that are "conspicuously marked in such a way as to identify them as deer kept by that person". The prohibitions in connection with the killing or taking of deer at night and the use of prohibited methods of killing or capture,[6] on the other hand, apply to any "deer".[7]

[3] Wildlife and Countryside Act 1981, ss 9(6) and 11(5).

[4] Wildlife and Countryside Act 1981, ss 27(1) and 27(3).

[5] Protection of Badgers Act 1992, s 14.

[6] Deer Act 1991, ss 3 and 4.

[7] "Deer" means deer of any species and includes the carcase of any deer or any part thereof; "species" includes any hybrid of different species of deer (Deer Act 1991, s 16).

Discussion

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

5.16 We have taken the view that the approach in the Habitats Directive is anomalous and cannot be replicated in domestic legislation through an effective criminal offence. First, it could create legal uncertainty in relation to species – such as bats – that roost inside premises. Secondly, it would mean that once person A captures an animal of a protected species (whether lawfully or unlawfully), person B could kill the animal without committing a wildlife crime. Those results, in our view, could not possibly accord with the object and purpose of the Bern Convention and the Habitats Directive.

5.17 Regulation 41(1) of the Conservation of Habitats and Species Regulations 2010 transposes article 12(1) by reference to "wild animals" of species protected under annex 4 to the Directive. We are satisfied that this is the only workable transposition of article 12(1) in domestic legislation. The same approach, therefore, should be retained under the new framework.

5.18 In line with our recommendations in connection with the transposition of the Wild Birds Directive, we have concluded that – for the purpose of transposing article 12(1) of the Habitats Directive under the new framework – "wild animal" should be defined in line with the ruling of the Court of Justice of the European Union in *Vergy*.[8] For present purposes, the object and purpose of the Wild Birds Directive is equivalent to the object and purpose of the Bern Convention and the Habitats Directive. It follows that there is no reason why the test to determine whether an animal of a protected species falls within the scope of the Habitats Directive should be different from the test to determine whether a bird of a protected species falls within the scope of the Wild Birds Directive.

5.19 "Wild animal", therefore, should be defined as any animal which was not bred in captivity, or an animal that was bred in captivity which has been lawfully released into the wild as part of a re-population or re-introduction programme. Secondly, an animal should not be considered "captive-bred" unless it was bred in captivity using animals which were lawfully in captivity. This will ensure that a person who has unlawfully captured a protected animal from the wild will not be able to possess or sell its young lawfully.

5.20 In line with article 12(3) of the Habitats Directive, we have concluded that any reference to an animal should include a reference to an animal, other than a bird, at any stage of development.

5.21 In addition, for the reasons explained in Chapter 4, in proceedings for an offence giving effect to article 12(1) of the Habitats Directive, an animal of a protected species should be presumed to be a wild animal unless the contrary is shown.

[8] Case C-149/94 *Didier Vergy* [1996] ECR I-299, discussed at para 4.8 above.

Article 12(2) of the Habitats Directive

5.22 To ensure that the same category of wild animals are protected by the secondary activity prohibitions under article 12(2) as are protected by primary activity prohibitions under article 12(1) of the Directive, we have concluded that the prohibitions under article 12(2) should be transposed by reference to the same definition of "wild animal".

Harmonisation of provisions arising from domestic policy

WILDLIFE AND COUNTRYSIDE ACT 1981

5.23 As discussed above, the Wildlife and Countryside Act 1981 defines "wild animal" as "any animal (other than a bird) which is or (before it was killed or taken) was living wild".[9] In proceedings for offences under sections 9 (prohibition of killing or taking) and 11 (prohibited methods), in addition, an animal is presumed to be a wild animal unless the contrary is shown.[10]

5.24 We have taken the view that this approach is substantively identical to the way we have approached the definition of "wild bird" and "wild animal" for the purpose of giving effect to the object and purpose of the Wild Birds Directive and the Habitats Directive. The only difference is that the definition used in the Wildlife and Countryside Act 1981 would also cover captive-bred animals of a protected species that have escaped into the wild. Because the great majority of animals protected under the Wildlife and Countryside Act 1981 are not animals that are ordinarily bred in captivity, and the burden of proof to show that the animal had been bred in captivity would remain on the defendant, we have reached the view that, in practice, the two definitions are interchangeable. We have concluded, therefore, that in the Wildlife Bill the definition of "wild animal" in the provisions reproducing those of the Wildlife and Countryside Act 1981 should be aligned with the definition of "wild animal" in the provisions giving effect to article 6 of the Bern Convention and article 12 of the Habitats Directive.

BADGERS, SEALS AND HARES

5.25 For similar reasons, we have concluded that the same approach should also extend to the protection of badgers under the Protection of Badgers Act 1992, the protection of seals under the Conservation of Seals Act 1970 and the protection of hares under section 3 of the Game Act 1831. From looking at the nature of the protection provisions under the above legal instruments it is clear that the aim of the drafters of those instruments was the protection and conservation of wild specimens rather than the protection of the welfare of (for example) animals in zoos. In our view, therefore, restricting the protection provisions of the prohibitions under the above legal instruments to animals that were not bred in captivity will have no substantive effect on the level of protection that animals of that species currently enjoy.

[9] Wildlife and Countryside Act 1981, s 27(1).

[10] Wildlife and Countryside Act 1981, ss 9(6) and 11(5).

DEER

5.26 As mentioned above, section 2(3) of the Deer Act 1991 draws a distinction between deer that are kept for the purpose of meat production and other deer. This distinction ensures that deer that are kept for the purpose of meat production may be killed all year round by their owner without the need to seek a licence, on the basis that there would be no conservation or animal welfare reason for imposing a close season on farmed deer.[11]

5.27 We have noted that the same distinction does not currently apply to the prohibition on the killing or capture of deer during the night and the prohibition on the use of certain prohibited methods of killing or capture.[12] As deer kept for the purpose of meat production are protected by the Animal Welfare Act 2006, however, it is difficult to find a good reason why they should continue to be protected by provisions that were designed to regulate hunting. We have concluded, therefore, that under the new framework the provisions replicating the protection regime of the Deer Act 1991 should extend to any deer except deer kept for the purpose of meat production that fall within the definition currently in section 2(3) of the Deer Act 1991.

5.28 We have considered the option of further restricting the protection provisions of the new framework to "wild deer". After protracted discussions with stakeholders, however, we have realised that limiting the protection regime to "wild deer" would run the risk of complicating, rather than simplifying the application of the law.

5.29 Restricting the application of wildlife protection legislation to wild deer, for instance, could create significant legal uncertainty in connection with the management of "park deer".[13] This is because in certain circumstances it may be difficult to determine whether, for the purpose of the application of the Animal Welfare Act 2006, a park deer is living wild or not. Given that, in theory, deer may also be legally captured from the wild during the open season for restocking deer parks or deer farms, creating a distinction between "wild deer" and other deer would have the effect of creating artificial distinctions between different park deer specimens on the basis of their origin.

Recommendations

Recommendation 67: we recommend that "wild animal" should be defined as any animal other than a captive-bred animal, unless the captive-bred animal has been lawfully released into the wild as part of a re-population or re-introduction programme.

This recommendation is given effect in the draft Bill by clause 28(3).

[11] The welfare of captive animals is generally protected by the Animal Welfare Act 2006. The welfare of farmed animals is currently primarily protected by the Welfare of Farmed Animals (England) Regulations 2007 SI 2007 No 2078 and the Welfare of Farmed Animals (Wales) Regulations 2007 SI 2007 No 3070 (W 264) as amended.

[12] Deer Act 1991, ss 3 and 4.

[13] "Park deer" are deer kept in parks, often purely for ornamental purposes.

Recommendation 68: we recommend that the prohibitions replicating the current protection regime in connection with badgers, seals and hares should apply to "wild animals" of such species.

This recommendation is given effect in the draft Bill by clauses 43, 49, 52, 57, 59, 60 and 62.

Recommendation 69: we recommend that an animal should be presumed to be a wild animal unless the defendant shows that it was captive-bred, but an animal should not be treated as captive-bred unless the defendant shows that the animal in question was bred in captivity using animals which were lawfully in captivity.

This recommendation is given effect in the draft Bill by clauses 28(4) and (6).

Recommendation 70: we recommend that the protection provisions replicating the effect of the Deer Act 1991 should not apply to any deer which is

(1) kept by a person, by way of business for the production of meat or other foodstuffs, skins or byproducts or as breeding stock;

(2) kept by that person on land enclosed by a deer-proof barrier; and

(3) conspicuously marked in such a way as to identify it as a deer kept by that person.

This recommendation is given effect in the draft Bill by clause 162(2).

PRIMARY ACTIVITY PROHIBITIONS

5.30 In line with the protection of wild birds, primary activity prohibitions constitute the backbone of the species-specific protection regime for wild animals in England and Wales.

5.31 As explained at the beginning of this Chapter, a number of problems that we have identified in this area of law are linked to the presence of overlapping regulatory regimes and the use of inconsistent language and definitions across a fragmented regulatory landscape.

5.32 Keeping in mind the need to give effect to the UK's international and EU obligations whilst retaining domestic policy preferences, in reviewing this area of law we have focused primarily on the simplification and harmonisation of existing primary activity prohibitions with a view to reorganising them within a flexible, accessible and coherent structure.

5.33 In this context, it is important to note that the extent to which we have been able to simplify the existing protection regime under the Wildlife Bill has been significantly curtailed by our inability to recommend substantive changes to the level of protection of species protected for domestic reasons. We suggest, therefore, that serious consideration should be given to the possibility of further harmonising provisions giving effect to domestic protection preferences with prohibitions giving effect to international and EU obligations.

Simplification of the mental element of certain offences

5.34 In the consultation paper we highlighted the current lack of consistency in the mental element required to convict a person for a wildlife crime.[14]

5.35 Killing, capturing or injuring an animal protected under article 9(1) of the Wildlife and Countryside Act 1981, for instance, is prohibited if the activity was carried out "intentionally".

5.36 Killing, capturing or injuring a wild animal of a species protected by article 12 of the Habitats Directive, on the other hand, is prohibited if the activity is carried out "deliberately". As discussed in Chapter 3, in this context the word "deliberate" should be interpreted in the light of the case law of the Court of Justice of the European Union.[15] In other words, the killing, capture or injuring of a protected animal is deliberate not only if the defendant intended to cause the death, injury or capture of the protected animal, but also if:

(1) he or she intended to kill, injure or capture that animal; or

(2) his or her actions presented a serious risk to animals of the relevant species unless reasonable precautions were taken and he or she was aware that that was the case but failed to take reasonable precautions; or

(3) his or her actions presented a serious risk to animals of the relevant species whether or not reasonable precautions were taken, and he or she was aware that that was the case.

5.37 Killing, capturing or injuring badgers and seals is prohibited if the activity is carried out "wilfully".[16] As discussed in the consultation paper, since the case of *R v Sheppard*[17] the courts have consistently interpreted the term "wilful" as including both intention and "recklessness". It is also settled law that "recklessness" for these purposes should be understood in a subjective sense;[18] in other words if an individual "has seen the risk of the proscribed circumstances or consequences and has nevertheless gone on unreasonably to take that risk, his conduct can be described as 'wilful'".[19] On this construction, section 1(1) of the Protection of Badgers Act 1992 and section 2(2) of the Conservation of Seals Act 1970 prohibit a broader range of activities than section 9(1) of the Wildlife and Countryside Act 1970.

5.38 Lastly, activities causing disturbance to animals protected under schedule 5 to the Wildlife and Countryside Act 1981 and the disturbance of badgers are prohibited if carried out "intentionally or recklessly".[20]

[14] Wildlife Law (2012) Law Commission Consultation Paper No 206, paras 7.5-7.9.

[15] See, in particular, Case C-221/04 *Commission v Spain* [2006] ECR I-4515.

[16] Protection of Badgers Act 1992, s 1(1); Conservation of Seals Act 1970, s 2(2).

[17] *R v Sheppard* [1981] AC 394.

[18] *R v D* [2008] EWCA Crim 2360, [2009] Criminal Law Review 280; for the leading case on subjective recklessness see *R v G* [2003] UKHL 50, [2004] 1 AC 1034.

[19] D Ormerod and K Laird, *Smith and Hogan's Criminal Law* (14th ed 2015) p 140.

[20] Wildlife and Countryside Act 1981, ss 9(4) and (4A); Protection of Badgers Act 1992, s 3.

Discussion

5.39 With a view to harmonising as far as possible the mental element of a number of domestic offences, in consultation we asked a number of questions in order to ascertain the extent to which stakeholders thought that the imperative for a simplified regulatory regime should take precedence over Parliament's current choices as to the mental element of these offences.

5.40 First, we asked whether consultees thought that under the new framework disturbance offences against badgers and disturbance offences against wild specimens of species listed in schedule 5 to the Wildlife and Countryside Act 1981 should prohibit both intentional and reckless behaviour.

5.41 Secondly, in connection with species protected from killing, injury or capture as a matter of domestic law, we presented the following options to consultees:

(1) All domestically protected species not protected as a matter of EU law should be protected from being intentionally or recklessly taken, killed or injured.

(2) Badgers and seals should be protected from being intentionally or recklessly killed, taken or 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.

5.42 Consultees expressed overwhelming support for the options that would bring a higher level of consistency across the protection regime. However there was no consensus as to what that level of protection should be. We concluded, therefore, that we would not be comfortable with substantively altering the level of protection of species protected under the Wildlife and Countryside Act 1981 as a matter of domestic law for the sole purpose of simplifying the regulatory regime. This is a policy decision that should be taken by elected representatives, in the light of sound scientific advice. In general, therefore, we have concluded that under the new regulatory framework the level of protection of wild animals protected for domestic reasons should, in substance, reflect the level of protection that they currently enjoy under domestic law.

5.43 Whilst refraining from substantially altering the level of protection of wild animals, we have concluded that it would still be possible to simplify the new regime by reducing the number of prohibited mental elements to two: "intentional" and "deliberate".

5.44 We recommend that wild animals that are currently protected from "intentional" killing or capture under section 9(1) of the Wildlife and Countryside Act 1981 and section 2(1) of the Deer Act 1991 should continue to be protected from activities carried out intentionally. Activities that are currently prohibited when committed "wilfully" or "recklessly", on the other hand, should be prohibited under the new framework when carried out "deliberately" as described in Chapter 3.

5.45 As just mentioned, the term "wilfully" is to be understood in the law of England and Wales as including "recklessness". We consider that "recklessness", as the courts understand it for these purposes, sets a marginally lower threshold of proof than the concept of "deliberate" action as we have formulated it in Chapter 3.[21] However, in the domestic legislation as originally enacted, all the offences capable of being committed either "intentionally", "recklessly" or "wilfully" were subject to the "incidental results" defence discussed in Chapter 7 below. This provided a defence where the activity engaged in by the defendant was "lawful", the death or disturbance of the animal was "incidental" to that activity and the defendant showed that the otherwise prohibited result "could not reasonably have been avoided". However, in *Commission v United Kingdom* the Court of Justice held that the incidental results defence infringed the Habitats Directive by going beyond the grounds of derogation permitted by article 16.[22]

5.46 As we explain in Chapters 3 and 7, we take the view that our recommendation in connection with the transposition of prohibitions of "deliberate" activity will both reflect the requirements of EU law and meet the concerns that appear to have underlain the introduction of the "incidental results" defence by removing from the scope of the prohibitions giving direct effect to the directives those cases where the use of the concept of recklessness would result in over-criminalisation of legitimate economic activities. For the same reasons, we take the view that replacing the recklessness element of the offences that protect animals for reasons of domestic policy with a prohibition of "deliberate" action will leave the practical scope of the offences virtually unchanged while reducing the number of different mental elements used in the offence-creating provisions of wildlife law.

Recommendations

Recommendation 71: we recommend that all activities interfering with protected wild animals that are currently prohibited if committed "wilfully" or "intentionally or recklessly" should be prohibited under the new regulatory regime when committed "deliberately", as defined in recommendations 25 to 28.

[21] *R v G* [2003] UKHL 50, [2004] 1 AC 1034.

[22] Case C-6/04 *Commission v United Kingdom* [2005] ECR 09017 at [106] to [107].

Mental element as to the circumstances in "intentional" offences

5.47 In replicating existing "intentional" prohibitions under the new regulatory framework, we noticed that the way existing "intentional" prohibitions are drafted leaves the question as to the required mental element as to the circumstances required to convict a person of a relevant offence unanswered.[23] It is unclear whether the prosecution need to establish that the defendant:

(1) intended to kill the creature that was killed and that, regardless of the defendant's knowledge, the creature in question was, as a matter of fact, an animal of a protected species (the offence is one of "strict liability" as to the circumstances);

(2) intended to kill the creature that was killed and believed that the creature was an animal of a protected species;

(3) intended to kill the creature that was killed in the belief that the creature was an animal of the species that happened to be killed;

(4) intended to kill the creature that was killed being reckless as to whether the creature in question was an animal of a protected species; or

(5) intended to kill the creature that was killed being reckless as to whether the creature in question was an animal of the species that was killed.

5.48 Given the ambiguous statutory language and the absence of relevant case law, we have been unable to provide a conclusive answer to the question. On balance, nevertheless, we have taken the view that the most likely conclusion that a court would reach if presented with the above question is that "intentional" offences, in the context of wildlife law, do not require the prosecution to establish any mental element as to the circumstances of the offence (option (1) above).[24]

5.49 We have taken the view that strict liability is both the most likely answer and, from an enforcement perspective, the most workable option. It would foreclose the defendant's ability to present arguments such as "I did not know what species that animal was, I just wanted to shoot it" or "I am not an entomologist; I thought it was a butterfly of unprotected species X, not a butterfly of protected species Y".

[23] Whilst a couple of High Court decisions clarified that existing secondary activity offences under the Wildlife and Countryside Act 1981 do not require the prosecution to establish any mental element as to the circumstances of the offence, they are inconclusive as to whether the same approach extends to primary activity prohibitions. See *Kirkland v Robinson* (1987) 151 JP 377. See also *R (on the application of the Royal Society for the Prevention of Cruelty to Animals) v Sittingbourne Magistrates* [2001] EWHC Admin 470, where it was common ground between the parties that the offences that were being prosecuted were offences of strict liability (both as to the consequences and the circumstances).

[24] The Wildlife Bill has been drafted accordingly (see, for instance, clause 30).

5.50 There are also strong policy reasons for adopting a strict liability approach (as to the circumstances) in this context. Before intentionally killing an animal a person should make sure that the animal is not one of a protected species, and if the person has doubts as to the identity of the animal he or she should not act, or should take further steps to ensure that the animal he or she is intending to kill is not one of a protected species. This is consistent with the precautionary principle.[25]

5.51 We also think that requiring the prosecution to establish that the defendant was merely reckless as to the circumstances would be, from a policy perspective, as workable as the strict liability approach. However, on balance we have taken the view that it is unlikely – in the statutory context of existing "intentional" offences – that a court would read "recklessness" (as to the circumstances) into a criminal offence that only refers to intentionality.

Deliberately killing, injuring or capturing a wild animal: European protected species etc

International and EU obligations

5.52 Article 6 of the Bern Convention requires contracting parties to take appropriate legislative and administrative measures to ensure the special protection of wild fauna species listed in appendix 2 to the Convention and, in particular, prohibit "all forms of deliberate capture and keeping and deliberate killing".

5.53 Similarly, article 3(5) of the Bonn Convention requires parties that are "range states" of a migratory species listed in appendix 1 to the Convention to prohibit the "capture" and "deliberate killing" of animals belonging to such species, subject to specific exceptions.[26] Species listed in appendix 1 that have a natural range including Great Britain include the turtle (*Caretta caretta)*, the common sturgeon (*Acipenser sturio*) and the basking shark (*Cetorhinus maximus*).[27]

5.54 Lastly, article 12(1)(a) of the Habitats Directive requires member states to take the requisite measures to establish a system of strict protection for the animal species listed in annex 4(a) in their natural range, prohibiting "all forms of deliberate capture or killing of specimens of those species in the wild".

[25] The precautionary principle is both a general principle of EU law (see art 191(2) of the Treaty of the Functioning of the European Union) and a fundamental policy principle which lies behind the domestic regulation of most activities that have the potential of causing adverse impacts on the environment.

[26] Art 3(5) of the Convention on Migratory Species prohibits the "taking" of species listed in appendix 1. "Taking" is defined in art 1 as including "capture" and "deliberate killing".

[27] The European Union entered a reservation as regards the listing of the basking shark in appendix 1 to the Bonn Convention. As the basking shark is not protected under the Habitats Directive, the UK's obligation to protect the basking shark is only an obligation under international law.

Domestic transposition

5.55 Article 12(1)(a) of the Habitats Directive is currently transposed in domestic law by the Conservation of Habitats and Species Regulations 2010, which make it an offence deliberately to capture, injure or kill any wild animal of a European protected species. "European protected species" are those listed in schedule 2 to the 2010 Regulations, which reproduces those species of animals listed in annex 4(a) to the Habitats Directive which have a natural range which includes any area of Great Britain.[28]

5.56 Whilst annex 4(a) to the Habitats Directive covers most of the species listed in appendix 2 to the Bern Convention and appendix 1 to the Bonn Convention that have a natural range which includes Great Britain, a limited number of such species that are strictly protected under the two Conventions fall outside the protection regime of the Habitats Directive. Some of those species, including the basking shark (*Cetorhinus maximus*)[29] and the walrus (*Odobenus rosmarus*),[30] are currently listed in schedule 5 to the Wildlife and Countryside Act 1981 and are therefore protected by section 9(1) of the 1981 Act, which makes it an offence "intentionally" to kill, capture or injure a wild animal of a schedule 5 species.

Mental element of the new offence

5.57 The Bern Convention, the Bonn Convention and the Habitats Directive require member states to prohibit the "deliberate" capture or killing of protected species. We have concluded, therefore, that in line with regulation 41(1) of the 2010 Regulations, the offence giving effect to the UK's external obligations under the new framework should prohibit the killing, injuring or capturing of protected species when the relevant prohibited activity is carried out "deliberately" rather than "intentionally".

5.58 In line with the discussion in Chapter 3, we have concluded that "deliberately" for these purposes should be defined in accordance with our recommendations giving effect to the Court of Justices' ruling in Case C-221/04 *Commission v Spain*. Whilst the ruling of the Court of Justice was primarily focused on the meaning of "deliberate" in the context of article 12(1) of the Habitats Directive, we see no reason why the Court would interpret the provisions of the Bern and Bonn Conventions differently.

[28] SI 2010 No 490, regs 40 and 41(1)(a).

[29] Bonn Convention, appendix 1.

[30] Bern Convention, appendix 2.

Species protected by the new offence

SPECIES PROTECTED BY INTERNATIONAL AND EU LAW

5.59 In connection with primary activity prohibitions, the Habitats Directive requires a system of strict protection to be established for species listed in annex 4(a) within their natural range. This is a different approach to that taken in the Wild Birds Directive, which specifically protects across the EU all bird species whose natural range includes any part of the EU. It produces the result that an animal artificially removed from its natural range into Great Britain is not protected by the Habitats Directive. This approach is reflected in the Conservation of Habitats and Species Regulations 2010 (the 2010 regulations) which – in the context of primary activity prohibitions – protects only those species listed under annex 4 to the Habitats Directive that have a natural range including Great Britain. The Bonn Convention takes an equivalent approach to the Habitats Directive, by imposing the obligation to prohibit the deliberate capture or killing of an animal listed in appendix 1 only upon "range states".

5.60 Article 6 of the Bern Convention, on the other hand, would appear to impose upon contracting states an obligation to protect any wild animal listed in appendix 2, regardless of the natural range of the animal in question. We have concluded that this cannot have been the intention of the drafters. Except for possession and commercial offences, it would be confusing and counter-productive to protect in domestic legislation a list of hundreds of species and sub-species of animals only a very limited fraction of which are likely to be encountered in practice. The killing or capture of a specimen transported by human agency outside its natural range would generally be unlikely to cause, in itself, any significant impact on the conservation status of the population of the species concerned. If the species were invasive, moreover, there could be a public interest in eradicating it.

5.61 In recommendation 48 we are recommending an offence of deliberate killing, capture or injury of birds. Here we recommend an offence of "deliberate" killing, injuring or capture of the following animal species:

(1) Species listed in appendix 2 to the Bern Convention (except birds) that have a natural range including Great Britain;

(2) Species listed in appendix 1 to the Bonn Convention (except birds) that have a natural range including Great Britain;

(3) Species listed in annex 4(a) of the Habitats Directive that have a natural range including Great Britain.

5.62 In theory, it would be possible to restrict the scope of the offence to species whose natural range includes England and Wales. Given the absence of significant natural borders between Scotland, England and Wales, however, we have taken the view that, on balance, the approach under the 2010 Regulations should be retained. The risk with the alternative option is that a protected species that extended its natural range from Scotland to northern England would remain unprotected in England and Wales until it was scheduled by the Secretary of State or the Welsh Ministers. Such a hypothetical situation would be problematic not only in terms of conservation, but also in terms of the compliance with international and EU obligations.

BADGERS

5.63 In line with our recommendations in connection with the simplification and harmonisation of the mental element of certain offences, we have concluded that in replicating section 1(1) of the Protection of Badgers Act 1992 under the new framework, badgers[31] should be protected from deliberate killing, injury or capture in the same way as animals protected under the Habitats Directive, the Bern Convention and the Bonn Convention.

Recommendations

Recommendation 72: we recommend that it should be an offence to kill, injure or capture the following animal species "deliberately":

(1) wild animals of a species listed in appendix 2 to the Bern Convention (except birds) that have a natural range including Great Britain;

(2) wild animals of a species listed in appendix 1 to the Bonn Convention (except birds) that have a natural range including Great Britain;

(3) wild animals of a species listed in annex 4(a) of the Habitats Directive that have a natural range including Great Britain;

(4) wild animals of the species *Meles meles* (badgers).

This recommendation is given effect in the draft Bill by clause 29 and schedule 12.

Intentional killing, injuring and capture: animals protected in England and Wales

5.64 Section 9(1) of the Wildlife and Countryside Act 1981 makes it an offence for any person "intentionally" to kill, injure or take a wild animal of a species protected in schedule 5 to the 1981 Act.

5.65 As mentioned above, for the purpose of section 9(1), schedule 5 lists certain species protected under the Bern Convention and Bonn Convention that fall outside the scope of annex 4 to the Habitats Directive. A large number of species that are currently listed in schedule 5 of the 1981 Act, nevertheless, are species protected for the purpose of giving effect to domestic nature conservation policy.

5.66 In line with our general policy of retaining the existing level of protection of species protected as a matter of domestic law, we have concluded that under the new framework it should be an offence intentionally to kill, capture[32] or injure a wild animal of a species which is currently listed in schedule 5 to the 1981 Act. This should not apply to species covered by Recommendation 72, which must be protected against "deliberate" killing, injury or capture.

[31] Wild animals of the species *Meles meles*.

[32] In line with the discussion in Chapter 4 paras 4.50 to 4.51, we have concluded that the term "capture" should be preferred to the term "take".

Recommendations

Recommendation 73: we recommend that it should be an offence to intentionally kill, injure or capture wild animals of the species currently listed in schedule 5 to the Wildlife and Countryside Act 1981, other than those covered by Recommendation 72.

This recommendation is given effect in the draft Bill by clause 30.

Close seasons and prohibited periods

5.67 In Chapter 3 we concluded that under the new framework there should be a general power to introduce or remove close seasons or other shorter periods of protection for any animal.

5.68 Close seasons are currently imposed in connection with the killing or taking of certain species of deer under section 2 of the Deer Act 1991 and certain species of seal under section 2 of the Conservation of Seals Act 1970.

5.69 In addition, section 3 of the Deer Act 1991 prohibits the killing or taking of any species of deer at night; section 3 of the Game Act 1831 prohibits the killing or taking of hares on Sundays and Christmas day.

5.70 We have concluded, therefore, that together with the creation of a general power to add or remove animals and the power to add, remove or amend close seasons (or prohibited periods) imposed on specific animals, the existing close seasons and prohibited periods should be replicated under the new framework.

5.71 Whilst we struggled to see any good conservation or animal welfare reason for retaining the prohibition of the killing or capture of hares on Sundays and Christmas day, in line with our general policy we have decided simply to replicate the existing close seasons and prohibited periods under the new framework. We suggest, nevertheless, that a review of this prohibition may be warranted.

5.72 In line with our policy of retaining the existing level of protection, we also felt compelled to create two parallel prohibitions of killing animals during the close season or prohibited period. This is due to the difference between the prohibited mental element under section 2 of the Conservation of Seals Act 1970 ("wilful") and the prohibited mental element under section 2 of the Deer Act 1991 ("intentional").

5.73 On this basis, therefore, we have concluded that it should be an offence to intentionally kill, capture or injure animals listed in part 1 of the schedule (deer, hares) during the specified close season or prohibited period; the killing of animals listed in part 2 of the schedule, on the other hand, should be prohibited during the close season or prohibited period if carried out "deliberately".[33] We wonder, however, whether there is any conservation or animal welfare reason for retaining two separate offences. We suggest, therefore, that a further harmonisation of those offences may be warranted.

[33] As defined in Chapter 3 above.

Recommendations

Recommendation 74: we recommend that it should be offence to capture relevant species of deer intentionally during the relevant close season and hares during the relevant prohibited period.

This recommendation is given effect in the draft Bill by clause 60(1).

Recommendation 75: we recommend that it should be an offence to kill, injure or capture relevant species of seals "deliberately" during the relevant close season

This recommendation is given effect in the draft Bill by clauses 60(2) and (3).

Recommendation 76: we recommend that consideration be given to further simplifying provisions on close seasons by harmonising the prohibited mental element.

Taking or deliberately damaging eggs: European protected species

International and EU obligations

5.74 Article 6(d) of the Bern Convention prohibits – in relation to oviparous animal species listed in appendix 2 – the deliberate destruction or taking of eggs from the wild. Similarly, article 12(1)(c) of the Habitats Directive requires member states to prohibit the deliberate destruction or taking of eggs of such animal species listed in annex 4 from the wild.

Domestic transposition

5.75 Article 12(1)(c) of the Habitats Directive is currently transposed in domestic legislation through regulation 41 of the Conservation of Habitats and Species Regulations 2010, which makes it an offence deliberately to take or destroy the eggs of a wild animal of a species listed in schedule 2. Under regulation 3 of the 2010 Regulations, the word "destroy" is defined, in relation to an egg, as including anything done to the egg which is calculated to prevent it from hatching.

Reform

5.76 In line with the discussion in the section above, the new prohibition should apply to any animal of a species listed in appendix 2 to the Bern Convention (except birds) and annex 4(a) to the Habitats Directive which have a natural range including any part of Great Britain.

5.77 We have concluded that the current domestic transposition of article 6(d) of the Bern Convention and article 12(1)(c) of the Habitats Directive is, broadly speaking, satisfactory and should be replicated under the new framework.

5.78 We have taken the view, however, that the wording of this offence could be further harmonised with the wording of the equivalent offence designed to give effect to the UK's obligations under the Wild Birds Directive without substantively altering the protection of animals protected under the Bern Convention and the Habitats Directive.[34]

5.79 The first difference between the prohibition under the Habitats Directive and the equivalent prohibition under the Wild Birds Directive is that the latter prohibits the "taking" of eggs from the wild whether or not the defendant acted "deliberately". We have concluded that the same approach could be taken in connection with the transposition of article 12(1)(c) of the Habitats Directive, on the basis that it is difficult to think about any realistic situation when a person could take an egg from the wild other than intentionally.

5.80 The second difference is that article 5(b) of the Wild Birds Directive prohibits both the deliberate "destruction" of, and deliberate "damage" to, the eggs of a wild bird. We have concluded, again, that in the light of the object and purpose of the Habitats Directive the drafters could not have intended to exclude from the purpose of this offence activities causing damage to the egg of an oviparous protected animal. Any damage to the egg of such an animal runs the risk of interfering with the development of the young and would, therefore, have equivalent impact on the conservation of the relevant species as the destruction of that egg. We have concluded, therefore, that under the new framework it should be an offence to both deliberately "destroy" and "damage" a protected animal's egg.

5.81 Lastly, both the Bern Convention and the Wild Birds Directive prohibit egg collection even if the egg in question turns out to be empty. To give effect to the UK's obligations under the Bern Convention, we have concluded that the offence under the new framework should apply to any egg, or part of an egg, of wild animals protected under the Bern Convention and the Habitats Directive.

Recommendations

Recommendation 77: we recommend that it should be an offence to take or "deliberately" damage or destroy (including doing anything which prevents hatching) the egg of a wild animal of the following species:

(1) wild animals of a species listed in appendix 2 to the Bern Convention (except birds) that have a natural range including Great Britain;

(2) wild animals of a species listed in annex 4(a) of the Habitats Directive that have a natural range including Great Britain.

This recommendation is given effect in the draft Bill by clause 34.

[34] See Chapter 4 above, paras 4.57 to 4.62.

Taking or intentionally damaging eggs: species protected in England and Wales

5.82 While section 9 of the Wildlife and Countryside Act 1981 does not expressly prohibit the collection or destruction of the eggs of protected animals, section 27 of the 1981 Act defines "animal" as including the eggs, or any other immature stage of that animal. Despite the fact that some of the terms adopted in section 9 of the 1981 Act are not easily reconcilable with activities interfering with eggs, in the light of its conservation aim we have taken the view that, on balance, this section appears to indicate that it was Parliament's intention to prohibit egg collection (taking of "animals") and activities causing the destruction or damage of the eggs of protected animals (killing or injuring an "animal").

5.83 We have concluded, therefore, that under the new framework it should remain an offence to take or intentionally damage or destroy an egg of a wild animal of a species currently listed in schedule 5 to the 1981 Act. We have taken the view that the language of the new prohibited activity should be harmonised with the language giving effect to the equivalent prohibitions under the Bern Convention, the Habitats Directive and the Wild Birds Directive.

Recommendations

Recommendation 78: we recommend that it should be an offence to intentionally take, damage or destroy (including doing anything which prevents hatching) the eggs of an animal of a species currently listed in schedule 5 to the Wildlife and Countryside Act 1981.

This recommendation is given effect in the draft Bill by clauses 34(8) and 35.

Destruction, damage and deterioration of breeding sites and resting places: European protected species

International and EU obligations

5.84 Article 6(b) of the Bern Convention requires member states to prohibit deliberate damage to, or destruction of, breeding or resting sites.

5.85 Article 12(1)(d) of the Habitats Directive requires member states to prohibit the "deterioration or destruction" of breeding sites or resting places, whether or not brought about "deliberately".

Domestic transposition

5.86 Article 12(1)(d) of the Habitats Directive is currently transposed in domestic legislation by regulation 41(1)(d) of the Conservation of Habitats and Species Regulations 2010, which makes it an offence to damage or destroy a breeding site or resting place of an animal of a species listed in annex 4 to the Habitats Directive that has a natural range including any part of Great Britain.

Mental element of the new offence

5.87 As noted above, article 12(1)(d) of the Habitats Directive does not refer to "deliberate" destruction or deterioration, The absence of a prohibited mental element in article 12(1)(d) of the Habitats Directive was discussed in Case C-98/03 *Commission v Germany*, where the Court of Justice of the European Union suggested that by not limiting this prohibition to "deliberate" acts, the Community legislature had demonstrated its intention to give breeding sites or resting places increased protection against acts causing their deterioration or destruction. In the opinion of the Court of Justice, this was proportionate to the importance of the conservation objectives which the Directive aims to achieve.[35]

5.88 In line with regulation 41(1)(d) of the Conservation of Habitats and Species Regulations 2010, therefore, we have concluded that under the new framework damage to or destruction of breeding sites or resting places of species protected under annex 4(a) to the Habitats Directive that have a natural range including Great Britain should be prohibited, whether or not carried out "deliberately".

"Destruction", "damage" or "deterioration"

5.89 For the reasons explained in Chapter 4 on the transposition of article 6(b) of the Bern Convention, we have concluded that under the new framework it should also be an offence to "cause the deterioration" of a breeding site or resting place of a protected animal.

Obstructing access to a breeding site or resting place

5.90 As the European Commission guidance to article 12 of the Habitats Directive suggests, the aim of the above prohibitions is to "safeguard the ecological functionality of breeding sites and resting places". This is because resting places and breeding sites "are crucial to the life cycle of animals and are very important parts of a species' entire habitat, needed to ensure its survival."[36]

5.91 In line with the discussion in Chapter 4, therefore, we have concluded that under the new framework it should also be an offence to obstruct access to a protected breeding site or resting place, on the basis that the effect of such activity on protected animals that are reliant upon such breeding sites or resting places is equivalent to the effect of activities causing damage to or destruction or deterioration of that site.

Species protected by the new offence

5.92 We have concluded that the new offence should extend to the breeding sites and resting places of species (other than birds) listed in appendix 2 to the Bern Convention and species listed in annex 4(a) of the Habitats Directive that have a natural range including any part of Great Britain.

[35] Case C-98/03 *Commission v Germany* [2006] ECR I-53 at [55].

[36] European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007), p 41, para 53.

5.93 We are mindful of the fact that the Bern Convention, unlike the Habitats Directive, only prohibits *deliberate* destruction of or damage to breeding sites or resting places. Because the discrepancy between the list of animal species protected under annex 4(a) to the Habitats Directive and the list of animal species protected under appendix 2 to the Bern Convention is negligible in the context of animal species that have a natural range including Great Britain,[37] we have taken the view that it would have made little sense, from a policy perspective, to create two separate offences. We have decided, therefore, to harmonise the transposition of the two prohibitions in favour of the stricter formulation under article 12(1)(d) of the Habitats Directive.

Guidance

5.94 In line with the discussion in Chapter 4 on article 6(b) of the Bern Convention and the current transposition of article 12(1)(d) of the Habitats Directive in domestic law,[38] we have concluded that under the new framework the Secretary of State or Welsh Ministers should have the power to issue codes of practice for the purpose of providing practical guidance in respect of the application of this offence. As the European Commission guidance acknowledges, it is impossible to provide a definition of "breeding site" and "resting place" that will apply to all protected animal species.[39] Codes of practice, therefore, could usefully clarify how the terms "breeding site" and "resting place" should be understood in connection with specific animal species.

Recommendations

Recommendation 79: we recommend that it should be an offence to damage, destroy, cause the deterioration or obstruct access to the breeding site or resting place of wild animals of the following species:

(1) Wild animals of a species listed in appendix 2 to the Bern Convention (except birds) that have a natural range including Great Britain;

(2) Wild animals of a species listed in annex 4(a) of the Habitats Directive that have a natural range including Great Britain.

This recommendation is given effect in the draft Bill by clause 48.

[37] As far as we are aware, animal species with a natural range including Great Britain that are listed in appendix 2 to the Habitats Directive but are not listed in annex 4(a) to the Habitats Directive include the walrus (an animal classified as a "vagrant" in Great Britain) and a small number of other insects that have only been rarely spotted in the British Isles.

[38] See, in particular, SI 2010 No 490, regs 41(9) and (10).

[39] European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007), p 41, Ch 2, para 55.

Recommendation 80: we recommend that the Secretary of State or Welsh Ministers should have the power to issue codes of practice for the purpose of providing practical guidance in respect of the application of the provisions in connection with the damage, destruction or deterioration of breeding places or resting sites of wild animals (other than birds) protected under the Bern Convention and the Habitats Directive that have a natural range including Great Britain.

This recommendation is given effect in the draft Bill by clause 127.

Deliberately damaging protected shelters: species protected in England and Wales

5.95 Under section 9(4)(a) and (c) of the Wildlife and Countryside Act 1981 a person commits an offence if, intentionally or recklessly,

> (a) he or she damages or destroys any structure or place which any wild animal specified in schedule 5 uses for shelter or protection; [or]
>
> (c) he or she obstructs access to any structure or place which any such animal uses for shelter or protection.

Mental element of the new offence

5.96 In line with the general policy discussed above, we have concluded that under the new framework it should be an offence to carry out any of the activities currently prohibited under sections 9(4)(a) and (c) of the 1981 Act "deliberately".

Prohibited activity

5.97 So as to harmonise the language of the prohibition replicating section 9(4)(a) of the 1981 Act with the prohibition giving effect to article 6(b) of the Bern Convention and article 12(1)(d) of the Habitats Directive, we have concluded that in addition to "damage" and "destruction" it should also be an offence to "cause the deterioration" of a place of shelter of a protected animal species.

5.98 In line with section 9(4)(c) of the 1981 Act, we have concluded that under the new framework it should also be an offence to cause access to the shelter of a protected animal to be obstructed.

Species protected by the new offence

5.99 Whilst the prohibition under section 9(4)(a) only extends to places used as shelter or protection by animal species protected for domestic policy reasons, the offence under section 9(4)(c) extends to places used for shelter or protection by a number of animal species that are also protected by article 6(b) of the Bern Convention and article 12(1)(d) of the Habitats Directive.

5.100 Above we have recommended that to give effect to the UK's international and EU obligations, under the new framework it should be an offence to obstruct access to the "breeding site or resting place" of animals of species strictly protected under the Bern Convention and the Habitats Directive. As the expression "breeding site or resting place", in our view, includes "places used for shelter and protection", we have concluded that it would be unnecessary to protect the same animals from both prohibitions, as doing so would give rise to two overlapping offences. As a result, the new offences replicating the effect of sections 9(4)(a) and (c) of the 1981 Act should only apply to species listed in schedule 5 to the 1981 Act that are not species which are also protected under appendix 2 to the Bern Convention or annex 4(a) to the Habitats Directive.

Guidance

5.101 In line with the discussion in Chapter 4 of article 6(b) of the Bern Convention and the current transposition of article 12(1)(d) of the Habitats Directive in domestic law,[40] we have concluded that under the new framework the Secretary of State or Welsh Ministers should have the power to issue codes of practice giving practical guidance in respect of the application of this offence.

Protection of badger setts

5.102 Section 3 of the Protection of Badgers Act 1992 makes it an offence, among other things, intentionally or recklessly to

(1) damage or destroy a badger sett or any part of it;

(2) obstruct access to a badger sett;

(3) cause a dog to enter a badger sett; and

(4) disturb a badger when it is occupying a badger sett.[41]

5.103 "Badger sett" is defined as "any structure or place which displays signs indicating current use by a badger".[42]

5.104 In the consultation paper we suggested that all the protection provisions in section 3 of the Protection of Badgers Act 1992 could be adequately covered under the new framework by the prohibitions replicating section 9(4) of the Wildlife and Countryside Act 1981.[43] This is because "badger sett" clearly constitutes a place or structure that badgers use as "shelter or protection" and the prohibitions listed in section 3 of the 1992 Act are equivalent to the prohibitions listed in section 9(4) of the 1981 Act.

[40] See, in particular, SI 2010 No 490, regs 41(9) and (10).

[41] Protection of Badgers Act 1992, ss 3(a) to (c).

[42] Protection of Badgers Act 1992, s 14.

[43] Wildlife Law (2012) Law Commission Consultation Paper No 206, Question 6-9.

5.105 The only difference between the two lists of prohibitions, we suggested, was the offence of causing a dog to enter a badger sett. We pointed out, however, that causing a dog to enter a sett whilst the sett is occupied by a badger would almost invariably make out the offence of "disturbing a wild animal whilst it is occupying a structure or place which it uses for shelter or protection".[44] Causing a dog to enter a badger sett, in most cases, would also "damage" the sett, thus making out the offence replicating section 9(4)(a) of the 1981 Act. On this basis we suggested that we could not see any reason why badger setts should be protected differently from any other place of shelter used by animals of protected species listed in schedule 5 to the Wildlife and Countryside Act 1981.[45]

5.106 The majority of consultees, including the Department for Environment, Food and Rural Affairs, Natural England, the Countryside Council for Wales,[46] the National Wildlife Crime Unit and environmental NGOs disagreed with our analysis. It was pointed out that this particular activity, commonly known as "badger baiting", is a practice which causes significant suffering to both the badger and the dog and often involves the participation of criminal organisations.[47] Causing a dog to enter a badger sett, as a result, should be prohibited without it being necessary for the prosecution to prove actual damage to the sett or disturbance to the badger.

5.107 On those grounds, we were persuaded that a separate criminal offence targeting this activity as an evil in itself should be retained, whether or not it results in the disturbance of a badger or in actual damage to a badger sett.

5.108 We have concluded, therefore, that for the purpose of replicating the effect of sections 3(a), (b), (c) and (e) of the 1992 Act in the new framework, badgers should simply be treated as any other wild animal of a species listed in schedule 5 to the Wildlife and Countryside Act 1981. In addition, causing a dog to enter a badger sett should remain a self-standing offence whenever it is established that the defendant carried out the prohibited activity "deliberately".

Recommendations

Recommendation 81: we recommend that it should be an offence "deliberately" to damage, destroy, cause the deterioration of, or obstruct access to any structure or place that is used for shelter or protection by a wild animal of the following species:

(1) an animal of a species currently listed in schedule 5 to the Wildlife and Countryside Act 1981;

(2) a wild animal of the species *Meles meles* (a badger).

This recommendation is given effect in the draft Bill by clause 49.

[44] Wildlife and Countryside Act 1981, s 9(4)(b).

[45] Wildlife Law (2012) Law Commission Consultation Paper No 206, para 6.58.

[46] The functions of the Countryside Council for Wales are now exercised by Natural Resources Wales (Natural Resources Wales (Establishment) Order 2012 SI 2012 No 1903 (W 230), art 6(1)(a)(i)).

[47] See for example http://www.northyorkshire.police.uk/badgers (last visited 26 October 2015).

Recommendation 82: we recommend that the Secretary of State or Welsh Ministers should have the power to issue codes of practice for the purpose of providing practical guidance in respect of the application of the provisions in connection with damage to, destruction or deterioration of structures or places used for shelter or protection.

This recommendation is given effect in the draft Bill by clause 124.

Disturbance and harassment

5.109 The transposition of the prohibitions on deliberate disturbance and harassment has been discussed at length in Chapter 3 above. In sum, we have concluded that there should be two separate offences under the new framework to give effect to the UK's international and EU obligations.

5.110 The first offence should prohibit the deliberate disturbance of individual specimens of listed species. The second offence should prohibit the deliberate disturbance of the local populations of all wild animals listed in appendix 2 to the Bern Convention and annex 4(a) to the Habitats Directive that have a natural range including Great Britain. We have recommended that disturbance should include, in particular, any act likely to impair the ability of animals of that species to survive, to breed or rear their young and – in the case of migratory species – migrate, or any act that is likely to have a significant effect on the distribution or abundance of the population of the species in the area.

5.111 In Recommendations 30, 32 and 33 we recommended that the first (individual disturbance) offence should apply to species currently protected from individual disturbance under section 9(4) of the Wildlife and Countryside Act 1981 apart from those protected under the Bern Convention and the directives, which should be protected from disturbance of their local populations in line with the requirements of the Convention and the directives. We also recommended that consideration be given to whether particular species protected by the Convention and the directives should be protected from individual disturbance.

5.112 Since the individual disturbance offence gives effect to the prohibition of harassment under the Bonn Convention, we have recommended that it should also apply to the basking shark (*Cetorhinus maximus*), the common sturgeon (*Acipenser sturio*), the marine turtle (*Caretta caretta*) and any other species listed in appendix 1 to the Bonn Convention with a natural range including Great Britain.[48]

5.113 Section 9(4A) of the Wildlife and Countryside Act 1981 additionally prohibits the intentional or reckless disturbance of specimens of basking shark, dolphins and whales. The basking shark is covered by our recommendation in the previous paragraph. Dolphins and whales, being species protected by the Habitats Directive, are already covered by our earlier recommendation that consideration be given to whether any such species should be protected from individual harassment as a matter of domestic policy.

[48] As the Law Commission does not have any specialist scientific expertise, under the Wildlife Bill we have only listed the animals that are treated by existing legislation as having a natural range including Great Britain.

5.114 As we noted in Chapter 3, section 9(4)(b) of the 1981 Act currently prohibits the intentional or reckless disturbance of an animal of the species listed in schedule 5 to the Act "while it is occupying a structure or place which it uses for shelter or protection". Schedule 5 of the 1981 Act includes both species protected under the Bern Convention or Habitats Directive and species protected purely for domestic reasons. As just discussed, section 3(e) of the Protection of Badgers Act 1992 includes an equivalent prohibition in connection with badgers.

5.115 Under the new framework, therefore, it should also be an offence "deliberately" to disturb a badger whilst it is occupying a structure or place which it uses for shelter or protection.

Recommendations

Recommendation 83: we recommend that it should be an offence "deliberately" to disturb a wild animal of the species *Meles meles* (a badger) in circumstances where the animal in question is occupying a structure or place that it uses for shelter or protection.

This recommendation is given effect in the draft Bill by clause 52.

Recommendation 84: we recommend that it should be an offence to "deliberately" cause a dog to enter a badger sett.

This recommendation is given effect in the draft Bill by clauses 62(7) and (8).

Protection of Badgers Act 1992: other primary activity prohibitions

5.116 The Protection of Badgers Act 1992 includes a number of other primary activity prohibitions that are specific to the protection of badgers.

5.117 Section 2 of the 1992 Act, for instance, makes it an offence to "cruelly ill-treat a badger" and to "dig for a badger". Section 5 of the 1992 Act, in addition, makes it an offence to mark, attach any ring, tag or other marking device to a badger other than one which is lawfully in a person's possession by virtue of a licence.

5.118 As those prohibitions give effect to purely domestic policy preference, we have concluded in line with our general policy of retaining the existing species protection levels, that – subject to the general considerations below – they should be replicated under the new framework.

Reverse burden of proof in offences against badgers

5.119 Section 1(2) of the Protection of Badgers Act 1992 imposes a reverse burden on the defendant once the prosecution has provided evidence "from which it could be reasonably concluded" that the defendant was attempting to kill, take or injure a badger.[49]

[49] Liability for attempting to commit an activity prohibited under the Wildlife Bill is discussed in Chapter 10 below.

5.120 Similarly, section 2(2) of the Protection of Badgers Act 1992 provides that if in any proceedings for an offence under section 2(1)(c) of the 1992 Act (digging for a badger) there is evidence from which it could reasonably be concluded that at the material time the accused was digging for a badger, he or she should be presumed to have been digging for a badger unless the contrary is shown.

5.121 In the consultation paper, we explained that the use of reverse burdens of proof, if unjustified, may be incompatible with article 6(2) of the European Convention on Human Rights, which guarantees the presumption of innocence in criminal proceedings.[50] Relevant case law suggests, however, that a reverse burden of proof will be justified where it is proportionate and is reasonably necessary in all the circumstances.[51]

5.122 As a result, we asked consultees whether in their view there were good reasons for retaining the reverse burden of proof currently imposed on the defendant in proceedings for the offence of "digging for a badger" under section 2(1)(c) of the 1992 Act.[52] The majority of consultees, including regulators, enforcement authorities and environmental NGOs argued in favour of retaining the reverse burden in connection with the offence of digging for a badger; organisations representing the interests of landowners, farmers, gamekeepers and the shooting industry opposed it, arguing that it hinders lawful fox control activities and results in unfair private prosecutions against people engaged in legitimate wildlife management.

5.123 On the basis of the evidence provided in consultation, we have concluded that, on balance, there are good grounds for retaining the current reverse burden in connection with the "digging for a badger" offence. Because of the particular nature of the prohibited conduct, we are persuaded that in the absence of a reverse burden it could be difficult to prosecute this offence successfully, because of the need to prove by way of prosecution evidence that the defendant's purpose was to dig for a badger and not (for example) for a fox, given that foxes often use badger setts as places of rest and refuge.

5.124 We have not consulted on the reverse burden imposed under section 1(2) of the 1992 Act in connection with offences of attempting to kill, injure or capture a badger. On balance, however, we have come to the conclusion that section 1(2) of the Protection of Badgers Act 1992 is justifiable, on the basis that attempts to kill, take or injure badgers often take place during the night – when badgers come out of their setts – and in remote areas of the countryside. Those circumstances arguably make it extremely difficult for the prosecution to collect enough first hand evidence to satisfy a criminal standard of proof. Anyone stopped for attempting to kill or injure a badger could easily claim that they were legitimately hunting some other animal.

[50] Wildlife Law (2012) Law Commission Consultation Paper No 206, paras 7.51-7.57. See also Chapter 4 paras 4.26 to 4.28 above.

[51] See *Sheldrake v DPP* [2003] EWCA Crim 762 [2005] 1 AC 246. See also *Salabiaku v France* (1988) 13 EHRR 379 at [28]; *Hoang v France* (1993) 16 EHRR 53; *X v UK* (1972) 42 CD 135; *A-G's Reference (No 1 of 2004), R v Edwards and others* [2004] EWCA Crim 1025, [2004] 1 WLR 2111.

[52] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 7-12.

Cruelly ill-treating a badger

5.125 Before replicating this offence under the new framework, we considered whether it had been superseded by more recent animal welfare legislation. This is because we found it anomalous that only badgers, as opposed to other large mammals, should be expressly protected from "cruel ill-treatment".

5.126 It is worth noting that whenever any vertebrate is within the control of a person, whether temporary or permanent,[53] the protection regime under the Animal Welfare Act 2006 applies.[54] The 2006 Act, among other things, makes it an offence to cause unnecessary suffering to a protected animal. It follows that the "cruel ill-treatment" offence under the Protection of Badgers Act 1992 overlaps with the 2006 Act in circumstances where a badger is under the control of a person.

5.127 A large number of specific activities that may fall within the definition of "cruel ill-treatment", committed against mammals that fall outside the scope of the protection provisions of the 2006 Act, are prohibited under the Wild Mammals (Protection) Act 1996.[55] Section 1 of the 1996 Act makes it an offence to mutilate, kick, beat, nail or otherwise impale, stab, burn, crush, drown, drag or asphyxiate any wild animal with intent to inflict unnecessary suffering, unless this is authorised under any enactment.[56]

5.128 As discussed below,[57] the use of traps to capture or kill wild badgers that do not accord with the standards laid down in annex 1 to the Agreement on International Humane Trapping Standards needs to be prohibited as a matter of compliance with EU law.

5.129 Whilst in most cases the cruel ill-treatment of a badger would be prohibited by one of the animal welfare regimes mentioned above, we have concluded that the offence should be replicated under the new framework on the basis that we are not confident that repealing it would have no effect on the level of protection of wild badgers. In discussions with licensing authorities, it was pointed out that because the "cruel ill-treatment" offence cannot be licensed under the 1992 Act, it prevents the issuing of licences authorising the killing or capture of badgers during the periods of the year where the killing of badgers could cause their cubs to starve.

[53] Animal Welfare Act 2006, s 2.

[54] Animal Welfare Act 2006, s 4.

[55] Wild Mammals (Protection) Act 1996, s 3.

[56] Wild Mammals (Protection) Act 1996, s 2(c).

[57] See Chapter 7 paras 7.193 to 7.194.

5.130 As discussed in Chapter 1, recommending changes to species protection levels falls outside the Law Commission's remit. On this basis we have taken the view that substantively reforming provisions aimed at the protection of the welfare of wild animals would almost invariably clash with the scope of our review. We think, nevertheless, that the fact that the cruel ill-treatment prohibition under the 1992 Act still has some application outside the general regime for the protection of the welfare of wild animals is anomalous and indicates the existence of gaps and inconsistencies in the protection of the welfare of wild animals. We suggest, therefore, that consideration should be given to reviewing this area of law with a view to ensuring that animal welfare legislation applies consistently across similar categories of animals.

Recommendations

Recommendation 85: we recommend that the offences of "cruelly ill-treating a badger", "digging for a badger" and "marking, attaching any ring, tag or other marking device to a badger other than one which is lawfully in a persons' possession by virtue of a licence" should be replicated under the new regulatory framework.

This recommendation is given effect in the draft Bill by clauses 62(1) to (6).

Recommendation 86: we recommend that the reverse burden of proof in the context of the offences of "digging for a badger" and "attempting to kill, injure or capture a badger" should be retained.

This recommendation is given effect in the draft Bill by clauses 62(3) and (5).

Recommendation 87: we recommend that consideration should be given to reviewing animal welfare legislation insofar as it applies to wild animals falling outside the scope of the Animal Welfare Act 2006 with a view to ensuring consistency across the protection regimes applying to similar categories of animals.

PROHIBITED METHODS OF KILLING, INJURING OR CAPTURING WILD ANIMALS

5.131 As discussed in Chapter 4, methods of killing, injuring or capturing wild animals are generally protected for two, sometimes overlapping, reasons: conservation and animal welfare.

5.132 Most prohibited methods of killing, injuring or capturing wild animals in domestic legislation reflect the protection provisions of the Bern Convention and the Habitats Directive – the primary aim of which is to prohibit the use of methods of killing or capture that may have negative impacts on the conservation status of the protected species concerned. In the context of the protection of wild animals other than birds, other international and EU legal instruments – such as the Agreement on International Humane Trapping Standards between the European Union, Canada and the Russian Federation – also prescribe the regulation of certain methods of killing or capturing purely for animal welfare reasons.[58] Lastly, besides giving effect to the UK's international and EU obligations, domestic legislation also prohibits the use of certain prohibited methods in connection with the capture or killing of any wild animal and a number of specific methods in connection with the capture or killing of particular species, such as deer and badgers.

5.133 Currently, prohibited methods of killing, capturing or injuring wild animals are scattered around a large number of different Acts and Regulations. This makes it difficult for the public to figure out which methods are prohibited in relation to which species. The provisions aimed at protecting wild animals for domestic reasons, in addition, very often overlap with provisions aimed at transposing the UK's international and EU obligations.[59] One of the reasons for such complexities is that, both to satisfy specific domestic preferences and to accommodate developments in international and EU law, a number of self-standing legislative provisions have been developed independently and not integrated properly into existing regulatory structures.

5.134 In this section, therefore, our recommendations are aimed at bringing all prohibited methods of killing, taking or injuring wild animals within a coherent, flexible and accessible regime which reflects domestic preferences whilst giving effect to the UK's international and EU obligations.

Generally prohibited methods of killing, capturing or injuring wild animals

5.135 The use of a number of devices, substances or methods in connection with the killing or capture of wild animals – such as the use of explosives – is generally prohibited. In broad terms, our policy is that those generally applicable prohibitions should be retained.

5.136 To retain domestic preferences of general application and give effect to the UK's international and domestic obligations through a transparent and consistent regulatory structure, therefore, we have decided to create two main prohibitions with two separate associated schedules: the first giving effect to the UK's international and EU species-specific obligations together with any residual domestic protection preference; the second replicating the existing generally applicable prohibitions in domestic law in respect of any other wild animal.

[58] Agreement on International Humane trapping Standards, art 7 and annex 1.

[59] The protection provisions listed under section 11 of the Wildlife and Countryside Act 1981, for example, apply to a list of wild animals (schedule 6 of the Wildlife and Countryside Act 1981) which are protected from almost identical methods of killing or taking under the reg 43 of the Conservation of Habitats and Species Regulations 2010 (see schs 2 and 4 of the Conservation of Habitats and Species Regulations 2010).

5.137 In this section we discuss the content of the latter set of prohibitions, together with recommendations for simplifying and rationalising the existing legal framework. The subsequent section deals with EU and international law obligations.

Current law

THE WILDLIFE AND COUNTRYSIDE ACT 1981

5.138 Section 11 of the Wildlife and Countryside Act 1981 lists a number of methods of killing, capturing or injuring wild animals that are prohibited generally.

5.139 Section 11(1)(a) prohibits the setting in position any self-locking snare which is of such a nature and so placed as to be calculated to cause bodily injury to any wild animal coming into contact therewith.

5.140 Section 11(1)(b) prohibits the use of the following articles for the purpose of killing or taking any wild animal:

(1) any self-locking snare;

(2) any bow or cross-bow; or

(3) any explosive other than ammunition for a firearm.

5.141 Section 11(1)(c) further prohibits the use of any live mammal or bird as a decoy, for the purpose of killing or taking any wild animal.

5.142 Lastly, section 11(3) makes it an offence to

(1) use any snare which is of such a nature and so placed as to be calculated to cause bodily injury to any animal coming into contact therewith; and

(2) while the snare remains in position, fail – without reasonable excuse – to inspect it once every day.

THE PROTECTION OF ANIMALS ACT 1911

5.143 Section 8(b) of the Protection of Animals Act 1911, which – after the coming into force of the Animal Welfare Act 2006 – is one of the very few remaining prohibitions under the 1911 Act, makes it an offence knowingly to put or place, or cause or procure any person to put or place, or knowingly be a party to the putting or placing, in or upon any land or building any poison, or any fluid or edible matter (not being sown seed or grain) which has been rendered poisonous.[60]

[60] It is worth noting that the use of a limited number of specific poisons is also prohibited under the Animals (Cruel Poisons) Regulations 1963 SI 1963 No 1278 issued under s 2 of the Animals (Cruel Poisons) Act 1962.

THE PESTS ACT 1954

5.144 The Pests Act 1954 makes it an offence to use any spring trap other than a trap approved by regulations or in circumstances not approved by regulations issued by the Secretary of State or Welsh Ministers. The prohibition does not apply to the experimental use of a spring trap authorised under a licence issued by the Secretary of State or Welsh Ministers or to the use of traps specified by order as being adapted solely for the destruction of rats, mice and other small ground vermin.[61]

Reform

5.145 As the protection of the welfare of captive animals is now regulated by the Animal Welfare Act 2006, it is apparent that despite the use of a number of different formulations, the residual function of the prohibitions under the Pests Act 1954 and the Protection of Animals Act 1911 is to regulate the use of spring traps or poison in connection with the killing, injuring or capturing of wild animals.

5.146 Subject to the comments below, therefore, we have concluded that all of the above prohibitions of general application should be consolidated into a single offence of using a listed device, substance of method for or in connection with the purpose of killing, injuring or capturing any wild animal other than protected wild animals.

SNARES OTHER THAN SELF-LOCKING SNARES

5.147 We have noted that, as currently drafted, the existing prohibition does not appear to provide sufficient guidance as to what should be done, for instance, once the snare is inspected and an injured animal is found trapped in the snare. It is our view, therefore, that the operation and inspection of snares may benefit, in the future, from additional regulations prescribing how relevant snares should be operated and inspected.

5.148 We have concluded, therefore, that under the new framework it should be an offence to use a snare other than a self-locking snare in connection with the purpose of killing, capturing or injuring a wild animal (other than a protected animal) unless the snare

(1) is inspected at least once in every 24 hour period that it is in use;[62] and

(2) complies with, and is operated in accordance with, such other requirement, if any, as may be prescribed by regulations.

[61] Pests Act 1954, s 8(1)(a).

[62] Whilst s 11(3)(b) requires that a person inspects a snare "every day", we have concluded that using the expression "once in every 24 hour period that it is in use" would provide more legal certainty, on the basis that the expression "every day" would make it possible to leave a snare uninspected for up to 48 hours. Despite our lack of expertise in animal suffering, we find it difficult to believe that this could have been the intention of Parliament.

SELF-LOCKING SNARES

5.149 The 1981 Act prohibits both the "use" of a self-locking snare for the purpose of killing or capturing a wild animal and the "setting in position" of a self-locking snare of such a nature and so placed as to be calculated to cause bodily injury to any wild animal. As a snare may only be "used" by "setting it in position", we have concluded that the "setting in position" offence will be covered under the new framework by the general prohibition on the "use" of a prohibited article for or in connection with the purpose of killing, injuring or capturing a wild animal.[63]

POISON

5.150 We have noted that placing poison in or upon any land or building is a strict liability offence. We have concluded, however, that harmonising this prohibition with the prohibition replicating the effect of section 11 of the Wildlife and Countryside Act 1981 would be unlikely to have any substantive impact on the scope of application of this offence. First, the Animal Welfare Act 2006 already makes it an offence to cause any poisonous or injurious drug or substance to be taken by any domesticated animal or any other animal that is not a wild animal.[64] Secondly, the use of poison when there would be a serious risk that it would result in the death or injury of any protected wild animal or bird will be prohibited by a separate offence that may be extended, if necessary, to other animal or bird species.[65] Lastly, a strict liability offence of placing poison in any building – in any event – would appear to cast the net too wide, on the basis that poisoned substances may be placed in buildings in circumstances where it would be unlikely that a wild animal would ever come into contact therewith.[66]

5.151 We have also concluded that the prohibition under the new framework should merely refer to the use of "poison", on the basis that the expression "any fluid or edible matter (not being sown seed or grain) which has been rendered poisonous" is already covered by the word "poison". The exclusion of "sown seed or grain" could, if necessary, be replicated by means of a general licence.[67]

[63] This conclusion is supported by the fact that in order to convict a person for the "use" of a prohibited article for the purpose of capturing or killing a protected species, the prosecution does not need to provide evidence that any wild animal was actually killed or captured by the relevant prohibited article (see *Robinson v Whittle* [1980] 1 WLR 1476, Donaldson LJ, 1481).

[64] Animal Welfare Act 2006, s 7.

[65] Wildlife Bill, cls 5 and 36.

[66] As discussed in Chapter 7, s 8(b) of the Protection of Animals Act 1911, provides a defence if the person can show that that the poison was placed for the purpose of destroying insects and other invertebrates, rats, mice, or other small ground vermin, where such is found to be necessary in the preservation of public health, agriculture, or the preservation of other animals, domestic or wild, or for the purpose of manuring the land, and that he took all reasonable precautions to prevent injury thereby to dogs, cats, fowls, or other domestic animals and wild birds. It is also a defence to do anything in accordance with a permit granted under Regulation 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market.

[67] The substantive defence to this general prohibition is discussed in Chapter 7 below.

SPRING TRAPS

5.152 The use of any spring trap is generally prohibited unless the trap is of a description or is used in circumstances authorised in an order or licence issued by the Secretary of State or Welsh Ministers. As the only plausible use of spring traps is for the purpose of killing or capturing an animal, and the residual function of this prohibition would appear to be limited to the protection of wild animals, we have concluded that under the new framework this offence should be integrated into a general prohibition of the use of a prohibited item for or in connection with the purpose of killing, capturing or injuring a wild animal.

EXPLOSIVES

5.153 For the same reasons as were discussed in Chapter 4,[68] we have concluded that the prohibition on the use of "explosives other than ammunition for firearms" should be simply replicated as a prohibition on the use of "explosives".

Recommendations

Recommendation 88: we recommend that existing methods and means prohibitions of general application, including the prohibition on the use of unregulated spring traps under the Pests Act 1954 and the prohibition on the use of poison under the Protection of Animals Act 1911, should be consolidated into a single offence of using a listed device, substance of method for or in connection with the purpose of killing, injuring or capturing any wild animal other than protected wild animals.

Recommendation 89: we recommend that it should be an offence to use a snare, other than a self-locking snare, unless the snare

(1) is inspected at least once in every 24 hour period that it is in use; and

(2) complies with, and is operated in accordance with, such other requirement, if any, as may be prescribed by regulations.

These recommendations are given effect in the draft Bill by clause 37.

The Leghold Traps Regulation

5.154 Article 2 of Council Regulation (EEC) No 3254/91 ("the Leghold Traps Regulation") states that the:

> Use of leghold traps in the Community shall be prohibited by 1 January 1995 at the latest.

5.155 "Leghold trap" is defined as "a device designed to restrain or capture an animal by means of jaws which close tightly upon one or more of the animal's limbs, thereby preventing withdrawal of the limb or limbs from the trap".[69]

[68] Chapter 4, paras 4.143 to 4.144.

[69] Council Regulation on Leghold Traps (EEC) No 3254/91, Official Journal L 308/1 of 9.11.1991, p 1, art 1.

5.156 While the prohibition in article 2 of the Leghold Traps Regulation is partially given effect in domestic law through the general ban on the use of unregulated spring traps and the prohibitions giving effect to the UK's obligations under the Habitats and Wild Birds Directives, there is currently no criminal offence in domestic law that fully implements the general prohibition on the use of leghold traps under article 2 of the Regulation.

5.157 As the preamble to the Regulation makes clear that its object and purpose is the protection of wild fauna species, we have concluded that – in line with the wording of the prohibitions of general application discussed above – under the new framework it should be an offence to use a leghold trap for or in connection with the purpose of killing, injuring or capturing any wild bird or wild animal.

Recommendations

Recommendation 90: we recommend that it should be an offence to use leghold traps for the purpose of killing, injuring or capturing any wild animal (including wild birds).

This recommendation is given effect in the draft Bill by clause 108.

Regulated devices, substances and activities: European protected species

International and EU obligations

5.158 We now turn to the prohibitions required in order to give effect to EU and international obligations.

BERN CONVENTION

5.159 As discussed in Chapter 4, article 8 of the Bern Convention requires member states to prohibit, in respect of the capture or killing of wild fauna species listed in appendixes 2 and 3, the use of all indiscriminate means of capture and killing and the use of all means capable of causing the local disappearance of, or serious disturbance to populations of a protected species, and in particular, the means specified in appendix 4.

5.160 The prohibited means of capturing or killing wild mammals specified in appendix 4 include snares, live animals used as decoys which are blind or mutilated, tape recorders, electrical devices capable of killing or stunning, artificial light sources, devices for illuminating targets, mirrors and other dazzling devices, sighting devices for night shooting, explosives, nets or traps,[70] poison and poisoned or anaesthetic bait, gassing or smoking out, semi-automatic or automatic weapons, aircraft and motor vehicles in motion. Prohibited means of killing or capturing freshwater fish include, in particular, explosives, firearms, poisons, anaesthetics, electricity with alternating current and artificial light sources. Lastly, prohibited means of killing or capturing crayfish include explosives and poisons.

[70] If applied for large scale or non-selective capture or killing.

THE HABITATS DIRECTIVE

5.161 Article 15 of the Habitats Directive purports to give effect to article 8 of the Bern Convention by prohibiting, in respect of the capture or killing of species of wild fauna listed in annexes 4 and 5 to the Directive, the use of all indiscriminate means capable of causing the local disappearance of, or serious disturbance to, populations of such species, and in particular, the means specified in annex 6.

5.162 The list of prohibited methods under annex 6(a) to the Habitats Directive, insofar as it applies to protected mammals, is, subject to a limited number of exceptions,[71] consistent with the list of prohibited methods under appendix 4 to the Bern Convention.

AGREEMENT ON INTERNATIONAL HUMANE TRAPPING STANDARDS BETWEEN THE EUROPEAN COMMUNITY, CANADA AND THE RUSSIAN FEDERATION

5.163 In 1997 the European Union concluded an agreement with Canada and the Russian Federation. The Agreement was inspired by the desire to agree on international humane trapping standards as well as to avoid trade disputes with the main international fur exporters. The aim of the established humane trapping standards is to ensure a sufficient level of welfare for trapped animals.[72]

5.164 As discussed in Chapter 3,[73] agreements concluded by the Union are, as a general rule, binding upon the institutions of the Union and its member states.[74]

5.165 The core obligations of the Agreement are set out in article 7, which requires contracting parties to ensure that their respective competent authorities

(1) establish appropriate processes for certifying traps in accordance with the agreed trapping Standards set out in annex 1 to the Agreement;

(2) ensure that the trapping methods conducted in their respective territories are in accordance with the Standards;

(3) prohibit the use of traps that are not certified in accordance with the Standards; and

(4) require manufacturers to identify certified traps and provide instructions for their appropriate setting, safe operation and maintenance.

[71] Under annex 6(a) protected animals are also protected from the use of crossbows. A more limited number of prohibited methods, on the other hand, are prohibited in connection with the capture or killing of fish.

[72] The European Community ratified the Agreement in 1998, followed by the Government of Canada in 1999 and the Russian Federation in 2008, which enabled the Agreement to enter into force in July 2008 and the schedule for the implementation of the provisions to start from that date.

[73] Chapter 3, paras 3.18.

[74] Treaty on the Functioning of the European Union, art 216.

5.166 The use of uncertified traps is prohibited for the capture, killing or injuring of animals listed in part 2 of annex 1 to the Agreement.[75] Part 2 of annex 1 to the Agreement includes a number of animals that are normally present in the wild state in England and Wales, including the badger (*Meles meles*), the European otter (*Lutra lutra*), the Pine marten *(Martes martes*) and the stoat (*Mustela erminea*).[76]

Domestic legislation

THE CONSERVATION OF HABITATS AND SPECIES REGULATIONS 2010

5.167 The Conservation of Habitats and Species Regulations 2010 copy out the list of prohibited methods and means in annex 6 to the Habitats Directive. In line with the Court of Justice's ruling in *Commission v United Kingdom*,[77] the 2010 Regulations also make it an offence to use, for the purpose of killing or capturing any wild animal

> Any other means of capturing or killing which is indiscriminate and capable of causing the local disappearance of, or serious disturbance to, a population of any species of animal listed in schedule 4 or any European protected species of animal.[78]

WILDLIFE AND COUNTRYSIDE ACT 1981

5.168 The Wildlife and Countryside Act 1981, broadly speaking, purports to give effect to article 8 of, and appendix 4 to the Bern Convention by specifically prohibiting the use of the following methods for the purpose of killing, capturing or injuring wild animals of a species listed in schedule 6 to the 1981 Act:

(1) any trap or snare;

(2) any electrical device for killing or stunning;

(3) any poisonous, poisoned or stupefying substance;

(4) any automatic or semi-automatic weapon;

(5) any device for illuminating a target or sighting device for night shooting;

(6) any form of artificial light or any mirror or other dazzling device;

(7) any gas or smoke not falling within paragraphs (a) and (b);

(8) the use of sound recordings as a decoy;

[75] Agreement on International Humane Trapping Standards, Official Journal L42 of 14/02/1998 p. 43, art 3.

[76] All animals protected by the Agreement on International Trapping Standards that are normally present in Great Britain are also listed in appendix 3 to the Bern Convention and protected by the methods and means prohibitions in article 8 and appendix 4.

[77] Case C-6/04 *Commission v United Kingdom* [2005] ECR I-9017*,* [94-98].

[78] SI 2010 No 490, reg 43.

(9) any mechanically propelled vehicle in the immediate pursuit of any such wild animal for the purpose of driving, killing or taking that animal.[79]

5.169 As discussed above, the use of a number of other prohibited methods, such as explosives, is generally prohibited by section 11(1) of the 1981 Act. There is, however, no general prohibition on the use of any other means of capturing or killing which is indiscriminate or capable of causing the local disappearance of, or serious disturbance to, a population of a protected species.

5.170 It is worth noting, in addition, that schedule 6 to the 1981 Act would not appear to include all species listed in appendixes 2 and 3 to the Bern Convention that have a natural range including England and Wales.

Discussion

SCOPE OF THE PROHIBITION UNDER THE NEW FRAMEWORK

5.171 Currently a large number of animal species protected by the methods and means prohibitions listed in regulation 43 of the Conservation of Habitats and Species Regulations 2010 are protected by a virtually identical list of methods and means prohibitions under section 11 of the Wildlife and Countryside Act 1981.[80]

5.172 As both prohibitions purport to give effect to equivalent obligations under the Habitats Directive and the Bern Convention, we have concluded that under the new framework there should only be one set of provisions on prohibited methods of killing and capture in relation to wild animals of the following species

(1) Species listed in appendixes 2 and 3 to the Bern Convention with a natural range including Great Britain; and

(2) Species listed in annex 4(a) and 5 to the Habitats Directive with a natural range including Great Britain.

5.173 Giving effect to the United Kingdom's reservations against the Bern Convention in connection with seals, hares, stoats, weasels and deer involves adding extra detail into the legislation as regards the last three of those species.[81] The effect of the reservations on the new regulatory framework is discussed in a separate section below.

[79] Wildlife and Countryside Act 1981, s 11(2).

[80] Those include horseshoe bats (all species) (*Rhinolophidae*); typical bats (all species) (*Vespertilionidae*); wild cat (*Felis silvestris*); bottle-nosed dolphin (*Tursiops truncates*); common dolphin (*Delphinis delphis*); dormouse (*Muscardinus avellanarius*); pine marten (*Martes martes*); common otter (*Lutra lutra*); polecat (*Mustela putorius*); and the harbour porpoise (*Phocaena phocaena*).

[81] The reservations in connection with methods and means for the killing or capture of seals are now irrelevant, since all seal species with a natural range including Great Britain are protected from the prohibited methods and means under annex 6 to the Habitats Directive. As further explained below, the reservations in connection with methods and means for the killing or capture of hares are also irrelevant, on the basis that the Mountain hare (the only species of hare with a natural range including Great Britain) is protected by the methods and means prohibitions listed in annex 6 to the Habitats Directive,

MENTAL ELEMENT

5.174 In line with the discussion in Chapter 4, we have concluded that the required mental element should be the "deliberate" use of prohibited methods in relation to the killing or capture of wild animals protected under the Bern Convention and the Habitats Directive.

ARTICLE 8 OF THE BERN CONVENTION AND ARTICLE 15 OF THE HABITATS DIRECTIVE

5.175 Following the Court of Justice's ruling in *Commission v United Kingdom*,[82] it is now clear that to give full effect to article 15 of the Habitats Directive and article 8 of the Bern Convention member states should enact an express prohibition on the use of any indiscriminate means capable of causing the local disappearance of, or serious disturbance to, a population of an animal species protected from the list of prohibitions under appendix 4 to the Bern Convention and annex 6 to the Habitats Directive.

5.176 We have noted that article 8 of the Bern Convention requires contracting parties generally to prohibit any method which is *either* indiscriminate *or* capable of causing the local disappearance of, or serious disturbance to protected animals. Article 15 of the Habitats Directive, on the other hand, appears to require member states only to prohibit methods that are *both* indiscriminate *and* capable of causing the local disappearance or local disturbance to the population of a protected species. As the primary aim of the Habitats Directive is to give effect to the Bern Convention obligations across the European Union, we have concluded that the approach of the Bern Convention should be preferred.

EXPRESSLY PROHIBITED METHODS AND MEANS

5.177 As discussed in Chapter 4, the Wildlife and Countryside Act 1981 prohibits a number of methods that are not expressly prohibited under the Bern Convention or the Habitats Directive. We have concluded, however, that because the lists of prohibited methods under the Bern Convention and the Habitats Directive is non-exhaustive, any method prohibited under domestic law – including generally prohibited methods – that is not expressly listed in appendix 4 to the Bern Convention or annex 6 to the Habitats Directive should not be treated as goldplating the UK's international or EU obligations.

5.178 In general terms, therefore, the list of prohibited methods under the new framework should include all methods prohibited under the Bern Convention, the Habitats Directive and the Wildlife and Countryside Act 1981. For this reason, partial overlaps between methods prohibited under international and EU law, or between external obligations and domestic law, have been generally resolved in favour of the broader prohibition. A number of relevant examples are discussed below.

[82] Case C-6/04 *Commission v United Kingdom* [2005] ECR I-9017, [94-98].

Poison and explosives

5.179 As discussed in Chapter 4, we have concluded that the expression "explosives other than ammunitions for firearms" should be simply replicated as a general prohibition on the use of "explosives" and the prohibition on the use of "poisons and poisoned or anaesthetic bait" should be simply replicated as a general prohibition on the use of "poison" or "anaesthetic or stupefying substances".

Nets and traps

5.180 The Bern Convention only prohibits the use of traps and nets "if applied for large scale or non-selective capture or killing". The Habitats Directive, similarly, only prohibits the use of nets and traps "which are non-selective according to their principle or conditions of use". The prohibitions under the Wildlife and Countryside Act 1981 are broader, on the basis that they generally prohibit the use of nets and traps, whether or not they are non-selective.[83] In this context we have concluded that the current domestic transposition under the 1981 Act should be preferred for two reasons.

5.181 First, we have taken the view that prohibiting the use of nets or traps "if applied for large scale or non-selective capture or killing" could create significant legal uncertainty for regulatory addressees. Prohibiting the use of all traps and nets and (where appropriate) authorising the use of selective traps through the licensing regime is, in our view, the most effective way of giving effect to the UK's obligations under international and EU law.

5.182 Secondly, as further discussed in Chapter 7, prohibiting the use of all nets and traps will also ensure that the same regulatory structure may be used to give effect to the UK's obligation to comply with the Agreement on International Humane Trapping Standards. This would be achieved by authorising the trapping of animals protected by the Agreement only when the licensing authority is satisfied that traps in question comply with the standards prescribed under part 1 of annex 1 to the Agreement.

THE USE OF VEHICLES IN THE COURSE OF HUNTING PROTECTED ANIMALS

5.183 In line with the discussion in Chapter 4, we have concluded that to give effect to the Bern Convention and the Habitats Directive, under the new framework it should be an offence to use a motor vehicle, boat or aircraft in the course of hunting relevant wild animals protected under the Bern Convention and the Habitats Directive. The detail of the permitted exceptions can be dealt with by way of licensing.

Recommendations

Recommendation 91: we recommend that the methods and means prohibitions giving effect to article 8 of the Bern Convention, article 15 of the Habitats Directive and section 5 of the Wildlife and Countryside Act 1981 should apply to the following species:

[83] Wildlife and Countryside Act 1981, ss 11(2)(a) and (b).

(1) Species listed in appendixes 2 and 3 to the Bern Convention with a natural range including Great Britain (other than those subject to the UK's reservations); and

(2) Species listed in annex 4(a) and 5 to the Habitats Directive with a natural range including Great Britain.

Recommendation 92: we recommend that a person should be guilty of a methods and means offence if he or she "deliberately" uses the item or substance, or carries out the activity.

Recommendation 93: we recommend that the use of a device or substance which is indiscriminate or capable of having a significant effect on the abundance of, or causing serious disturbance to, the population of a protected animal species in the area in which it is used should constitute a stand-alone offence.

Recommendation 94: we recommend that the list of prohibited methods under the new framework should reflect and consolidate the lists in annex 6 of the Habitats Directive, appendix 4 to the Bern Convention and section 11(2) of the Wildlife and Countryside Act 1981 by giving precedence, as a general rule, to the most stringent formulation of the prohibition.

Recommendation 95: we recommend that the use of all traps and nets in connection with the killing, injuring or capture of animals of a protected species should be generally prohibited.

These recommendations are given effect in the draft Bill by clauses 36 and 46 and schedule 15.

The UK's reservations to the Bern Convention

5.184 This section focuses on the extent of the changes and additional detail needed in order for the regulatory regime to give full effect to the UK's reservations to the Bern Convention, with a view to enabling the Government to evaluate more closely the pros and cons of maintaining the reservations.

Hares and seals

5.185 The UK entered reservations to annex 4 to the Bern Convention in connection with a number of prohibited methods of killing or capturing "seals" and "hares". For the reasons explained below, we have concluded that such reservations no longer have any effect on the required list of prohibited methods in connection with those species.

5.186 All species of seal are now protected by the methods and means prohibitions in article 15 and annex 6 to the Habitats Directive.[84] We have concluded, therefore, that the reservations to the Bern Convention in connection with seals no longer have any practical effect, on the basis that they do not affect the UK's obligation to apply the same list of prohibitions under the Habitats Directive.[85]

5.187 The Bern Convention protects two species of hare from the use of prohibited methods of killing or capturing: the *Lepus timidus* (Mountain hare) and the *Lepus capensis* (Europaeus) (European brown hare).[86]

5.188 The Mountain hare is now protected by the methods and means prohibitions in article 15 and annex 6 to the Habitats Directive.[87] It follows that the reservations to the Bern Convention in connection with "hares" should be disregarded insofar as they apply to the Mountain hare, on the basis that they do not affect the UK's obligation to apply with the same list of prohibitions under the Habitats Directive.[88]

5.189 As far as we are aware, the natural range of the European brown hare does not include Great Britain.[89] Their presence in Great Britain, in fact, appears to be the result of their artificial introduction by the Romans about 2000 years ago.[90] As discussed at the beginning of this Chapter, we have taken the view that the prohibitions – other than secondary activity prohibitions – under the Bern Convention should only be transposed in domestic law insofar as they relate to wild animals or plants that have a natural range including Great Britain. As a result, we have concluded that insofar as the reservations to the Bern Convention apply to the European brown hare, they would not appear to have any substantive effect on the UK's obligations under the Bern Convention.

[84] Directive 92/43/EEC, annexes 4(a) and 5.

[85] See SI 2010 No 490, sch 4.

[86] It would seem that a more common scientific name for the European brown hare is *Lepus europaeus*. The reason for the use of different scientific names, it would appear, is that there is ongoing scientific uncertainty as to whether the European hare is a separate species from the North African hare (*Lepus capensis*) (see http://www.iucnredlist.org/details/41280/0 (last visited 26 October 2015)).

[87] Directive 92/43/EEC, annex 5.

[88] See SI 2010 No 490, sch 4.

[89] http://www.iucnredlist.org/details/41280/0 (last visited 26 October 2015).

[90] Hutchings and Harris, *The Current Status of the Brown Hare (Lepus europaeus) in Britain* 1996, chapter 1, http://jncc.defra.gov.uk/pdf/pub96_brownhare_ch1.pdf (last visited 26 October 2015)

Stoats

5.190 The UK reservations under the Bern Convention include "stoats".

5.191 "Stoats" are listed in appendix 3 to the Bern Convention under the scientific name *Mustela erminea* and protected, in principle, from the methods and means prohibitions under article 8 and appendix 4 to the Convention. Stoats are also a protected animal under the Agreement on International Humane Trapping Standards.[91]

5.192 In domestic law, stoats are not currently individually protected by specific wildlife protection provisions. As any wild animal, however, they are protected from the methods and means prohibitions of general application under section 11(1) of the Wildlife and Countryside Act 1981, section 8 of the Pests Act 1954 and section 8(b) of the Protection of Animals Act 1911.

RESIDUAL OBLIGATIONS UNDER THE BERN CONVENTION

5.193 The UK's reservations in relation to stoats cover all prohibited methods of killing or capture listed in appendix 4 to the Convention except for the use of self-locking snares, live animals used as decoys which are blind or mutilated, explosives and poison, poisoned and anaesthetic bait. The prohibition on the use of those prohibited methods, as a result, remains within the scope of the UK's obligations under the Bern Convention.

5.194 It is also worth noting that the UK's reservations under the Bern Convention only apply in connection with the methods of killing or capture that are specifically listed under appendix 4 to the Bern Convention. They do not apply to the general obligation under article 8 to prohibit the use of all other "indiscriminate means of capture and killing and the use of all means capable of causing local disappearance of, or serious disturbance to, populations of a species" listed in appendix 2 or 3 to the Convention.

OBLIGATIONS UNDER THE AGREEMENT ON INTERNATIONAL HUMANE TRAPPING STANDARDS

5.195 In the section above we have taken the view that because all animals listed in part 2 of annex 1 to the Agreement on International Humane Trapping Standards that are normally present in Great Britain are also animals protected under the Bern Convention, the easiest mechanism to ensure compliance with the Agreement would be to simply give effect to the general prohibition on the use of traps under the Bern Convention. The introduction of an additional licensing condition would ensure that the trapping of those animals may not be authorised unless the licensing authority is satisfied that the prohibited traps or trapping methods accord with the Standards set out in annex 1 to the Agreement.[92]

[91] Agreement on International Humane Trapping Standards, annex 1, part 2.

[92] Pt 2 of annex 1 to the Agreement on International Humane Trapping Standards includes stoats.

PROTECTION OF STOATS UNDER THE NEW FRAMEWORK

5.196 We have concluded that for the purpose of complying with the residual obligations under the Bern Convention whilst giving effect to general domestic protection preferences, under the new framework stoats should be expressly listed together with all other species protected from methods and means prohibitions as a matter of international and EU law. The list of methods and means prohibited in connection with the killing or capture of stoats, however, should be limited to:

(1) Anaesthetic or stupefying substances.

(2) Bows and crossbows;

(3) Explosives;

(4) Poison;

(5) Snares

(6) Traps;

(7) Live animals which are blind or mutilated, or any mammal or bird, used as decoy.

5.197 In addition, stoats should also be protected from the use of any other item that is indiscriminate or capable of causing local disappearance of, or serious disturbance to, the population of a protected species.

5.198 For the purpose of ensuring compliance with the Agreement on International Humane Trapping Standards, we have concluded that stoats should be generally protected from the use of any trap or snare, on the basis that “snares” (whether self-locking or not) are trapping methods that may fall within the scope of the Agreement on International Humane Trapping Standards.

5.199 Because the use of traps and snares (other than self-locking snares or other regulated snares that are regularly inspected every 24 hours) against stoats will only be prohibited for the purpose of giving effect to the Agreement on International Humane Trapping Standards, we have concluded that under the new framework the relevant licensing authority should be able to license the use of the above traps or snares whenever it is satisfied that granting a licence would not be contrary to the UK’s obligations to comply with the Agreement.

Weasels

5.200 The UK's reservations under the Bern Convention also include "weasels".

5.201 In British English, a reference to "weasels" is generally understood as a reference to animals that belong to the species *Mustela nivalis* (the least weasel), the smallest species of the genus *Mustela*.[93] The word "weasel", however, is sometimes used to refer to any species of the genus *Mustela*, which includes the polecat and the stoat.

5.202 By looking at appendixes 2 and 3 to the Bern Convention and annexes 4 and 5 to the Habitats Directive, we have concluded that the reference to "weasels" in the UK's reservations to the Bern Convention should be taken as a reference to the species *Mustela nivalis*. This is because the other protected species that belong to the genus *Mustela*, except for stoats, are either protected under the Habitats Directive or have a natural range that does not include Great Britain.

5.203 The UK's reservations in connection with weasels are coextensive with the reservations in connection with stoats. In terms of international and EU obligations, therefore, the only difference between the least weasel and stoats is that the former is not protected under the Agreement on International Humane Trapping Standards. We have concluded, therefore, that under the new framework the least weasel should be expressly listed together with all other species protected from methods and means prohibitions as a matter of international and EU law. The list of methods and means prohibited in connection with the killing or capture of the least weasel, however, should be limited to:

(1) Anaesthetic or stupefying substances;

(2) Bows and crossbows;

(3) Explosives;

(4) Poison;

(5) Self-locking snares and snares that are not inspected daily or used in accordance with regulations;

(6) Spring traps;

(7) Live animals which are blind or mutilated, or any mammal or bird, used as decoy.

5.204 In addition, the least weasel should also be protected from the use of any other item that is indiscriminate or capable of causing local disappearance of, or serious disturbance to, the population of a protected species.

[93] Oxford English Dictionary.

Deer

5.205 The Bern Convention prohibits the use of the methods and means listed in appendix 4 in connection with the killing or capture of any species of deer. The UK entered reservations in connection both with species of deer that have a natural range that include Great Britain and with certain non-native species of deer, such as the Sika deer. This is because the domestic protection regime under the Deer Act 1963 (subsequently consolidated under the Deer Act 1991) extends to both native and non-native deer.

5.206 The way the reservations in connection with deer have been drafted is rather obscure. In essence, however, it would appear that their primary aim was to preserve the existing domestic protection of deer under the Deer Act 1963. The effect of the reservations was to exempt the UK from the obligation to prohibit the use of the following items (in connection with the capture of killing of deer protected under the Deer Act 1963) during the open season for the deer in question:

(1) Tape recorders;

(2) Electrical devices capable of killing and stunning;

(3) Mirrors and other dazzling devices;

(4) Semi-automatic weapons with a magazine capable of holding more than two rounds of ammunition;

(5) Devices for illuminating targets.

5.207 This approach is problematic for a number of reasons.

5.208 First, the Deer Act 1991 – which has now superseded the 1963 Act – also imposes a close season on the Chinese water deer and hybrids between the red and sika deer. While Chinese water deer clearly do not have a natural range including Great Britain, whether a hybrid between a native and a non-native species should be considered as a species with a natural range including Great Britain is a more difficult question.

5.209 Secondly, the dates of the close season for certain species of deer have changed. It follows that there is now a gap between the dates certain close seasons start and the dates when the reservations cease to have effect.

5.210 Thirdly, the reservations only appear to apply during the open season. It follows that current domestic legislation, arguably, is not in line with the UK's obligations under the Convention on the basis that it fails to prohibit the use of those methods during the close season. Even though the capture or killing of deer during the close season is generally prohibited, it may currently be authorised by a licensing regime and a number of specific defences. In that context, for the purpose of ensuring compliance with article 8 and appendix 4 to the Bern Convention, the use of those prohibited methods should be banned unless the licensing authority is satisfied that the use of those prohibited methods may be authorised in accordance with the derogation regime under article 9 of the Convention.[94]

PROTECTION OF DEER UNDER THE NEW FRAMEWORK

5.211 In the light of the above discussion, we have concluded that the only way to give effect to the UK's reservations to the Bern Convention whilst ensuring compliance with the residual obligations under the Convention and retaining domestic protection preferences, is to introduce a different set of obligations during the close seasons and open seasons as defined in the text of the UK's reservations.

5.212 During the close season, the relevant species of deer should be protected from all methods and means prohibitions that apply in connection to any other wild mammal protected under the Bern Convention or the Habitats Directive.

5.213 As highlighted above, we have noted that the close seasons defined in the text of the reservations are inconsistent with the close seasons under the Deer Act 1991. In practice, this means that for the doe and hinds of certain species of deer, the full list of prohibitions required by article 8 of, and appendix 4 to, the Bern Convention will continue to apply during the first month of the open season. Whilst we are conscious that this approach, in policy terms, makes very little sense, we have concluded that it is the only way of correctly giving effect to the UK's obligations under the Bern Convention whilst fully giving effect to the UK's reservations.[95]

5.214 Outside the close season, the same prohibitions should apply except for the following:

(1) Using a sound recording as a decoy;

(2) Electrical devices that are capable of killing or stunning an animal;

[94] The reservations do mention exceptions and defences in the following sentence: "for any person entering land without the consent of the owner/occupier/lawful authority (unless subject to limited exception under ss 10, 10A and 11 of the Deer Act 1963 as amended by sch 7 of the Wildlife and Countryside Act 1981)". A plain reading of the above sentence, however, would appear to suggest that it was merely intended to enter a reservation for trespassers, except when they are authorised to carry out an activity by the limited exceptions in ss 10, 10A and 11 of the Deer Act 1963. Supposedly, the reason is that the capture or killing of deer (whether during the open season or the close season) by a trespasser is, in any event, prohibited by poaching legislation at all times.

[95] Whilst no reservations were entered in connection with Chinese water deer or hybrids of red and sika deer, we suggest that the same regulatory approach should apply to those species.

(3) Mirrors or other dazzling devices;

(4) Semi-automatic weapons;

(5) Devices for illuminating targets.

Recommendations

Recommendation 96: we recommend that the protection of stoats, weasels and deer from the use of methods of killing or capture prohibited under the Bern Convention should be restricted in accordance with the wording of the UK's reservations to the Bern Convention.

Recommendation 97: we recommend that wild animals of the species *Mustela erminea* (stoats) should, for the purpose of ensuring compliance with the International Agreement on Humane Trapping Standards, be additionally protected from the use of any trap or snare.

These recommendations are given effect in the draft Bill by clauses 38, 39, 40 and 41 and schedules 17, 18, 19, 20 and 67(10).

Other prohibited methods under domestic legislation

5.215 As discussed at the beginning of this Chapter, a number of existing methods and means prohibitions under the Protection of Badgers Act 1992,[96] the Deer Act 1991,[97] the Conservation of Seals Act 1970,[98] the Pests Act 1954,[99] the Protection of Animals Act 1911,[100] the Ground Game Act 1880[101] and the Game Act 1831[102] only protect individual species. This is sometimes the case where particular prohibited items, such as badger tongs, are unique to a species. In other cases different prohibitions, such as the prohibitions of firearms below a certain power, reflect the different physiology of the species in question or attempt to tackle specific human activities that affect particular species.

5.216 A number of specific methods and means prohibitions under the above Acts have been superseded by subsequent prohibitions of general application and should, therefore, be repealed. We consider these in turn below.

Seals

5.217 Section 1(1)(a) of the Conservation of Seals Act 1970 prohibits the use, for the purpose of killing or taking any seal, of any poisonous substance.

[96] Protection of Badgers Act 1992, ss 2(1)(b) and (d).

[97] Deer Act 1991, s 4(2) and sch 2.

[98] Conservation of Seals Act 1970, ss 1(1)(a) and (b).

[99] Pests Act 1954, ss 9(1) and 12.

[100] Protection of Animals Act 1911, s 10.

[101] Ground Game Act 1880, s 6.

[102] Game Act 1831, s 3.

5.218 As discussed above, under the new framework all species of seal that have a natural range including Great Britain will have to be protected by the prohibition on the use of any poison – as well as any anaesthetic or stupefying substance – to give effect to the UK's obligations under the Bern Convention and the Habitats Directive. Similarly, species of seal that do not have a natural range including Great Britain will have to be generally protected by the prohibition on the use of poison for the purpose of killing or capturing any wild animal other than a protected animal. On those grounds, we have concluded that it is unnecessary to replicate this specific prohibition under the new framework.

Hares

5.219 Section 3 of the Game Act 1831 prohibits the use of "any dog, gun, net or other engine or instrument" for the purpose of taking any game on a Sunday or Christmas Day. Because, as discussed in Chapter 10, under the new framework it will be generally prohibited to attempt to kill, injure or capture a protected animal, it is unclear what the prohibition on the use of dogs, guns, nets or other engines or instruments would add to the general prohibition of killing, injuring or capturing hares on a Sunday or a Christmas Day. We have concluded, therefore, that this prohibition need not be replicated under the new framework.

5.220 Section 3 of the Game Act 1831 also prohibits the use of poison for the purpose of killing hares.[103] As discussed above, we have taken the view that this prohibition will be generally superseded under the new framework by the general prohibition on the use of poison for the purpose of killing any wild animal which replicates the effect of section 8(b) of the Protection of Animals Act 1911. As the mountain hare is listed in annex 5 to the Habitats Directive, similarly, it will be protected by the prohibition on the use of any poison – as well as any anaesthetic or stupefying substance – in connection with the killing, injuring or capturing of protected animals. We have concluded, therefore, that this prohibition need not be replicated under the new framework.

Hares and rabbits

5.221 Section 10 of the Protection of Animals Act 1911 prohibits the use of spring traps for the purpose of capturing hares or rabbits if the spring trap is not inspected at least once every day between sunrise and sunset. The use of any spring trap other than in circumstances approved by the Secretary of State or Welsh Ministers, nevertheless, was subsequently generally prohibited by section 8(1)(a) of the Pests Act 1954. It follows that section 10 of the 1911 Act has, in practice, been superseded by the general prohibition under section 8 of the 1954 Act. In line with section 8, therefore, under the new framework the use of spring traps will be generally prohibited unless authorised by a licence issued by the Secretary of State or Welsh Ministers. On this basis the prohibition in the 1911 Act need not be replicated under the new framework.

[103] Game Act 1831, s 2.

5.222 Section 9 of the Pests Act 1954 prohibits the use of spring traps other than in a rabbit hole for the purpose of killing or taking hares or rabbits. We have concluded that this is largely redundant.[104] As nothing in section 9 of the 1954 Act renders unlawful the "use of spring traps in such circumstances and subject to such conditions as may be prescribed by regulations" made by the relevant minister, the only function of the prohibition in section 9(1) is to prohibit unauthorised use of spring traps, other than in a rabbit hole, for the purpose of killing or capturing hares and rabbits. We have concluded that under the new framework this provision could be simply given effect by a licence prescribing how hares and rabbits may be lawfully trapped.

5.223 Lastly, it has come to our attention that section 6 of the Ground Game Act 1880 continues to prohibit the use of poison for the purpose of killing rabbits or hares in Greater London (other than the outer London boroughs).[105] We have concluded that this provision is redundant and should not be retained under the new framework.

Recommendations

Recommendation 98: subject to recommendations 100 to 103, we recommend that the residual methods and means prohibitions under Protection of Badgers Act 1992, the Deer Act 1991, the Conservation of Seals Act 1970, the Pests Act 1954, the Protection of Animals Act 1911 and the Ground Game Act 1880 should be replicated under the new framework.

This recommendation is given effect in the draft Bill by clause 43 and schedule 21.

Recommendation 99: we recommend that the prohibition on using poison for the purpose of killing seals under section 1(1)(a) of the Conservation of Seals Act 1970 should not be replicated under the new framework.

Recommendation 100: we recommend that the list of prohibited methods of killing or capturing hares under section 3 of the Game Act 1831 should not be replicated under the new framework.

Recommendation 101: we recommend that the specific prohibition on the use of spring traps in connection with the purpose of killing hares and rabbits under section 10 of the Protection of Animals Act 1911 and section 9 of the Pests Act 1954 should not be replicated under the new framework.

Recommendation 102: we recommend that the prohibition on using poison for the purpose of killing rabbits or hares in Greater London (other than the outer London boroughs) should not be replicated under the new framework.

[104] Pests Act 1954, s 9(1).

[105] Ground Game Act 1880, s 6, as amended by the Prevention of Damage by Rabbits Act 1939.

Weights and measurements

5.224 Certain provisions in current domestic legislation express quantities in units of measurement which are not in conformity with the International System of Units.

5.225 The Protection of Badgers Act 1992, for example, makes it an offence to shoot a badger with

> any firearm other than a smooth bore weapon of not less than 20 bore or a rifle using ammunition having a muzzle energy not less than 160 footpounds and a bullet weighing not less than 38 grains.[106]

5.226 The Wildlife and Countryside Act 1981, similarly, prohibits the use, for the purpose of killing or taking a wild bird, of any shot-gun of which the barrel has an internal diameter at the muzzle of more than one and three-quarter inches.[107]

5.227 Article 1 of the Units of Measurement Directive No 80/181/EEC,[108] as amended,[109] lists the units of measurement that must be used by member states for the purpose of expressing quantities and prohibits the use of any other unit. The Directive nevertheless allows, the use of supplementary indicators – although units of measurement listed in chapter 1 of annex 1 to the Directive should always predominate.[110]

5.228 The current use of units of measurement such as the "grain", the "footpound" or the "inch" in domestic legislation is not in line with the requirements of Council Directive 80/181/EEC. We have concluded, therefore, that under the new framework any reference to grains, footpounds and inches should be replaced by references to multiples of the kilogram, joule and metre. In line with article 3 of the Directive, references to grains, footpounds and inches should be retained, in brackets, as supplementary indicators.

Recommendations

Recommendation 103: we recommend that any reference to grains, footpounds and inches should be replaced by references to multiples of the kilogram, joule and metre. In line with article 3 of the Directive, references to grains, footpounds and inches should be retained, in brackets, as supplementary indicators.

[106] Protection of Badgers Act 1991, s 2(1)(d).

[107] Wildlife and Countryside Act 1981, s 5(1)(c)(iv).

[108] Units of Measurement Directive 80/181/EEC Official Journal L 39 of 15.2.1980 p 40 (repealing Directive 71/354/EEC).

[109] Amended by Council Directive 85/1/EEC Official Journal L 2 of 18.12.1984, Council Directive 89/617/EEC Official Journal L 357 of 7.12.1989 p 28, Directive 1999/103/EC Official Journal L 34 of 9.2.2000 p 17 and Directive 2009/3/EC Official Journal L 114 of 7.5.2009 p 10.

[110] Units of Measurement Directive 80/181/EEC, art 3.

SECONDARY ACTIVITY PROHIBITIONS

5.229 As discussed in Chapter 4,[111] the aim of secondary activity prohibitions is to regulate activities that may constitute an important incentive for direct interferences with wild animals. The regulation of secondary activity prohibitions, therefore, constitutes an important part of the protective regime for wildlife, on the basis that its aim is to reduce the incentive for a number of unlawful activities that negatively affect wild populations of protected animals.

5.230 Whilst the main focus of our reform of secondary activity prohibitions in connection with wild birds has been compliance with EU law, in the context of provisions prohibiting the possession of, or trade in, protected wild animals the main problem that we have identified is the absence of consistency in the terminology and scope of a number of the existing secondary activity prohibitions.

5.231 The inconsistent terminology appears in a number of cases to be purely the result of the fragmented nature of wildlife protection legislation rather than conscious decisions to create different levels of protection for different animals. The result, however, is that some of the prohibitions of trading in specimens are currently more difficult to enforce than others for no apparent reason.

5.232 Keeping in mind the need to retain the current level of protection for species protected as a matter of domestic law, in this section our recommendations aim at harmonising trade and possession prohibitions with a view to ensuring that the language of the new offences is consistent and guarantees the effective enforcement of domestic legislation.

International obligations

Convention on the International Trade in Endangered Species

5.233 The principal international instrument regulating the international trade in wild animals is the Convention on the International Trade in Endangered Species, which is implemented across the European Union through a number of EU Regulations.[112] The EU Regulations are enforced domestically through the Control of Trade in Endangered Species (Enforcement) Regulations 1997[113] and the Endangered Species (Import and Export) Act 1976.

[111] Chapter 4, paras 4.151 to 4.154.

[112] See, in particular, Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein.

[113] SI 1997 No 1372.

5.234 The Convention, and the EU Regulations implementing the Convention in EU law, prohibit trade in a number of species that are also protected in domestic law for the purpose of giving effect to the UK's obligations under the Bern Convention and the Habitats Directive. Those species include, for instance, all cetaceans, marine turtles, sturgeon and otters. Nevertheless, we have concluded that the implementation of the Convention should fall outside the scope of this project on the basis that there is virtually no scope for reforming its implementation in the law of England and Wales (the EU Regulations only being capable of amendment by the EU itself) and no scope for removing or rationalising the existing overlaps between the obligations under the Convention and obligations giving effect to other international and EU obligations.[114]

Bern Convention

5.235 As discussed in Chapter 4, article 6(e) of the Bern Convention requires contracting parties to prohibit the trade in, and possession of, animal species listed in appendix 2 "when this would contribute to the effectiveness of the other primary activity prohibitions in article 6". It would appear, therefore, that this prohibition is "softer" than the other prohibitions in article 6, in that it does not require member states to prohibit the trade in species in cases where, for example, the threat to that species is unrelated to collection for the purpose of trade.

5.236 Article 7, in addition, requires member states to take appropriate measures to ensure the protection of the wild fauna species listed in appendix 3. Appropriate measures include, among other things, the regulation of trade in those species.

EU obligations

Habitats Directive

5.237 Article 12(2) of the Habitats Directive requires member states to prohibit the "keeping, transport and sale or exchange, and offering for sale or exchange, of [specimens of the species listed in annex 4(a)] taken from the wild except for those taken legally before [the implementation date of the Directive]".

5.238 In this context, it is worth noting that while the primary activity prohibitions under article 12(1) of the Habitats Directive only apply to animal species listed in annex 4(a) to the Directive "in their natural range", the secondary activity prohibitions flowing from article 12(2) of the Habitats Directive apply to animal species listed in annex 4(a) without any geographical limitation. As the aim of the Habitats Directive is to "contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the member states to which the Treaty applies", it is obvious that the trade in, or possession of, any species strictly protected under the Directive should be prohibited in all member states. This is because the trade in protected species creates an incentive for illegal killing and capture of strictly protected species, whether or not the trade is carried out in member states where the protected species in question is native.

[114] See further the discussion in Chapter 4 paras 4.152 to 4.154 above.

Other EU obligations falling outside the scope of this review

5.239 It is also worth noting that there are three other specific pieces of EU legislation which are relevant to the protection of wild animals in that they regulate the import, export and trade in seal products and pelts derived from other protected animals for the primary purpose of protecting their welfare.

5.240 The Seal Pups Directive requires that member states take "all necessary measures to ensure that the products listed in the annex are not commercially imported into their territories".[115] The annex to the Directive refers to the whitecoat pups of harp seals and pups of hooded seals, and does not extend to any species naturally occurring in the UK.

5.241 The Seal Products Regulation provides that "the placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence".[116] This is subject to a limited set of derogations listed in article 3(2).

5.242 Lastly, the Leghold Traps Regulation prohibits "the introduction into the Community of the pelts of the animal species listed in annex 1 and of the other goods listed in annex 2, inasmuch as they incorporate pelts of the species listed in annex 2". This is unless the European Commission determines that there is sufficient protection in place in a particular exporting state.[117]

5.243 In line with the approach to the implementation of the Convention on the International Trade in Endangered Species, at the outset of the project it was decided that provisions directly regulating the import and export of products derived from protected fauna or flora should fall outside the scope of the project. As a result, we have concluded that the implementation of the Seals Pups Directive and article 3 of the Leghold Trap Regulation falls outside the scope of this review.

5.244 The Seal Products Regulation is directly applicable in domestic law and trade prohibited by article 3(1) was expressly made a criminal offence under the Seal Products Regulations 2010.[118] As the trade in seal products is substantively regulated by the EU Regulation through a self-contained regulatory regime, we have concluded that there would be no benefit in integrating it into the new framework.

Current domestic law

Conservation of Habitats and Species Regulations 2010

5.245 In line with article 12(2) of the Habitats Directive, regulation 41(3) of the Conservation of Habitats and Species Regulations 2010 makes it an offence to

[115] Seal Pups Directive 83/129/EEC, Official Journal L 91 of 9.4.1983 p 30, art 1.

[116] Regulation on Trade in Seal Products (EC) No 1007/2009, Official Journal L286 of 31.10.2009 p36, art 3(1).

[117] Regulation on Leghold Traps (EEC) No 3254/91, Official Journal L308 of 9.11.1991 p 1, arts 3 and 5.

[118] SI 2010 No 2068, reg 3(1).

(1) be in possession of, or control;

(2) transport;

(3) sell or exchange; or

(4) offer for sale or exchange

any live animal (regardless of the stage of its life), any dead animal, any part of an animal or anything derived from an animal of a species or sub-species listed in annex 4(a) to the Habitats Directive.[119]

5.246 Where it is alleged that an animal or a part of an animal was taken from the wild, it is presumed, unless the contrary is shown, that that animal or part was taken from the wild.[120]

5.247 In line with the Wild Birds Directive, the aim of the Habitats Directive is to contribute towards insuring biodiversity through the conservation of wild fauna and flora *in the European territory of the member states to which the treaty applies*.[121] It is reasonable to conclude, therefore, that the trade in protected species of wild fauna taken outside the European territory of the member states falls outside the scope of the prohibitions in article 12(2) of the Habitats Directive. Article 12(2), in addition, expressly excludes from the scope of its prohibitions wild species of fauna that were taken legally before the implementation date of the Directive.

5.248 The temporal and geographical restrictions of the Habitats Directive discussed above are given effect in domestic law through regulation 42(5) and (7) of the 2010 Regulations. The geographical restrictions, however, are limited by regulation 42(6), which provides that they do not constitute a defence to the offence of trading in wild fauna species listed in annex 4(a) to the Habitats Directive which have a natural range including Great Britain or in animals of the species *Lacerta vivipara pannonica* (viviparous lizard) or *Lycaena dispar* (the large copper butterfly).

5.249 Lastly, to give effect to a number of specific geographical restrictions specified in annex 4(a) to the Habitats Directive, regulation 42(8) provides that a person is not guilty of an offence under regulation 41(3) if that person shows that the animal or part of the animal, or the animal from which the thing in question is derived –

(1) is of a species listed in the second column of Schedule 3 to the 2010 Regulations (excluded populations of certain species) and was from a population occurring in a country or area which is specified in respect of that species in the third column of that schedule;

[119] SI 2010 No 490, regs 41(3) to (5).

[120] SI 2010 No 490, reg 41(7).

[121] Directive 1992/43/EEC, art 2(1).

(2) is of the species *Capra aegagrus* (wild goat) and was not from a naturally occurring population; is of the subspecies *Ovis gmelini musimon* (European mouflon) and was not from a naturally occurring population in Corsica or Sardinia; or is of the species *Coregonus oxyrhynchus* (houting) and either was from Finland or was not from an anadromous population.

Wildlife and Countryside Act 1981

5.250 Section 9(2) of the Wildlife and Countryside Act 1981 makes it an offence for a person to have in his possession or control any live or dead wild animal included in schedule 5 or any part of, or anything derived from, such an animal. A person, however, is not guilty of an offence if he shows that

(1) the animal had not been killed or taken, or had been killed or taken otherwise than in contravention of the relevant provisions;[122] or

(2) the animal or other thing in his possession or control had been sold (whether to him or any other person) otherwise than in contravention of Part 1 of the 1981 Act or the (now repealed) Conservation of Wild Creatures and Wild Plants Act 1975.[123]

5.251 Trade in protected wild fauna species is prohibited by section 9(5)(a) of the Wildlife and Countryside Act 1981, which makes it an offence to

(1) sell;[124]

(2) offer for sale;

(3) expose for sale,

(4) be in possession for the purpose of sale; and

(5) transport for the purpose of sale;

any live or dead wild animal included in schedule 5, or any part of, or anything derived from, such an animal.

5.252 Section 9(5)(b) also makes it an offence to "publish or cause to be published any advertisement[125] likely to be understood as conveying that [the person publishing or causing the advertisement to be published] buys or sells, or intends to buy or sell, any of those things".

[122] The "relevant provisions" are those of the 1981 Act or of the Conservation of Wild Creatures and Plants Act 1975.

[123] Wildlife and Countryside Act 1981, s 9(3).

[124] According to s 27 of the Wildlife and Countryside Act 1981 "sale" includes "hire, barter and exchange and cognate expressions shall be construed accordingly".

[125] According to s 27 of the Wildlife and Countryside Act 1981, "advertisement" includes a "catalogue, a circular and a price list".

5.253 By section 9(6), in any proceedings for an offence under section 9(5)(a), the animal in question is be presumed to be a wild animal[126] unless the contrary is shown. As "animal" is defined as including an egg of an animal, it is reasonable to conclude that the above prohibitions also apply to the eggs of protected wild fauna species.[127]

5.254 As mentioned in previous sections of this Chapter, a number of species of fauna and flora listed in schedule 5 to the 1981 Act are also listed in annex 4(a) to the Habitats Directive and protected by equivalent prohibitions under regulation 41(3) of the 2010 Regulations.

Protection of Badgers Act 1992

5.255 Section 1(3) of the Protection of Badgers Act 1992 makes it an offence to be in possession or in control of any dead badger, or any part of, or anything derived from, a dead badger. A person, however, is not guilty of an offence under subsection (3) above if he shows that –

(1) the badger had not been killed, or had been killed otherwise than in contravention of the provisions of the Act or of the Badgers Act 1973; or

(2) the badger or other thing in his possession or control had been sold (whether to him or any other person) and, at the time of the purchase, the purchaser had had no reason to believe that the badger had been killed in contravention of any of those provisions.[128]

5.256 Being in possession or in control of a live badger, on the other hand, is generally prohibited, whether or not the defendant shows that the badger had been lawfully captured.[129] Section 4 of the 1992 Act also makes it an offence to sell or offer for sale any live badger whether or not the badger in question had been lawfully captured.

Deer Act 1991

5.257 Sections 10(3) and (4) of the Deer Act 1991 make it an offence for any person to

(1) sell;

(2) offer for sale;

(3) be in possession for the purpose of sale;

(4) purchase;

(5) offer to purchase; or

[126] That is, an animal that was living wild before it was killed or taken: Wildlife and Countryside Act 1981, s 27(1).

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

[128] Protection of Badgers Act 1992, s 1(4).

[129] Protection of Badgers Act 1992, s 4. This is subject to the exceptions in section 9; see Chapter 7.

(6) receive;

any venison which comes from a deer which has been taken or killed in circumstances which constitute an offence under the Deer Act 1991 and which the person concerned knows or has reason to believe has been so taken or killed**.**

5.258 The Deer Act 1991 prohibits, among other things, the poaching of deer, the killing or capture of deer during the close season, the killing or capture of deer at night and the use of prohibited methods of killing or capture.

Hares Preservation Act 1892

5.259 Section 2 of the Hares Preservation Act 1892 makes it an offence to sell any hare or leveret – except for "foreign hares" imported into Great Britain[130] – during the months of March, April, May, June and July.

General harmonisation of the language of secondary activity prohibitions

5.260 The basic structure of the offences is essentially similar as between the different offences described above. There are, however, certain inconsistencies as to the exact terms used.

5.261 As mentioned above, certain variations between the different offences clearly indicate the intention of Parliament to prohibit different forms of conduct so as to give effect to specific policy aims. A good example is the extension of the secondary activity prohibitions in connection with venison to people purchasing venison with the knowledge that it may have been obtained from a deer that was killed or taken in circumstances that constitute an offence under the Deer Act 1991.

5.262 In the consultation paper, however, we noted a number of variations the harmonisation of which, we suggested, would continue to capture the original intention of Parliament whilst improving the consistency and effectiveness of the legislation.[131]

[130] Hares Preservation Act 1892, s 3.

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

5.263 The Conservation of Habitats and Species Regulations 2010 and the Protection of Badgers Act 1992, for instance, make it an offence to "offer for sale" rather than "expose for sale".[132] In the consultation paper we explained that the expression "expose for sale" is broader – in contract law, exposing items for sale in a shop is generally regarded as an "invitation to treat" rather than an offer for sale.[133] It is difficult, however, to find a rational reason why a person should not be liable for an offence if they invite people to buy prohibited items. Similarly, we suggested that it is difficult to find good reasons why a statute making it an offence to offer for sale a wild animal of a protected species should not also prohibit "advertisements likely to be understood as conveying that [a person] buys or sells, or intends to buy or sell" the protected animal in question.[134]

5.264 We asked, therefore, whether consultees thought that the offence of selling certain protected wild animals, plants and fish should include offences of offering for sale, exposing for sale and advertising to the public.[135] In the light of the overwhelming support for this proposal, we have concluded that – in line with sections 9(5) and (6) of the 1981 Act – all trade prohibitions in relation to protected animals should cover the following conduct:

(1) sale;

(2) offering for sale;

(3) exposing for sale;

(4) being in possession for the purpose of sale

(5) transporting for the purpose of sale;

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

[132] The Wildlife and Countryside Act 1981, ss 6, 9 and 13, prohibits both "offering" and "exposing for sale" protected species.

[133] In *Fisher v Bell* [1961] 1 QB 394, a flick knife placed in a shop window was found not to be an offer for sale under the law of contract but an "invitation to treat". Similarly in *Partridge v Crittenden* [1968] 1 WLR 1204 the defendant was acquitted for the offence of "offering for sale" a protected bird in contravention of s 6(1) of the Protection of Birds Act 1954 on the basis that the Court of Appeal held that advertising the sale of the relevant bird only constituted an "invitation to treat". The phrase "expose for sale" was therefore introduced to avoid such an interpretation under the law of contract. For further discussion of the interpretation of "offer" in criminal offences see D Ormerod, *Smith and Hogan's Criminal Law* (13th ed 2011) p 924.

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

[135] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 7-2.

5.265 "Advertisement" is currently defined as including "a catalogue, a circular or a price list". Certain stakeholders queried whether further examples should be added in light of developments such as internet trading. Whilst we agree that the language of the current definition is hardly modern, we have taken the view that the most effective and flexible way of replicating the effect of the term "advertisement" under the new framework is to leave it undefined. This is because the word "advertisement" is hardly ambiguous and the means through which the sale of a product may be advertised will constantly evolve over time.

Recommendations

Recommendation 104: we recommend that all trade prohibitions in relation to protected animals should cover the following conduct:

(1) sale;

(2) offering for sale;

(3) exposing for sale;

(4) being in possession for the purpose of sale

(5) transporting for the purpose of sale;

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

This recommendation is given effect in the draft Bill by clauses 54(1) and 56.

Possession and sale of wild animals and their eggs: European protected species

Possession and sale of wild animals

5.266 Regulation 41(3) of the Conservation of Habitats and Species Regulations 2010 and the relevant defences under regulations 42(5) to (8) appear to be fully compliant with article 12(2) of the Habitats Directive. In replicating those provisions under the new framework, however, we have concluded that – beside the harmonisation of the language with the offences with the other domestic secondary activity offences – a number of additional amendments could have the effect of making the new legislation clearer.

Possession and sale of eggs

5.267 Article 12(3) of the Habitats Directive provides that the prohibitions in article 12(2) of the Directive apply to "all stages of life of the animal" in question. "Specimen", in addition, is defined as including "any part or derivative" of a wild animal of a protected species.[136] Regulation 41 of the 2010 Regulations employs a similar definition.

[136] Directive 92/43/EEC, art 1(m).

5.268 We have taken the view that the current legislation is unclear as to whether the definition extends to the eggs of an oviparous wild animal. It follows that copying out the definitions of the Habitats Directive, in this context, does not appear to be the most effective and accessible way to give effect to its requirements. In Chapter 4 above, we have concluded that in the light of the object and purpose of the Wild Birds Directive the prohibition on the trade of wild birds should be read as implying that the trade in their eggs should also be prohibited. This is because the sale and possession of the eggs of protected birds or animals is often the primary driver for their illegal collection from the wild.

5.269 We have concluded, therefore, that in the light of the object and purpose of the Habitats Directive, the definitions in articles 1(m) and 12(3) of the Directive must be read as including a reference to the eggs of a protected animal. Consequently, we think that under the new framework the possession and trade in eggs of oviparous animals of a species listed in annex 4(a) to the Habitats Directive should be expressly prohibited.

Exemptions

5.270 As discussed above, regulation 42(5) and (7) of the 2010 Regulations – in line with the temporal and geographical restrictions of the Habitats Directive – exempts from the scope of secondary activity prohibitions animals of a protected species that have been taken outside the European territory of member states to which the Treaty on the Functioning of the European Union (TFEU) applies or animals lawfully taken in that territory before the implementation date of the Habitats Directive. Similarly, regulation 42(8) further restricts the possession and trade prohibitions in relation to a limited list of animals on the basis that their protection under the Habitats Directive is limited to certain geographical areas. As the above restrictions appear to be fully in line with the territorial and temporal application of the Habitats Directive, we have concluded that they should be retained in the new framework.

5.271 Regulation 42(6) of the 2010 Regulations, however, further restricts the trade in a number of species to an extent that goes beyond the scope of application of the Habitats Directive. It would appear that the rationale for these restrictions is to ensure the strict protection of protected wild animals that have a natural range including Great Britain by entirely prohibiting trade in specimens of them whenever and wherever those animals were originally taken.

5.272 The restrictions also extend to the viviparous lizard and the large copper butterfly: two sub-species listed under annex 4(a) to the Habitats Directive which do not have a natural range including Great Britain. In this context, it would appear that the rationale for extending the temporal and geographical application of the trade prohibitions in regulation 41(3) was to effectively ensure the complete prohibition on the trade of other species protected under schedule 5 to the Wildlife and Countryside Act 1981 that may not be easily distinguished from those sub-species.

5.273 We have concluded that the above exceptions under regulation 42(6) should not be retained under the new framework on the basis that they goldplate the requirements of the Habitats Directive.

5.274 Our view is that regulation 42(6) of the 2010 Regulations was most likely inserted to ensure consistency with the scope of the trade prohibitions under section 9(5) of the Wildlife and Countryside Act 1981. This is because section 9(5) of the 1981 Act also prohibits the trade in species listed in annex 4(a) to the Habitats Directive that have a natural range including Great Britain regardless of their origin or the time of collection.

5.275 However, as is further discussed in the section below, we do not see any good reason why species listed in annex 4(a) to the Habitats Directive that have a natural range including Great Britain should be protected by two identical criminal offences under different legal instruments. In principle, therefore, we have taken the view that under the new framework all species protected under the Habitats Directive should be protected by the provisions giving effect to article 12(2) of the Habitats Directive. Species listed under schedule 5 to the 1981 Act that are not listed in annex 4(a) to the Habitats Directive should be protected by the prohibitions giving effect to section 9(2) and (5) of the 1981 Act.

5.276 This, of course, is a default position the purpose of which is to ensure that domestic legislation does not goldplate the requirements of the Habitats Directive. It follows that if the Secretary of State or Welsh Ministers consider that there are valid policy reasons for removing the temporal and geographical restrictions that apply to the trade prohibitions in connection with certain species listed in annex 4(a) to the Habitats Directive, it will be possible to do so under the new framework by moving the relevant species from one protection regime to the other.

Recommendations

Recommendation 105: we recommend that, subject to the existing exceptions, the possession, control, transport and trade in wild animals of a species listed in annex 4(a) to the Habitats Directive or the eggs of oviparous animals of a species listed in annex 4(a) to the Habitats Directive should be expressly prohibited.

This recommendation is given effect in the draft Bill by clauses 54(2) and 56.

Recommendation 106: we recommend that a person should not be guilty of an offence of possessing or selling a wild animal of a species listed in annex 4(a) of the Habitats Directive, a part a such an animal, anything derived from such an animal, or an egg of such an animal (or any part of an egg of such an animal) if he or she shows that the animal or egg in question was killed, captured or taken from the wild

(1) before the implementation date of the Habitats Directive (as long as the killing, capture or taking was lawful); or

(2) outside the European territory of a member state to which the TFEU applies.

This recommendation is given effect in the draft Bill by clauses 55(1), (2) and (8).

Possession and sale of wild animals and their eggs: species protected in England and Wales

Possession of wild animals and their eggs

5.277 We have concluded that, in line with section 9(2) of the Wildlife and Countryside Act 1981, under the new framework it should be an offence to be in possession or be in control of any live or dead wild animal, listed in schedule 5 to the 1981 Act,[137] including any part of, anything derived from, or an egg[138] of, such an animal. The same offence should be extended to badgers so as to replicate the equivalent prohibitions under the Protection of Badgers Act 1992.

5.278 We have noted that in addition to prohibiting the "possession" or "control" of a protected species, regulation 41(3) of the Conservation of Habitats and Species Regulations 2010 – so as to give effect to article 12(2) of the Habitats Directive – also prohibits the "transport" of that species. As we could not see any reason why a person who causes a protected specimen to be transported without being directly in possession or in control of that specimen should not also be liable for the same offence, we have concluded that under the new framework it should also be an offence to transport a species listed in schedule 5 to the 1981 Act or a badger.

5.279 We have concluded that the list of exceptions in section 9(3) of the 1981 Act should be replicated under the new framework subject to the following three changes.

5.280 First, while showing that the animal in question had been lawfully captured or killed should remain a defence, the term "lawful" should be redefined as restricted to activities carried out without contravention of the new Wildlife Act, the Wildlife and Countryside Act 1981 or the Protection of Badgers Act 1992. In other words, we have taken the view that a person should not be guilty of an offence if he or she shows that the animal in question had been killed or captured before the 1981 Act and the 1992 Act came into force. This is because we cannot see any conservation reason for continuing to require proof of compliance with legislation that was in force before that time by continuing to criminalise, for instance, the possession of a badger that was killed or captured in the 1970s in contravention of the Badgers Act 1973.[139]

5.281 Secondly, in line with section 1(3) of the 1981 Act,[140] equivalent exceptions should expressly refer to the eggs of a wild animal to which the new provision applies.

[137] For the purpose of s 9(2) of the Wildlife and Countryside Act 1981, sch 5 does not include species listed in annex 4(a) of the Habitats Directive.

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

[139] Currently the term "lawful", in the context of the 1981 Act, is defined as "not in contravention of the 1981 Act or the Conservation of Wild Creatures and Wild Plants Act 1975"; in the context of the 1992 Act it is defined as "not in contravention of the 1992 Act or the Badgers Act 1973".

[140] Section 1(3) makes it a defence to the offence of possessing an egg that the egg had been lawfully taken.

5.282 Thirdly, so as to retain the effect of section 1(4)(b) of the Protection of Badgers Act 1992, we have concluded that in proceedings for a possession offence in connection with the possession of a dead badger it should be a defence to show that the badger, or part of the badger, had been sold to a person and that person had no reason to believe that the animal had been unlawfully killed.

Recommendations

Recommendation 107: we recommend that it should be an offence to be in possession, be in control or transport wild animals, any part of a wild animal, anything derived from a wild animal or the eggs of a wild animal of a species listed in schedule 5 to the Wildlife and Countryside Act 1981 (other than a species listed in annex 4(a) of the Habitats Directive) or a wild animal of a species *Meles meles* (badger).

This recommendation is given effect in the draft Bill by clause 57.

Recommendation 108: we recommend that the exceptions listed in section 9(3) of the Wildlife and Countryside Act 1981 should be replicated under the new framework subject to the following modifications:

(1) the term "lawful" should be redefined as restricted to activities carried out without contravention of the new Wildlife Act, the Wildlife and Countryside Act 1981 or the Protection of Badgers Act 1992.

(2) the exceptions should expressly extend to the possession of the eggs of relevant oviparous animals;

(3) in proceedings for a possession offence in connection with the possession of a dead badger it should be a defence to show that the badger, or part of the badger, had been sold to a person and that person had no reason to believe that the animal had been unlawfully killed.

This recommendation is given effect in the draft Bill by clauses 58(1), (3), (4) and (5).

Sale of wild animals and their eggs

5.283 We have concluded that the trade prohibitions under section 9(5) and (6) of the Wildlife and Countryside Act 1981 should be replicated under the new framework and apply to the following protected animals:

(1) Any live or dead wild animal, any part of or derivative of such a wild animal or the eggs of a wild animal of any species listed in schedule 5 of the 1981 Act that is not listed in annex 4(a) to the Habitats Directive;

(2) Live badgers.

5.284 As discussed above, this prohibition goes beyond the requirements of the Habitats Directive. As a result, we have taken the default position that the prohibitions replicating section 9(5) and (6) of the 1981 Act should only apply to species other than those listed under annex 4(a) to the Habitats Directive and protected by the secondary activity prohibitions discussed above. Of course, the secondary activity prohibitions applying to species listed in annex 4(a) of the Habitats Directive and those replicating section 9(5) and (6) of the 1981 Act could, in principle, be further harmonised. As doing so would substantially alter the protection level of a large number of species, however, we have concluded that making recommendations for that purpose would fall outside the scope of this review.

5.285 Live badgers are included in the same list on the basis that the Protection of Badgers Act 1992 only includes an equivalent prohibition in connection with the trade in live, as opposed to dead badgers.

Recommendations

Recommendation 109: we recommend that the trade prohibitions under section 9(5) and 9(6) of the Wildlife and Countryside Act 1981 should be replicated under the new framework and apply to the following species:

(1) Any live or dead wild animal, any part of or derivative of such a wild animal or the eggs of a wild animal of any species listed in schedule 5 of the Wildlife and Countryside Act 1981 that is not listed in annex 4(a) to the Habitats Directive;

(2) Live wild animals of the species *Meles meles* (badgers).

This recommendation is given effect in the draft Bill by clauses 59(3) and (4).

Sale of venison

5.286 We have concluded that the prohibition on the sale and purchase of venison under section 10 of the Deer Act 1991 should be replicated under the new framework in line with the general harmonisation policies discussed above.

5.287 The new provision, therefore, should make it an offence to:

(1) sell;

(2) offer or expose for sale;

(3) possess or transport for the purpose of sale; and

(4) publish or cause to be published any advertisement likely to be understood as conveying that a person buys or sells or intends to buy or sell;

venison which comes from a deer which has been killed in circumstances which constitute an offence[141] and which the person knows, or has reason to believe has been so taken or killed.

5.288 Currently the definition of "venison" under section 16 of the Deer Act 1991 excludes any carcase of a deer or any edible part of the carcase of a deer which has been "cooked or canned". We have concluded that this restriction should not be replicated under the new framework. The above restriction derives from the original version of section 10 of the Deer Act 1991, which prohibited unlicensed game dealers from selling venison during "prohibited periods" (the period beginning with the expiry of the tenth day, and ending with the expiry of the last day, of the close season imposed in connection with the relevant deer species). Whilst in the context of that prohibition it made sense to exempt unlicensed game dealers from selling canned venison on the basis that venison which has been canned may remain edible for years, since the repeal of that prohibition we were unable to find any rational reason for retaining the exclusion.[142]

Recommendations

Recommendation 110: we recommend that under the new framework it should be an offence to

(1) sell;

(2) offer or expose for sale;

(3) possess or transport for the purpose of sale;

(4) publish or cause to be published any advertisement likely to be understood as conveying that a person buys or sells or intends to buy or sell;

venison which comes from a deer which has been killed in circumstances which constitute a wildlife offence and which the person knows, or has reason to believe has been so taken or killed.

This recommendation is given effect in the draft Bill by clause 66.

[141] "Circumstances which constitute an offence" should include all protection provisions under the Deer Act 1991 and the new Wildlife Act except for those concerning poaching, on the basis that, as discussed in Chapter 8, we have concluded that the offence of trading in venison taken from a deer that has been poached should be integrated into a general prohibition on the trade in poached animals.

[142] In line with the discussion of the Hares Preservation Act 1892 in the following section, we think that the prohibition to sell venison during certain periods of the year was repealed, among other things, on the basis that, since the invention (and widespread use) of freezers, prohibiting the sale of venison during the close season as a means of preventing the unlawful killing of deer during that period has become an unnecessary and anachronistic market restriction.

Hares

5.289 We have concluded that the Hares Preservation Act 1892 should be repealed on the basis that its prohibitions are obsolete. Since the invention of refrigerators and freezers, prohibiting the trade in hares or leverets during particular times of the year is neither an effective, nor a proportional mechanism to remove the incentive to kill or capture wild hares during that time.

5.290 Under the new framework, of course, the Secretary of State or Welsh Ministers will be able to provide additional protection to hares by prohibiting, if appropriate, their killing or capture during a prescribed close season, prohibiting the use of particular methods of killing or capture or generally prohibiting the trade in them subject to a licensing regime.

Recommendations

Recommendation 111: we recommend that the Hares Preservation Act 1892 should be repealed and replicated, if necessary, by a prohibition of killing, injuring or capturing hares during particular periods of the year.

Other animals protected under the Bern Convention

5.291 As discussed in previous sections, not all species listed in appendix 2 to the Bern Convention are included in annex 4(a) to the Habitats Directive. As a result, the secondary activity prohibitions under the Conservation of Habitats and Species Regulations 2010 – the aim of which is to give effect to the UK's obligations under the Habitats Directive – omit a number of species the trade in and possession of which may need to be banned so as to give effect to the UK's international commitments under the Bern Convention. A limited number of those species are currently listed in schedule 5 and protected by the secondary activity prohibitions in section 9(2), (5) and (6) of the Wildlife and Countryside Act 1981.[143] The list of appendix 2 species in schedule 5 to the 1981 Act, however, is limited to species that have a natural range including Great Britain. It does not extend to species the trade in which may have to be prohibited in Great Britain so as to protect the wild populations of that species in other contracting states.

5.292 Article 6(e) of the Bern Convention provides that the trade in and possession of species listed in appendix 2 need only be prohibited where this would contribute to the effectiveness of primary activity prohibitions. As whether or not prohibiting the trade in a certain species would contribute to the effectiveness of the prohibitions under article 6 of the Bern Convention is a question of fact that falls outside the Law Commission's remit, we have decided to refrain from making specific recommendations in connection with the implementation of article 6(e) in domestic law. Serious consideration, however, should be given to whether limiting the trade prohibitions to certain appendix 2 species that have a natural range including Great Britain is sufficient to give effect to the UK's obligations under article 6(e).

[143] Species listed in schedule 5 to the Wildlife and Countryside Act 1981 that are only strictly protected under the Bern Convention include, among others, the walrus (*Odobenus rosmarus*) and the Southern damselfly (*Coenagrion mercuriale*).

POSSESSION AND SALE OF OTHER PROHIBITED ARTICLES

Poisoned grain or seed and spring traps

5.293 The Pests Act 1954 makes it an offence to be in possession of, sell, offer or expose for sale any spring trap other than an approved trap with a view to its being used for a purpose which is unlawful.[144] The Protection of Animals Act 1911 makes it an offence to sell, offer or expose for sale or give away any grain or seed which has been rendered poisonous except for bona fide use in agriculture. [145]

5.294 We have concluded that the above prohibitions should be replicated under the new framework on the basis that they are primarily relevant to the protection of wild animals. In line with our policy of harmonising the language of secondary activity prohibitions, we have concluded that under the new framework it should also be an offence to publish or caused to be published any advertisement likely to be understood as conveying that a person sells or buys, or intends to sell or buy, a prohibited article. In line with our general policy of increasing the flexibility of the new regulatory regime, in addition, we have concluded that the prohibited items should be listed in a schedule that the Secretary of State or Welsh Ministers may update by regulations.

5.295 Section 8 of the Pests Act 1954 currently provides that the sale and possession of spring traps should only be prohibited where they are possessed or sold with a view to the relevant trap being used for a purpose which is unlawful under section 8 of the 1954 Act. In essence, an "unlawful purpose" is any use of a spring trap which is not authorised by regulations issued by the Secretary of State or Welsh Ministers.

5.296 As discussed earlier in this Chapter, we have concluded that under the new framework any use of spring traps should be prohibited unless expressly authorised by a licence issued by the Secretary of State or Welsh Ministers. In line with that approach, we have concluded that the possession and sale of spring traps, similarly, should be generally prohibited except when authorised by a licence.

5.297 Because, as discussed in Chapter 10, under the new framework the possession of anything capable of being used for committing an offence for the purpose of committing that offence will constitute a criminal offence of general application,[146] we have also concluded that it would be unnecessary to expressly replicate the prohibition of possessing a spring trap with a view to its being used for the purpose of committing a criminal offence.

[144] Pests Act 1954, ss 8(1)(b) and (c).

[145] Protection of Animals Act 1911, s 8(a).

[146] See Chapter 10, paras 10.55 to 10.62 and Wildlife Bill, cl 114.

5.298 We have concluded, therefore, that under the new framework the effect of sections 8(1)(b) and (c) of the Pests Act 1954 and section 8(a) of the Protection of Animals Act 1911 should be expressly replicated through making it generally unlawful to sell, give away,[147] offer for sale, expose for sale, be in possession for the purpose of sale, transport for the purpose of sale, or to publish or cause to be published any advertisement likely to be understood as conveying that a person sells or buys, or intends to sell or buy, any scheduled item, including spring traps and grains or seeds that have been rendered poisonous.

Recommendations

Recommendation 112: we recommend that the effect of sections 8(1)(b) and (c) of the Pests Act 1954 and section 8(a) of the Protection of Animals Act 1911 should be expressly replicated through a general prohibition to sell, give away, offer for sale, expose for sale, be in possession for the purpose of sale, transport for the purpose of sale, or to publish or cause to be published any advertisement likely to be understood as conveying that a person sells or buys, or intends to sell or buy, any scheduled item, including spring traps and grains or seeds that have been rendered poisonous.

This recommendation is given effect in the draft Bill by clauses 114 and 115.

Possession of pesticides harmful to wildlife

5.299 Section 43 of the Natural Environment and Rural Communities Act 2006 empowers the Secretary of State to prohibit the possession of particular pesticides by order, when satisfied that it would be expedient to do so in the interests of protecting wild birds or wild animals from harm. Because the use of a number of pesticides is regulated by specific sectoral legislation, under section 43(3) it a defence to show that the possession of the pesticide in question was for the purpose of doing anything authorised by relevant sectoral legislation.

5.300 As the aim of this power is to prevent the use of pesticides that may cause harm to wild birds or wild animals, we have concluded that it should be integrated into the new framework.

Recommendations

Recommendation 113: we recommend that section 43 of the Natural Environment and Rural Communities Act 2006 prohibiting the possession of pesticides listed by order should be integrated into the new regulatory regime.

This recommendation is given effect in the draft Bill by clauses 111, 112 and 113.

[147] As the existing prohibition in connection with spring traps generally prohibits the possession of unauthorised spring traps for the purpose of committing an offence, we have taken the view that additionally prohibiting activities such as "giving away" (in line with section 8(a) of the Protection of Animals Act 1911) would have the benefit of harmonising the language of both prohibitions without substantially altering the scope of the current prohibition in connection with spring traps.

CHAPTER 6
PROHIBITED CONDUCT: PROTECTION OF WILD PLANTS

INTRODUCTION

6.1 In this Chapter we make recommendations for the reform of existing prohibitions connected with the protection of wild plants and other living organisms that are not animals, such as algae and fungi.

6.2 Broadly speaking, the current regulatory structure for the species-specific protection of wild plants, algae and fungi mirrors the structure of the current regulatory regime for the protection of wild animals. The Conservation of Habitats and Species Regulations 2010[1] make provision for the domestic transposition of the UK's obligation to protect wild plants listed in annex 4(b) to the Habitats Directive, prohibiting the deliberate collection or destruction of wild plants of species that have a natural range including Great Britain and the possession, transport and sale of all wild plant species listed in annex 4(b). The Wildlife and Countryside Act 1981 prohibits the intentional picking, uprooting, destruction and sale of a list of wild plants protected as a matter of domestic policy.[2]

6.3 In line with Chapter 5, recommendations in this Chapter cover, in particular, the harmonisation of the definition of "wild plant", the domestic transposition of article 5 of the Bern Convention and article 13 of the Habitats Directive, the harmonisation and simplification of the language of domestic protection provisions and the rationalisation of the current regime regulating the trade in, and possession of, protected wild plants.

6.4 Beside the transposition of the term "deliberate" and the harmonisation of the language of a number of prohibited activities, in the consultation paper we did not propose any specific changes to the existing criminal offences aimed at prohibiting conduct that negatively interferes with the conservation of wild plants, algae and fungi. In consultation, however, a number of stakeholders argued that the current protection regime contains a number of gaps that should be addressed as part of our review. This Chapter, therefore, outlines the problems raised by stakeholders in consultation and discusses the extent to which those concerns may be addressed by the current reform.

[1] SI 2010 No 490, regs 45 and 46.

[2] See Wildlife and Countryside Act 1981, s 13 and sch 8. As with ss 9(5) and (6), the trade prohibitions in s 13(2) of the 1981 Act overlap with the trade prohibitions in reg 45 of the Conservation of Habitats and Species Regulations 2010.

DEFINITION OF "WILD PLANT"

The Bern Convention and the Habitats Directive

6.5 As discussed in Chapter 5, article 1(1) of the Bern Convention and article 2(2) of the Habitats Directive make it clear that the underlying purpose of their respective provisions is the conservation of "wild fauna and flora". The species-specific obligations under the two instruments, however, are framed in slightly different terms.

6.6 Article 5 of the Bern Convention requires member states to take appropriate legislative and administrative measures to ensure the special protection of "wild flora species" listed in appendix 1. Article 13(1)(a) of the Habitats Directive, on the other hand, requires member states to prohibit activities interfering with protected plant species "in the wild". Similarly, article 13(1)(b) of the Habitats Directive prohibits the possession and trade in specimens "taken in the wild".[3]

6.7 Article 13(2) of the Habitats Directive further specifies that the prohibitions referred to in article 13(1) of the Directive apply to "all stages of the biological cycle" of the plants species to which article 13 applies.

Domestic legislation

Conservation of Habitats and Species Regulations 2010

6.8 In line with the transposition of article 12 of the Habitats Directive discussed in Chapter 5,[4] regulation 45(1) of the Conservation of Habitats and Species Regulations 2010 makes it an offence to collect or destroy "wild plants" rather than plants "in the wild". Regulation 45(5), in addition, provides that unless the contrary is shown, in proceedings for an offence under paragraph (1) the plant in question will be presumed to have been a wild plant.

6.9 As regards secondary activity prohibitions under regulation 45(2), on the other hand, regulation 45(3) of the 2010 Regulations replicates the approach of article 12(2) of the Habitats Directive, providing that paragraph (2) only applies to any live or dead plant, or part of a plant, of a protected species which "has been taken from the wild". Regulation 45(6), in line with regulation 45(5), provides that in any proceedings for an offence under paragraph (2) where it is alleged that a plant was taken from the wild, it will be presumed that the plant in question was taken from the wild unless the contrary is shown.

6.10 Lastly, in line with article 13(2) of the Habitats Directive, regulation 45(4) provides that the prohibitions under paragraphs (1) and (2) apply regardless of the stage of the biological cycle of the plant in question.

[3] For the purpose of art 13(2), "specimen" refers to any plant, alive or dead, any part or derivative thereof, as well as any other goods which appear to be parts or derivatives of plants of those species (Habitats Directive 92/43/EEC, Official Journal L 206 of 22.7.1992, p 7, art 1(m)).

[4] See Chapter 5 paras 5.15 to 5.22.

Wildlife and Countryside Act 1981

6.11 The prohibitions in relation to protected plant species in the Wildlife and Countryside Act 1981 consistently apply to "wild plants". In line with the Conservation of Habitats and Species Regulations 2010, the 1981 Act provides that in proceedings for an offence, the plant in question is presumed to have been a wild plant unless the contrary is shown.[5] The 1981 Act, in addition, generally defines "wild plant" as "any plant which is or (before it was picked, uprooted or destroyed) was growing wild and is of a kind which ordinarily grows in Great Britain in a wild state".[6]

Discussion

Definition of "wild plant"

6.12 For the reasons given in Chapter 5 in connection with the definition of "wild animal", we have concluded that the prohibitions under the new framework should consistently refer to "wild plants", rather than "plants in the wild".

6.13 We have considered whether "wild plant", in line with the approach that we have taken in previous chapters, could be defined by reference to the exclusion of plants that have been artificially propagated. Because of the variety of ways plants, fungi or algae reproduce, however, we were concerned that adopting a definition along those lines could have given rise to unforeseen problems. On balance, therefore, we have concluded that – in line with section 27(1) of the Wildlife and Countryside Act 1981 – "wild plant" should be generally defined as "any plant that is growing wild or has, at any time, grown wild".

6.14 For the reasons explained in Chapter 4, we have further concluded that – in line with current domestic legislation – in proceedings for an offence under the new framework a protected plant should be presumed to be wild unless the contrary is shown.[7]

Fungi and algae

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

[5] Wildlife and Countryside Act 1981, s 13(4).

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

[7] See Chapter 4 paras 4.25 to 4.33. In Chapter 4 we explained that the justification for a reverse burden of proof on the defendant, in this context, is the significant information imbalance between defence and prosecution. In the absence of a reverse burden of proof, the prosecution would have to prove beyond reasonable doubt that (in the present case) the plant was wild. This could be extremely challenging in many circumstances, given that there may be no obvious genetic differences between a wild and a non-wild plant. As the defendant could reasonably be expected to know the provenance of the plant that was found in his or her possession, in most cases the burden of proof should not be a heavy one.

6.16 While, in taxonomic terms, most "algae" fall within the plant kingdom, fungi fall under a completely separate category of organisms; lichens are organisms that result from a symbiotic relationship between a fungus and an alga.[8]

6.17 The Natural Environment and Rural Communities Act 2006 tackled the potential uncertainties created by the absence of a reference to fungi, algae and other organisms by adding section 71(2) to the 1981 Act, which now expressly provides that any reference to a "plant" includes a reference to "fungi and algae".[9] In the 2010 Regulations, on the other hand, the word "plant" has been left undefined.

6.18 We have concluded that the absence of an express reference to fungi and algae in the 2010 Regulations may be potentially misleading. We have concluded, therefore, that in line with section 71(2) of the 1981 Act the new regulatory framework should generally provide that a reference to a "plant" includes a reference to fungi and algae. As lichens are the result of a symbiotic relationship between a fungus and an alga, we have taken the view that they would be implicitly covered by the non-exhaustive definition replicating the effect of section 71(2) of the 1981 Act.

"Plants at any stage of their biological cycle"

6.19 As noted above, the 2010 Regulations reflect the Habitats Directive by clarifying that a "plant" means a plant at any stage of its biological cycle.

6.20 While section 13 of the Wildlife and Countryside Act 1981 (relating to the protection of wild plants) as it applies in England and Wales, is silent as to the stages of the biological cycle to which the offence applies, in Scotland that section expressly makes it an offence to pick, uproot or destroy "any seed or spore attached to [a wild plant of a protected species]" and section 27(3A) provides that a reference to a plant includes a reference to "a bulb, corm and rhizome".

6.21 In the light of the object and purpose of section 13 of the 1981 Act – which is the conservation of endangered wild plant species – we have taken the view that a reference to a protected "wild plant" should be read as including a reference to a plant at any stage of its biological cycle, including its seeds and spores. The collection of the seeds of a wild plant, indeed, may have an equivalent effect on the conservation status of that plant to the taking of the plant itself.

6.22 We have concluded, therefore, that the new framework should expressly provide that any reference to a plant includes a reference to a plant at any stage of its biological cycle. As it may be unclear to many users what exactly the "biological cycle" of a plant includes, we have concluded that a non-exhaustive list including "bulbs, corms, rhizomes, spores and seeds" would make the definition more accessible to non expert users of the legislation.

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

[9] Natural Environment and Rural Communities Act 2006, sch 11, para 97.

Recommendations

Recommendation 114: we recommend that "wild plant" should be generally defined as "any plant that is growing wild or has, at any time, grown wild".

Recommendation 115: we recommend that a plant should be presumed to be wild unless the contrary is shown.

Recommendation 116: we recommend that "wild plant" should be defined as including fungi and algae.

Recommendation 117: we recommend that "wild plant" should also be defined as including a reference to a plant at any stage of its biological cycle, including bulbs, corms, rhizomes, spores and seeds.

These recommendations are given effect in the draft Bill by clause 71.

PRIMARY ACTIVITY PROHIBITIONS

6.23 As discussed at the beginning of this Chapter, in consultation some stakeholders argued that there are a number of gaps in the current domestic provisions on the protection of wild plants, fungi and algae.

6.24 Certain stakeholders, including Plantlife, suggested that the narrow focus of the legislation on taking and destruction fails to address the threats created by activities, from forestry to mountain biking, that can cause damage generally but are not directly targeted at a particular plant.

6.25 More specifically, some stakeholders, including the Association of British Fungus Groups, argued that the current also law fails to address appropriately the differences between plants and fungi. A fungus cannot, in most cases, be collected or uprooted. Fungi do not have "roots", but a vegetative part called mycelium – which is often invisible and ramifies through the substrate.[10] What damages a fungus, therefore, is not necessarily the collection of its visible fruiting bodies, but activities which interfere with the substrate over which their microscopic mycelial threads ramify.

6.26 This section makes recommendations for the simplification and rationalisation of existing primary activity prohibitions in connection with plants, algae and fungi and discusses the extent to which stakeholders' concerns may be addressed under the new framework.

[10] The "substrate" is surface or material on which any particular organism occurs or grows (Oxford English Dictionary).

International and EU obligations

6.27 The Bern Convention requires contracting parties to take appropriate and necessary legislative and administrative measures to ensure the special protection of wild flora species listed in appendix 1 to the Convention and to prohibit, in particular, the deliberate picking, collecting cutting or uprooting of such plants.[11]

6.28 Article 13(1)(a) of the Habitats Directive requires member states to prohibit the deliberate picking, collecting, cutting, uprooting, as well as the "destruction" of plant species listed in annex 4(b) to the Directive in their natural range in the wild.

Domestic legislation

6.29 As mentioned above, article 13(1)(a) of the Habitats Directive is given effect in domestic law by regulation 45 of the Conservation of Habitats and Species Regulations 2010, which makes it an offence deliberately to "pick, collect, cut, uproot or destroy a wild plant of a European protected species".

6.30 A number of other wild plant species falling outside the scope of the Habitats Directive are protected in domestic law under section 13(1)(a) of the Wildlife and Countryside Act 1981, which makes it an offence intentionally to pick, uproot or destroy a wild plant included in schedule 8. "Pick" is defined as "gathering or plucking any part of the plant without uprooting it"; "uproot" is defined as "digging up or otherwise removing the plant from the land on which it is growing".[12]

6.31 Section 13(1)(b) of the 1981 Act, in addition, makes it an offence for any unauthorised person intentionally to uproot any wild plant not included in schedule 8 to that Act. An "authorised person" includes the owner, occupier or anyone authorised by the owner or occupier of the land in question, any person authorised in writing by the relevant local authority, the Environment Agency (in England), Natural Resources Wales (in Wales) or a water or sewerage undertaker.[13]

Mental element of the new offence

6.32 Article 5 of the Bern Convention and article 13(1) of the Habitats Directive require member states to prohibit "deliberate" actions. As discussed in Chapter 3, in this context the word "deliberate" should be interpreted in the light of the case law of the Court of Justice of the European Union.[14] In other words, an act is deliberate not only if the defendant intended the prohibited result, but also if he or she was aware that there was a serious risk that an act would produce that result and failed to take reasonable precautions to prevent the act from having that effect (or was aware of a serious risk irrespective of whether precautions were taken). Section 13(1) of the Wildlife and Countryside Act 1981, on the other hand, only prohibits intentional actions in connection with plant species listed in schedule 8.

[11] Bern Convention, art 5.

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

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

[14] See, in particular, Case C-221/04 *Commission v Spain* [2006] ECR I-4515.

6.33 In line with our general policy discussed in Chapter 5, it would be inappropriate for the Law Commission to recommend the harmonisation of the mental element of the above prohibitions, as doing so would substantively alter the level of protection of plant species protected for reasons related to purely domestic conservation policy. We have concluded, therefore, that two separate prohibitions should be retained under the new framework, one prohibiting "deliberate" activities interfering with plant species listed in appendix 1 to the Bern Convention and annex 4(b) to the Habitats Directive that have a natural range including Great Britain, the other prohibiting "intentional" activities interfering with plant species listed in schedule 8 to the Wildlife and Countryside Act 1981 that are not protected under the Bern Convention or the Habitats Directive.

Harmonisation of prohibited activities in connection with protected plants

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

6.35 While section 13(1)(a) of the Wildlife and Countryside Act 1981 – in contrast to regulation 45(1) of the 2010 Regulations – does not expressly make it an offence to "collect" or "cut" a wild plant of a protected species, it is clear from the definition of "uprooting" and "picking" under section 27 of the 1981 Act that those terms were intended to cover such activities.

6.36 The definition of "uprooting" clarifies that the prohibition extends to the taking of organisms – such as algae and bryophytes – that do not, strictly speaking, have roots. Our view is that the same concept is covered by the prohibition of "collecting" wild plants of a protected species. While there is no guidance on the meaning of "collecting" in the context of article 13(1) of the Habitats Directive, its natural meaning would suggest that it was intended to extend the scope of prohibited activities to the taking of any organism from the ground, whether or not it is rooted to the ground.[15] Similarly, because "picking" includes "plucking any part of a plant without uprooting it", it is clear that it was intended to include activities such as "cutting".

6.37 We have concluded, therefore, that the list of prohibited activities in connection with plants of a protected species should be harmonised in line with the current domestic transposition of the Habitats Directive in regulation 45 of the 2010 regulations.

Recommendations

Recommendation 118: we recommend that it should be an offence "deliberately" to pick, collect, cut, uproot or destroy a wild plant of a species listed in appendix 1 to the Bern Convention or annex 4(b) to the Habitats Directive that has a natural range including Great Britain.

This recommendation is given effect in the draft Bill by clause 72.

[15] This view is supported by the use of the term "*ramasser*" in the French language version of the Habitats Directive, defined by the Larousse Online Dictionary as including the taking of organisms that live, grow or are disseminated on the ground.

Recommendation 119: we recommend that it should be an offence to intentionally pick, collect, cut, uproot or destroy a wild plant of a species listed in schedule 8 of the Wildlife and Countryside Act 1981.

This recommendation is given effect in the draft Bill by clause 73.

Addressing inadequacies in the existing protective framework

6.38 In essence, stakeholders argued that existing primary activity prohibitions are inadequate for two main reasons. First, they are limited to interferences carried out intentionally. They therefore fail to restrict activities other than collection that that negatively interfere with certain plants and fungi, such as land management or forestry. Secondly, the language of the prohibitions focuses on plants and does not address the differences between activities that negatively interfere with plants and activities interfering with other organisms, such as fungi and lichens.

6.39 Our view is that the first concern is addressed by the flexible structure of the new regulatory regime. As discussed above, activities interfering with plants protected under the Bern Convention and the Habitats Directive will be prohibited not only when carried out intentionally, but also when carried out by a person who was aware of a risk an activity causing such an interference. As discussed in Chapter 2, the new regulatory regime will make it possible to move species from one schedule to another by regulation. It follows that if the Secretary of State or Welsh Ministers consider that a plant species should be protected – as a matter of domestic policy – from a broader range of activities than mere collection, they will be able to achieve this aim by moving that species under the protection regime giving effect to the UK's international and EU obligations.

6.40 In response to the second concern, our view is that whilst the "uprooting" offence may well be irrelevant to the protection of fungi, other prohibited activities, such as the "deliberate destruction" prohibition, would appear to be highly relevant. As long as a solid causal connection can be established, the term destruction may well include activities which – whilst not directly destroying the fungus in question – cause its destruction by removing the "life support" on which the fungus is dependent. We would expect, for example, that a person who chops down a tree whilst aware of a serious risk (or even a certainty) that doing so will remove the support that a protected lichen needs in order to survive can be guilty of an offence under the new regulatory regime.

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

Prohibition of uprooting wild plants other than protected plants

6.42 The prohibition of intentionally uprooting wild plants – other than plants protected under schedule 8 to the 1981 Act – by any person other than an authorised person appears to be primarily aimed at protecting landowners' interest in the wild plants growing on their land. While to a large extent this provision overlaps with section 1 of the Theft Act 1968,[16] the offence under section 13(1)(b) is broader, on the basis that it does not require the prosecution to establish "dishonesty", or the intention of permanently depriving the landowner of the plant in question.[17] We have concluded, therefore, that this prohibition should be replicated in the new framework.

6.43 The prohibition currently extends to any plant – other than a wild plant listed in schedule 8 – that "ordinarily grows in Great Britain in the wild".[18] We have taken the view that the expression "ordinarily grows" is both ambiguous and at odds with the terminology normally used in the context of international legal instruments connected with the protection of fauna and flora, such as the Convention on Biological Diversity. [19] As the aim of the expression is to cover any native or non-native plant that has established a self-sustaining population in the wild in Great Britain, we have concluded that the concept would be more clearly expressed by a reference to any plant of a species that is "established in Great Britain in the wild". In line with the current approach, the offence should expressly exclude all wild plants of a protected species.

6.44 Lastly, we have concluded that the definition of "authorised person" should be extended to include any person authorised by the Secretary of State, the Welsh Ministers, Natural England and the Forestry Commissioners. This is because under schedule 9A to the Wildlife and Countryside Act 1981 the above entities have now the power to issue species control orders authorising third parties to enter land for the purpose of eradicating invasive non-native species, but are not currently referred to in the definition of "authorised person".[20] As the offence under section 13(1)(b) also extends to invasive non-native species that have established a self-sustaining population in the wild in Great Britain, extending the definition of "authorised person" will ensure that people acting in pursuance of a species control order will not be inadvertently criminalised.

[16] See, in particular, the definition of "property" under ss 4(2) and (3).

[17] Theft Act 1968, ss 1(1), 2 and 6.

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

[19] In the context of the conference of the parties of the Convention on Biological Diversity, the concept of "establishment" is defined as the "process of an alien species in a new habitat successfully producing viable offspring with the likelihood of continued survival". See Sixth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, 7, 19 April 2002, The Hague, Netherlands, Decision VI/23.

[20] As discussed in Chapter 9, schedule 9A to the Wildlife and Countryside Act 1981 has been introduced by section 23 of the Infrastructure Bill 2015, which to give effect to the Law Commission's Report, Wildlife Law: Control of Invasive Non-native Species (2014) Law Com No 342.

Recommendations

Recommendation 120: we recommend that it should be an offence for a person, other than an "authorised person", to intentionally uproot a wild plant, other than a protected plant, that is established in Great Britain in the wild.

Recommendation 121: we recommend that the definition of "authorised person" under section 27(1) of the Wildlife and Countryside Act 1981 should be extended to include any person authorised by the Secretary of State, the Welsh Ministers, Natural England and the Forestry Commissioners.

These recommendations are given effect in the draft Bill by clause 74.

SECONDARY ACTIVITY PROHIBITIONS

6.45 The current regulatory regime in connection with secondary activity prohibitions in relation to protected wild plants is virtually identical to the regime that regulates the possession and sale of wild animals discussed in Chapter 5.

6.46 Article 13(1)(b) of the Habitats Directive prohibits the keeping, transport, sale or exchange and offering for sale or exchange of specimens of species listed in annex 4(b) to the Directive, except for those legally taken before the implementation date of the Directive.[21] This prohibition is transposed in domestic law by regulations 45(2) and 46 of the Conservation of Habitats and Species Regulations 2010. In line with the transposition of the secondary activity prohibitions in connection with wild animals, regulation 45(2), in essence, copies out the wording of the Directive. Regulation 46 of the 2010 Regulations, on the other hand, goes further than the Directive, making it an offence to trade in wild plants of a species listed in annex 4(b) to the Habitats Directive that have a natural range including Great Britain, regardless of their origin or time of collection.

6.47 Section 13(2) of the Wildlife and Countryside Act 1981, in line with section 9(5), prohibits trade in wild plant species listed in schedule 8 to the 1981 Act, as well as the publication of any advertisement likely to be understood as conveying that a person buys or sells, or intends to buy or sell a protected plant or anything derived from it. Like schedule 5 to the 1981 Act, schedule 8 includes both species protected solely as a matter of domestic policy and a number of species listed in annex 4(b) to the Habitats Directive that have a natural range including Great Britain. The possession and transport of wild plants protected as a matter of domestic policy is not prohibited unless it is shown that the transport or possession was for the purpose of sale.

[21] Annex 4(b) also includes all species listed in annex 2(b) except bryophytes.

Possession and sale of wild plants: European protected species

6.48 We have concluded that regulations 45(2) and 46 of the Conservation of Habitats and Species Regulations 2010 should be replicated under the new framework subject to the general harmonisation and simplification recommendations discussed in Chapter 5. Secondary activity prohibitions in connection with wild plants in annex 4(b) to the Habitats Directive, therefore, should include the following:

(1) possession, control or transport;

(2) sale, or offering or exposing for sale; and

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

6.49 In line with the discussion in Chapter 5, we have also concluded that the exceptions to the temporal and geographical restrictions of the Habitats Directive in connection with wild plants listed in annex 4(b) to the Directive that have a natural range including Great Britain[22] should not be retained, on the basis that they goldplate the requirements of the Habitats Directive.

6.50 Our view is that regulation 46(4) of the 2010 Regulations was most probably inserted to ensure consistency with the scope of the trade prohibitions under section 13(2) of the Wildlife and Countryside Act 1981. Section 13(2) of the 1981 Act prohibits trade in species listed in annex 4(b) to the Habitats Directive that have a natural range including Great Britain regardless of their origin or the time of collection.

6.51 We do not think that there is any good reason why species listed in annex 4(b) to the Habitats Directive that have a natural range including Great Britain should be protected by two identical criminal offences under different legal instruments. In principle, therefore, we have taken the view that under the new framework all species protected under the Habitats Directive should be protected by the provisions giving effect to article 13(1)(b) of the Habitats Directive. All species listed under schedule 8 to the 1981 Act that are not listed in annex 4(b) to the Habitats Directive should be protected by the prohibitions corresponding to section 13(2) of the 1981 Act.

6.52 This, of course, is a default position the purpose of which is to ensure that domestic legislation does not goldplate the requirements of the Habitats Directive. It follows that if the Secretary of State or Welsh Ministers consider that there are valid policy reasons for removing the temporal and geographical restrictions that apply to the trade prohibitions in connection with certain species listed in annex 4(a) to the Habitats Directive, it will be possible to do so under the new framework by moving the relevant species from one protection regime to the other.

[22] SI 2010 No 490, reg 46(4).

Recommendations

Recommendation 122: we recommend that it should be an offence to possess, control, transport, sell, offer for sale, expose for sale or publish (or causing to be published, any advertisement likely to be understood as conveying that a person sells, or intends to buy or sell a wild plant of a species listed in annex 4(b) to the Habitats Directive.

This recommendation is given effect in the draft Bill by clauses 76 and 78.

Recommendation 123: we recommend that a person should not be guilty of an offence of possessing or selling a wild plant of a species listed in annex 4(b) of the Habitats Directive, a part a such a plant, or anything derived from such a plant if he or she shows that the plant in question was taken from the wild

(1) before the implementation date of the Habitats Directive (as long as the taking of the relevant plant was lawful); or

(2) outside the European territory of a member state to which the Treaty on the Functioning of the European Union applies.

This recommendation is given effect in the draft Bill by clause 77.

Sale of wild plants: species protected in England and Wales

6.53 In line with the discussion in Chapter 5, we have concluded that the trade prohibitions under sections 13(2)(a) and (b) of the Wildlife and Countryside Act 1981 should be replicated under the new framework and apply to all wild plants, or anything derived from those plants, that are listed in schedule 8 to the 1981 Act – except for plants currently listed in schedule 8 that are also listed in annex 4(b) to the Habitats Directive.

Recommendations

Recommendation 124: we recommend that the trade prohibitions under sections 13(2)(a) and (b) of the Wildlife and Countryside Act 1981 should be replicated under the new regulatory regime and apply in connection with wild plant species listed in schedule 8 to the 1981 Act other than species listed in that schedule that are also listed in annex 4(b) o the Habitats Directive.

This recommendation is given effect in the draft Bill by clause 79.

CHAPTER 7
PERMITTED ACTIVITY: LICENSING AND DEFENCES

INTRODUCTION

7.1 Having considered in previous chapters the way in which the regulatory regime for wildlife law prohibits activities which negatively interfere with wild animals and plants, we discuss in this Chapter the reform of provisions designed to balance conservation and animal welfare concerns with legitimate human activities.

7.2 In the current domestic regulatory framework, most prohibited activities[1] discussed may be lawfully carried out as long as:

(1) the person in question is authorised to do so by a licence issued by the competent authority, or

(2) the relevant activity is carried out in circumstances falling within the scope of a defence.

7.3 In this Chapter, we make recommendations for the reform of the current licensing regimes and of defences against criminal prosecution for otherwise prohibited activities. As discussed in previous chapters, the domestic protection of a number of bird, animal and plant species falls within the scope of international and EU law. In that context, the recommendations in this Chapter aim at ensuring that the mechanisms designed to authorise activities interfering with those species accord with the UK's external wildlife protection obligations. In the context of species protected primarily as a matter of domestic policy preferences, recommendations in this Chapter aim to simplify and modernise a regulatory regime which is both inconsistent and unnecessarily complex.

7.4 The first question we consider in this Chapter is the general rationalisation of a number of procedural aspects common to all licensing regimes. These are the authorities that grant licences, the duty to give reasons, the types of wildlife licences that may be issued, their maximum duration, the extent of reporting requirements imposed under them, the mechanisms to enforce breaches of licensing conditions and the way licensing decisions may currently be challenged. We follow this by discussing the legality of the existing licensing regimes and defences, in the light of the UK's obligations under international and EU law, and we make recommendations to ensure a streamlined and flexible approach to the licensing regime under the new framework to reflect these obligations. We also make recommendations for the rationalisation and simplification of the mechanisms designed to authorise activities interfering with animal or plant species protected for domestic policy reasons.

[1] See, in particular, the prohibited activities discussed in Chapters 4 to 6 above.

LICENSING: COMMON PROVISIONS AND PROCEDURAL ISSUES

7.5 In this section, we discuss a number of principally procedural aspects common to all wildlife licensing regimes that we have considered reforming under the new framework. We do this with a view to enhancing the consistency between different licensing regimes, and ensuring that primary legislation reflects the licensing practices that have evolved over time.

The appropriate licensing authority

7.6 On paper, there are currently a number of different authorities responsible for wildlife licences. In England they are principally the Secretary of State, Natural England and the Marine Management Organisation.[2] The relevant statutory licensing authorities in Wales are the Welsh Ministers and, in most cases, Natural Resources Wales.

7.7 For example, in the context of the licensing regime under regulation 53 of the Conservation of Habitats and Species Regulations 2010 – which is designed for authorising activities interfering with animals or plants protected under the Habitats Directive – the licensing functions are organised as follows:

(1) Natural England and the Marine Management Organisation (so far as the licence relates to the restricted English inshore region) are responsible for issuing any licence for a purpose listed in regulations 53(2)(a) to (d).[3]

(2) The Secretary of State is responsible for issuing licences for a purpose specified in regulations 53(2)(e) to (g) and (4).[4]

(3) Natural Resources Wales is responsible for all licensing functions as far as they relate to Wales.

7.8 Where the "appropriate authority" (the Secretary of State or Welsh Ministers) or the Marine Management Organisation exercise any function under regulation 53, they must from time to time consult the "appropriate nature conservation body" (Natural England or Natural Resources Wales) as to the exercise of those functions. They must not grant a licence of any description unless the appropriate nature conservation body has advised as to the circumstances in which, in its opinion, licences of that description should be granted.[5]

[2] It is worth noting that whilst most wildlife licensing functions are entrusted, on the face of the statutes, to the "Minister of Agriculture and Fisheries" or the "Minister of Agriculture, Fisheries and Food", those functions have now been transferred to the Secretary of State by a number of subsequent transfer of functions orders (see, in particular, Transfer of Functions (Ministry of Food) Order 1955 SI 1955 No 554 and The Ministry of Agriculture, Fisheries and Food (Dissolution) Order 2002 SI 2002 No 794).

[3] SI 2010 No 490, reg 56(2).

[4] SI 2010 No 490, reg 56(3).

[5] SI 2010 No 490, regs 53(11) and (12).

7.9 It is important to note, however, that in practice all wildlife licensing functions in respect of England have now been delegated by the Secretary of State to Natural England and the Marine Management Organisation through agreements with those bodies.[6]

7.10 The result is that currently, as far as England is concerned, the only relevant licensing authorities are Natural England and the Marine Management Organisation.[7] The exercise of those functions by those bodies does not prevent the Secretary of State from performing the functions to which the agreement relates.[8]

Licensing authorities under the new framework

7.11 On balance, we have concluded that under the new framework all licensing functions should, in principle, be entrusted to the Secretary of State (in England) and the Welsh Ministers (in Wales).

7.12 In the light of the significant simplification of the domestic licensing regimes discussed below, it would be virtually impossible to replicate the existing arrangements in primary legislation. As the powers of the Secretary of State and Welsh Ministers to delegate or otherwise transfer functions to the relevant nature conservation bodies will be retained under the new framework, the Secretary of State or Welsh Ministers will be able to recreate the existing arrangements by entrusting all their wildlife licensing functions to the relevant nature conservation bodies.

7.13 We are persuaded that this solution would not substantively alter the current institutional relations between the Secretary of State and Natural England or between the Welsh Ministers and Natural Resources Wales. Whether or not the licensing functions of Natural England or Natural Resources Wales are set out in primary legislation, those bodies remain bound to comply with any direction issued by the Secretary of State or Welsh Ministers.[9]

[6] Those agreements were entered into under section 78 of the Natural Environment and Rural Communities Act 2006 and section 14 of the Marine and Coastal Access Act 2009. The licensing functions of Natural Resources Wales, on the other hand, have been transferred by Order (see Natural Resources Body for Wales (Functions) Order 2013 SI 2013 No 755).

[7] It is worth noting that on 1 April 2010 the Marine Management Organisation entered into an agreement with Natural England under s 15 of the Marine and Coastal Access Act 2009. The agreement delegates a number of functions to Natural England, including granting and revoking licences under the Conservation of Seals Act 1970 for activities taking place outside the English inshore region; granting licences under s 16 of the Wildlife and Countryside Act 1981 (subject to the condition that a licence relating to the restricted English inshore region cannot be granted by Natural England without the agreement of the MMO) and granting licences under regs 53(a) and (d) of the Conservation of Habitats and Species Regulations 2010 SI 2010 No 490.

[8] See Marine and Coastal Access Act 2009, s 14(5)(b) and Natural Environment and Rural Communities Act 2006, s 78(2)(b).

[9] See Marine and Coastal Access Act 2009, s 37; Natural Environment and Rural Communities Act 2006, s 16; and Natural Resources Body for Wales (Establishment) Order 2012 SI 2012 No 1903, s 11.

Recommendations

Recommendation 125: we recommend that the relevant licensing authorities under the new regulatory regime should be the Secretary of State or Welsh Ministers. We would expect that existing arrangements will be replicated through the existing powers to delegate or transfer functions to other public bodies.

Obligation to consult the relevant nature conservation bodies

7.14 We have concluded that under all the wildlife licensing regimes discussed below the Secretary of State or Welsh Ministers should have a general obligation to consult, from time to time, the appropriate nature body as to the exercise of their licensing functions.[10] The Secretary of State or Welsh Ministers should not grant a licence of any description unless the appropriate nature conservation body has advised as to the circumstances in which, in its opinion, licences of that description should be granted.

7.15 So as to allow the Secretary of State or Welsh Ministers to retain the existing arrangements, we have concluded that "nature conservation body" should be defined as including Natural England (in relation to England), Natural Resources Wales (in relation to Wales) or any other body designated for that purpose by regulations made by the Secretary of State or Welsh Ministers. This is because although in most cases we would expect Natural England and Natural Resources Wales to perform that role, we have concluded that there may be value in retaining the limited advisory functions of other bodies. For instance, the Secretary of State may wish to consult the Natural Environment Research Council in connection with licences authorising the killing of seals during the close season.[11]

Duty to give reasons

7.16 In line with the discussion in Chapter 2 on statutory factors, we have concluded that under the new framework any licensing authority should be under an obligation to give reasons in connection with any decision to grant or refuse a licence.

Recommendations

Recommendation 126: we recommend that the relevant licensing authorities should have a general obligation to consult, from time to time, the appropriate nature conservation body as to the exercise of their licensing functions. The relevant licensing authority should not grant a licence of any description unless the appropriate nature conservation body has advised as to the circumstances in which, in its opinion, licences of that description should be granted.

This recommendation is given effect in the draft Bill by clauses 117(1) to (3).

[10] This is in line with regulation 53(11) of the Conservation of Habitats and Species Regulations 2010 and other equivalent provisions under section 16 of the Wildlife and Countryside Act 1981 and section 10 of the Conservation of Seals Act 1970.

[11] Conservation of Seals Act 1970, s 10(3)(a).

Recommendation 127: we recommend that the relevant licensing authority should be under an obligation to give reasons in connection with any decision to grant or refuse a licence.

This recommendation is given effect in the draft Bill by clauses 117(4) and (5).

Types of licences

Defining class, general and individual licences

7.17 In the consultation paper we noted the development of class and general licences and explained that the development of rules on them has been achieved through practice. There are no provisions that prescribe when a general or class licence should or should not be used as opposed to an individual licence, although general licences are usually issued for low risk activity.[12] We asked, therefore, whether consultees thought it would be desirable to define in the statute what individual, class and general licences are and the circumstances in which they should be used.[13] We explained that whilst defining the nature of the various types of licences that may be issued could add valuable clarity to this area, it could have the side effect of removing flexibility from the current regulatory regime.

7.18 Consultation responses were evenly split on this issue. Regulators strongly argued in favour of retaining the existing flexibility, on the basis that seeking to cover all options within the statute risks adding unnecessary complexity or constraints on the ability of the licensing authority to select the appropriate licence type for a given set of circumstances. Other stakeholders, including a number of environmental organisations, argued that more clarity is needed on the circumstances where general licences may be used. Their main contention was that the current use of certain class and general licences by Natural England may not be in line with the Wild Birds and Habitats Directive. This was on the basis that they require licensees to make scientific judgements that the licensing authority should be making itself before the licence is granted. Many of the arguments in favour of defining licences, however, were rooted in a general opposition to the use of general licences as a regulatory tool.

7.19 We have taken the view that the advantage of the current regime is that new tools, such as class and general licences, can be developed and refined without the need for legislative change. Defining the types of available licences in primary legislation, on the other hand, would run the risk of arbitrarily restricting the regulatory toolkit available to licensing authorities.

[12] Wildlife Law (2012) Law Commission Consultation Paper No 206, paras 3.42 to 3.51.

[13] Wildlife Law (2012) Law Commission Consultation Paper No 206, Question 5-14.

7.20 Our understanding of the current law, and the regulatory regime on which it is based, is that a licence should only be granted where there is "no satisfactory alternative".[14] This applies both to the content and the form of the licence sought. In our view, therefore, there is already adequate protection against the use of licences with an excessively broad scope. The opportunity to challenge the grant of general licences by way of judicial review would remain. This seems a more proportionate way of addressing any problems concerning the grant of general licences, and less drastic than removing their use completely, even when they relate to very low risk activity.

Availability of class and general licences

7.21 The Protection of Badgers Act 1992 provides that the Secretary of State or Welsh Ministers may grant a licence to any person, authorising "that person" to conduct an otherwise prohibited activity under the licence.[15] The effect of this provision would appear to be that the licensing authority may only grant a licence to a named individual. As we suggested in our consultation paper, this restriction potentially creates unnecessary burdens. If a named digger operator fails to show up for work one day, a replacement may not carry out the same activity unless expressly named in a licence. The same issue arises in connection with licences issued under the Deer Act 1991 and the Conservation of Seals Act 1970.

7.22 As this restrictive approach is not mirrored in the more recent protection regimes – where a licence can be granted to "persons of a class or to a particular person"[16] – we provisionally proposed that under the new framework both individuals and classes of persons should be able to benefit from a badger licence.[17]

7.23 Whilst consultation responses were evenly split, the arguments against our provisional proposals were primarily based on a general opposition to the use of class and general licences. Not a single response provided convincing reasons why the licensing regime for authorising activities interfering with badgers should be stricter than the licensing regime to authorise activities interfering with other mammals that are strictly protected under the 2010 Regulations or the 1981 Act, such as otters or cetaceans.

[14] See Habitats Directive, art 16(1).

[15] Protection of Badgers Act 1992, s 10(2). For further discussion see Wildlife Law (2012) Law Commission Consultation Paper No 206, paras 7.47 to 7.50.

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

[17] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 7-10.

7.24 As discussed below, under the new framework the licensing regimes for species protected for domestic policy reasons will be harmonised in line with the derogation regime under article 9 of the Bern Convention.[18] This means that a licence may only be granted if the relevant licensing authority is satisfied that there is no other satisfactory solution. As discussed above, our understanding is that this requirement applies both to the content and the form of the licence sought, thus providing adequate protection against the use of licences with an excessively broad scope. We have concluded, therefore, that there is no reason why licences to authorise activities interfering with badgers, deer or seals should be expressly restricted to individuals named in a licence.

7.25 As discussed in the consultation paper, class and general licences are now regularly issued under the 2010 Regulations and the 1981 Act.[19] The issuing of licences other than individual licences is made possible by two equivalent provisions authorising the licensing authority to grant licences "either to persons of a class or to a particular person". The definition of a class of persons "may be framed by reference to any circumstances whatever including, in particular, their being authorised by any other person".[20]

7.26 While it is clear that the above provisions allow licensing authorities to issue class licences, it is less clear to what extent they authorise licensing authorities to issue certain types of general licences. General Licence WLM – GL03 authorising the temporary possession of dead bats as part of the Passive Surveillance for Bat Rabies project, for example, provides that the licence may be used by "anyone, except those with a recent conviction".[21] While a class of person may be framed by reference to "any circumstances whatever", framing the scope of the licence by reference to the world at large "except in circumstances where the relevant person has been recently convicted" would appear to stretch the concept of "a class of persons" beyond its ordinary meaning. We have concluded, therefore, that to ensure that primary legislation reflects current practices, under the new framework the licensing authority should – in principle – be expressly authorised to grant licences to a particular person, a class of persons or the public at large.

Recommendations

Recommendation 128: we recommend that the meaning of "individual", "class" or "general licence" should be left undefined.

Recommendation 129: we recommend that under the new framework the licensing authority should be expressly authorised to grant licences to a particular person, a class of persons or persons generally.

[18] Wildlife Law (2012) Law Commission Consultation Paper No 206, Question 7-9.

[19] Wildlife Law (2012) Law Commission Consultation Paper No 206.

[20] Conservation of Habitats and Species Regulations 2010 SI 2010 No 490, regs 55(2)(b) and (3); Wildlife and Countryside Act 1981, ss 16(5)(b) and (8).

[21] Natural England, *General Licence: The temporary possession and transport of dead bats for testing as part of the Passive Surveillance for Bat Rabies project*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/386709/general_licence_to_possess_dead_bats_for_rabies_surveillance__GL03_.pdf (Last visited 26 October 2015).

This recommendation is given effect in the draft Bill by clauses 24(1)(b), 68(1)(b), 81(1)(b), 100(2)(b) and 116(2)(b).

Duration of licences

7.27 In the consultation paper, we pointed out that there are different maximum durations of wildlife licences.[22]

7.28 The duration of licences granted under the Conservation of Habitats and Species Regulations 2010 is only restricted to two years in cases where they authorise the killing of a protected species.[23] Under the Wildlife and Countryside Act 1981, similarly, all licences authorising the killing of wild birds or wild animals are limited to two years.[24] The Deer Act 1991 prescribes a maximum duration of two years for a licence to take or kill deer.[25] Under the Protection of Badgers Act 1992, on the other hand, there is no limit as to the duration of a licence.

7.29 In the consultation paper, we addressed the question whether the duration of wildlife licences could be standardised, and, if so, at what length. As two years is the default position for all species other than badgers, we provisionally proposed that time limit for all licences authorising the killing of protected species, considering the lack of a restriction on the duration of licences to kill badgers a simple anomaly.[26] In relation to licences granted for other purposes, we suggested that it was worth having some time longstop limit so as to force regulators to review periodically the underlying conditions of the licence. We provisionally proposed that the maximum duration of those licences should be set at ten years.[27]

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

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

[23] SI 2010 No 490, reg 53(10).

[24] Wildlife and Countryside Act 1981, s 16(6).

[25] Deer Act 1991, s 8(3G)(e).

[26] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 5-15.

[27] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 5-16.

7.31 With the benefit of consultation, we were persuaded by the view that maximum licence length requirements would unnecessarily fetter the flexibility of the new regulatory framework and preclude necessary licences from being granted. This is not to say that licences should be issued for indefinite periods: a licence should say transparently how long it is intended to last for, so that its obligations and effects are clear. In line with the above discussions on general licences, the maximum length of a licence will be indirectly controlled by the general requirement that a licence cannot be granted for a particular length of time unless there is no other satisfactory solution but to grant it for that length. Regulators highlighted in consultation that the bulk of licences are granted for terms considerably shorter than the two year maximum because of this requirement.

Recommendations

Recommendation 130: we recommend that wildlife licences should not be subject to any express maximum length requirements.

Reporting requirements

7.32 In the consultation paper we highlighted the fact that member states are legally required to send regular reports to the European Commission on their implementation of the Wild Birds and Habitats Directives.[28] We noted, however, that there is considerable difference between the reporting obligations under the two Directives. The Wild Birds Directive is less prescriptive, and would not seem, on the face of it, to require the recording of all activity permitted under the derogations. The Habitats Directive, however, seems to require reporting on all activity conducted under derogations. We suggested, nevertheless, that we did not think that it would be necessary to require the reporting of all numbers of a species captured or killed in derogation from the prohibitions of either Directive.[29]

7.33 The views of consultees were split. Representatives of the shooting industry, gamekeepers and landowners agreed that reporting requirements would be unnecessary, on the basis that they would increase costs and bureaucracy and are not expressly required by EU law. Environmental organisations, on the other hand, were almost unanimously in favour of the introduction of statutory reporting requirements, arguing that they are necessary for monitoring compliance with licence conditions and to assess whether certain licences or closed seasons are sustainable for the relevant protected species. They further maintained that monitoring requirements are the only way to ensure appropriate compliance with "wise use" requirements and the reporting obligations under article 9(3) of the Wild Birds Directive. Natural England took an intermediate position, suggesting that whilst reporting requirements may be necessary for monitoring the effect of certain activities on particular species, in many cases they would be unnecessary, on the basis that general monitoring practices already provide reliable data.

[28] See Wild Birds Directive 2009/147/EC, Official Journal L 020 of 26.1.2010, p 7, art 9(3) and Habitats Directive 92/43/EEC, Official Journal L 206 of 22.7.1992, p 7.

[29] Wildlife Law (2012) Law Commission Consultation Paper No 206, Question 6-19.

7.34 Whilst valid points were made on both sides, we have concluded that a blanket obligation to report to the relevant licensing authority the number of specimens captured or killed under a licence would be an unnecessarily inflexible mechanism. Whilst we agree, in principle, that certain licences affecting species protected under the Directives may need reporting requirements, we have taken the view that the appropriate licensing authorities are in a better position to assess the circumstances in which reporting requirements would be necessary. We have concluded, therefore, that it should be for the competent authorities to determine the circumstances where reporting requirements should be imposed on licensees.

7.35 In line with the current licensing regimes, we recommend that under the new framework it should be possible for the relevant licensing authority to impose reporting requirements under any wildlife licence. As discussed in Chapter 4, under the new framework it will also be possible to impose reporting requirements through the hunting regulations giving effect to article 7 of the Wild Birds Directive.[30]

Recommendations

Recommendation 131: we recommend that it should be for the relevant licensing authority to determine the circumstances where reporting requirements would be necessary.

Criminal liability for breaching a licence condition

7.36 Most wildlife licensing regimes[31] make it an offence to breach the conditions of a wildlife licence, unless the defendant shows that he or she took all reasonable precautions and exercised due diligence to avoid the commission of the offence, or the commission of the offence was otherwise due to matters beyond his or her control. This is not the case in the context of wildlife licences issued under the Wildlife and Countryside Act 1981, where a person who breaches a licence condition may only be prosecuted for the commission of the underlying offence to which the licence, if complied with, would have provided a defence.[32]

7.37 In the consultation paper we suggested that the absence of an offence of breaching a licence condition under the 1981 Act was anomalous. We explained, in addition, that the absence of a self-standing prohibition of breaching a licence condition could create enforcement problems in connection with licences imposing long term monitoring requirements. We provisionally proposed, therefore, that under the new framework there should be a general offence of breaching a licence condition.[33]

[30] See Chapter 4, paras 4.99 to 4.111.

[31] Conservation of Habitats and Species Regulations 2010 SI 2010 No 490, reg 58; Protection of Badgers Act 1992, s 10(8); Deer Act 1991, s 8(5).

[32] Wildlife and Countryside Act 1981, s 16.

[33] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 5-17.

7.38 Whilst the overwhelming majority of consultees agreed with the above provisional proposal, a minority worried about the effects that the creation of such an offence would have on the wildlife regime as a whole. It was argued, in particular, that prosecuting people for breaching "trivial" licence conditions could be disproportionate in certain cases.[34]

7.39 We do not think that the concerns raised by consultees in the context of this provisional proposal are well founded. First, all examples mentioned in consultation were of breaches of licence conditions leading to conviction of the underlying offence. This merely demonstrates that a person who breached any of those licensing conditions could be prosecuted under the 1981 Act despite the absence of an additional offence of breaching a licence condition. Secondly, we recommend that the offence of breaching a licence condition should – in line with the 2010 Regulations – be subject to a due diligence defence, which will make it more difficult to prosecute a person for a trivial breach of the condition. Lastly, as discussed in Chapter 10 below, under the new framework we would expect technical breaches of licence conditions to be enforced through civil sanctions rather than criminal prosecutions.[35]

7.40 In the consultation paper, one of the main arguments in favour of creating a general offence of breaching a licence condition was based on the existence of a limitation period of two years for the prosecution of substantive offences. On those grounds, we suggested that in the absence of a self-standing offence of breaching a licence condition, it would be impossible to enforce monitoring obligations that extended for more than two years after the commission of the otherwise prohibited activity on the basis that the prosecution of the underlying offence would be time-limited.[36]

7.41 Because, as discussed in Chapter 10, most offences under the new framework will be triable either way – that is in the Crown Court or the Magistrates' court, the limitation period of two years will also automatically disappear.[37] We have concluded, nevertheless, that a general self-standing offence of breaching a licence condition would remain necessary under the new framework. In many circumstances it may be extremely difficult to prosecute a person for the commission of the underlying offence when the breach of the relevant licence condition took place years after the commission of the otherwise prohibited activity.

[34] The National Gamekeepers' Organisation, for instance, highlighted a licensing condition providing that at each inspection of a trap "any dead animal, including any dead bird, caught in the trap should be removed from it" (see General Licence WLM-GL06, para 8).

[35] See Chapter 10 paras 10.143 to 10.153.

[36] Wildlife Law (2012) Law Commission Consultation Paper No 206, paras 5.100 and 5.101.

[37] See Chapter 10 paras 10.154 to 10.163.

Recommendations

Recommendation 132: we recommend that failing to comply with the condition of a wildlife licence should constitute a criminal offence, unless the defendant shows that he or she took all reasonable precautions and exercised all due diligence to avoid the commission of the offence or that the commission of the offence was otherwise due to matters beyond his or her control.

This recommendation is given effect in the draft Bill by clause 118.

Appeals against and challenges to wildlife licences

7.42 The issue of whether there should be a dedicated appeals mechanism for wildlife licences was one that engaged the interest of many consultees. In our consultation paper we set out the current law, explaining that there is no appeals mechanism at present and that parties wanting to challenge the grant or refusal of a wildlife licence have to rely on judicial review. We presented consultees with the following options:

(1) there should be no new appeals process for wildlife licences;

(2) there should be an appeal process which is only open to applicants; or

(3) there should be an appeals process which is open to both applicants and members of the public with a "sufficient interest".

7.43 In addition, we asked consultees whether they thought that, if we were to establish an appeal process, it should be available for all types of wildlife licences. Lastly, we asked whether the most appropriate body to hear appeals against wildlife licences would be the Planning Inspectorate or the First-tier Tribunal (Environment).[38]

7.44 Though in consultation a significant majority of respondents were in favour of an appeals process, this was based predominantly on assertions that the excessive cost of and delays in judicial review make it an inappropriate mechanism for challenging wildlife licensing decisions. There was, however, no consensus as to who should be able to benefit from a new self-standing appeal mechanism. In general, those representing land or development interests favoured "applicant only" appeals, whilst environmental organisations strongly argued in favour of an appeals process that would also be open to any member of the public with a sufficient interest.

7.45 We have concluded, on balance, that there were not sufficiently compelling arguments to suggest that an appeal process on the merits would be necessary. As highlighted by some consultees, there may well be disadvantages to a further appeal process. Such a system could lead to greater legalism in the processes adopted by the regulators. In policy terms we are not convinced that the benefits of adopting a self-standing appeal mechanism to challenge wildlife licences would justify taking these risks.

[38] Wildlife Law (2012) Law Commission Consultation Paper No 206, Questions 10-2 to 10-4.

7.46 A number of consultees challenged the current reliance on judicial review on the basis that, at the time we consulted on this issue, there were serious concerns as to the legality of judicial review in the light of the UK's international commitments on access to justice in environmental matters. Below, therefore, we consider the relevance of such concerns in the light of subsequent reforms aimed at bringing access to justice in England and Wales in line with article 9 of the Aarhus Convention, discussed below. The discussion focuses on two main contentious issues: costs and grounds of review.

Access to justice in environmental matters: international and EU law

THE AARHUS CONVENTION

7.47 The aim of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention) is to "contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being".[39] To achieve this, the Convention provides the public, including environmental organisations, with a set of procedural rights the aim of which is to improve the quality and accountability of decision-making having an effect on the environment. The Convention came into force in October 2001 and was ratified by the UK and the European Union in February 2005.

7.48 The Aarhus Convention, amongst other things, seeks to widen access to environmental justice. In particular, article 9(2) requires that:

> members of the public concerned … having a sufficient interest … or maintaining the impairment of a right … have access to a review procedure before a court of law and/or another independent and impartial body established by law to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6.[40]

7.49 Whilst the effect of article 9(2) is confined to large scale projects, articles 9(3) and (4) create more general obligations, providing that:

> 3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

[39] Aarhus Convention, art 1.

[40] Art 6 of the Aarhus Convention, to which art 9(2) relates, covers: "decisions on whether to permit proposed activities listed in annex 1" (such as quarries and opencast with a site surface over 25 hectares); or, "in accordance with national law …, decisions on proposed activities not listed in annex 1 which may have significant effect on the environment …" (see arts 6(a) and (b)).

> 4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

THE TREATY ON EUROPEAN UNION

7.50 Article 4(3) of the Treaty on European Union generally requires member states to take any appropriate measure to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. This provision has been interpreted by the Court of Justice of the European Union as imposing a general duty on member states to take all appropriate measures to implement EU law. Under such a duty, member states must ensure that EU law is given its full effect within their legal systems (*effet utile*),[41] and member states must ensure that there are not excessive barriers to the enforcement of rights prescribed by EU law (*principle of effectiveness*).[42]

THE ENVIRONMENTAL IMPACT ASSESSMENT DIRECTIVE[43]

7.51 The Environmental Impact Assessment Directive imposes upon member states procedural obligations to ensure that, where projects are likely to have significant effects on the environment, those effects are appropriately assessed before consent is granted.[44] To give effect to the Aarhus Convention, the Directive was amended so as to incorporate, among other things, the access to justice obligations under articles 9(2) and 9(4) of the Convention. It is worth noting, however, that the application of article 9(2) of the Aarhus Convention goes further than decisions subject to environmental impact assessments. Under article 6(1) of the Convention, article 9(2) applies to all decisions having a significant effect on the environment.

EU LAW OBLIGATIONS TO COMPLY WITH THE AARHUS CONVENTION

7.52 The question of the effect of the Aarhus Convention in EU law outside its transposition into the Environmental Impact Assessment Directive was raised before the Court of Justice in Case C-240/09 *Slovak Brown Bear*.[45] In *Slovak Brown Bear*, the Court of Justice held that the provisions of article 9(3) of the Aarhus Convention are not capable of having direct effect. However, in the context of the implementation of EU environmental legislation – such as the Habitats and Wild Birds Directives – member states' courts remain under an obligation to:

41 Case C-34/89 *Italy v Commission* [1990] ECR I-3603 at [12]; Case C-277/98 *France v Commission* [2001] ECR I-8453 at [40].

42 Case 33/76 *Rewe* [1976] ECR 1989 at [5]; Case 45/76 *Comet* [1976] ECR 2043 at [12].

43 Environmental Impact Assessment Directive 2011/92/EU, Official Journal L 26 of 28.1.2012 p 1.

44 Directive 2011/92/EU, art 2(1).

45 Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo ivotného prostredia Slovenskej republiky* [2011] ECR I-1255.

> interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, so as to enable an environmental protection organisation … to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.[46]

7.53 By analogy, the same reasoning must extend to the application articles 9(2) and 9(4) of the Aarhus Convention.

Domestic implementation: costs

7.54 Article 9(4) of the Aarhus Convention provides, among other things, that the procedures to challenge environmental decisions falling within the scope of articles 9(2) and 9(3) must not be "prohibitively expensive". This obligation led to a large number of challenges to the costs regime for judicial review in England and Wales before the Court of Justice and the Aarhus Convention Compliance Committee.[47]

7.55 Broadly speaking, those challenges were upheld primarily on the ground that the principles determining the circumstances in which protective cost orders[48] should be granted to claimants in environmental cases were excessively discretionary and unpredictable. In addition, it was found that the principles determining the grant of protective costs orders failed to give sufficient weight to the imperative of removing financial barriers to access to justice in environmental matters.[49]

7.56 In response to a series of adverse rulings from the Court of Justice and the Aarhus Convention Compliance Committee, the protective cost orders regime in judicial review cases in England and Wales was reformed with a view to ensuring compliance with article 9(4) of the Convention.[50] In judicial review proceedings challenging the grant of wildlife licences, costs liability of claimants is now capped at £5000 for individuals and £10,000 for claimants other than individuals.[51]

[46] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo ivotného prostredia Slovenskej republiky* [2011] ECR I-1255 at [49] to [52].

[47] The Aarhus Convention Compliance Committee is designed to fulfill the requirement imposed by Article 15 of the Aarhus Convention to establish optional arrangements for reviewing compliance with the Convention.

[48] These are orders limiting a party's liability to pay another party's costs in the event of losing the case.

[49] See *R (Corner House Research)* v *Secretary of State for Trade & Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600 and *R (Garner) v Elmbridge Borough Council and Others* [2010] EWCA Civ 1006, [2014] 1 WLR 55.

[50] The reform was implemented through an amendment to the Civil Procedure Rules, with effect from 1 April 2013.

[51] See Civil Procedure Rule 45.and Practice Direction to Civil Procedure Rule 45. Defendants' costs liability is cross-capped at £35,000. The Ministry of Justice has recently launched a consultation entitled "Costs Protection in Environmental Claims Proposals to revise the costs capping scheme for eligible environmental challenges" proposing various changes to the Aarhus Convention costs rules.

7.57 In light of the reform to the Civil Procedure Rules in April 2013 and the objective and subjective assessment of prohibitive costs elaborated by the Court of Justice in the *Edwards* case,[52] we have concluded that the issue of prohibitive costs liability, on its own, would no longer appear to constitute a compelling reason for shifting away from the current reliance on judicial review for the purpose of challenging decisions to grant or refuse wildlife licences.

7.58 That said, it is worth noting that – whilst largely welcoming the direction of the recent reforms to the costs regime for "Aarhus Convention cases" – the Aarhus Convention Compliance Committee suggested that further steps should be taken to ensure full compliance with article 9(4). In particular, the Committee found that there continued to be a lack of clear guidance, or legally binding directions to the judiciary, on how the cost caps will be applied to individual applicants with different means or how cost caps would be shared in cases with multiple applicants.[53]

Domestic implementation: grounds of review

7.59 A key issue for large scale projects, and other projects to which article 9(2) applies, is whether the existing grounds of review are sufficiently broad to allow individuals to challenge the "substantive legality" of a decision. This is not a completely new question: the issue of whether *Wednesbury* unreasonableness (or "irrationality") is a sufficient ground for challenging substantive judgements has been tackled in other areas of the law – most notably for the purposes of human rights actions.[54]

[52] See *R (Edwards and another) v Environment Agency and another (No 2)* [2013] UKSC 78, [2014] 1 WLR 55 and Case C-260/11 *R (Edwards and another) v Environment Agency and others (No 2)* [2013] ECR I-0000 read together with Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo ivotného prostredia Slovenskej republiky* [2011] ECR I-1255.

[53] UN Economic and Social Council, *Report by the Compliance Committee on the Compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention*, 22 May 2014 ECE/MP.PP/2014/23; see also UN Economic and Social Council, *Findings and Recommendations with regard to Communication ACCC/C/2012/77 concerning compliance by the United Kingdom of Great Britain and Northern Ireland*, 2 July 2014 ECE/MP.PP/C.1/2015/3, where the Compliance Committee ruled that an £8,000 cost order against Greenpeace in judicial review proceedings challenging the Nuclear National Policy Statement was in breach of article 9(4) of the Convention by reason of being prohibitively expensive. As an aside, see *Secretary of State for Communities and Local Government v Venn* [2014] EWCA Civ 1539 at [34] and [35], where the Court of Appeal suggested that the failure to include planning and statutory appeals within the scope of the reform of the costs regime in judicial review cases constitutes a clear breach of the Aarhus Convention.

[54] *Smith and Grady v UK* (1999) 29 EHRR 493 (App No 33985/96 and 33986/96) at [138].

7.60 In this context, drawing a parallel with cases such as *Smith and Grady v UK* and *R (Daly) v Secretary of State for the Home Department*,[55] the Aarhus Convention Compliance Committee expressed doubts as to whether judicial review in England and Wales meets the standards of review required by the Aarhus Convention as regards substantive legality. Interestingly, the Compliance Committee also expressed its concerns in connection with proceedings falling within the scope of article 9(3) of the Aarhus Convention, despite the fact that article 9(3) does not expressly include the same express requirement in connection to challenges to the substantive legality of a decision.[56]

7.61 There are, however, two important points relating to whether these pronouncements necessitate a change to domestic law. First, the Aarhus Convention Compliance Committee has not conclusively ruled on whether traditional grounds of review are insufficient to satisfy the requirements of articles 9(2) and 9(3) of the Convention. Secondly, the findings and recommendations of the Compliance Committee are not, strictly speaking, binding on contracting parties.[57] We have concluded, therefore, that while the comments of the Compliance Committee should be taken into account by domestic courts when interpreting the scope of the traditional grounds of review in domestic challenges to wildlife licences,[58] they do not, on their own, constitute a sufficiently compelling reason for setting up a new appeals system.

7.62 Meeting the requirements of a substantive review in proceedings challenging the grant of a wildlife licence for species covered by the Wild Birds and Habitats Directives is unproblematic. When implementing EU law, the general principles of EU law apply – including the possibility to review the proportionality of a substantive decision. In other words, for challenges to wildlife licences concerning species protected by either the Habitats Directive or the Wild Birds Directive, proportionality may already be relied upon as a ground of review.[59]

Recommendations

Recommendation 133: we recommend that compliance of judicial review with the access to justice requirements of the Aarhus Convention should be kept under close review.

[55] *Smith and Grady v UK* (1999) 29 EHRR 493 (App No 33985/96 and 33986/96) and *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532.

[56] UN Economic and Social Council, *Findings and Recommendations of the Aarhus Convention Compliance Committee with regard to communication ACCC/C/2008/33 (ClientEarth) concerning compliance by the United Kingdom*, paras 125 to 127.

[57] The Aarhus Convention Compliance Committee was established under article 15 of the Aarhus Convention, which merely requires contracting parties to establish "optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of the Convention".

[58] By analogy, Lord Carnwath in *Walton v The Scottish Ministers* [2012] UKSC 44, [2013] Env LR 16 at [100] suggested that “although the Convention is not part of domestic law as such (except where incorporated through European directives) […] the decisions of the Committee deserve respect on issues relating to standards of public participation”.

[59] See A le Sueur, J Jowell and Lord Woolf, *De Smith’s Judicial Review* (5th ed, 2007) paras 11-073, 11-077 and 14-124 to 14-133. See further R Gordon, *EC Law in Judicial Review* (2007) Chs 1 and 14.

LICENSING AND DEFENCES INVOLVING DEROGATING FROM INTERNATIONAL AND EU OBLIGATIONS

7.63 The obligations to prohibit activities which harm species protected under international and EU law are not absolute. Member states are allowed to derogate from the general prohibitions as long as the circumstances and conditions upon which the derogation is granted comply with a number of listed criteria.

7.64 Article 16(1) of the Habitats Directive, for instance, provides that activities otherwise prohibited by the Directive may be authorised provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a "favourable conservation status" in their natural range.[60] On top of those general considerations, otherwise prohibited activities may only be authorised if they fall under one or more grounds for derogation. The permitted grounds for authorising activities otherwise prohibited by the Habitats Directive include the prevention of serious damage to crops or livestock, the protection of fauna and flora, scientific research, the protection of public health and safety or "other imperative reasons of overriding public interest".

7.65 Article 16(2), in addition, requires member states to forward to the European Commission every two years a report on the derogations applied under article 16(1). This report must specify, among other things, the species which were subject to the derogations, including the nature of the risk, the means, devices or methods authorised for the capture or killing of animal species and the reason for their use as well as the circumstances where such derogations were granted.

7.66 Article 9(1) of the Wild Birds Directive similarly allows member states to derogate from the prohibitions of the Directive, on specified grounds, where there is no other satisfactory solution. As discussed in Chapter 3, the listed grounds do not include the "overriding public interest" ground, which is usually relied upon to authorise and regulate development projects which may have potential impacts on wildlife.[61] A catch-all provision, nevertheless, allows member states to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.

7.67 Article 9(2) provides that derogations granted under article 9(1) must specify, among other things, the species subject to the derogations, the means, arrangements and methods authorised for the capture or killing of protected birds and the circumstances where such derogations were granted. Article 13 of the Directive provides that the application of measures taken pursuant to the Directive may not lead to deterioration in the present situation as regards the conservation of the species of birds referred to in article 1.

[60] Art 1(i) of the Habitats Directive defines "conservation status of a species" as "the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2". The conservation status will be taken as "favourable" when: "population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats; the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future; and there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis".

[61] See Chapter 3 paras 3.49, 3.90 to 3.91 and 3.128 to 3.137.

7.68 Article 16(2) of the Habitats Directive and article 9(3) of the Wild Birds Directive require member states to report each year to the European Commission on the implementation of the conditions imposed by articles 9(1) and 9(2).

Licences or statutory defences?

The Court of Justice's approach to the transposition of the derogation regimes under the Habitats and Wild Birds Directives

7.69 Article 16 of the Habitats Directive and article 9 of the Wild Birds Directive do not expressly require member states to set up a centralised licensing system to control all activities derogating from the general prohibitions of the Directives. The structure of the above provisions and the strict approach by the Court of Justice to the transposition of the derogation regimes in domestic law, however, strongly militate in favour of a centralised regulatory approach based on licences and against a system based on automatic exceptions.

7.70 Firstly, in Case C-339/87 *Commission v Netherlands* the Court of Justice ruled that:

> the criteria which the Member States must meet in order to derogate from the prohibitions laid down in the [Wild Birds] Directive must be reproduced in specific national provisions, since a faithful transposition becomes particularly important in a case where the management of the common heritage is entrusted to the Member States in their respective territories.[62]

7.71 This means, in essence, that mere administrative practice is insufficient to give appropriate effect to the obligations under article 9 of the Wild Birds Directive. For the purpose of complying with article 9, in other words, member states are under an implied obligation to replicate in domestic legislation the conditions under which derogations may be authorised.[63]

7.72 Secondly, article 9(2) of the Directive provides that derogations granted by the member state must specify a number of conditions. This suggests that derogations under article 9 were intended to be permitted on the basis of specific administrative decisions by the competent authority. A general statutory exception would only be acceptable if it were very specific and narrowly drawn.

[62] Case C-339/87 *Commission v Netherlands* [1991] ECR I-851 at [28]. In Case C-262/85 *Commission v Italy* [1987] ECR 3073 at [39], the Court of Justice went further by concluding that the failure to expressly transpose the criteria and conditions in article 9(2) of the Directive in domestic legislation constituted, in itself, a breach of the Directive as it introduced "an element of uncertainty as regards the obligations which the regions must observe when adopting their regulations".

[63] Case C-339/87 *Commission v Netherlands* [1991] ECR I-851 at [29].

7.73 In Case C-247/85 *Commission v Belgium* the Court of Justice confirmed that article 9(2) of the Wild Birds Directive requires all derogations to specify the time and place in which they may be granted as well as the controls to be carried out and any other relevant terms and conditions required by article 9(2). The general statutory derogation in Belgian law authorising, for example, "occupants and hunting-right owners, their attorneys or sworn wardens and officials and servants of the water and forestry authorities [to] capture, kill, destroy or drive away [certain eggs or birds]" was therefore held, by virtue of its generality, to exceed the limits set by article 9.[64]

7.74 While the Habitats Directive does not expressly require the competent authority to specify terms and conditions, articles 16(2) and (3) impose reporting requirements on member states which include, for example, an obligation to specify "the species which are subject to the derogations and the reason for the derogation, including the nature of the risk, with, if appropriate, a reference to alternatives rejected and scientific data used". It is unclear how this obligation could be complied with through a system based on automatic statutory defences to prohibited activities.

7.75 Lastly, the Court of Justice has consistently stressed that the circumstances in which a member state may derogate from the prohibitions under the Habitats Directive and, by analogy, the Wild Birds Directive, must be interpreted restrictively. On this basis, it has consistently ruled against the use of defences that failed to ensure strict compliance with the obligation to derogate solely in the absence of satisfactory alternatives, and where the act in question is not detrimental to the favourable conservation status of the relevant protected species.[65]

Balance between licensing and criminal defences: general considerations

7.76 A regulatory framework which is overly reliant on licensing may have a number of disadvantages. For example, the licensing process may impose undue burdens on both users and the licensing authority and may be impractical in circumstances requiring immediate action.

7.77 In the context of wildlife protection legislation, however, a system which is primarily based on licensing carries a number of benefits. First, it enhances the information flow to competent authorities about the activities which are interfering with protected species and their impact. Secondly, it allows the competent authority effective control of the cumulative impact of activities on the population of protected species, thus ensuring compliance with the object and purpose of the Habitats and Wild Birds Directives. Lastly, it provides a higher level of legal certainty to developers and other regulatory addressees, as it allows the competent authority to delineate more precisely their obligations in the context of a specifically licensed operation.

[64] Case C-247/85 *Commission v Belgium* [1987] ECR 3029 at [30] to [34].

[65] See, for example, Case C-6/04 *Commission v United Kingdom* [2005] ECR I-9017 at [111].

Conclusion

7.78 As discussed in detail below, our general assessment is that the current domestic transposition of EU law and, in particular, the transposition of article 9 of the Wild Birds Directive is over-reliant on criminal defences – a large number of which, for reasons explained below, are not in line with EU law. The discrepancy between the regulatory approach required by the Directives and the domestic approach to their transposition, as discussed in Chapter 1, is the direct result of an attempt to fit the requirements of the Directives into regulatory structures which reflected earlier legislation. The approach of the Protection of Birds Act 1954, for example, was not designed to give effect to the UK's international and EU obligations.[66]

7.79 In the light of this, our general policy is that derogations from the protection provisions of the Habitats Directive, the Wild Birds Directive and the Bern Convention should only be authorised by means of licences issued by the competent authority on the basis of the specific grounds prescribed by article 9 of the Wild Birds Directive, article 16 of the Habitats Directive, and article 9 of the Bern Convention, unless there are persuasive reasons to depart from that approach – for instance, where it would be highly impractical or could lead to excessive suffering on the part of the animal concerned. Statutory defences should therefore, only be used in exceptional circumstances, and should be narrowly drawn. They should also ensure compliance with EU law obligations by requiring the defendant to establish, for example, the absence of satisfactory alternatives to undertaking the otherwise unlawful activity.

Wild birds: licensing regime under the new framework

7.80 As discussed in previous chapters, the domestic protection of wild birds is strongly influenced by a number of overlapping international and EU obligations.[67] All of the instruments require contracting parties to prohibit particular activities in connection with protected species, subject to derogation regimes which are slightly different from each other. As the literal transposition of the obligations under the above instruments would result in the creation of three separate licensing regimes that would introduce a high level of unnecessary complexity in domestic legislation, in this section we make recommendations with a view to ensuring a streamlined and flexible approach to the licensing of activities affecting wild birds of a protected species.

[66] See Chapter 1, paras 1.26 to 1.39.

[67] The relevant international and EU obligations are prescribed by the Bern Convention, the Bonn Convention, the African-Eurasian Migratory Waterbirds Agreement and the Agreement on the Conservation of Albatrosses and Petrels, as well as the Wild Birds Directive.

7.81 The derogation regime under the Wild Birds Directive has been comprehensively set out above, and in our consultation paper.[68] The first part of this section, therefore, describes the derogation regimes prescribed under other relevant international instruments and the way the UK's international and EU obligations are currently given effect in domestic legislation. In the second part of this section we make recommendations for the reform of the domestic licensing regime for wild birds, with a view to ensuring that the wildlife licensing regime under the new framework gives effect to the UK's external obligations through a flexible, consistent and streamlined approach.

International obligations

THE BERN CONVENTION

7.82 The Bern Convention requires contracting parties to prohibit a number of activities which harm a limited number of strictly protected bird species listed in appendix 2. Similar to the position under the Habitats and Wild Birds Directives, prohibited activities may nevertheless be authorised by contracting parties provided that "there is no other satisfactory solution and that the exception will not be detrimental to the survival of the population concerned".[69] In line with the Habitats Directive, otherwise prohibited activities may only be authorised if they are covered by one or more grounds of derogation.

7.83 Grounds for authorising activities otherwise prohibited by the Bern Convention include the protection of fauna and flora; the prevention of serious damage to crops, livestock, forest, fisheries, water and other forms of property; the interests of public health and safety, air safety or other overriding public interests; research and education, repopulation, reintroduction and necessary breeding; and the judicious exploitation of certain wild animals and plants in small numbers.[70] Article 9(2) of the Convention, in addition, requires member states to forward to the Bern Convention Standing Committee a report on the derogations applied under article 9(1) every two years specifying, among other things, the populations of species subject to the derogations, "the conditions of risk and the circumstances of time and place under which such exceptions were granted" and the means, devices or methods authorised for the capture or killing of animal species.

THE BONN CONVENTION AND THE AFRICAN-EURASIAN MIGRATORY WATERBIRDS AGREEMENT

7.84 Beside the Bern Convention there are two other relevant international environmental agreements that have been ratified by both the EU and its member states: the Bonn Convention and the African-Eurasian Migratory Waterbirds Agreement.

[68] See Chapter 3, paras 3.41 to 3.42, and Wildlife Law (2012) Law Commission Consultation Paper No 206, pp 19 to 21.

[69] Bern Convention, art 9(1).

[70] Bern Convention, art 9(1).

7.85 Article 3(5) of the Bonn Convention, discussed in Chapter 3, requires parties that are range states to migratory species listed in appendix 1 to the Convention to prohibit the "taking" of animals belonging to such species.[71] Exceptions may be made only for scientific purposes, enhancing the propagation or survival of the affected species, accommodating the needs of traditional subsistence users of a species or when "extraordinary circumstances" so require, provided that such exceptions are precise as to content, are limited in space and time and "do not operate to the disadvantage of the species".

7.86 Article 3(2)(a) of the African-Eurasian Migratory Waterbirds Agreement requires contracting parties to accord the same strict protection for endangered migratory waterbird species in the Agreement area as is provided under articles 3(4) and (5) of the Bonn Convention. As was mentioned in Chapter 3, it is currently unclear to us whether any waterbird species listed in annex 2 to the Agreement has a natural range including Great Britain so as to qualify for strict protection under article 3(2)(a).[72]

AGREEMENT ON THE CONSERVATION OF ALBATROSSES AND PETRELS

7.87 The Agreement on the Conservation of Albatrosses and Petrels was also concluded within the framework of the Convention on Migratory Species. It was ratified by the United Kingdom in July 2004 but has never been ratified by the EU.

7.88 The only wild bird covered by the Agreement that has a natural range including the United Kingdom is the Balearic shearwater (*Puffinus mauretanicus*). By virtue of having a natural range including the European territory of an EU member state, it is also protected under the Wild Birds Directive.[73]

7.89 Article 2(1) of ACAP states that the objective of the agreement is to achieve and maintain a "favourable conservation status for albatrosses and petrels". In line with article 1(i) of the Habitats Directive and articles 1(b) and (c) of the Bonn Convention, "conservation status" is defined as "the sum of the influences acting on the migratory species that may affect its long-term distribution and abundance". For the purpose of the Agreement, the conservation status of a protected species is taken as "favourable" when:

(1) population dynamics data indicate that the migratory species is maintaining itself on a long-term basis;

[71] "Range states", in relation to a particular migratory species, means any state, or "Party" (defined in art 1(1)(k)), "that exercises jurisdiction over any part of the range of that migratory species, or a State, flag vessels of which are engaged outside national jurisdictional limits in taking that migratory species" (art 1(1)(h)). Under art 1(1)(i) of the Bonn Convention, "taking" means taking, hunting, fishing, capturing, harassing, deliberate killing, or attempting to engage in any such conduct. See Chapter 3, paras 3.29 to 3.33.

[72] See Chapter 3, paras 3.33 to 3.36.

[73] It would appear that the Balearic shearwater is also protected under appendix 2 to the Bern Convention. In 1997 the Bern Convention's contracting parties agreed to introduce the *Puffinus yelkouan* in appendix 2. According to the IUCN website ((http://www.iucnredlist.org/details/22728432/0 (last visited 26 October 2015)), it was only in 2004 that it was found that the *Puffinus mauretanicus* was a separate species from the *Puffinus yelkouan*. We assume, therefore, that by introducing the *Puffinus yelkouan* as a protected species the contracting parties to the Bern Convention had intended to cover both species.

(2) the range of the migratory species is neither currently being reduced, nor is likely to be reduced, on a long-term basis;

(3) there is, and will be in the foreseeable future, sufficient habitat to maintain the population of the migratory species on a long-term basis; and

(4) the distribution and abundance of the migratory species approach historic coverage and levels to the extent that potentially suitable ecosystems exist and to the extent consistent with wise wildlife management.

7.90 Similarly to the Bonn Convention, articles 3(2) and (3) require contracting parties to prohibit the deliberate "taking"[74] of, or harmful interference with, albatrosses and petrels, their eggs, or their breeding sites. Contracting parties, however, may grant an exemption from those prohibitions provided that there is "no other satisfactory course of action" and the exemption is for the following purposes:

(1) to enhance the propagation, re-establishment or survival of albatrosses or petrels;

(2) on a selective basis and to a limited extent for scientific, educational or similar purposes;

(3) to accommodate the traditional needs and practices of indigenous peoples; or

(4) in other exceptional circumstances, in which case, unless an exceptional circumstance is of the nature of a short-term emergency, a prior environmental impact assessment shall be carried out and made publicly available in accordance with requirements in the action plan established by article 4.

7.91 Article 3(4) provides in addition that all exemptions should be precise and limited in space and time, and should not operate to the detriment of the conservation status of albatrosses or petrels.

Current domestic transposition

7.92 Article 9 of the Wild Birds Directive is currently transposed in domestic legislation through section 16 of the Wildlife and Countryside Act 1981. Section 16(1) provides that the prohibitions in sections 1, 5, 6(3), 7 and 8 and orders under section 3 do not apply to anything done in accordance with a licence issued for a specified purpose. While the specified purposes listed in article 16(1) are broadly in line with article 9 of the Wild Birds Directive, the catch-all "judicious use" licensing ground is currently transposed in domestic law by an exhaustive list of licensable purposes, such as "taxidermy" or "falconry".

[74] According to art 1(2)(q) of the Agreement, "taking" means "taking, hunting, fishing, capturing, harassing, deliberate killing or attempting to engage in any such conduct". Humane killing, by duly authorised persons, to end the suffering of seriously injured or moribund albatrosses or petrels, however, does not constitute "deliberate taking" or "harmful interference" (art 3(5)).

7.93 So as to ensure compliance with article 9(1) of the Wild Birds Directive, section 16(1A)(a) provides that a licence may not be granted for any purpose mentioned in section 16(1) unless the licensing authority is satisfied that, as regards that purpose, there is no other satisfactory solution. In addition, to give effect to the restrictions on the use of the catch-all "judicious use" derogation ground in article 9(1)(c) of the Directive, section 16(1A)(b) provides that a licence for one of the exhaustive list of purposes giving effect to that derogation grounds may only be granted "on a selective basis" and in respect of a "small number of birds".

7.94 For the purpose of ensuring compliance with article 9(2) of the Wild Birds Directive, section 16(5A) further provides that a licence under section 9(1) authorising any action in respect of wild birds must specify the species of wild birds in respect of which, the circumstances in which, and the conditions subject to which, the action may be taken and the methods, means or arrangements which are authorised or required for the taking of the action.

Rationalising the transposition of international and EU obligations

7.95 The above paragraphs portray a landscape of overlapping and often inconsistent international and EU provisions. For instance, while the scope of permitted derogations under article 3(5) of the Bonn Convention is more limited than under article 9(1) of the Wild Birds Directive, article 3(5) does not expressly require contracting parties to be satisfied of the absence of other satisfactory alternatives before derogating from its prohibitions.

7.96 Similarly, the language used to describe the effects that derogations may, or may not have on a protected species is different under each instrument. The Bern Convention, for instance, provides that the derogation should "not be detrimental to the survival of the population concerned".[75] The Bonn Convention, similarly, provides that the derogation "should not operate to the disadvantage of the species".[76] The Agreement on the Conservation of Albatrosses and Petrels is in line with the language of the Habitats Directive which provides that derogations should not operate "to the detriment of the conservation status of albatrosses or petrels".[77] The Wild Birds Directive generally provides that measures taken pursuant to the Directive "may not lead to deterioration in the present situation as regards the conservation of the species of birds referred to in article 1".[78]

7.97 A literal transposition of the above obligations would result in multiple licensing regimes and introduce unnecessary complexity in domestic legislation. We have concluded, therefore, that a more purposive approach to transposition is necessary to ensure a streamlined and coherent domestic approach to the licensing of activities affecting wild birds.

[75] Bern Convention, art 9(1).

[76] Bonn Convention, art 3(5)(d).

[77] Agreement on the Conservation of Albatrosses and Petrels, art 3.

[78] Directive 2009/147/EC, art 13.

NO OTHER SATISFACTORY SOLUTION

7.98 In line with the current transposition of article 9(1) of the Wild Birds Directive, we have concluded that, under the new framework, licences authorising otherwise prohibited activities, in connection with any wild bird of a protected species, should only be granted if the relevant licensing authority is satisfied that there is no other satisfactory way of achieving the purpose for which the licence is granted. This is because, whilst the "no other satisfactory solution" test is not expressly required by the Bonn Convention or the African-Eurasian Migratory Waterbirds Agreement, the species that the UK is required to protect under those instruments are also protected by the Wild Birds Directive, to which the UK is also bound to give effect.

FAVOURABLE CONSERVATION STATUS

7.99 As highlighted above, the language used to describe the effects that derogations may, or may not, have on a protected bird species is not consistent. Article 9(1) of the Bern Convention provides that a contracting party may only derogate from the activities otherwise prohibited by the Convention if the exception "will not be detrimental to the survival of the population concerned". While article 9 of the Wild Birds Directive is silent on this point, article 13 generally provides that the application of the measures taken pursuant to the Wild Birds Directive "may not lead to deterioration in the present situation as regards the conservation of species referred to in article 1".[79]

7.100 Later instruments, such as the Habitats Directive and the Agreement on the Conservation of Albatrosses and Petrels, only authorise derogations when they will not be detrimental to the "favourable conservation status" of a protected species – a concept which also underpins the Bonn Convention and all its other daughter agreements.

7.101 The Habitats Directive defines the conservation status of a species as "the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations". The conservation status is taken as favourable when:

(1) population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats;

(2) the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and

(3) there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.[80]

[79] Art 13 should be read together with art 2 of Directive 2009/147/EC, which generally requires member states to "take the requisite measures to maintain the population of the species referred to in article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level".

[80] Directive 92/43/EEC, art 1(i).

7.102 We have taken the view that there is no significant difference between the different formulations of the requirements that exceptions should not be detrimental to the survival or conservation status of the various protected species. In essence, all three expressions require member states to be satisfied that, on a long term basis, authorised activities derogating from the relevant protection provisions do not have unsustainable impacts on the population of the relevant protected species.

7.103 The above position is supported by the European Commission's *Guidance document on the strict protection of animals species of Community interest under the Habitats Directive*, where the Commission explains that the concept of "conservation status" is a "flexible and proportional approach to the use of derogations" which allows member states to take a broad approach to the impact of a particular derogation on the population of a species, by taking into account how the conservation status of a species is likely to develop in the future as well as the role of compensation measures on the impact of derogations. [81]

7.104 Our view is also expressly supported by the European Commission's *Guide to Sustainable Hunting under the Birds Directive*, which suggests that "whereas the term 'favourable conservation status' is not mentioned explicitly in the [Wild Birds] Directive […] it is implicit from the requirements of article 2 of the Directive".[82] Similarly, the appendix to the Bern Convention Standing Committee's Revised Resolution No 2 (1993) on the scope of articles 8 and 9 of the Bern Convention suggests that in determining whether a derogation may be "detrimental to the survival of the population concerned" contracting parties should rely on current data on the state of the population including its size, distribution, state of the habitat and future prospects, and that special caution should be taken in case of species that are not in "favourable" conservation status.[83]

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

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

[83] Bern Convention Standing Committee, *Revised Resolution No 2 (1993) on the scope of Articles 8 and 9 of the Bern Convention* (2 December 2011) appendix, para 7.

7.105 We therefore see no good reason why the criterion for granting a licence authorising otherwise prohibited activities in connection with wild birds of a protected species should differ from the criterion for granting a licence authorising otherwise prohibited activities in connection with other animal or plant species protected under the Habitats Directive.[84] We are, of course, aware that, unlike European protected species under the Habitats Directive, a number of protected bird species – such as the common wood pigeon – do not have particular conservation problems. From the above discussion, however, it is clear that the phrase "detriment to the conservation status of a species" expresses a flexible concept which is strongly dependent on the existing conservation status of the species in question. In other words, authorised activities having an impact on wood pigeons would be unlikely to be found "detrimental to their favourable conservation status" except in extreme circumstances.

7.106 We have concluded that before granting a licence authorising otherwise prohibited activities affecting wild birds of a protected species, the appropriate authority should be satisfied that the permitted activity will not be detrimental to the maintenance of the population of the protected bird species concerned at a "favourable conservation status" in its natural range. This approach will rationalise and harmonise the domestic approach to derogations to the relevant international and EU legal instruments, whilst ensuring full compliance with the UK's external obligations.

ENSURING COMPLIANCE WITH THE GROUNDS OF DEROGATION UNDER THE BONN CONVENTION AND CONNECTED AGREEMENTS

7.107 As noted above, the reasons for which contracting parties may derogate from the protection provisions of the Bonn Convention, the African-Eurasian Migratory Waterbirds Agreement and the Agreement on the Conservation of Albatrosses and Petrels are more limited than under the Wild Birds Directive. We have concluded, therefore, that under the new framework the appropriate licensing authority should grant a licence in connection with activities interfering with a wild bird of a protected species, only where it is satisfied that doing so would not be contrary to the United Kingdom's EU and other treaty obligations. This provision will only have practical effect in the limited number of cases in which a licence is sought in connection with a species covered by one of those two treaties.

[84] We are aware that in *Sustainable Shetland v Scottish Ministers* [2015] UKSC 4, [20], the Supreme Court found that the "favourable conservation status test" should not be read across the Habitats and Wild Birds Directives. We agree that the Supreme Court's interpretation of the Directives is technically correct in that context. As explained above, however, our view is that in substance the "favourable conservation status" test would not appear to be significantly different from the tests required under the Bern Convention or the Wild Birds Directive, and is flexible enough to accommodate necessary wildlife management decisions in connection with wild bird species that do not require particular protection measures. In the light of the similarity between the tests discussed above, we have also taken the view that in terms of drafting it would have made little sense to transpose four or five different tests for licensing activities in connection with different species.

Deficiencies in transposition of article 9(1) of the Wild Birds Directive

7.108 There are three anomalies in the current domestic transposition of article 9 of the Wild Birds Directive. First, section 16(2) expressly authorises the issuing of licences for activities otherwise prohibited under section 1 of the 1981 Act for the purpose of "providing food for human consumption" in relation to "a gannet on the island of Sula Sgeir" or "a gull's egg or, at any time before 15th April in any year, a lapwing's egg". Section 16(2) does not expressly require the relevant licensing authority to be satisfied of the absence of other satisfactory solutions, or that the licence is granted on a "selective basis" and in relation to a "small number of birds".

7.109 Secondly, licences authorising trade in wild or captive-bred birds may currently be granted for any reason, whether or not there are other satisfactory solutions or the reason for granting the licence falls within the scope of article 9 of the Wild Birds Directive.[85] Thirdly, the killing or capture of "game birds" during the close seasons imposed by section 3 of the Game Act 1831 may not be licensed for any reason, even when this may be required for reasons of public health, air safety or for the protection of other fauna or flora.

7.110 In the light of the strict approach of the Court of Justice's case law to the transposition of article 9 of the Wild Birds Directive in domestic legislation, we have concluded that the first two anomalies identified in the above paragraph constitute a breach of the Directive and should not be replicated under the new framework. The main reason for this is that both provisions fail to require the relevant licensing authority to be satisfied about the absence of any other satisfactory ways of achieving the purpose for which the licence is to be granted. It follows that under the new framework licences authorising the taking of gull's eggs will have to be issued under the same licensing regime applicable to all wild birds of a protected species.

7.111 Section 16(4), in addition, also fails to require the relevant licensing authority to be satisfied that the licence falls within the list of derogation reasons authorised by article 9(1) of the Directive. Whilst that provision is primarily used for authorising the trade in captive-bred birds which, as discussed in previous chapters, fall outside the scope of the Directive, the problem is that the same provision may also be used to authorise the trade in wild birds falling within the scope of the Directive.

7.112 The inability to license the killing or capture of game birds during the close season, on the other hand, goes unnecessarily beyond the requirements of the Directive. There are no conservation reasons why a licensing authority should be unable to license the killing or capture of a pheasant or a red-legged partridge during the close season.

7.113 We have concluded, therefore, that for the purpose of ensuring compliance with article 9(1) of the Wild Birds Directive (as well as the specific provisions of the international instruments discussed above) under the new framework, activities interfering with wild birds of a protected species, including game birds, should not be capable of being licensed unless the appropriate licensing authority is satisfied that:

[85] Wildlife and Countryside Act 1981, s 16(4). See, also, Chapter 4, paras 4.206 to 4.207.

(1) there is no other satisfactory way of achieving the purpose for which the licence is to be granted;

(2) granting the licence will not be detrimental to the maintenance of the population of any species of bird at a favourable conservation status in its natural range; and

(3) granting the licence is not contrary to the UK's obligations (where applicable) under the Bonn Convention, the African-Eurasian Migratory Waterbirds Agreement or the Agreement on the Conservation of Albatrosses and Petrels.[86]

Recommendations

Recommendation 134: we recommend that the relevant licensing authority should not grant a wildlife licence authorising otherwise prohibited activities interfering with protected birds, including game birds, unless it is satisfied that:

(1) there is no other satisfactory way of achieving the purpose for which the licence is granted;

(2) granting the licence will not be detrimental to the maintenance of the population of any species of bird at a favourable conservation status in its natural range; and

(3) granting the licence is not contrary to the UK's obligation to comply with the Bonn Convention, the African-Eurasian Waterbirds Agreement and the Agreement on the Conservation of Albatrosses and Petrels.

This recommendation is given effect in the draft Bill by clause 23(6)

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

WILD BIRDS DIRECTIVE

7.114 Article 9(1)(c) of the Wild Birds Directive, as discussed above, includes a catch-all derogation reason which authorises member states to permit, under "strictly supervised conditions" and "on a selective basis", the capture, keeping or other "judicious use" of certain birds in "small numbers".

[86] A number of prohibitions that we have replicated under the new framework, such as the prohibition of certain cages, are purely aimed at protecting the welfare of captive birds. We have concluded, therefore, that those prohibitions should be subject to a separate licensing regime discussed at the end of this Chapter.

7.115 The European Commission's guidance on sustainable hunting suggests that the expression "strictly supervised conditions" implies that any use of this derogation must involve "clear authorisations that must be related to particular individuals, places, times and quantities".[87] The guidance further suggests that the expression should be understood as implying "a system of individual authorisations (or narrow-category authorisations involving a high degree of accountability)", and should imply strict territorial, temporal and personal controls.[88] The expression "selective basis" implies that the activity in question must be "very specific in its effects", targeting one species, or even one gender or age class of that species.[89]

7.116 Lastly, the expression "small numbers" relates to the specific population of birds to which the derogation relates, and clearly requires the competent authority to take into account the cumulative effect of all licences granted each year on the basis of this derogation ground, and their impact on the overall mortality rate of the species concerned.[90] The interpretation of the concept of "small numbers" has been subject to a number of rulings from the Court of Justice.[91] In such proceedings the Court of Justice has consistently relied on the scientific reports published by the Committee for Adaptation to Technical and Scientific Progress (the ORNIS Committee), established under article 16 of the Wild Birds Directive.

DOMESTIC TRANSPOSITION

7.117 Section 16(1) of the Wildlife and Countryside Act 1981 expressly transposes all derogation grounds authorised by article 9(1) of the Wild Birds Directive, except for the catch-all "judicious use" ground, which is currently given effect by an exhaustive list of activities that may be authorised, including:

(1) falconry or aviculture;

[87] European Commission, *Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds* (2009) para 3.5.43.

[88] European Commission, *Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds* (2009) para 3.5.49. Similarly the appendix to the Bern Convention Compliance Committee's Revised Resolution No 2 (1993) on the scope of articles 8 and 9 of the Bern Convention suggests that "under strictly supervised conditions" should be interpreted to mean that "the authority granting the exception must possess the necessary means for checking on such exceptions either beforehand (e.g. a system of individual authorisations) or afterwards (e.g. effective on-the-spot supervision), or also combining the two possibilities" (see Bern Convention Standing Committee, *Revised Resolution No 2 (1993) on the scope of Articles 8 and 9 of the Bern Convention* (2 December 2011) appendix, para 12).

[89] European Commission, *Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds* (2009) para 3.5.44. This does not necessarily mean that "non-selective" methods of capturing or killing may never be licensed on this derogation ground. In Case C-252/85 *Commission v France* [1988] ECR 2243, for instance the Court of Justice satisfied itself that the requirements under section 9(1)(c) had been met, on the basis that the use of the lines and nets in question involved individual authorisations and that there were strict territorial, temporal and personal controls in order to guarantee the selective nature of the capture.

[90] In Case C-182/02 *Ligue pour la Protection des Oiseaux and Others* [2003] ECR I-12105 the Court of Justice stated that the condition as to "certain birds in small numbers … cannot be satisfied if a hunting derogation does not ensure the maintenance of the population of the species concerned at a satisfactory level."

[91] See, in particular, Case C-344/03 *Commission v Finland* [2005] ECR I-11033.

(2) any public exhibition or competition;

(3) taxidermy; and

(4) photography.

7.118 In accordance with article 9(1)(c) of the Wild Birds Directive, section 16(1A)(b) provides that a licence authorising one of the above activities may not be granted otherwise than "on a selective basis" and in respect of a "small number of birds". The Wild Birds Directive's requirement of "strictly supervised conditions" is currently not expressly transposed in section 16 of the 1981 Act. The equivalent requirement of article 16 of the Habitats Directive is, however, expressly transposed in regulation 53 of the Conservation of Habitats and Species Regulations 2010. Regulation 53 provides that "judicious use" licences for European protected species may only be granted "to such persons as are named in the licence" and must specify:

> the maximum number of specimens which may be taken or be in possession or control of the person authorised by the licence, or which particular specimens may be taken or be in the possession or control of that person.[92]

REFORM

7.119 In the consultation paper we noted that the grounds of derogation authorised by article 9(1) of the Wild Birds Directive have been transposed in domestic law more strictly than necessary. We suggested, in particular, that replacing the "judicious use" ground with an exhaustive list of licensable purposes renders the current licensing regime unnecessarily inflexible. There could be legitimate reasons, other than falconry, public exhibitions, taxidermy and photography, for issuing licences authorising activities interfering with small numbers of protected wild birds. We proposed, therefore, that under the new framework a licensing authority should be able to authorise the capture, possession or "other judicious use" of wild birds when satisfied that:

(1) there is no other satisfactory solution;

(2) the otherwise prohibited activity will be carried out under strictly supervised conditions; and

(3) the otherwise prohibited activity will be carried out on a selective basis and in relation to a small number of birds.[93]

7.120 In other words, we suggested that the list of licensing reasons under the new framework should reflect the list of derogation reasons under article 9(1) of the Wild Birds Directive.

[92] SI 2010 No 490, regs 53(6) and (8)(b).

[93] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 6-18.

7.121 The majority of consultees agreed with our provisional proposal. Pigeon Racing UK, for instance, pointed out – as a practical example – that pigeon fanciers are currently unable to obtain licences under the Wildlife and Countryside Act 1981 to control certain raptors for the purpose of protecting racing and homing pigeons. Their view was that their inability to obtain a licence is due to the unnecessarily strict transposition of the Wild Birds Directive in domestic law. At the other end of the spectrum, a number of environmental organisations disagreed with our proposal, arguing that it may introduce excessive flexibility in the regulatory regime. Other consultees expressed conditional support, so long as the new legislation provided for clear reporting requirements and ensured that the cumulative impacts of licences granted on "judicious use" grounds do not have a detrimental effect on the conservation status of protected bird species.

7.122 We have no views as to the merits of managing sparrowhawk populations in the sort of way Pigeon Racing UK would prefer. However, we remain convinced of the benefits of allowing a regulatory regime to be flexible in order to be able to adapt to changing circumstances. The example given by Pigeon Racing UK is just one of a number that could be given where the distribution of species has changed such that conflicts may have to be managed. An effective regulatory regime should at the very least allow this to be considered. This does not mean that licences would necessarily be granted; an applicant would still have to make out that there was no other satisfactory solution to the granting of a licence on the terms sought. This is a high threshold and we consider it sufficient to prevent "judicious use" licences circumventing the general obligation to conserve wild birds found in the Wild Birds Directive.

7.123 We have concluded, therefore, that under the new framework the relevant licensing authority may grant a licence whose effect is to authorise the capture, possession or other judicious use of birds and the licensing authority is satisfied that the activity will be carried out under strictly supervised conditions, on a selective basis and to a limited extent.[94]

7.124 To clarify that the reference to a "small number" of birds requires the relevant licensing authority to consider the cumulative effect of the licences on the population of the protected bird in question, we have also concluded that the licensing authority will need to be satisfied that the licence is consistent with the principle that no more than a "small number" of birds from any given population of protected birds should be captured, possessed or otherwise used in accordance with a "judicious use licence". The expression "small number of birds" will have to be interpreted, when relevant, in accordance with the guidance issued by the ORNIS Committee.[95]

7.125 So as to address the concerns expressed in consultation, we have also concluded that, in line with the European Commission's guidance, the new legislation should also expressly provide that "judicious use" licences should:

[94] While the "limited extent" condition is absent from art 9(1) of the Wild Birds Directive, it is required for the purpose of derogating from the obligations of the Bern Convention (as well as the Habitats Directive). Whilst in substantive terms this expression would not appear to add much to the existing conditions, we considered that including it would have the benefit of ensuring full compliance with the Bern Convention as well as ensuring the use of consistent language across the different licensing regimes.

[95] See para 7.116 above.

(1) specify the maximum number of birds that may be captured, possessed or otherwise "used" under the licence; and

(2) include appropriate conditions requiring reports to be made to the appropriate authority about the things done under the licence and otherwise enabling the appropriate authority to monitor the things done under the licence.

7.126 We have noted above that the current transposition of the "judicious use" licensing condition in the context of article 16(1) of the Habitats Directive further provides that licences may only be granted to "such persons as are named in the licence".[96] As we have explained, we take the view that this requirement is unnecessarily restrictive and should not be replicated under the new framework. The European Commission guidance, in fact, merely suggests that the phrases "under strictly supervised conditions" and "on a selective basis" should be understood to imply a system of individual or narrow-category authorisations, as long as a high degree of accountability is ensured.[97] As it is obvious that general licences, or broad class licences, would fail the "strictly supervised conditions" test, we have concluded that express provisions circumscribing the class of people that may benefit from a "judicious use" licence would unnecessarily restrict the flexibility of the licensing regime.

Recommendations

Recommendation 135: we recommend that grounds for which a licence should be capable of being granted under the new regulatory regime should reflect the grounds listed in article 9(1) of the Wild Birds Directive.

This recommendation is given effect in the draft Bill by clauses 23(2) and (4).

Recommendation 136: we recommend the relevant licensing authority may only grant a licence whose effect is to authorise the capture, possession or other "judicious use" of birds if satisfied that

(1) the activity will be carried out under strictly supervised conditions, on a selective basis and to a limited extent;

(2) the licence is consistent with the principle that no more than a "small number" of birds from any given population of protected birds should be captured, possessed or otherwise used.

This recommendation is given effect in the draft Bill by clauses 23(4) and (5)

[96] SI 2010 No 490, reg 53(6).

[97] European Commission, *Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds* (2009) p 67. Available at http://ec.europa.eu/environment/nature/conservation/wildbirds/hunting/docs/hunting_guide_en.pdf (last visited 26 October 2015).

Recommendation 137: we recommend that "judicious use" licences should also

(1) specify the maximum number of birds that may be captured, possessed or otherwise "used" under the licence; and

(2) include appropriate conditions requiring reports to be made to the appropriate authority about the things done under the licence and otherwise enabling the appropriate authority to monitor the things done under the licence.

This recommendation is given effect in the draft Bill by clause 23(8).

Licensing the destruction, damage to or deterioration of protected breeding sites or resting places on grounds of overriding public interest

7.127 As discussed in Chapter 4,[98] the Bern Convention requires contracting parties to prohibit the destruction, damage to or deterioration of the breeding sites and resting places of bird species listed in appendix 2 to the Convention. As this obligation was not replicated under the Wild Birds Directive, we have concluded that under the new framework it should also be possible for the relevant licensing authority to authorise activities which may cause the destruction, damage or deterioration of a breeding site or resting place of a relevant bird species on grounds of "overriding public interest" – a derogation ground authorised by article 9 of the Bern Convention which, as discussed in Chapter 3, was surprisingly omitted from article 9 of the Wild Birds Directive.[99]

7.128 As further discussed below, we think that the possibility to authorise the destruction, damage or deterioration of breeding sites or resting places of relevant bird species subject to the conditions of a licence will have the benefit of providing more legal certainty for developers whilst allowing regulators to have a closer oversight over activities having potential effects on protected species.[100]

Recommendations

Recommendation 138: we recommend that activities causing the destruction, damage or deterioration of breeding sites or resting places of relevant protected bird species prohibited under the new framework should be capable of being authorised under a licence on grounds of "overriding public interest".

This recommendation is given effect in the draft Bill by clause 23(3).

[98] See Chapter 4, paras 4.54 to 4.76

[99] See Chapter 3 paras 3.49, 3.90 to 3.91 and 3.128 to 3.137.

[100] It is worth noting, however, that in this context the effect of this additional licensing ground is likely to be significantly restricted by the fact that relevant licensing authorities will be unable to authorise activities causing, for instance, the destruction of a breeding site if those activities are also likely to cause the disturbance of the local population of wild birds of a relevant protected species.

Transposition of article 9(2) of the Wild Birds Directive

7.129 As the Court of Justice held in *Commission v Italy*,[101] the additional conditions listed in article 9(2) of the Wild Birds Directive should be expressly transposed in domestic legislation so as to ensure that they are appropriately taken into account by the relevant licensing authorities. In line with the current transposition of article 9(2) of the Wild Birds Directive under section 16(5A) of the Wildlife and Countryside Act 1981, therefore, we have concluded that under the new framework, any licence authorising otherwise prohibited activities in connection with protected birds should expressly specify the species of birds in respect of which the activity may be carried out, the conditions subject to which it may be carried out, and the means, arrangements or methods which may or must be used in doing it.

7.130 We have noted that section 16(5A) of the 1981 Act fails to require the relevant licensing authority to specify the places, times, or periods over which the action may be carried out. While it is common practice for existing licensing authorities to specify the area where – or time during which – otherwise prohibited activities may be carried out, we have concluded that to ensure full compliance with article 9(2) of the Wild Birds Directive those conditions should be made mandatory.[102]

Recommendations

Recommendation 139: we recommend that wildlife licences issued in connection with activities interfering with protected birds should specify

(1) the species of bird in respect of which the activity may be carried out;

(2) the means, arrangements or methods which may or must be used in doing so; and

(3) the places, times, or periods in which the activity may be carried out.

This recommendation is given effect in the draft Bill by clause 23(7).

[101] Case C-262/85 *Commission v Italy* [1987] ECR 3073 at [39].

[102] Article 9(2) of the 1981 Act further provides that derogations should specify the "controls which will be carried out". We have taken the view that – similarly to the requirement to specify the authority empowered to decide which methods may be used – it is unlikely that this condition had ever been meant to require competent licensing authorities to specify under each licence the controls that will be carried out. Our view, therefore, is that the general enforcement and inspection provisions discussed in Chapter 10 below are sufficient to give effect to this obligation under the new framework.

Wild birds: defences to prohibited activities

7.131 A number of provisions of the Wildlife and Countryside Act 1981 grant derogations from the prohibitions giving effect to the Wild Birds Directive without the need to rely on a licence issued by a competent authority, reflecting the regulatory approach adopted in connection with the protection of birds and other animals in earlier legislation. In the light of the subsequent case law of the Court of Justice, however, it is clear that such a broad approach to the transposition of article 9 of the Directive is now, in most cases, inadequate. This section, therefore, discusses whether and how the existing defences should be replicated under the new framework. We make recommendations with a view to ensuring compliance with the Wild Birds Directive whilst retaining, as far as possible, domestic policy preferences.

Acting in pursuance of an order

7.132 Section 4(1) of the Wildlife and Countryside Act 1981 provides a defence to primary activity prohibitions in connection with wild birds where the activity is carried out pursuance of a requirement issued by the Secretary of State or Welsh Ministers under section 98 of the Agriculture Act 1947 (a "pest control order")[103] or an order issued under the Animal Health Act 1981 (an "animal health order").

7.133 Section 98 of the Agriculture Act 1947 authorises the Secretary of State or Welsh Ministers, if it appears to them expedient to do so, to issue binding requirements to take steps as may be necessary for the killing, capture or destruction of a list of "pest" animals, including a number of wild bird species, on relevant land. The Animal Health Act 1981 includes broad powers to make orders authorising relevant officials to enter land and kill or capture animals, including birds, for the purpose of reducing the incidence or preventing the spread of diseases in certain areas.

COMPLIANCE WITH EU LAW

7.134 The Court of Justice has consistently highlighted that the circumstances in which a member state may derogate from the prohibitions under the Habitats Directive, and by analogy the Wild Birds Directive, must be interpreted restrictively,[104] and that mere administrative practices which are alterable at will by the public authorities cannot be regarded as appropriately fulfilling the requirements of article 9 of the Wild Birds Directive.[105]

[103] As discussed in Chapter 9, the power to require relevant persons to kill or capture pests in their land under section 98 of the Agriculture Act 1947 has been brought under the new framework through cl 83 of the Wildlife Bill and re-named "pest control order".

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

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

7.135 As a number of consultees pointed out in connection with our provisional proposal to extend the scope of the "animal health orders" defence to species protected under the Habitats Directive, the defences under section 4(1) of the 1981 Act fail to give appropriate effect to article 9 of the Wild Birds Directive.[106] These defences automatically authorise activities carried out in pursuance of orders issued under separate regulatory frameworks, without subjecting the powers to issue such orders to the conditions listed in article 9 of the Wild Birds Directive.

7.136 For example, the powers to issue animal health orders or pest control orders currently fail to require the relevant authority to be satisfied – where the order relates to a protected species – about the absence of other satisfactory alternatives before authorising activities that effectively derogate from the prohibitions in article 5 of the Wild Birds Directive. A pest control order may require the destruction of wild birds if it appears to the Secretary of State or Welsh Ministers that it is "expedient" to do so. In issuing an animal health order under section 21 of the Animal Health Act 1981 the relevant authority must only be satisfied that the destruction of wildlife is "necessary in order to eliminate or substantially reduce the incidence of [specific diseases] in animals". The lack of a requirement that the relevant authority be satisfied about the absence of other satisfactory alternatives before authorising actions derogating from the protection provisions of the Wild Birds Directive constitutes a breach of that directive.

REFORM

7.137 In the absence of section 4(1) of the Wildlife and Countryside Act 1981, a person acting in pursuance of an animal health order or a pest control order would be unable to kill or capture wild birds in accordance with the order without committing a wildlife offence, unless the relevant action was also separately authorised by a wildlife licence issued under section 16(1) of the Wildlife and Countryside Act 1981. In other words, the Secretary of State or Welsh Ministers would have to issue two separate documents for the purpose of authorising the same activity.

7.138 This would be both administratively inconvenient and potentially confusing for the end user. We have taken the view, therefore, that a more effective way of ensuring compliance with the Directive will be to retain the existing defences in the new framework whilst integrating the wildlife licensing requirements into the order-making process.

[106] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 6-12.

7.139 In other words, under the new framework a person acting in pursuance of an animal health order under the Animal Health Act 1981 or a pest control order will not be liable for a wildlife crime. The Secretary of State or Welsh Ministers, however, will only be able to issue an animal health order or a pest control order authorising the killing of a protected bird if satisfied that the order is issued for one of the purposes listed in article 9(1) of the Directive, that there is no other satisfactory way of achieving that purpose and that making the order will not be detrimental to the maintenance of the population of the relevant bird at a favourable conservation status within its natural range.[107]

Recommendations

Recommendation 140: we recommend that acting in pursuance of an order under the Animal Health Act 1981 or a pest control order should remain a defence to primary activity prohibitions.

This recommendation is given effect in the draft Bill by clause 25.

Recommendation 141: we recommend that the Secretary of State or Welsh Ministers should only be able to issue an order under the Animal Health Act 1981 or a pest control order which would affect a protected bird if satisfied that

(1) the order is issued for one of the purposes listed in article 9(1) of the Directive;

(2) there is no other satisfactory way of achieving the purpose for which the order is made;

(3) making the order will not be detrimental to the maintenance of the population of the relevant bird at a favourable conservation status within its natural range; and

(4) the making of the order is not contrary to the UK's international obligations (where applicable) under the Bonn Convention, the African-Eurasian Migratory Waterbirds Agreement and the Agreement on the Conservation of Albatrosses and Petrels.

This recommendation is given effect in the draft Bill by clause 110 and paragraph 2 of schedule 31.

"Mercy killing" and tending to injured birds

7.140 Section 4(2)(a) of the Wildlife and Countryside Act 1981 provides that capturing a bird of a protected species is not an offence if the defendant shows that the bird "had been disabled otherwise then by his unlawful act and was taken solely for the purpose of tending it and releasing it when no longer disabled".

[107] The Secretary of State or Welsh Ministers will also have to be satisfied that the making of the order is not contrary to the UK's international obligations (where applicable) under the Bonn Convention, the African-Eurasian Migratory Waterbirds Agreement and the Agreement on the Conservation of Albatrosses and Petrels.

7.141 Section 4(2)(b) of the 1981 Act provides that killing a bird of a protected species is not an offence if the defendant shows that the bird had been "so seriously disabled otherwise than by his unlawful act that there was no reasonable chance of its recovering".

COMPLIANCE WITH EU LAW

7.142 Before being repealed in England and Wales by the Conservation of Habitats and Species Regulations 2010, the Conservation (Natural Habitats) Regulations 1994 contained equivalent defences in connection with the capture and killing of animals protected by the Habitats Directive.[108] In Case C-6/04 *Commission v United Kingdom*, however, the Court of Justice found these to infringe article 16 of the Habitats Directive[109] on the grounds that member states can only derogate from the prohibitions in article 12 of the Habitats Directive if there is no other satisfactory alternative, and if the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range.[110] The defences under regulations 40(3)(a) and (b) of the 1994 Regulations amounted to derogations from article 12 of the Habitats Directive, but failed to require the fulfilment of the above conditions.

7.143 Despite the fact that the defences under sections 4(2)(a) and 4(2)(b) of the 1981 Act amount to derogations from article 5 of the Wild Birds Directive, there is no provision in the Act which ensures that the defences under sections 4(2)(a) and 4(2)(b) may only be relied upon in the absence of "other satisfactory alternatives" and when the activity is not detrimental to the favourable conservation status of the relevant bird species. By analogy to the reasoning of the Court of Justice in *Commission v United Kingdom*, therefore, it follows that the blanket defences in sections 4(2)(a) and 4(2)(b) of the 1981 are currently in breach of article 9(1) of the Directive.

REFORM

7.144 The Conservation of Habitats and Species Regulations 2010 superseded the Conservation (Natural Habitats) Regulations 1994 and were drafted with the aim of rectifying the infringements of the Habitats Directive identified by the Court of Justice in *Commission v United Kingdom.* The defences under regulations 40(3)(a) and (b) of the 1994 Regulations were reformed by adding a requirement to satisfy the missing conditions identified by the Court. In other words, the above defences now do not apply in connection to the capture, killing or possession of animals protected under the Habitats Directive if the prosecution shows that there were other satisfactory alternatives or that the action was detrimental to the maintenance of the species concerned at a favourable conservation status in its natural range.[111]

[108] SI 1994 No 2716, regs 40(3)(a) and (b).

[109] Case C-6/04 *Commission v United Kingdom* [2005] ECR I-09017 at [106] to [107].

[110] Directive 92/43/EEC, art 16(1).

[111] SI 2010 No 490, regs 42(1), (2), (9) and (10).

7.145 Replicating the approach adopted in the 2010 Regulations would appear to be sufficient for the purpose of ensuring compliance with article 9 of the Wild Birds Directive. While the two defences would constitute an automatic derogation from the Wild Birds Directive, they would be very narrowly drawn and unlikely, therefore, to have any negative impacts on the conservation status of protected wild bird species.

7.146 In the context of the defence authorising the capture of a protected bird species for the purpose of tending it, compliance with the Directive would be ensured, in particular, by allowing a person to rely on the defence only if capturing the wild bird in question was the only satisfactory way to help it recover and had no negative impact on the maintenance of the population of the relevant bird species at a favourable conservation status in its natural range. In the context of the defence authorising the mercy killing of disabled birds, compliance with the Directive would, in particular, be ensured by allowing a person to rely on the defence only if the killing of the bird is the only satisfactory way to end its suffering[112] and is not detrimental to the favourable conservation status of its population.[113]

7.147 A separate issue that we have identified in connection with the defence under section 4(2)(a) of the 1981 Act is linked to the fact that, as discussed in Chapter 4, once a bird of a protected species is lawfully captured it is automatically lawfully possessed.[114] In the context of this defence, this currently means that a person who captures a protected wild bird for the purpose of tending it and releasing it when no longer disabled would not be guilty of an offence for deciding later on to keep the bird indefinitely for reasons unconnected to the purpose for which the bird was initially captured. We have concluded that the defence authorising a person to keep a bird that has been lawfully captured should not apply in this context, unless it is also shown that the person was in control of the bird solely for the purpose of tending it and releasing it after it had been tended.

[112] In Opinion of Advocate General Kokott, Case C-6/04 *Commission v United Kingdom* [2005] ECR I-09017 at [110], Advocate General Kokott expressed doubts as to the existence of an appropriate derogation ground under art 16(1) of the Habitats Directive that could be relied upon to justify the "mercy killing" of protected animals. We have taken the view that the "protection of fauna" derogation ground would appear to be sufficiently broad to encompass activities taken for the purpose of protecting the welfare of wild fauna.

[113] In line with the approach adopted in regs 42(9) and (10), it will be for the prosecution to prove that there were other satisfactory alternatives or that the defendant's action was detrimental to the conservation status of the protected species in question.

[114] See Wildlife and Countryside Act 1981, ss 1(3) and (3A), given effect under the new framework by cl 13(1) of the Wildlife Bill.

SHOULD THE DEFENCES BE REPLACED WITH GENERAL LICENCES?

7.148 In conservation and animal welfare terms, the principle that any person should be able to capture any protected animal for the purpose of tending it (or killing it in the belief that it has no reasonable chance of recovery) is questionable. A lay person who finds an injured otter or a poisoned raptor on the side of the road, or an injured dolphin on the shore, may not be in the best position to tend to it, determine whether it has a reasonable chance of recovering or, where relevant, determine the effect of his or her actions on the conservation status of the species concerned. In some cases those decisions would be better taken with expert veterinary judgement and some ecological knowledge about the species in question, as well as adequate infrastructure to tend for it or transport it to an adequate facility.

7.149 It must be right that that well-intentioned people are not unfairly criminalised for attempting to rescue a protected animal or for killing a protected animal that is obviously suffering. However, it may be that an automatic defence is not the most effective way of avoiding this result. The use of general licences could achieve the same end whilst allowing the licensing authority to impose further common sense conditions in connection with the tending or mercy-killing of species of concern. A general or class licence could include, for instance, conditions requiring the relevant person (once that person has, for instance, taken possession of the relevant animal) to report the incident to a competent body or transport the relevant animal to the closest veterinary clinic.

7.150 Although we see the merit of the arguments for replacing the defences with a licensing regime, we also recognise that the existing defences may reflect beliefs about human responsibility towards animals which are deeply held and culturally important. We consider therefore that to alter them significantly is a policy decision better suited to Government after public consultation. We are persuaded, however, that consideration should be given to the option of generally repealing such defences and replicating their effect, when necessary, by means of general or class licences.

Recommendations

Recommendation 142: we recommend that a person (P) should not be guilty of an offence only by reason of capturing a bird if the bird had been disabled otherwise than by P's unlawful act, P captures the bird for the purpose of tending it when no longer disabled (and retains possession of it only for that purpose) and capturing the bird

(1) Is the only satisfactory way to help it recover; and

(2) Is not detrimental to the maintenance of the population of the species of bird at a favourable conservation status in its natural range.

This recommendation is given effect in the draft Bill by clauses 3(1) and 13(2).

Recommendation 143: we recommend that a person (P) should not be guilty of an offence only by reason of killing a bird, or capturing a bird for the purpose of killing it if the bird had been disabled otherwise than by P's unlawful act, it has no reasonable chance of recovery and killing it

(1) Is the only satisfactory way to end its suffering; and

(2) Is not detrimental to the maintenance of the population of the species of bird at a favourable conservation status in its natural range.

This recommendation is given effect in the draft Bill by clause 3(2).

Recommendation 144: we recommend that consideration should be given to the option of generally repealing "mercy killing" and "tending" defences and replicating their effect, where necessary, by means of general or class licences.

The "incidental results" defence

7.151 Section 4(2)(c) of the Wildlife and Countryside Act 1981 provides a defence to primary activity prohibitions in connection with wild birds when the defendant shows that the otherwise prohibited act was the "incidental result of a lawful operation and could not reasonably have been avoided".

7.152 In the consultation paper, we provisionally proposed that this defence be repealed on the basis that a virtually identical defence under the Conservation (Natural Habitats) Regulations 1994[115] was found to be in breach of the derogation regime authorised under article 16 of the Habitats Directive.[116] In line with its previous restrictive approach to the use of defences for the purpose of derogating from the Wild Birds and Habitats Directives, in Case C-6/04 *Commission v United Kingdom* the Court of Justice ruled that:

> the [incidental results defence] in the present case authorises acts which lead to the killing of protected species and to the deterioration or destruction of their breeding and resting places, where those acts are as such lawful. Therefore such a derogation, founded on the legality of the act, is contrary both to the spirit and purpose of the Habitats Directive and to the wording of article 16 thereof.[117]

7.153 The "incidental results" defence, in fact, automatically authorises any "lawful" activity which results, as an "unavoidable" side effect, in the death, injury or disturbance of protected bird species without any consideration of the potential impact of such activities on the population levels of the species concerned. Because, in line with the Habitats Directive, the ultimate aim of the Wild Birds Directive is the maintenance of populations of protected species at sustainable levels, it is hard to see how the defence could possibly be considered as an acceptable derogation.

[115] SI 1994 No 2716, regs 40(3)(c) and 43(4) (now repealed in England and Wales).

[116] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 6-11.

[117] Case C-6/04 *Commission v UK* [2005] ECR I-9017 at [113].

7.154 In the absence of any convincing argument explaining why the defence under section 4(2)(c) of the 1981 Act would ever be treated differently by the Court of Justice from its equivalent under the 1994 Regulations, we have concluded, in line with our provisional proposal, that the "incidental results" defence should be repealed.

7.155 In consultation a number of stakeholders expressed serious concerns with the prospect of repealing the "incidental results" defence. In essence, it was argued that in the absence of this defence a number of legitimate economic activities which interfere with wildlife on a regular basis – such as farming, forestry or development – would be unnecessarily and disproportionately criminalised. It was suggested that this could increase the costs of operations and could result in an increasing number of applications for wildlife licences.

7.156 Other stakeholders, whilst accepting that the current defence is in breach of the Wild Birds Directive, suggested that it could be brought into line with the Directive by reforming it in line with Scottish law, under which, the defence only applies if the defendant shows that

(1) he or she took reasonable precautions for the purpose of avoiding carrying out the unlawful act; or

(2) he or she did not foresee, and could not reasonably have foreseen, that the unlawful act would be an incidental result of the carrying out of the lawful operation or other activity; and

(3) he or she, immediately upon the consequence of that act becoming apparent to the person, took such steps as were reasonably practicable in the circumstances to minimise the damage or disturbance to the wild bird, nest or egg in relation to which the act was carried out.[118]

7.157 We are persuaded, however, that the concerns underlying these provisions will be adequately addressed by our recommendations on the transposition of "deliberate" in Chapter 3 of this Report. This will, in essence, integrate a number of aspects of the reformed Scottish defence into the mental element of the offence. Under the new framework, a person will not be found guilty of a primary activity offence against protected wild birds unless the prosecution shows that he or she was aware that, unless reasonable precautions were taken, there would be a serious risk of harm to the relevant bird species and failed to take reasonable precautions (or was aware of a serious risk whether or not reasonable precautions were taken). Acting in pursuance of relevant guidance, permits or directions, in addition, will be a relevant consideration in considering whether the steps taken to avert the risk were reasonable.

[118] Wildlife and Countryside Act 1981, s 4(2A).

7.158 In cases where a person needs to act despite the knowledge about serious risks of harm to a protected species, and in the knowledge that such risk will persist regardless of the steps taken to prevent the actions from having that effect, it would seem reasonable, in the light of the object and purpose of the Directive, to require that person to seek a licence derogating from its protection provisions. We are confident that any increase in the number of applications for wildlife licences will be marginal.

Recommendations

Recommendation 145: we recommend that the "incidental results" defence should not, therefore, be replicated under the new framework.

Urgent action taken for certain purposes

7.159 Sections 4(3) to (6) of the Wildlife and Countryside Act 1981 provide that an "authorised person" does not commit an offence by reason of killing or injuring any wild bird other than a bird listed in schedule 1 to the 1981 Act if he or she shows that the action was "necessary" for the purpose of:

(1) preserving public health or public safety;

(2) preventing the spread of disease; or

(3) preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber, fisheries or inland waters.[119]

7.160 With a view to ensuring compliance with article 9 of the Wild Birds Directive as regards preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber, fisheries or inland waters:

(1) section 4(4) of the 1981 Act provides that an action taken should not be regarded as "necessary" unless the defendant shows that, as regards that purpose, there was no other satisfactory solution; and

(2) subsection (5) removes the defence in cases where the defendant had failed to apply for a licence as soon as reasonably practicable after the need for the action became apparent or an application for such a licence had already been determined – and, by necessary implication, refused.

(3) subsection (6) removes the defence if the defendant fails to notify the Secretary of State or Welsh Ministers as soon as reasonably practicable after taking the action.

7.161 "Authorised person" is defined by section 27(1) of the 1981 Act as including the owner or occupier of the land on which the action is taken and any person authorised in writing by a relevant authority (including the relevant local authority, the Environment Agency (in England) or Natural Resources Wales (in Wales), a water undertaker or a sewerage undertaker).

[119] Wildlife and Countryside Act 1981, ss 4(3)(a), (b) and (c).

7.162 The defences derogate from article 5 of the Wild Birds Directive insofar as they apply to wild birds protected by the Directive and will only be found to be in line with the obligations of the Directive if strictly complying with the derogation regime in article 9. Whilst the relevant authorities are already under an obligation to comply with all the requirements of article 9(2) of the Wild Birds Directive, and ought to apply them when deciding whether to grant an authorisation, this is irrelevant when "an authorised" person is, for example, a landowner or occupier of land.[120] If the issue of whether a landowner's action fell within section 4 came before a criminal court, it would not be open to the court to read into the section the further requirements of article 9 of the Wild Birds Directive.

7.163 We have doubts as to whether the defence that an activity was "necessary" would be read as importing the Directive's requirement of there being "no other satisfactory solution". The 1981 Act defences also fail to specify, among other things, the conditions, means of capture or killing, and the "circumstances of time and place" under which the statutory authorisation is granted.

7.164 The scope of the defence under section 4(3)(c) was significantly narrowed by an amendment introduced by regulation 2(1) of the Wildlife and Countryside Act 1981 (Amendment) Regulations 1995 which introduced the subsections described in paragraph 7.160 above. We understand that these were introduced in response to a threat of infraction proceedings by the European Commission and were intended to ensure compliance with the Wild Birds Directive.[121] We also take it that the provisions were regarded by the Commission as adequate to achieve compliance with the Directive.

7.165 Section 4(4) introduces the "no other satisfactory solution" test as a condition for an authorised person's ability to rely on the defence. Section 4(5) attempts to make sure that the defence in section 4(3)(c) is not regularly used as a substitute for the licensing regime under section 16 of the 1981 Act. This is currently achieved, in essence, by restricting the application of the defence to activities taken in circumstances where the defendant did not have the time to apply for a licence or wait for the licence application to be determined. Section 4(6), lastly, requires retrospective notification to the relevant licensing authority, thus ensuring a measure of supervision.

[120] Under section 27 of the Wildlife and Countryside Act 1981, landowners or occupiers of land or any person authorised by them is deemed to be an authorised person for the purpose of section 4(3) of the 1981 Act.

[121] SI 1995 No 2825. It is unclear why the amendment was not extended to the defences under s 4(3)(a) or (b) of the Wildlife and Countryside Act 1981. The most likely explanation for the decision to limit the amendment to s 4(3)(c) is that that provision had been the subject of the European Commission's infraction proceedings.

REFORM

7.166 We have taken the view that the defences under sections 4(3)(a) and (b) of the 1981 Act should also be made subject to the conditions currently contained in sections 4(4) to 4(6). In policy terms, retaining a restricted version of the defences under sections 4(3)(a) and (b) of the 1981 Act (as opposed to repealing them altogether) would have the benefit of allowing authorised persons to take action for the purpose of protecting certain key interests in circumstances where it would be impractical to apply for a licence or wait for an application to be determined.

7.167 To ensure consistency with the new licensing regime and the full transposition of the derogation reasons authorised by article 9(1) of the Wild Birds Directive, an "authorised person" should be able to rely on the new defence for the purpose of:

(1) preserving public health, public safety or air safety;

(2) preventing serious damage to crops, livestock, forests, fisheries and water; or

(3) protecting fauna from the spread of diseases.

7.168 For the purpose of clarifying the "last resort" purpose of this defence, we have concluded that the defendant – in addition to the "no other satisfactory solution test" – should also be required to show that the protection of the above interests was "urgently" necessary.

7.169 Lastly, in line with our interpretation of articles 2 and 13 of the Wild Birds Directive, we have concluded that an additional condition should be introduced to ensure that a person may not rely on the defence unless he or she can show that the action was not detrimental to the maintenance of the population of the species concerned at a favourable conservation status in its natural range.

Recommendations

Recommendation 146: we recommend that the defences under sections 4(3)(a) to (c) of the Wildlife and Countryside Act 1981 should all be replicated under the new framework subject to the conditions currently contained in sections 4(4) and 4(6).

Recommendation 147: we recommend that the reasons for which the defences under sections 4(3)(a) to (c) of the Wildlife and Countryside Act 1981 may be relied on should be harmonised with the equivalent reasons for which a wildlife licence may be granted.

Recommendation 148: we recommend that to rely on the defences under sections 4(3)(a) to (c) of the Wildlife and Countryside Act 1981 under the new regulatory framework the "authorised person" should be required to show that the action

(1) was the only satisfactory way of achieving that purpose,

(2) had to be taken urgently if it was to achieve that purpose; and

(3) was not detrimental to the maintenance of the population of the species of bird at a favourable conservation status in its natural range.

These recommendations are given effect in the draft Bill by clause 4.

Using prohibited methods but taking all reasonable precautions to prevent injury to birds

7.170 Section 5 of the Wildlife and Countryside Act 1981 gives effect to the requirements of the Wild Birds Directive as to prohibited means of killing or capture. Sections 5(4) and 5(4A) make it a defence to show that the prohibited device was set in position for the purpose of:

> killing or taking, in the interests of public health, agriculture, forestry, fisheries or nature conservation, any wild animals which could be lawfully killed or taken by those means and that [the defendant] took all reasonable precautions to prevent injury thereby to wild birds.

7.171 As discussed in Chapter 4, our view is that article 8 of the Wild Birds Directive requires member states to prohibit the use of methods of killing or capture listed in annex 4 to the Directive when:

(1) the prohibited method is used for the purpose of killing, injuring or capturing a protected wild bird; or

(2) the prohibited method is used in the knowledge of a serious risk that a protected wild bird would be killed, injured, or captured as a result of the use of that prohibited method and by failing to take reasonable steps to prevent that from happening.

7.172 We have concluded that there is no reason why the defences in sections 5(4) and (4A) should be retained. In the new framework the taking of "reasonable precautions" will already be a key component of the mental element of the offence. Replicating the above defences, therefore, would have no significant effect on the application of the new methods and means prohibitions.

Recommendations

Recommendation 149: we recommend that the effect of the defences in sections 5(4) and (4A) of the Wildlife and Countryside Act 1981 should not be replicated under the new framework.

Use of prohibited methods for certain purposes

7.173 Section 5(5) of the 1981 Act provides that the methods and means prohibitions under section 5(1) should not be read as prohibiting:

(1) the use of a cage-trap or net by an authorised person for the purpose of taking a bird included in part II of schedule 2;[122]

(2) the use of nets for the purpose of taking wild duck in a duck decoy which is shown to have been in use immediately before the passing of the Protection of Birds Act 1954; or

(3) the use of a cage-trap or net for the purpose of taking any game bird if it is shown that the taking of the bird is solely for the purpose of breeding.

7.174 Annex 4 to the Wild Birds Directive specifically lists "nets" and "traps" as indiscriminate means of killing or capturing prohibited under article 8 of the Directive. As discussed above, derogations from article 8 may only be granted on the basis of the conditions listed in article 9.

7.175 In the light of the case law of the Court of Justice on the transposition of article 9 of the Wild Birds Directive, we have concluded that section 5(5) of the 1981 Act is currently in breach of article 9 of the Directive as it fails to require, as a necessary precondition, the absence of other satisfactory solutions. The defences in section 5(5) also fail to impose any of the additional conditions listed in article 9(2) of the Wild Birds Directive.

7.176 In the absence of any strong reasons why the above provisions should be retained as statutory defences, we have concluded that section 5(5) of the Wildlife and Countryside Act 1981 should be repealed and replaced, where relevant, by appropriate individual, class or general licences.

Recommendations

Recommendation 150: we recommend that the effect of the defence in section 5(5) of the Wildlife and Countryside Act 1981 should not be replicated under the new framework.

Use of prohibited methods in pursuance of an order

7.177 Section 21(4) of the Animal Health Act 1981 provides the Secretary of State or Welsh Ministers with the power to issue orders authorising the use of methods of destruction which would otherwise be unlawful if they are satisfied that the use of the methods in question "is the most appropriate way of carrying out that destruction".

[122] It is worth noting that part 2 of sch 2 to the Wildlife and Countryside Act 1981 is currently empty, on the basis that it used to authorise, in breach of art 9 of the Wild Birds Directive, the killing of certain huntable birds throughout the year (see Wildlife and Countryside Act 1981 (Variation of Schedules 2 and 3) Order 1992 SI 1992 No 3010).

7.178 Above we have explained that the provision authorising the killing of wild birds "in pursuance of an animal health order" is currently in breach of article 9 of the Wild Birds Directive on the basis that it fails to require the Secretary of State or Welsh Ministers to be satisfied, before issuing the order, that there are no other satisfactory solutions and that the order will not be detrimental to the favourable conservation status of the species concerned. For the same reasons, a provision authorising the use of methods of destruction prohibited under article 8 and annex 4 to the Wild Birds Directive when this is "the most appropriate way of carrying out that destruction" also fails to transpose the UK's obligations under article 9 correctly.

7.179 In line with the reform of animal health orders affecting protected wild birds discussed above, we have concluded that under the new framework the Secretary of State or Welsh Ministers should retain the power to issue orders authorising the use of methods of destruction prohibited by the Wild Birds Directive. Before issuing such orders, however, the Secretary of State or Welsh Ministers should be satisfied that the order is issued for one of the purposes listed in article 9(1) of the Directive, there is no other satisfactory way of achieving that purpose and that the making of the order will not be detrimental to the conservation status of the population of the bird species that will be affected by the order.

7.180 The same approach, we think, should also be extended to the power to issue pest control orders on the basis that there is no reason why a separate wildlife licence should be necessary to authorise methods of killing or capture required by such an order.

Wild animals other than birds: licensing regime under the new framework

7.181 As we have seen, the obligations undertaken in the Bern Convention and the Bonn Convention are primarily given effect in EU law by the Habitats Directive, which is transposed in England and Wales through the Conservation of Habitats and Species Regulations 2010. As a general rule, therefore, the licensing regime under the new framework to authorise otherwise prohibited activities in connection with animal and plant species protected under international and EU law can simply reflect the derogation regime under article 16 of the Habitats Directive.

7.182 However, there are a number of discrepancies between the Habitats Directive and the two Conventions. First, the Habitats Directive does not cover all species protected under the Conventions. The walrus and the basking shark, for instance, have a natural range including Great Britain and are respectively protected under the Bern Convention and the Bonn Convention, but not by the Habitats Directive. Secondly, there are some slight differences between the grounds for derogation permitted under article 16 of the Habitats Directive and those permitted under article 9 of the Bern Convention and article 3(5) of the Bonn Convention.

7.183 In this section we discuss how we think these discrepancies should be rationalised, with a view to creating a coherent and harmonised licensing regime for all animal species protected by international and EU law. We then make more specific recommendations with a view to ensuring that the new licensing regime reflects the UK's external obligations by way of a flexible and consistent regulatory framework. We have made recommendations to this effect in Recommendations 141 and 142 above.

Reconciling international and EU obligations

THE HABITATS DIRECTIVE AND THE BERN CONVENTION

7.184 The Habitats Directive authorises member states to derogate from its species specific protection provisions provided that there is "no satisfactory alternative" and the derogation is "not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range".[123] The Bern Convention derogation regime adopts slightly different language but, as is explained above in the context of the transposition of the Wild Birds Directive, we take the view that there is no substantive difference between the obligations imposed by the different instruments.

7.185 In line with our recommendations on wild bird licences, therefore, we have concluded that before authorising otherwise prohibited activities interfering with species protected under the Habitats Directive or the Bern Convention, the relevant licensing authority should be satisfied that there is no other satisfactory way of achieving the purpose for which the licence is granted and that the granting of a licence will not be "detrimental to the maintenance of the population of the relevant species at a favourable conservation status in its natural range". The concept of "favourable conservation status" – as defined in article 1(i) of the Habitats Directive – not only broadly produces the same results as the concept of "survival of the population concerned" but also provides much clearer guidance to the relevant licensing authority.

7.186 The grounds for derogation under the Habitats Directive and the Bern Convention are virtually identical. We have noticed, however, a number of discrepancies in the scope of the catch-all "judicious use" licensing ground under the two instruments. First, article 16(1) of the Habitats Directive only permits the "*taking* or *keeping*" of protected species in limited numbers under supervised conditions, on a selective basis and to a limited extent. Article 9(1) of the Bern Convention, on the other hand, permits, under the same conditions, "the taking, keeping or other *judicious exploitation*" of certain wild animals and plants in small numbers.

[123] Directive 92/43/EEC, art 16(1).

7.187 The scope of the derogation ground under article 9(1) of the Bern Convention is clearly broader than the scope of the derogation ground under article 16(1)(e) of the Habitats Directive. "Other judicious exploitation" includes activities causing, for instance, the death of the protected animal in question, something which is evidently not permitted under article 16(1)(e) of the Habitats Directive. Secondly, article 16(1)(e) of the Habitats Directive, for no apparent reason, does not include wild animal species listed in annex 5(a) (animals only protected from indiscriminate methods of killing or capture under article 8) within the scope of the derogation. The derogation under article 9(1) of the Bern Convention, on the other hand, applies to strictly protected species as well as species only protected from methods and means prohibitions listed in appendix 3.

7.188 We have concluded, therefore, that otherwise prohibited activities interfering with animal species protected under the Bern Convention or the Habitats Directive should be authorised under the same derogation regime. Nevertheless, for the purpose of ensuring compliance with the Habitats Directive whilst retaining the more flexible approach authorised by the Bern Convention, we have concluded that licences issued other than for one of the listed purposes authorising the capture or possession of species should only be granted for species not listed in annex 5(a) to the Habitats Directive; and licences issued other than for one of the listed purposes authorising "other judicious exploitation" should only be granted in connection with species listed in the Bern Convention which are not listed under the Habitats Directive.

7.189 In line with the transposition of the "judicious use" licensing ground for the purpose of giving effect to article 9(1) of the Wild Birds Directive, in both cases the relevant licensing authority should not grant a licence on that ground unless it is satisfied that otherwise prohibited activity will be carried out under strictly supervised conditions, on a selective basis, to a limited extent and in relation to a small number of specimens.

THE BONN CONVENTION

7.190 There are also slight inconsistencies between the derogation grounds authorised under the Bonn Convention and the derogation grounds allowed under the Bern Convention or the Habitats Directive.[124] In essence, the list of grounds authorising contracting parties to derogate from the prohibitions of the Bonn Convention is more restricted; there is, however, no express requirement to be satisfied about the absence of satisfactory ways of achieving the purpose for which the licence is granted.

[124] Discussed in the context of the transposition of the Wild Birds Directive above, see para 7.24, and see also Chapter 3 paras 3.49, 3.90 to 3.91 and 3.128 to 3.137.

7.191 Other than the basking shark, all species protected under the Bonn Convention that have a natural range including Great Britain are also protected under the Bern Convention or the Habitats Directive. We have concluded, therefore, that in order to ensure compliance with both regimes whilst avoiding the creation of a separate licensing structure, under the new framework activities interfering with species protected under the Bonn Convention which have a natural range including Great Britain should be authorised under the same licensing regime as gives effect to the Bern Convention and the Habitats Directive. An express provision should be introduced, however, to make sure that a licence is not granted unless the appropriate licensing authority is satisfied that it would not be contrary to the UK's obligations under the Bonn Convention.

7.192 The basking shark is the only Bonn Convention species with a natural range including Great Britain that is neither protected under the Bern Convention nor under the Habitats Directive.[125] We have concluded that, for the purpose of rationalising existing obligations under the new licensing regime, the basking shark should be treated as though it were a species protected under the Bern Convention. This would be subject to the condition that no licence authorising otherwise prohibited activities interfering with basking sharks should be granted unless the competent licensing authority is satisfied that the authorisation would not be contrary to the UK's obligations under the Bonn Convention.[126]

THE AGREEMENT ON INTERNATIONAL HUMANE TRAPPING STANDARDS

7.193 As discussed in Chapter 5, a number of animals protected under the Bern Convention are also protected from the use of traps or trapping methods which do not accord with the agreed trapping standards set out in annex 1 to the Agreement on International Humane Trapping Standards between the European Union, Canada and the Russian Federation.[127] Compliance with the standards set out in annex 1 to the Agreement is currently not expressly required by domestic legislation.

7.194 Under the new framework, in granting a wildlife licence authorising the use of traps in relation to animals listed in part 2 of annex 1 to the Agreement, the relevant licensing authority should be under an express obligation to be satisfied that the authorised trapping method is not contrary to the UK's obligations to comply with the Agreement. This will give effect to the UK's obligations under EU law in respect of the Agreement.

Recommendations

Recommendation 151: we recommend that grounds for which a licence should be capable of being granted in connection with activities interfering with animals (other than birds) protected under the Bern Convention, the Bonn Convention and the Habitats Directive should reflect, as a general rule, the grounds listed in article 16 of the Habitats Directive.

[125] The Bern Convention only protects basking sharks in the Mediterranean Sea.

[126] This is consistent with our discussion on the rationalisation of the licensing regime in connection with species protected for domestic conservation reasons: see paras 7.6 to 7.46 above.

[127] See Chapter 5, paras 5.157 to 5.182.

This recommendation is given effect in the draft Bill by clauses 67(2) and (3).

Recommendation 152: we recommend that licences authorising the capture or possession of species for reasons other than one of the listed purposes should only be granted to species that are not listed in annex 5(a) to the Habitats Directive and licences authorising "other judicious exploitation" should only be granted in connection with species listed in the Bern Convention which are not listed under the Habitats Directive.

This recommendation is given effect in the draft Bill by clause 67(3).

Recommendation 153: we recommend the relevant licensing authority may only grant a licence whose effect is to authorise the capture, possession or other "judicious use" of protected animals other than for one of the listed purposes if satisfied that

(1) the activity will be carried out under strictly supervised conditions, on a selective basis and to a limited extent;

(2) the licence is consistent with the principle that no more than a "small number" of individuals from any given population of protected animals should be captured, possessed or otherwise used.

This recommendation is given effect in the draft Bill by clauses 67(3) and (4).

Recommendation 154: we recommend that licences granted for other than one of the listed purposes should also

(1) specify the maximum number of animals that may be captured, possessed or otherwise "used" under the licence; and

(2) include appropriate conditions requiring reports to be made to the appropriate authority about the things done under the licence and otherwise enabling the appropriate authority to monitor the things done under the licence.

This recommendation is given effect in the draft Bill by clause 67(7).

Recommendation 155: we recommend that the relevant licensing authority should not grant a wildlife licence authorising otherwise prohibited activities interfering with animals protected under the Bern Convention, the Bonn Convention and the Habitats Directive unless it is satisfied that

(1) there is no other satisfactory way of achieving the purpose for which the licence is granted;

(2) granting the licence will not be detrimental to the maintenance of the population of any species of animal at a favourable conservation status in its natural range; and

(3) granting the licence is not contrary to the UK's obligation to comply with the Bonn Convention or the Agreement on International Humane Trapping Standards.

This recommendation is given effect in the draft Bill by clause 67(5).

Compliance with article 16(3) of the Habitats Directive

7.195 Article 16(3) of the Habitats Directive imposes an obligation on member states to specify particular information in the biennial reports to the European Commission on the derogations granted under article 16(1) of the Directive. In line with article 9(2) of the Wild Birds Directive, the reports must, among other things, give information on the species subject to the derogation and the means, arrangements or methods authorised for the capture or killing of protected animal species. Article 9(2) of the Bern Convention, which is virtually identical to article 16(3) of the Habitats Directive, imposes an equivalent obligation on the contracting parties to the Convention.

7.196 Unlike the broadly equivalent article 9(2) of the Wild Birds Directive, the derogation provisions of the Habitats Directive and Bern Convention do not expressly oblige the competent authority to specify such conditions in the licences granted. We have concluded, nevertheless, that because there is a clear obligation to specify the conditions that were imposed in licences in the reports to the European Commission (or, in the context of the Bern Convention, in the report to the Standing Committee), there is an implicit obligation to include such conditions in each licence granted on the basis of article 16(1) of the Habitats Directive or article 9(1) of the Bern Convention.[128]

7.197 Under the new framework, therefore, licences which authorise otherwise prohibited activities in relation to animals protected under the Habitats Directive or the Bern Convention should expressly specify:

(1) the species of animal in respect of which the activity may be carried out;

(2) the conditions subject to which it may be carried out;

(3) the means, arrangements or methods which may or must be used;

(4) the time or periods during which the activity may be carried out; and

(5) the places at which it may be carried out.

7.198 This should ensure an approach consistent with that in licences authorising otherwise prohibited activities in connection with wild birds.

[128] As a matter of administrative practice, existing wildlife licences already specify the relevant conditions listed in art 16(3) of the Habitats Directive or art 9(2) of the Wild Birds Directive. See, for example, class licence CL-17 authorising surveys and research in connection with bats, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389090/Bats_--_survey_or_research_licence__level_1___CL17_.pdf (last visited 26 October 2015).

Recommendations

Recommendation 156: we recommend that wildlife licences issued in connection with activities interfering with animals protected under the Bern Convention, the Bonn Convention or the Habitats Directive should specify

(1) the species of animals in respect of which the activity may be carried out;

(2) the means, arrangements or methods which may or must be used in doing so; and

(3) the places, times, or periods in which the activity may be carried out.

This recommendation is given effect in the draft Bill by clause 67(6).

Wild animals other than birds: defences to prohibited activities

7.199 As we have seen, most activities interfering with wild animals protected under the Habitats Directive are now regulated by the Conservation of Habitats and Species Regulations 2010.[129] However, a number of activities affecting animals which are only protected by the Bern Convention or other international instruments continue to be regulated by the Wildlife and Countryside Act 1981 or other species-specific protection regimes.[130] Methods and means prohibitions under the 2010 Regulations,[131] in addition, significantly overlap with the methods and means prohibitions under section 11 of the 1981 Act.

7.200 In line with the adverse ruling of the Court of Justice in Case C-6/04 *Commission v United Kingdom*, a number of defences that previously applied to prohibited activities in connection with wild animals protected under the Habitats Directive were repealed by the 2010 Regulations.[132] The same reforms, however, have not taken place in connection with other animal species which are protected by virtually identical obligations under the Bern Convention or other relevant international instruments. The result is that equivalent external obligations are transposed inconsistently in domestic legislation.

[129] SI 2010 No 490.

[130] See, for instance, the Deer Act 1991.

[131] SI 2010 No 490, reg 43.

[132] The only substantive defences relevant to this Chapter that were retained under the Conservation of Habitats and Species Regulations 2010 are those authorising the "mercy killing" of protected animals or the capture and possession of disabled animals for the purpose of tending them.

7.201 For example, a person may currently disturb, or cause the death of a basking shark – a species strictly protected by the Bonn Convention – without incurring criminal liability if he or she shows that its death was the incidental result of a lawful operation and could not reasonably have been avoided.[133] The same defence, however, does not apply if the animal is a dolphin – a species strictly protected by virtually identical prohibitions under the Bonn Convention and the Habitats Directive – on the basis that the application of that defence to the killing or disturbance of animals protected under the Habitats Directive was expressly held to constitute a breach of article 16 of that Directive.[134]

7.202 As the structure of the protection regimes under the Bonn Convention, the Bern Convention and the Habitats Directive is virtually identical, there is no obvious reason why the restrictive approach to criminal defences under the 2010 Regulations should not extend to all three.

Acting in pursuance of an order

7.203 Acting in pursuance of an "animal health order" under the Animal Health Act 1981 or a "pest control order" under section 98 of the Agriculture Act 1947 is not currently an express defence to prohibited activities interfering with species protected under the Habitats Directive (a "European protected species"). Therefore under the current regulatory framework the Secretary of State or Welsh Ministers can only effectively issue an animal health order or a pest control order which interferes with a European protected species if the order is accompanied by a wildlife licence authorising the otherwise prohibited conduct.

7.204 As discussed above in the context of the protection of wild birds, we have taken the view that whilst this solution would ensure full compliance with the derogation regimes under the Habitats Directive, the Bern Convention or the Bonn Convention, it would be both administratively inconvenient for the decision-maker and potentially confusing for the end user. Our view is that a more effective way of ensuring compliance with the derogation regimes under the above instruments is to introduce a defence authorising anything done in pursuance of an animal health order or a pest control order whilst integrating the wildlife licensing requirements in the order-making process.

7.205 In order words, we have concluded that under the new framework a person acting in pursuance of an animal health order or a pest control order should not be liable for a wildlife crime. The Secretary of State or Welsh Ministers, however, should only issue an animal health order or a pest control order authorising the destruction of a species protected under the Directive or either of the Conventions if satisfied that the order complies with the same conditions that would have to be satisfied in order to grant a wildlife licence to interfere with the species in question.

[133] Wildlife and Countryside Act 1981, ss 9(1), 9(4A) and 10(3)(c).

[134] Case C-6/04 *Commission v UK* [2005] ECR I-9017 at [113].

Recommendations

Recommendation 157: we recommend that acting in pursuance of an order under the Animal Health Act 1981 or a pest control order should remain a defence to primary activity prohibitions, subject to equivalent conditions to those specified in recommendation 142 (modified in line with the differences between the derogation regime under the Wild Birds Directive and the derogation regime under the Bern Convention and the Habitats Directive).

This recommendation is given effect in the draft Bill by clauses 69, 110 and paragraph 3 of schedule 31.

"Mercy killing" and tending to disabled animals

7.206 The Conservation of Habitats and Species Regulations 2010 provide that the capture, control, possession or transport of a species protected under the Habitats Directive do not constitute an offence if the defendant shows that the act in question was carried out in relation to an animal that had been disabled otherwise than by the defendant's unlawful act and was solely for the purpose of tending it or releasing it when no longer disabled or releasing it after it had been tended.[135]

7.207 The 2010 Regulations also authorise the capture, killing, injury, possession and control of a species protected under the Habitats Directive if the defendant shows that the act in question was carried out in relation to an animal that had been seriously disabled otherwise than by the defendant's unlawful act and that there was no reasonable chance of its recovering. A person may only rely on the defence if he or she shows that the act was done "solely for the purpose of ending the animal's life" or "disposing of it (otherwise than by sale or exchange) as soon as practicable after it was dead".[136]

7.208 So as to ensure formal compliance with article 16 of the Habitats Directive, the 2010 Regulations further provide that the above defences do not apply if the prosecution shows that there were other satisfactory alternatives or that the action was detrimental to the maintenance of the population of the species concerned at a favourable conservation status.

7.209 We considered these defences above in connection with the killing or capture of wild birds. In line with that discussion, we consider, on balance, that the defences should be replicated under the new framework and extended to species protected by the Bern Convention or the Bonn Convention. As discussed above, however, it is our view that further consideration should be given to the benefits of repealing these defences altogether and substituting them, when necessary, with a regime of general or class licences.

[135] SI 2010 No 490, reg 42(1).

[136] SI 2010 No 490, reg 42(2).

7.210 Owing to some structural differences between the protection regime under the Habitats Directive and the protection regime under the Wild Birds Directive we have been unable to adopt a fully consistent approach to the above defences across the new framework. The Habitats Directive, as opposed to the Wild Birds Directive, does not automatically authorise the possession of live or dead animals that have been legally killed or captured. It follows that when a member state derogates from the Habitats Directive through a defence allowing anyone to kill or capture an animal of a protected species for the purpose of tending it or killing it to end its suffering, the same defence cannot authorise the person in question to retain possession of the animal in question unless the possession is directly connected with the original purpose of the derogation.

7.211 It is to address this difference that regulation 42(2) of the 2010 Regulations further restricts the defendant's ability to possess a protected animal to cases where the possession is either for purpose of "ending the animal's life" or for the purpose of "disposing of it as soon as practicable after it was dead". Despite the absence of an express provision to that effect in the current provision, we have concluded that to ensure full compliance with the Habitats Directive the same approach should be taken in the context of activities carried out for the purpose of tending a protected animal. When a person captures a protected animal for the purpose of tending it the animal may well die in captivity. In that event, again, authorising the person to keep the dead animal in question, or part of that animal, would constitute a new, unconnected derogation from the Directive which should be subject to a licence.

Recommendations

Recommendation 158: we recommend that – subject to the conditions discussed in recommendations 142 and 143 – a person should not be guilty of an offence by reason of killing an animal of a species protected under the Bern Convention, the Bonn Convention or the Habitats Directive when the action is done solely for the purpose of ending its suffering or of capturing an animal solely for the purpose of tending it and subsequently releasing it.

This recommendation is given effect in the draft Bill by clause 31.

Recommendation 159: we recommend that a person should not be capable of relying on the "tending" defence in connection with an animal of a species protected under the Bern Convention, the Bonn Convention or the Habitats Directive unless he or she shows that the possession, control or transport of the animal in question was solely for the purpose of

(1) tending it and releasing it when no longer disabled;

(2) releasing it after it had been tended; or

(3) disposing of it after its death.

This recommendation is given effect in the draft Bill by clause 55(5)

Recommendation 160: we recommend that a person should not be capable of relying on the "mercy killing" in connection with an animal of a species protected under the Bern Convention, the Bonn Convention or the Habitats Directive defence unless he or she shows that the possession, control or transport of the animal in question was solely for the purpose of

(1) killing it; or

(2) disposing of it after its death.

This recommendation is given effect in the draft Bill by clauses 55(6) and (7).

Using prohibited methods but taking all reasonable precautions to prevent injury to protected animals

7.212 Section 11 of the Wildlife and Countryside Act 1981 broadly overlaps with regulation 43 of the Conservation of Habitats and Species Regulations 2010. It provides that it is not an offence to set in position an item calculated to cause bodily injury to certain animal species protected under the Bern Convention or the Habitats Directive if the article was set up for the purpose of:

> killing or taking, in the interests of public health, agriculture, forestry, fisheries or nature conservation, any wild animals which could be lawfully killed or taken by those means and that [the defendant] took all reasonable precautions to prevent injury thereby to any wild animals included in schedule 6.[137]

7.213 As discussed in Chapter 5, our view is that article 8 of the Bern Convention, in line with article 15 of the Habitats Directive, requires member states to prohibit the use of certain indiscriminate methods of killing or capture when:

(1) The prohibited method is used for the purpose of killing, injuring or capturing a protected wild animal; or

(2) The prohibited method is used in the knowledge of a serious risk that a protected wild animal would be killed, injured, or captured as a result of the use of that prohibited method and by failing to take reasonable steps to prevent that from happening.

7.214 We have concluded, therefore, that there is no reason why these defences should be retained under the new framework. Under our recommendations the taking of "reasonable precautions" will already be a key component of the mental element of the offence. Replicating the above defences, therefore, would have no effect on the application of the new methods and means prohibitions.

Recommendations

Recommendation 161: we recommend that the defences to the use of otherwise prohibited methods under section 11 of the Wildlife and Countryside Act 1981 should not be replicated under the new regulatory framework.

[137] Wildlife and Countryside Act 1981, ss 11(6) and (7).

Use of prohibited methods in pursuance of an order

7.215 Sections 19 and 21(4) of the Animal Health Act 1981 provide the Secretary of State or Welsh Ministers with the power to issue animal health orders authorising the use of methods of destruction which would otherwise be unlawful.

7.216 Above we have explained that the provision authorising the killing of wild birds "in pursuance of an animal health order" is in breach of article 9 of the Wild Birds Directive in that it fails to require the Secretary of State or Welsh Ministers to be satisfied, before issuing the order, that there are no other satisfactory solutions and that the order will not be detrimental to the favourable conservation status of the species concerned. The same reasoning applies here. A provision providing the Secretary of State or Welsh Ministers with the power to authorise the use of methods of destruction prohibited under article 8 of the Bern Convention or article 15 of the Habitats Directive also fails, in the absence of any further condition, to correctly transpose the UK's obligations under article 9 of the Bern Convention and article 16 of the Habitats Directive.

7.217 We have concluded, therefore, that under the new framework the Secretary of State or Welsh Ministers should retain the power to issue orders authorising the use of methods of destruction prohibited by the Wild Birds Directive. Before issuing such orders, however, the Secretary of State or Welsh Ministers must be satisfied that the order is issued for one of the purposes listed in article 16(1) of the Directive, there is no other satisfactory way of achieving that purpose and that the making of the order will not be detrimental to the conservation status of the population of the bird species that will be affected by the order.

7.218 The same approach, we think, should also be extended to the power to issue pest control orders. There is no reason why a separate wildlife licence should be required to authorise activities that may require the use of methods of killing or capture prohibited by the Habitats Directive or the Bern Convention.

Recommendations

Recommendation 162: we recommend that acting in pursuance of an order under the Animal Health Act 1981 constitute a defence to methods and means prohibitions in connection with animals protected under the Bern Convention, the Bonn Convention or the Habitats Directive, subject to equivalent conditions specified in recommendation 153.

This recommendation is given effect in the draft Bill by clauses 69, 110 and paragraph 3 of schedule 31.

Use of prohibited articles with a view to ending the suffering of a deer

7.219 Section 6(3) of the Deer Act 1991 provides that a person is not guilty of an offence by reason of setting in position or using any trap or net for the purpose of preventing the suffering of an injured or diseased deer. Section 6(4) similarly provides that a person is not guilty of an offence by reason of the use of any other reasonable means for the purpose of killing any deer if he or she reasonably believes that the deer has been so seriously injured, otherwise than by his or her unlawful act, or is in such condition, that to kill it is an act of mercy.

7.220 The use of traps, nets and other methods of killing or capture (such as poisoned or stupefying bait) in the course of killing or capturing deer is generally prohibited by the Bern Convention subject to the derogation regime under article 9.[138] In line with the approach that we have adopted in connection with similar defences to protection provisions deriving from the Wild Birds and Habitats Directive, we have concluded that the above defences should be retained under the new framework. A person should not, however, be able to rely on the above defences unless he or she can show that there were no other satisfactory ways of ending the deer's suffering or that the activity was not detrimental to the maintenance of the population of the species concerned at a favourable conservation status in its natural range.

Recommendations

Recommendation 163: we recommend that the effect of sections 6(3) and (4) of the Deer Act 1991 should be replicated under the new framework, subject to the conditions discussed in recommendations 142 and 143.

This recommendation is given effect in the draft Bill by clause 42.

Use of mechanically propelled vehicles for the purpose of driving deer

7.221 Section 4(5) of the Deer Act 1991 provides that the use of a mechanically propelled vehicle for the purpose of driving deer does not constitute an offence if the activity is carried out with the written authority of the occupier of any enclosed land where deer are usually kept and in relation to any deer on that land.

7.222 The use of a mechanically propelled vehicle for the purpose of capturing or killing wild deer is generally prohibited by the Bern Convention.[139] As the expression "deer kept in enclosed land" does not necessarily exclude "wild deer", on a strict interpretation it could be argued that the above defence constitutes a derogation from the Convention which fails to comply with the conditions imposed by article 9.

7.223 On balance, however, we have concluded that the above defence may be replicated under the new framework as currently drafted. The scope of the Bern Convention's prohibition is limited to the use of a vehicle for the purpose of "capturing" deer (or, in other words, taking deer from the wild). Deer which are kept in "enclosed land", however, cannot be "captured" on the basis that, it could be argued, they are already in captivity. For this reason, our view is that there are good grounds for interpreting the defence under section 4(5) of the Deer Act 1991 as falling outside the scope of the Bern Convention protection regime.

Recommendations

Recommendation 164: we recommend that the effect of section 4(5) of the Deer Act 1991 should be replicated under the new framework.

This recommendation is given effect in the draft Bill by clause 47.

[138] Bern Convention, appendix 4. As discussed in Chapter 5 above, this prohibition does not fall within the scope of the UK's reservations to the Convention.

[139] Bern Convention, appendix 4.

LICENSING AND DEFENCES: ANIMAL SPECIES PROTECTED FOR DOMESTIC POLICY REASONS

7.224 The terms of reference of this project prevent us from significantly altering the current level of protection of species, unless those changes are mandated by EU law. As a result, the scope of our proposed policy changes in relation to permitted activities against species protected solely for domestic reasons is limited to the rationalisation and consolidation of the current regime.

7.225 In consultation we highlighted the fact that there is currently no standardised system for licensing activities which interfere with various species protected primarily for domestic policy reasons, such as badgers, deer, seals and animals listed in schedules 5 and 6 of the Wildlife and Countryside Act 1981.[140] At the beginning of this Chapter we made recommendations for the standardisation of a number of technical requirements across the different licensing regimes. In this section we make recommendations with a view to substantively harmonise the licensing conditions across different protection regimes and ensure a consistent approach to the authorisation of prohibited activities under the new regulatory regime.

7.226 In consultation we also highlighted the existence of a large number of similar, and sometimes overlapping criminal defences across the existing domestic wildlife protection regime. As we noted in the consultation paper, our position on the reform of criminal defences is different in the context of activities affecting species protected solely for domestic reasons. In the absence of any international and EU obligation, substantively altering those defences would inevitably lead to significant changes to the level of protection provided for the relevant species which, as discussed in Chapter 1, would be outside the terms of reference of this project. As a general rule, therefore, we have taken the view that existing defences should be retained as they currently stand unless they can be simplified or harmonised without significantly altering the level of protection of the relevant species.

Wild animals protected primarily for domestic reasons: licensing regime under the new framework

7.227 Otherwise prohibited activities affecting species protected primarily for domestic reasons are currently licensed under five different licensing regimes, depending on the specific species or activity in question.[141]

7.228 The killing or capture of a badger, for example, may currently be authorised through a licence issued under section 10 of the Protection of Badgers Act 1992. Because badgers are also protected by the methods and means prohibitions under article 8 of and appendix 4 to the Bern Convention, however, licences to authorise the use of those prohibited methods against badgers have to be granted under section 16(3) of the Wildlife and Countryside Act 1981. Beside the complexity of the system, there are two obvious problems with this approach.

[140] Wildlife Law (2012) Law Commission Consultation Paper No 206, paras 7.40 to 7.46.

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

7.229 Firstly, to authorise the capture of a badger with an otherwise prohibited trap, the relevant licensing authorities would currently need to issue two licences based on different lists of authorised grounds. Secondly, section 16(3) of the 1981 Act is used both to license activities interfering with species protected for domestic reasons and to authorise activities interfering with species protected for the purpose of giving effect to the UK's international obligations. The problem with this approach is that, insofar as section 16(3) is used to license activities prohibited by the Bern Convention, it breaches article 9 of the Convention by failing to require the relevant licensing authority to be satisfied of the absence of other satisfactory solutions, and that the licence would not be detrimental to the survival of the population of the species concerned.

7.230 In consultation we suggested that the presence of a large number of different, and sometimes inconsistent, licensing regimes appeared to be primarily the result of the law being spread across different statutes, some of which predate by almost 150 years the UK's international and EU obligations under the Habitats and Wild Birds Directive. We suggested that the different licensing regimes for species primarily protected for domestic reasons could be rationalised in line with the licensing regime giving effect to article 9 of the Bern Convention.[142]

7.231 Most consultees agreed with our suggestion. Natural England, for instance, expressed strong support for the introduction of the Bern Convention licensing conditions, on the ground that they currently incur significant problems in authorising and regulating certain legitimate activities – such as development projects – affecting species listed in schedule 5 to the 1981 Act. Their view is that in the absence of an "overriding public interest" or "judicious use" licensing reason, developers are currently forced to rely on the "incidental results" defence. The result is that "the developer does not have the regulatory certainty associated with a licence issued for the development activity itself, and the public does not have the confidence that the activity has been properly scrutinised". This position was also supported by Defra, which added that it would also be "useful to import the conditions in article 9 of the Bern Convention about absence of alternative solution and absence of detriment to the survival of the population concerned".

7.232 Certain stakeholders, however, expressed some concerns with our suggestion. The National Farmers' Union and the National Gamekeepers' Organisation, for instance, opposed the application of the Bern Convention principles on the basis that, in their view, it would limit the available grounds for licensing interferences with domestically protected species. In particular, it was suggested that the Bern Convention does not permit derogation for the purposed of preventing the spread of disease, as currently appears in the Protection of Badgers Act 1992. At the other end of the spectrum, a number of environmental and animal welfare organisations opposed our suggestion on the basis that it could potentially water down the current protection afforded to species protected for domestic reasons.

[142] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 7-9.

7.233 We are not convinced by the argument that rationalising the existing licensing regimes around the conditions listed in article 9 of the Bern Convention would limit the grounds of derogation for domestic species, such as the "prevention of the spread of disease". Licences authorising activities for that purpose, in fact, could be based on the "prevention of serious damage to livestock", the "protection of fauna and flora" or on "overriding public interest" grounds.

7.234 While we accept that the presence of separate licensing regimes has the benefit of ensuring that the licensing reasons are specifically tailored to the activities affecting the species in question, a unified licensing regime would significantly reduce complexity for both decision-makers and prospective applicants. A licensing regime based on article 9 of the Bern Convention would, in addition, allow the licensing of otherwise prohibited activities for a broader range of reasons, such as development or other "judicious exploitation" of certain wild animals in small numbers.

7.235 This does not mean, as suggested by some environmental organisations, that the protection of species would be watered down under the new regime. Firstly, as Natural England explained in consultation, a broader licensing regime may carry conservation benefits, in that it allows the licensing authority more control over activities that, in the absence of a licensing ground, would otherwise be carried out in reliance on the available criminal defences. Secondly, in line with the transposition of article 9 of the Bern Convention discussed above, the licensing authority will only be able to license an activity if satisfied that there are no other satisfactory alternatives and that the activity would not be detrimental to the favourable conservation status of the relevant species.[143]

7.236 We have concluded, therefore, that under the new framework, otherwise prohibited activities (discussed in Chapters 4 and 5) in relation to species protected as a matter of domestic policy should be licensable in accordance with the licensing regime designed to give effect to article 9 of the Bern Convention. This would include activities that may currently be authorised through licences under the following licensing regimes:

(1) section 10 of the Protection of Badgers Act 1992;

(2) section 8 of the Deer Act 1991;

(3) sections 16(3) and 16(4)(b) of the Wildlife and Countryside Act 1981; and

(4) section 10 of the Conservation of Seals Act 1970.

[143] It is also worth noting that a centralised licensing regime based on the Bern Convention derogation reasons would, incidentally, also ensure full compliance with the Convention. While a number of animals (seals, deer and badgers) were historically protected to give effect to purely domestic policies, they have subsequently been listed in annex 3 to the Convention. The UK is not only under an obligation to prohibit the use of prohibited methods in connection with the capture or killing of those species, but is also under general obligations under art 7 of the Convention to introduce, when necessary, measures (such as close seasons or trade prohibitions) for the purpose of keeping their populations out of danger. This means that in particular circumstances licences authorising the killing of deer could be interpreted as derogations from the UK's obligations under the Convention that would require, in turn, compliance with the derogation reasons listed in art 9.

7.237 Certain conduct under the above Acts[144] cannot currently be licensed because Parliament considered it to be intolerable conduct that should not be authorised under any circumstances.[145] We propose to retain those limitations.

Recommendations

Recommendation 165: we recommend that the existing licensing regimes for authorising otherwise prohibited activities in relation to species protected as a matter of domestic policy should be simplified and consolidated in line with the licensing regime designed to give effect to article 9 of the Bern Convention.

Recommendation 166: we recommend that the new licensing regime should not extend to prohibited activities that may not currently be licensed.

These recommendations are given effect in the draft Bill by clause 67.

Defences to prohibited activities affecting wild animals protected for domestic reasons

7.238 Our approach to the reform of criminal defences is different when it comes to species protected solely for domestic reasons. In the absence of any international or EU obligations, substantive changes to criminal defences would, in most cases, fall outside the scope of this reform project, as they would inevitably alter the level of protection of the species in question. In line with the overwhelming support for our general proposal to consolidate the common exceptions to prohibited acts set out in existing wildlife protection legislation, therefore, we have concluded that existing defences in connection with activities prohibited as a matter of domestic law should be simply replicated under the new framework and, where relevant, simplified or harmonised with equivalent exceptions.[146] This section discusses the reasons behind the most significant changes to existing defences that we have considered appropriate for the purpose of giving effect to the above policy.

Recommendations

Recommendation 167: we recommend that existing defences in connection with activities prohibited as a matter of domestic law should be consolidated and, where relevant, harmonised with the equivalent exceptions in connection with animals protected as a matter of international and EU law.

This recommendation is given effect in the draft Bill by clauses 32, 33, 44, 45, 50, 53, 61, 63, 69 and 93(2).

[144] Examples of prohibited conduct that may not be licensed include cruelly ill-treating a badger, using badger tongs in the course of killing or capturing badgers or selling venison which has been unlawfully obtained.

[145] In connection with offences under s 3 of the Protection of Badgers Act 1992, see, for instance, *Hansard* (HL), 2 April 1973, vol 341, cols 27 to 28.

[146] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 7 to 8.

Recommendation 168: we recommend that serious consideration should be given to further simplifying this area of law by repealing unnecessary, or overly specific defences, and replacing them with relevant licences.

Acting in pursuance of an order

7.239 Section 10(1) of the Wildlife and Countryside Act 1981 provides, in effect, that species protected under schedule 5 to the 1981 Act (other than those which are also protected by the Habitats Directive) may be killed or captured without a licence as long as the activity is authorised by an order under the Animal Health Act 1981 or section 98 of the Agriculture Act 1947.

7.240 Surprisingly, the defence of "acting in pursuance of an animal health order" does not appear in the Protection of Badgers Act 1992, the Deer Act 1991 or the Conservation of Seals Act 1970. In *R (Badger Trust) v Secretary of State for the Environment, Food and Rural Affairs*, Lord Justice Laws suggested that the absence of an express defence under the Protection of Badgers Act 1992 might indicate that section 21 of the Animal Health Act 1981[147] could have been impliedly repealed in so far as it covered the killing or capture of badgers.[148] If this view is right, the current legal position is that an animal health order cannot be issued in relation to a badger.

7.241 By the same reasoning, this would also be true for orders under the Animal Health Act 1981 authorising the killing of deer during the close season in contravention of section 2 of the Deer Act 1991, but not necessarily for animal health orders authorising the killing of seals protected under the Conservation of Seals Act 1970, on the basis that the 1970 Act predates the 1981 Act.

7.242 The alternative view is that because the purpose of the Protection of Badgers Act 1992 and the Deer Act 1991 was to consolidate legislation that was passed in large part before the Animal Health Act 1981, in re-enacting legislation on the protection of badgers and deer in the 1990s the drafters could not have intended to change the relationship between those Acts and the Animal Health Act 1981. If this view is correct, it could be that the 1981 Act superseded the then current legislation relating to deer and badgers and that effect was re-enacted in the 1991 and 1992 Acts. The position would then be that seals, deer or badgers could be killed or captured at any time in pursuance of an animal health order without the need to apply for a licence.

7.243 In the context of the transposition of the Wild Birds and Habitats Directives, we have recommended that the effect of the above defences should be retained. The Secretary of State or Welsh Ministers, nevertheless, should only be able to issue animal health orders or pest control orders authorising activities interfering with a protected species if satisfied that the issuing of the order complies with the conditions under which a wildlife licence in connection with the same species would also be granted.

[147] The Animal Health Act 1981, s 21, provides the Secretary of State, Scottish Ministers and Welsh Ministers with a power to issue orders providing for the destruction of wild animals in any area where this is "necessary in order to eliminate, or substantially reduce the incidence of, that disease in animals of any kind in the area."

[148] [2012] EWCA Civ 1286 at [21] to [23].

7.244 We have concluded that there is no reason why the same approach should not be extended to orders authorising activities interfering with species protected for domestic reasons or orders authorising the use of otherwise prohibited methods of killing or capture.[149] Our view is that this approach would significantly rationalise the protection of wild fauna under the new framework, without substantively altering the existing level of protection of species protected for domestic reasons.

7.245 In addition to providing consistency, our view is that this approach would also better reflect the existing relationship between the general powers to issue animal health and pest control orders and the wildlife protection regime.

7.246 It would appear, in fact, that the reason why the defences under section 10(1) of the 1981 Act were introduced was that, at that point in time, the conditions under which an order could be issued under the Agriculture and Animal Health Acts were broadly equivalent to the reasons for which a wildlife licence authorising the same activities would be granted under section 16 of the 1981 Act. It was, therefore, unnecessary to retain a system where the Secretary of State would have to separately license activities carried out in pursuance of animal health or pest control orders.

7.247 As we have now recommended the harmonisation of domestic licensing conditions around article 9(1) of the Bern Convention, to replicate the existing approach the reasons and conditions for issuing an animal health or pest control order should remain equivalent to the reasons and conditions for issuing a licence under the new framework. In the absence of this change, the relationship between animal health and pest control orders would suddenly become asymmetrical; in other words, in some cases it would become easier to issue an order authorising the destruction of a European protected species than to issue a wildlife licence authorising the destruction of the same species for equivalent reasons.

Recommendations

Recommendation 169: we recommend that acting in pursuance of an order under the Animal Health Act 1981 or a pest control order should be a defence to primary activity prohibitions in connection with animals protected as a matter of domestic policy.

This recommendation is given effect in the draft Bill by clause 69.

Recommendation 170: we recommend that the Secretary of State or Welsh Ministers should not make an order under the Animal Health Act 1981 or a pest control order unless they are satisfied that

(1) the order is issued for one of the purposes listed in article 9(1) of the Bern Convention;

(2) there is no other satisfactory way of achieving the purpose for which the order is made; and

[149] As the new framework will only apply in England and Wales, any reference to s 39 of the Agriculture (Scotland) Act 1948 should be removed from the new defence.

(3) making the order in relation to a protected species will not be detrimental to the maintenance of the population of the relevant animal at a favourable conservation status within its natural range.

This recommendation is given effect in the draft Bill by clause 110 and paragraph 3 of schedule 31.

"Mercy killing" and tending to disabled animals

7.248 In line with our general policy discussed above, we have concluded that capturing a badger, or an animal listed in schedule 5 to the Wildlife and Countryside Act 1981, that has been disabled other than by the defendant's unlawful act solely for the purpose of tending to it should remain a defence.

7.249 For the same reasons, killing or injuring a badger, or an animal listed in schedule 5 to the 1981 Act, that has been so seriously disabled that there was no reasonable chance of its recovering should also remain a defence under the new framework.[150]

7.250 In the light of the problems identified in connection with the application of the same defences to wild birds, we have concluded that an additional condition should be introduced so as to clarify that the possession of a live animal which has been legally captured by virtue of the above defence should not be permitted unless it is shown that the person is in possession of the relevant animal solely for the purpose of tending to it and releasing it when no longer disabled.[151]

Recommendations

Recommendation 171: we recommend that – subject to the conditions discussed in recommendations 142 and 143 – a person should not be guilty of an offence by reason of killing an animal generally protected as a matter of domestic policy when the action is done solely for the purpose of ending its suffering. A person should not be guilty of an offence by reason of capturing an animal generally protected as a matter of domestic policy when the action is done solely for the purpose of tending it and subsequently releasing it.

This recommendation is given effect in the draft Bill by clauses 31, 58(2) and (3).

[150] The Protection of Badgers Act 1992, s 6(c), adopts the expression "to kill it would be an act of mercy" rather than "there was no reasonable chance of its recovering". We have considered that, in practice, there would not appear to be any significant difference between the two expressions to justify the retention of two separate defences. We have decided, therefore, that the language should be harmonised in line with the latter expression.

[151] For the purpose of simplifying the new regulatory framework, we have also decided to harmonise the conditions to be satisfied for the purpose of relying on this defence with the conditions to be satisfied for the purpose of relying on the defence applicable to activities affecting wild animals of a species protected under the Habitats Directive. It follows that under the new framework the defendant will not be able to rely on this defence if the prosecution establishes that (a) there were other satisfactory alternatives; or (b) that the activity was detrimental to the conservation status of the species in question.

Interfering with wild animals in a dwelling house

7.251 Section 10(2) of the Wildlife and Countryside Act 1981 authorises a person to damage or destroy places used by protected animals for shelter or protection, or disturb animals whilst occupying structures or places used for shelter or protection when the activity is carried out in a dwelling house.

7.252 Section 10(5) of the 1981 Act provides that a person may not rely on section 10(2) or the incidental result defence in section 10(3)(c) as respects anything done in relation to a bat otherwise than in the living area of a dwelling house unless he has notified the relevant conservation body.

7.253 We have concluded that while the defence under section 10(2) should generally be retained insofar as it applies to species protected for domestic reasons, the more limited version of the defence in relation to bats should be repealed. This is because interfering which a place used as shelter or protection by a bat in the manner authorised by section 10(2) read together with section 10(5) of the 1981 Act would currently constitute an offence under regulation 41 of the Conservation of Habitats and Species Regulations 2010.[152] In other words, the defence under section 10(5) of the 1981 Act has been rendered nugatory by the 2010 Regulations.

Recommendations

Recommendation 172: we recommend that the defence under section 10(2) of the Wildlife and Countryside Act 1981 should be retained insofar as it applies to animals protected solely as a matter of domestic policy.

This recommendation is given effect in the draft Bill by clause 49(6).

Recommendation 173: we recommend that the section 10(5) of the Wildlife and Countryside Act 1981 has currently no effect and should not, therefore, be retained under the new regime.

The "incidental results" defence

7.254 Section 10(3)(c) of the Wildlife and Countryside Act 1981 provides that notwithstanding anything in section 9, a person will not be guilty of an offence by reason of any act made unlawful by that section if he shows that the act was the "incidental result of a lawful operation and could not reasonably have been avoided".

7.255 Similarly, by virtue of sections 6(c) and 8(3) of the Protection of Badgers Act 1992 a person does not commit an offence by reason of killing or injuring a badger, damaging or obstructing access to a badger sett or disturbing a badger when it is occupying a badger sett if the action was the incidental result of a lawful operation and could not reasonably have been avoided.

7.256 In line with our general policy discussed above, we have concluded that, subject to the discussion below, the above defences should be retained and consolidated under the new framework.

[152] All bat species currently listed in sch 5 to the Wildlife and Countryside Act 1981 are also listed in sch 2 to the Conservation of Habitats and Species Regulations 2010.

7.257 In considering the extent to which the offences under section 9 of the 1981 Act and sections 6(c) and 8(3) of the 1992 Act could be consolidated, we noticed that the defence under section 10(3)(c) of the 1981 Act, in theory, also applies to secondary activities prohibitions (such as the prohibitions of possessing, transporting or selling an animal of a protected species) under section 9 of the 1981 Act. We have concluded, nevertheless, that this could not have been the intention of the drafters. The original purpose of this defence, in fact, was to exempt from liability people carrying out lawful land management operations, such as agricultural or forestry activities; nothing in the Parliamentary debates suggests that the defence was ever intended to extend to the sale or possession of a protected animal.[153]

7.258 In Chapter 5 we recommended that under the new framework activities which are currently prohibited if committed "intentionally or recklessly" or "wilfully" should be prohibited when committed "deliberately".[154] In the light of those recommendations, we suggest that serious thought should be given to whether the "incidental results" defence should be retained at all under the new framework, for the reasons we have given in paragraphs 7.157 and 7.158 above.

Recommendations

Recommendation 174: we recommend that in replicating and consolidating the existing "incidental results" defences in connection with activities interfering with animals protected as a matter of domestic policy, their effect should not extend to possession or trade offences.

Recommendation 175: we recommend that consideration should be given to repealing existing "incidental results" defences in connection with activities interfering with wild animals or plants protected for domestic policy reasons.

Urgent action for certain purposes

7.259 Sections 10(4) and 10(6) of the Wildlife and Countryside Act 1981 provide that an "authorised person" may lawfully kill or injure a protected animal if he or she shows that the action is necessary for the purpose of preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber or any other form of property or to fisheries. An authorised person, however, may not rely on the above defence if he or she failed to apply for a licence as soon as reasonably practicable after it had become apparent that action would be necessary for protecting one of the above interests (or an application for such a licence had been determined).

[153] In the unlikely event that the defence had ever been intended to apply to "possession" or "control" offences prohibited by s 9(2) of the 1981 Act, our view is that in the vast majority of cases the defence would be superfluous. This is because, as discussed in Chapter 5, in line with s 9(3) of the 1981 Act, under the new framework the possession of an animal that has been lawfully captured will not be an offence. It follows that if a person comes into possession of a dead specimen which he or she killed or captured as an incidental result of a lawful operation, he or she would not, in any event, be guilty of an offence.

[154] See Protection of Badgers Act 1992, ss 1(1) and (3) and Wildlife and Countryside Act 1981, s 9(4).

7.260 The Protection of Badgers Act 1992 contains equivalent defences in connection with the capture, injuring or killing of badgers as well as any action interfering with a badger sett prohibited by section 3 of the 1992 Act.[155]

7.261 In line with our general policy, we have concluded that the above defences should be consolidated and replicated under the new framework. For the reasons explained above concerning the reform of an equivalent defence in connection with wild birds, we have also concluded that under the new framework the defence should be expressly limited to actions which are "urgently" necessary for the purpose of protecting a relevant interest.

Recommendations

Recommendation 176: we recommend that in replicating existing defences allowing authorised persons to take actions without a licence in circumstances where applying for an individual licence would be ineffective, the defences should be subject to an express "urgency" requirement.

This recommendation is given effect in the draft Bill by clauses 33(2), 50(2), 53(2) and 63(2).

Anything authorised under the Animals (Scientific Procedures) Act 1986

7.262 Section 6(d) of the Protection of Badgers Act 1992 provides that a person is not guilty of an offence under the 1992 Act by reason only of doing anything which is authorised under the Animals (Scientific Procedures) Act 1986.

7.263 The reference to the 1986 Act in section 6(d) of the 1992 Act originates from a consequential amendment which replaced an earlier reference to experiments that do not constitute a contravention of the Cruelty to Animals Act 1876.[156] The amendment was made by section 8(3) of the Badgers Act 1973, which was introduced by a last minute amendment to the Badgers Bill in the House of Lords, on the basis that experiments may have to be conducted on badgers in the interest of their conservation and welfare.[157]

7.264 Sections 2B and 3 of the Animals (Scientific Procedures) Act 1986 now provide, in general terms, that "regulated procedures" may not be carried out in relation to relevant animals, unless they are expressly authorised by a licence issued by the Secretary of State. "Regulated procedure" includes

> any procedure applied to a protected animal[158] for a qualifying purpose which may have the effect of causing the animal a level of pain, suffering, distress or lasting harm equivalent to, or higher than, that caused by the introduction of a needle in accordance with good veterinary practice.

[155] Protection of Badgers Act 1992, ss 7, 8(1) and 8(2).

[156] Animals (Scientific Procedures) Act 1986, sch 3.

[157] *Hansard* (HL), 24 July 1973, vol 344, cols 1761 to 1762, amendment No 9.

[158] Any living vertebrate other than man and any living cephalopod.

7.265 It also includes the killing of an animal for experimental or scientific use under a licence or in a place specified by a project licence with a method that is not expressly considered "appropriate" to that description of animal.[159]

7.266 We have taken the view that because the above defence was added to the 1973 Act as a last minute amendment with the specific purpose of permitting regulated scientific experiments on badgers, it was primarily intended to constitute a limited defence to the "cruelty" offences under section 2 of the 1992 Act, on the basis that some of those offences could not have otherwise been authorised by a licence under the 1992 Act.[160]

7.267 We have concluded, therefore, that under the new framework the application of the above defence should be limited to the prohibitions replicating section 2 of the 1992 Act. There would be no logical reason, in fact, why the killing, injuring or capture of a wild badger should be automatically authorised if the action is carried out in pursuance of a licensed scientific experiment. Whether a wild animal should be captured or killed for scientific reasons is primarily a conservation question that should be taken in pursuance of the wildlife licensing regime discussed above. In the light of the object and purpose of the 1986 Act, licences authorising scientific experiments under that Act should only be relevant to questions as to the methods that may be used to injure or kill a relevant animal.

Recommendations

Recommendation 177: we recommend that the defence of doing anything to a badger which is authorised under the Animals (Scientific Procedures) Act 1986 should be limited to "cruelty" prohibitions under section 2 of the Protection of Badgers Act 1992.

This recommendation is given effect in the draft Bill by clause 63(1).

Recommendation 178: we recommend that consideration should be given to whether the same defence should extend to equivalent prohibitions in connection with other animals.

Possession of a live badger by a commercial carrier

7.268 Section 9(a) of the Protection of Badgers Act 1992 provides that a person is not guilty of an offence by reason of being in possession of a live badger if the badger is in his or her possession in the course of his or her business as a carrier.

[159] Animals (Scientific Procedures) Act 1986, s 2.

[160] It is worth noting, in fact, that while the above defence currently applies to all prohibitions under the Protection of Badgers Act 1992, its application is effectively coextensive with the licensing powers under the 1986 Act. As confirmed by existing practices, the capture of any badger for the purpose of a licensed scientific experiment under the 1986 Act would always be expected to be carried out under a licence granted by Natural England under s 10 of the Protection of Badgers Act 1992.

7.269 We have concluded that the above defence should be repealed and replaced, if necessary, by individual or class licences. The defence was introduced under the Badgers Act 1973 so as to prevent the Act from criminalising activities in connection with live badgers that were lawfully in captivity at the time the Badgers Act 1973 came into force.[161] It was linked to the transitional provision which allowed people to retain possession of live badgers which had been kept in captivity for a continuous period beginning before the passing of the 1973 Act.

7.270 Apart from the "tending of an injured badger" defence, a person may now only be in possession of a live badger under a licence issued under section 10 of the 1992 Act. There is, therefore, no reason why a business carrier should still be able to transport badgers that were either illegally caught or badgers that may only be kept and transported in accordance with the conditions of a licence.

Recommendations

Recommendation 179: we recommend that the defence authorising a person to be in possession of a live badger in the course of his or her business as a carrier should not be replicated under the new regime.

Defences to activities carried out during the close season or prohibited periods

7.271 As discussed in Chapter 5, the prohibition of killing, injuring or capturing animals other than birds during a specified close season currently only extends to deer, seals and hares. In Chapter 3 we recommended the creation of a general power to prohibit the killing, injuring or capture of any other animal during close seasons (or shorter prohibited periods) by regulations made by the Secretary of State or Welsh Ministers.

7.272 In the light of the recommendation to create this power, it became clear that merely replicating existing defences which only apply to specific animals, such as seals or deer, would not be consistent with the flexible nature of the new provision. We have decided, as a result, that the new prohibition of general application should be accompanied by a basic set of generally applicable exceptions which reflect the general approach to criminal defences in the current wildlife protection regime:

(1) A defence authorising the killing or injuring of any animal which has been disabled – otherwise than by the defendant's unlawful act – and has no reasonable chance of recovering.

(2) A defence authorising the capture of an animal which has been disabled – otherwise than by the defendant's unlawful act – when the animal is captured solely for the purpose of tending it and releasing it when no longer disabled.

[161] *Hansard* (HL), 24 July 1973, vol 344, cols 1761 to 1762.

(3) A defence authorising the killing, injuring or capture of an animal when it is shown that this was the incidental result of a lawful operation and could not reasonably have been avoided.[162]

7.273 In line with our general policy, species-specific defences which fall outside the above list of exceptions – such as the defence authorising the killing of seals in the immediate vicinity of fishing nets – should continue to apply to activities interfering with the species in question.

Recommendations

Recommendation 180: we recommend that the following defences should apply in connection with the prohibition on the killing or capturing protected animals during the close season:

(1) A defence authorising the capture of an animal which has been disabled – otherwise than by the defendant's unlawful act – when the animal is captured solely for the purpose of tending it and releasing it when no longer disabled;

(2) A defence authorising the killing or injuring of any animal which has been disabled – otherwise than by the defendant's unlawful act – and has no reasonable chance of recovering; and

(3) A defence authorising the killing, injuring or capture of an animal when it is shown that this was the incidental result of a lawful operation and could not reasonably have been avoided.

This recommendation is given effect in the draft Bill by clauses 61(1) to (3).

Prohibitions of general application: licensing regime under the new framework

7.274 As discussed in Chapters 4 and 5, a number of activities are prohibited generally. These include:

(1) the use or sale of poisons prohibited under section 8 of the Protection of Animals Act 1911,

(2) the use or sale of regulated spring traps under section 8 of the Pests Act 1954, and

[162] The first two defences consistently apply to all "killing, injuring or capturing offences" under all species specific protection regimes in England and Wales, including the Protection of Badgers Act 1992, the Deer Act 1991, the Wildlife and Countryside Act 1981 and the Conservation of Seals Act 1970. The third defence is consistently present in all of the above statutes except for the Deer Act 1991. We have taken the view, however, that the application of that defence to the killing or injuring of deer would have no impact on the protection of deer on the basis that it is difficult to think of many realistic circumstances where a deer may be intentionally killed, injured or captured "as the incidental result of a lawful operation that could not reasonably have been avoided". Note, however, paras 7.151 to 7.159 and 7.254 to 7.259 above explaining the reasons for which we expressed the general view that serious consideration should be given to repealing that defence completely under the new framework.

(3) the use of prohibited methods listed in section 11(1) of the Wildlife and Countryside Act 1981 in connection with the killing or capture of any wild animal.

7.275 Most of these prohibitions may currently be authorised in accordance with the conditions of an order or a licence. Subject to the discussion below, we have taken the view that the existing approach should be replicated under the new framework.

Generally prohibited methods of killing or capturing wild animals other than animals of a protected species

7.276 Currently, generally prohibited methods of killing or capturing wild animals[163] may be licensed in accordance with section 16(3) of the Wildlife and Countryside Act 1981. This is the same licensing regime as is currently used to authorise most otherwise prohibited activities in relation to protected animal species listed in schedules 5 and 6 to the 1981 Act. Section 16(3) lists a number of licensable purposes broadly in line with the Bern Convention grounds of derogation, but does not require the absence of other satisfactory solutions or that the use of those means does not affect the favourable conservation status of particular species.[164]

7.277 With a view to rationalising the existing regulatory framework, we have concluded that whilst an equivalent approach should be retained under the new framework, the list of licensable purposes – in line with the rationalisation of the licensing regime in connection with protected wild animals discussed above – should be harmonised with the list of grounds of derogation in article 9 of the Bern Convention.

Use of poison

7.278 In existing legislation, the use of poison under article 8(b) of the Protection of Animals Act 1911 may only be licensed if used for or in connection with the purpose of killing or capturing a protected wild bird or animal species.[165] It is also a defence to do anything in compliance with a permit issued under Regulation (EC) No 1107/2009 concerning the placing of plant protection products on the market,[166] or an order under section 19 of the Agriculture (Miscellaneous Provisions) Act 1972 authorising the use of poisons for the purpose of killing grey squirrels or coypus.[167]

[163] Wildlife and Countryside Act 1981, s 11(1).

[164] As discussed in Chapter 5, above, under the new framework those general prohibitions will only apply in connection with wild animals other than animals of a protected species.

[165] See, for instance, s 16(7) of the Wildlife and Countryside Act 1981 or reg 53(13) of the Conservation of Habitats and Species Regulations 2010.

[166] Official Journal L 309 of 24.11.2009, p 1–50. See also, Plant Protection Products Regulations 2011 SI 2011 No 2131, reg 25(4).

[167] See, for instance, the Grey Squirrels (Warfarin) Order 1973 SI 1973 No 744.

7.279 We have taken the view that the absence of a licensing regime for authorising the use of poison for or in connection with the killing or capture of animals other than protected animals is anomalous for two reasons. First, there is no logical reason why the use of poison in connection with the killing of protected species may be capable of being authorised by a licence, while the use of poison in connection with the killing of non-protected species should not be capable of being licensed. Secondly, as further discussed below, the current need to rely on imprecise criminal defences as authorising the use of poison for the purpose of killing unprotected species not only creates potential legal uncertainty but also unnecessarily curtails the flexibility of the regulatory regime.[168]

7.280 We have concluded, therefore, that under the new framework the use of poison for the purpose of killing, injuring or capturing wild animals other than protected wild animal or bird species should also be capable of being licensed in line with the licensing regime for authorising otherwise generally prohibited methods and means.[169]

Use and sale of spring traps

7.281 With a view to introducing consistency in the way otherwise prohibited activities are authorised under the new framework, we have concluded that the prohibitions on the use or sale of spring traps should be subject to a licensing regime rather than an order-making power authorising the use or sale of specified traps. We do not see any particular reason why the use of (for example) explosives for the purpose of killing or capturing wild animals should be authorised by a licence whilst the use of spring traps should be authorised by an order issued by the Secretary of State or Welsh Ministers.

7.282 In line with the existing order-making power, we have concluded that in granting a licence for the purpose of authorising the sale of a spring trap, or the use of a spring trap for the purpose of killing or capturing unprotected wild animals, the Secretary of State or Welsh Ministers should not be required to be satisfied that the licence is issued for any listed purpose. Choosing this approach is, in our view, supported by the fact that the primary aim of section 8 of the Pests Act 1954 is not conservation, but the protection of animal welfare.

[168] See, in particular, the defence under s 8(b) of the Protection of Animals Act 1911, which provides that it shall be a defence that the poison was placed by the accused for the purpose of destroying insects and other invertebrates, rats, mice, or other small ground vermin, where such is found to be necessary in the preservation of public health, agriculture, or the preservation of other animals, domestic or wild, or for the purpose of manuring the land, and that he took all reasonable precautions to prevent injury thereby to dogs, cats, fowls, or other domestic animals and wild birds.

[169] Wildlife Bill, cl 67. It is worth noting that the use of poisons having an effect on the welfare of wild animals may be separately prohibited by order under the Animals (Cruel Poisons) Act 1962. The use of poisons prohibited under the 1962 Act may not be licensed for any reason.

Sale of poisoned grain

7.283 We have been unable to find any applicable defence or licensing regime in relation to the prohibition on the sale of poisoned grains or seeds, except for bona fide use in agriculture. Our view is that the absence of additional licences or defences to this prohibition is anomalous, given that poisoned grains appear to be sold widely for pest control purposes.

7.284 We have concluded that the offence should be retained, but subject to the licensing regime applicable to the approval of spring traps. In other words, under the new framework the Secretary of State should be able to allow the sale, exchange, etc of poisoned grains or seeds under a licence. The licence may specify, for example, the type of poison that may be sold or the purposes for which it may be sold.

Recommendations

Recommendation 181: we recommend that generally prohibited methods of killing or capturing wild animals (other than protected animals), including the use of poison, should be capable of being licensed in line with section 16(3) of the Wildlife and Countryside Act 1981.

This recommendation is given effect in the draft Bill by clause 67(9).

Recommendation 182: we recommend that the grounds on which a licence should be capable of being issued under section 16(3) of the Wildlife and Countryside Act 1981 should be harmonised with the grounds listed in article 9 of the Bern Convention.

This recommendation is given effect in the draft Bill by clauses 67(2) to (4).

Recommendation 183: we recommend that the use or sale of spring traps or the sale of poisoned grains should be capable of being licensed for any reason.

This recommendation is given effect in the draft Bill by clause 67(9) and schedule 16, part 1.

Defences to generally prohibited activities connected to the protection of wild animals

7.285 In line with the approach that we have taken in connection with defences to activities interfering with animals protected for domestic reasons, we have concluded that existing defences in connection with generally prohibited activities should be replicated under the new framework and, where relevant, simplified and modernised.[170] This section discusses the reasons behind the most significant changes to existing defences that we have considered necessary for the purpose of giving effect to the above policy.

[170] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 7-8.

Use of poison for the purpose of destroying insects, invertebrates and small ground vermin

7.286 Section 8(b) of the Protection of Animals Act 1911 generally prohibits the use of poison which may result in the death or injury of an animal. Under the new framework, as discussed in Chapter 5, this offence has been harmonised with other similar prohibitions of general application; it will be an offence, therefore, to use poison for, or in connection with, the purpose of killing or injuring any wild animal other than a protected animal.

7.287 Under section 8(b) of the 1911 Act it is currently a defence for a person to show:

> that the poison was placed by the accused for the purpose of destroying insects and other invertebrates, rats, mice, or other small ground vermin, where such is found to be necessary in the preservation of public health, agriculture, or the preservation of other animals, domestic or wild, or for the purpose of manuring the land, and that he took all reasonable precautions to prevent injury thereby to dogs, cats, fowls, or other domestic animals and wild birds.

7.288 The scope of this defence is limited by the Animals (Cruel Poisons) Act 1962, which provides that the defence does not apply in connection with the use of poisons specified under regulations issued in accordance with section 2 of the 1962 Act.[171]

7.289 We have concluded that a defence to the same effect should be retained under the new framework. The obvious problem with the defence, as currently drafted, is the use of outdated language to describe certain categories of animals, such as "other small ground vermin" or "dogs, cats, fowls or other domestic animals". Below we make some recommendations with a view to modernising that language. As we have not consulted on the reform of this defence, however, we have been unable to address some of its key problems satisfactorily. We suggest, therefore, that further thought should be given to the option of repealing this defence (and replacing it with appropriate licences) or, alternatively, to the possibility of further clarifying its scope.

"SMALL GROUND VERMIN"

7.290 We have been unable to determine with any certainty what animals fall within the scope of the expression "small ground vermin". We have decided, therefore, to replicate the above expression in the new Wildlife Bill. We think, nevertheless, that serious thought should be given to replacing that expression with a clearer description of the type of animals that may fall under that category.

[171] Animals (Cruel Poisons) Act 1972, s 1(a), and see also Animals (Cruel Poisons) Regulations 1963 SI 1963 No 1278.

7.291 We are confident, however, that in the context of the 1911 Act the expression "small ground vermin" was not intended to cover grey squirrels. If grey squirrels fell within the scope of the expression "small ground vermin", there would have been no reason to draft the defence in section 19 of the Agriculture (Miscellaneous Provisions) Act 1972 authorising the use of certain poisons specified in regulations for the purpose of destroying grey squirrels.[172]

7.292 Similarly, we are confident that the expression "small ground vermin" does not include rabbits. When the 1911 Act came into force the use of poison for the purpose of killing hares or rabbits was separately prohibited by the Ground Game Act 1880. The prohibition of using poison to kill rabbits under the 1880 Act was then expressly repealed by the Prevention of Damage by Rabbits Act 1939, with the same Act introducing a defence to section 8(b) of the 1911 Act authorising the use of poisonous gas in a rabbit hole.[173] As the purpose of the new defence was to authorise the use of poisonous gas (otherwise prohibited under the 1911 Act) to kill rabbits for the purpose of protecting crops, it is clear that the interpretation of the 1911 Act at the time the 1939 Act was passed was that the reference to "small ground vermin" in section 8(b) of the 1911 Act did not include rabbits.

"WILD BIRDS"

7.293 We have concluded that the express requirement in section 8(b) of the 1911 Act to take reasonable precautions to prevent harm to wild birds need not be retained. As discussed in Chapter 4, under the new framework the use of poison in the knowledge that there is a serious risk that the poison will result in the death or injury of a wild bird, and in the absence of reasonable steps to prevent that effect, will be a separate offence.[174]

"DOGS, CATS, FOWL OR OTHER DOMESTIC ANIMALS"

7.294 We have taken the view that the reference to "dogs, cats, fowl or other domestic animals", as defined in section 15 of the 1911 Act, is outdated, particularly in the light of the recent change of approach to the categorisation of animals falling within the protection regime of the Animal Welfare Act 2006.[175]

[172] This view is supported by a statement made in the House of Commons in connection with the Grey Squirrels (Warfarin) Order 1973 SI 1973 No 744 authorising the use of warfarin for the purpose of killing grey squirrels: "at present it is an offence in England and Wales, under the Protection of Animals Act 1911, to lay poison or poisoned bait on land or in a building, but the Act provides a defence if it can be shown that this was done to destroy small ground vermin such as rats and mice in the interests of public health or agriculture. As grey squirrels live in trees, it is generally held that this defence would not apply if poison were used to control them" (*Hansard* (HC), 12 April 1973, vol 854, col 1630).

[173] See Prevention of Damage by Rabbits Act 1939, ss 4 and 5(2). The scope of this defence was subsequently extended by ss 98(3) and (4) of the Agriculture Act 1947.

[174] Wildlife Bill, cl 5.

[175] Under s 15 of the Protection of Animals Act 1911 "domestic animal" is defined as "any horse, ass, mule, bull, sheep, pig, goat, dog, cat, or fowl, or any other animal of whatsoever kind or species, and whether a quadruped or not which is tame or which has been or is being sufficiently tamed to serve some purpose for the use of man"; "dog" includes any bitch, sapling, or puppy; "cat" includes a kitten; and "fowl" includes any cock, hen, chicken, capon, turkey, goose, gander, duck, drake, guinea-fowl, peacock, peahen, swan, or pigeon.

7.295 To some extent, the obligation to take reasonable precautions to prevent harm to "dogs, cats, fowl or other domestic animals" has now been superseded by the offence under the Animal Welfare Act 2006 of causing "any poisonous substance…to be taken by a protected animal[176] without "lawful authority or reasonable excuse".[177] We are not confident, however, that this would always be the case, on the basis that the expression "reasonable excuse" could potentially include circumstances where the defendant used the poison for good reasons (such as "protecting other animals") but failed to take reasonable steps to prevent a "protected animal" from being poisoned.

7.296 We suggest, therefore, that the most logical modernisation of this provision is to replace the reference to "dogs, cats, fowl or other domestic animals" with a reference to the definition of "protected animal" under the Animal Welfare Act 2006. The term "domestic animal", as defined in section 15(b) of the 1911 Act, is, in this context, broadly coextensive with the term "protected animal" under the 2006 Act. It refers to any animal under the control of a person other than animals that are "captive".[178] Because animals that are "captive" are significantly less likely, in any event, to come into contact with poison placed for the purpose of killing wild animals, we have concluded that the slight extension of the definition of "domestic animal" would be unlikely to have any significant impact on the scope of the defence.

Using poison to destroy grey squirrels or coypus in compliance with an order

7.297 As mentioned above, section 19 of the Agriculture (Miscellaneous Provisions) Act 1972 provides that use of poison does not constitute an offence under section 8(b) of the Protection of Animals Act 1911 if the poison is used for the purpose of destroying grey squirrels or coypus[179] and in a manner authorised by an order made under the 1972 Act.

7.298 In the section above, we recommended that under the new framework it should be possible to issue licences authorising the use of poison for specified purposes. We have concluded, therefore, that the above defence should be repealed on the basis that its effect could be simply replicated through the licensing regime available under the new framework.

[176] The Animal Welfare Act 2006, s 2 provides that "an animal is a 'protected animal' for the purposes of this Act if – (a) it is of a kind which is commonly domesticated in the British Islands; (b) it is under the control of man whether on a permanent or temporary basis; or (c) it is not living in a wild state".

[177] Animal Welfare Act 2006, s 7.

[178] The Protection of Animals Act 1911, s 13(c), used to define "captive animal" as "any animal (not being a domestic animal) of whatsoever kind or species, and whether a quadruped or not, including any bird, fish, or reptile, which is in captivity, or confinement, or which is maimed, pinioned, or subjected to any appliance or contrivance for the purpose of hindering or preventing its escape from captivity or confinement".

[179] It is worth noting that currently the above defence would only appear to be relevant to grey squirrels, on the basis that the coypu was eradicated in Great Britain in 1989 (see http://www.nonnativespecies.org//factsheet/factsheet.cfm?speciesId=2282 (last visited 26 October 2015)).

Use of poison in accordance with a permit under Regulation 1107/2009

7.299 Regulation 25 of the Plant Protection Products Regulations 2011[180] provides a defence to anything done in contravention of section 8(b) of the Protection of Animals Act 1911 if the defendant can show that he or she acted in pursuance of an authorisation or permission granted, or deemed to be granted, in accordance with Regulation 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market. We have concluded that this defence should be retained so as to ensure that the general prohibition on the use of poison to kill wild animals does not, in any way, interfere with the regulation of plant protection products at EU level. However, we consider that, as it is more likely to be of interest to people whose primary focus is the Plant Protection Products Regulations 2011, the defence is better left in those Regulations. Of course, consequential amendments will need to be made to regulation 25 to ensure that it refers to the new Wildlife Bill rather than the 1911 Act.

Recommendations

Recommendation 184: we recommend that defences in connection with the use of poison against certain pests should be simply replicated under the new framework and, where relevant, simplified and modernised.

This recommendation is given effect in the draft Bill by clause 90.

Recommendation 185: we recommend that the defence under section 8(b) of the Protection of Animals Act 1911 in connection with the use of poison should be replicated subject to the following modifications:

(1) omitting the express requirement to take reasonable precautions to prevent harm to wild birds; and

(2) replacing the reference to "dogs, cats, fowl or other domestic animals" with a reference to the definition of "protected animal" under the Animal Welfare Act 2006.

This recommendation is given effect in the draft Bill by clause 90(2).

Recommendation 186: we recommend that in replicating the defence under section 8(b) of the Protection of Animals Act 1911, consideration should be given to replacing the expression "other small ground vermin" with a clear list of relevant animals that should not be covered by the general prohibition on the use of poison.

[180] SI 2011 No 2131.

LICENSING AND DEFENCES: PLANTS

Wild Plants: licensing under the new framework

7.300 As discussed in Chapter 6, the existing regulatory structure for the protection of wild plants mirrors the regulatory structure for the protection of wild animals. In line with our approach to the licensing of animals protected under the Bern Convention and the Habitats Directive, therefore, we have concluded that prohibitions in relation to wild plant species protected by the Habitats Directive should be licensable on the basis of the licensing regime – discussed in detail above – that gives effect to the UK's obligations under article 16 of the Habitats Directive. Offences in relation to plant species listed in appendix 1 to the Bern Convention that are not listed in annex 4 to the Habitats Directive, and offences in relation to plant species protected purely for domestic reasons, should be licensable on the same basis, subject to the different approach to "judicious use" licences discussed earlier in this chapter.[181]

7.301 In theory, the offence committed by an unauthorised person uprooting plants other than protected plants may currently be the subject of a licence under section 16(3) of the Wildlife and Countryside Act 1981. Our view is that this is an anomaly. In discussions with Natural England, we were informed that no licence has ever been issued for the purpose of authorising an "unauthorised" person to uproot an unprotected wild plant. This is presumably because it would make no sense for a person to apply for a licence when he or she could simply be authorised to carry out the otherwise prohibited activity by any "authorised person".[182] As discussed in Chapter 6, it would appear that the main purpose of this offence is in fact not conservation, but the protection of landowners' interest in wild plants growing on their land. It follows that applying for a licence would not appear to be the correct procedure to follow for a person intending to carry out an operation that is currently prohibited by section 13(1)(b) of the 1981 Act.

Recommendations

Recommendation 187: we recommend that the grounds for which a licence should be capable of being granted in connection with activities interfering with plants protected under the Bern Convention and the Habitats Directive should reflect the licensing grounds for which a licence should be capable of being granted in connection with activities interfering with wild animals protected under the same instruments (see recommendations 153 to 157).

Recommendation 188: we recommend that the grounds on which a licence should be capable of being granted in connection with activities interfering with plants protected for domestic policy reasons should reflect the licensing grounds for which a licence should be capable of being granted in connection with activities interfering with wild plants protected under the Bern Convention.

[181] See Chapter 7, paras 7.114 to 7.126 and 7.186 to 7.189 above.

[182] As discussed in Chapter 6, under the new framework an "authorised person" will also include the Secretary of State or Welsh Ministers.

Recommendation 189: we recommend that under the new regime a person (other than an authorised person) should not be capable of obtaining a licence for uprooting wild plants other than protected plants.

These recommendations are given effect in the draft Bill by clause 80.

Defences to prohibited activities affecting protected wild plants

7.302 For the purpose of this Chapter, the only substantive defence which applies to activities interfering with protected plants is section 13(3) of the Wildlife and Countryside Act 1981. This provides that an activity otherwise prohibited by section 13(1) of the 1981 does not constitute an offence if it was the incidental result of a lawful operation and could not reasonably have been avoided.

7.303 Subject to the general reservations that we have expressed above in connection with this defence, we have concluded that it should be replicated in the new framework insofar as it applies to plant species protected for domestic policy reasons.

Recommendations

Recommendation 190: we recommend that the "incidental result" defence should be replicated under the new framework insofar as it applies to plants protected for domestic policy reasons.

This recommendation is given effect in the draft Bill by clause 75.

CHAPTER 8
POACHING: SUBSTANTIVE PROHIBITIONS

INTRODUCTION

8.1 Historically, poaching laws have been drafted to protect the exclusive rights of landowners to exploit certain wild animals, the hunting or sale of which may carry significant economic and leisure benefits. This was achieved by making it a criminal offence to enter onto someone else's land to hunt certain species without the right or permission to do so. Animals currently subject to poaching prohibitions include deer, game birds, hares and rabbits.

8.2 As discussed in our consultation paper, poaching prohibitions are scattered across a collection of statutes dating back to the Night Poaching Act 1828, commonly referred to collectively as the Game Acts. Apart from the Deer Act 1991, which consolidated and modernised existing poaching prohibitions in connection with deer, the language of the poaching prohibitions under the Game Acts is archaic and inconsistent.[1] For instance, while an offence under the Game Act 1831 requires the "search or pursuit" of game,[2] the Night Poaching Act 1828 requires "taking or destroying" or "entering any land for that purpose".[3] This is in contrast to the Night Poaching Act 1844, which makes it an offence to take or destroy rabbits or game "on any public road, highway, or path",[4] thus not requiring trespass on land.

8.3 In this Chapter we discuss the modernisation and simplification of existing substantive poaching offences including, in particular, the poaching of relevant game animals, the poaching of eggs of relevant game birds and the trade in poached game. The rationalisation of enforcement mechanisms and penalties for non-compliance are then discussed in Chapter 10 below, together with a discussion of the reform of enforcement mechanisms in connection with wildlife crimes.

8.4 Most other provisions contained in the Game Acts concern the appointment of gamekeepers and the rights of particular individuals to hunt certain animals on particular land. We have decided to refrain from integrating such provisions into the new framework. In the absence of a specialised consultation exercise in connection with this aspect of the project, we considered that we did not have the necessary evidence base for making recommendations for the reform of this complex and archaic area of law.

1 Wildlife Law (2012) Law Commission Consultation Paper No 206, pp 7.23 to 7.24.

2 Game Act 1831, s 30. It is not necessary to prove that the search or pursuit was in order to kill game at the time. See *Stiff v Billington* (1901) 84 LT 467, DC; *Burrows v Gillingham* (1893) 57 JP 423.

3 Night Poaching Act 1828, s 1.

4 Night Poaching Act 1844, s 1.

CURRENT PROHIBITIONS

8.5 The main poaching offences are set out in the Game Act 1831 and the Night Poaching Act 1828. There are also prohibitions on poaching deer in the Deer Act 1991 and prohibitions in connection with the use of firearms in the Ground Game Act 1880. These offences differ in scope and the wording of the provisions is complex and inconsistent.[5]

Game Act 1831

8.6 Section 30 of the Game Act 1831 makes it an offence to trespass by entering or being in the daytime upon any land in search or pursuit of game birds,[6] hares, woodcock, snipe or rabbits. An aggravated version of the same offence applies where it is committed by five or more persons together. It is a defence to the section 30 offences that any person charged proves any matter which would have been a defence to trespass.[7] The leave and licence of the occupier of the land on which the trespass was committed, nevertheless, may not constitute a sufficient defence to trespass in circumstances where the right to kill the relevant game animal on that land is vested in the landlord, lessor or some other person. The landlord, lessor or other person with the right to kill game, on the other hand, may grant leave to enter the relevant land as if they were the occupier of that land.[8]

8.7 In connection with these offences, section 12 of the 1831 Act makes it an offence for an occupier of land who does not have the right to take game to kill or take it or permit anyone else to do so.

8.8 A further offence is also committed under section 32 of the 1831 Act where five people or more trespass in search or pursuit of game, woodcock, snipe or rabbits and one of them is armed with a gun and any of them by violence, intimidation or menace prevents or endeavours to prevent any authorised persons from exercising their powers of arrest, etc under section 31 of the 1831 Act.

8.9 Section 24 of the 1831 Act makes it an offence for any person, not having the right or permission to kill game upon the relevant land, wilfully to destroy or take the eggs of any game bird or of any swan, wild duck, teal or widgeon. It is also an offence to possess or be in control of any such eggs.

[5] The Theft Act 1968 (para 2 of sch 1) also makes it an offence to take or destroy unlawfully, or attempt to take or destroy, any fish in water which is private property or in which there is any private right of fishery. Given the self-contained nature of this offence, and the decision not to integrate legislation in connection with fisheries (such as the Salmon and Freshwater Fisheries Act 1975) under the new regulatory framework, we have taken the view that there would have been little benefit in integrating the above prohibition under the new framework.

[6] Pheasants, partridges, grouse, heath or moor game, black game.

[7] See generally D Ormerod and K Laird, *Smith and Hogan Criminal Law* (14th ed 2015) p 1081 to 1085.

[8] The provisions as to trespass do not extend to "any lord or any steward of the Crown of any manor, lordship, or royalty, or reputed manor, lordship, or royalty, nor to any gamekeeper lawfully appointed by such lord or steward within the limits of such manor, lordship, or royalty, or reputed manor, lordship, or royalty" (Game Act 1831, s 35).

8.10 Lastly, as discussed in Chapter 4, section 3A of the 1831 Act makes it an offence to sell game birds that have been illegally killed or taken in circumstances which constitute an offence under the 1831 Act, the Night Poaching Acts 1828 and 1844, the Poaching Prevention Act 1862 and Part 1 of the Wildlife and Countryside Act 1981.

Night Poaching Acts 1828 and 1844

8.11 Section 1 of the Night Poaching Act 1828 makes it an offence for a person, at night, unlawfully to take or destroy any game[9] on any land, open or enclosed, or unlawfully enter or be in any land, whether open or enclosed, with any gun, net, engine, or other instrument, for the purpose of taking or destroying game.

8.12 Under section 9 of the Night Poaching Act 1828, it is an offence for three or more armed persons to enter any land for the purpose of taking or destroying game or rabbits. "Armed" means armed with any gun, crossbow, firearms, bludgeon or any other offensive weapon.[10]

8.13 The Night Poaching Act 1844 extends the provisions of the 1828 Act, so that the night time poaching offence can also be committed on a public road.[11]

Ground Game Act 1880

8.14 The Ground Game Act 1880 provides every occupier of land, subject to a number of limitations, with the right to kill and take hares or rabbits on that land, concurrently with any other person who may be entitled to take ground game on the same land. [12]

8.15 For present purposes, the relevant prohibition under the 1880 Act is contained in section 6, which generally prohibits the use of firearms for the purpose of killing hares and rabbits at night. By virtue of paragraph 1 of schedule 7 to the Ground Game Act 1880, the use of firearms for the purpose of killing hares and rabbits at night does not constitute an offence in the case of the occupier of the land or any person authorised by the occupier under section 1 of that Act if (except where the occupier already has the exclusive right) the occupier has the written authority of the other person or one of the other persons entitled to kill and take the ground game on the land.

Deer Act 1991

8.16 Section 1(1) of the Deer Act 1991 makes it an offence for a person to enter any land, without the consent of the owner or occupier or other lawful authority, in search or pursuit of any deer with the intention of taking, killing or injuring it.

[9] "Game" includes "hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards" (Night Poaching Act 1828, s 13).

[10] Night Poaching Act 1828, s 9.

[11] Night Poaching Act 1844, s 1.

[12] Sections 1 to 3, 5 and 7 of the Ground Game Act 1880 remain coherent and self–contained law; on that basis we have decided to leave them in their current form.

8.17 Under section 1(2) of the 1991 Act, it is an offence for a person, without the consent of the owner or occupier of the land or other lawful authority, while on any land to:

(1) intentionally take, kill or injure, or attempt to take, kill or injure, any deer,

(2) search for or pursue any deer with the intention of taking, killing or injuring it, or

(3) remove the carcase of any deer.

8.18 A person is not guilty of the offences in either section 1(1) or (2) if the action was done in the belief that the person:

(1) would have the consent of the owner or occupier of the land if the owner or occupier knew of their doing it and the circumstances of it; or

(2) had other lawful authority to do it.[13]

8.19 Lastly section 10 of the 1991 Act makes it an offence to sell, to offer or expose for sale, or to have in one's possession for the purpose of sale, or to purchase or offer to purchase or receive any venison which comes from a deer

(1) which has been taken or killed in circumstances which constitute an offence under any of the preceding provisions of this Act; and

(2) which the person concerned knows or has reason to believe has been so taken or killed.

A CONSOLIDATED POACHING OFFENCE

8.20 In the consultation paper we suggested that under the new framework there should be a consolidated offence of poaching, covering all game animals that are currently protected from poaching under the relevant statutes.[14]

8.21 We further proposed a reform of the language of existing offences intended to capture what we considered the core aim of the law of poaching: the protection of the legal rights of an individual over certain wild animals on specified land. We suggested that any reference to trespass would be unnecessary, on the basis that the core of the existing poaching prohibitions is the interference with a person's sporting rights, which may often be held by someone who is not the person against whom the act of trespass was committed.[15]

[13] Deer Act 1991, s 1(3).

[14] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 7-6.

[15] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 7-6.

8.22 Despite using different language, section 30 of the Game Act 1831, in practice,[16] already has effect similar to our proposed reformed provision. While section 30 refers to the concept of "trespass", it covers most circumstances where a person kills or captures game on land when he or she does not have permission to do so granted by the relevant rights holder.[17]

8.23 The majority of consultees agreed unconditionally with our provisional proposals.

8.24 However, in connection with the provisional proposal to adopt the language of section 1 of the Deer Act 1991 as the model for the new consolidated offence, certain stakeholders highlighted potential gaps. The National Wildlife Crime Unit, for instance, queried what would happen if a person enters land without permission and then flushes game to another person who is on land where they have permission to take game. Defra suggested that relevant defences should be available for the purpose of allowing a person to enter land and kill game for the purpose of "mercy killing" an animal or preventing damage to other animals or persons.

8.25 A large number of stakeholders, including the National Farmers' Union, the National Gamekeepers' Organisation, the Scottish Association for Country Sports and the Countryside Alliance, expressed strong support for our provisional proposal to rephrase the new offence by reference to actions carried out without the consent of the rights holder (as opposed to actions carried out by trespass on land or without the permission of the occupier of land). Defra disagreed, arguing that "clandestine action has always been of the essence of poaching, and that should be regarded as absent where the person killing or taking the animal has been invited onto the land. (In other words the owner should be regarded as having constructive notice of what his guests on the land are doing on it)".

8.26 In the light of the strong support for our provisional proposals in consultation, we have concluded that under the new framework a person should (subject to the defences discussed below) be guilty of a poaching offence if he or she:

(1) intentionally kills, injures or captures an animal of any listed game species on any land;

(2) enters or remains on any land in search or pursuit of any listed game species with the intention of killing, injuring or capturing it or of removing it if dead; or

(3) removes any dead game on land, or enters or remains on land with the intention of removing dead game on that land.

[16] See, in contrast, s 1 of the Deer Act 1991, where a person does not commit a poaching offence if he or she entered land with the authorisation of the owner or occupier of the relevant land.

[17] This is the combined effect of the provisions in s 30 making leave to enter the land given by the occupier not a defence unless the occupier also holds the relevant sporting rights, and deeming the holder of the sporting rights over land to be the legal occupier of land for the purpose of giving leave to enter the land for the purpose of killing or capturing game, supplemented by the provision in s 12 making an occupier who kills game on land over which he or she does not have sporting rights, or who gives permission to another person to do so, guilty of an offence under that section.

8.27 In accordance with our provisional proposal, we have further concluded that a person should not be guilty of any of the above prohibited activities if he or she is authorised to carry them out on the relevant land by virtue of having a private right to kill or take game on the relevant land (or permission from the holder of the right), or any other lawful authority to do the thing in question.

8.28 In line with section 1(3) of the Deer Act 1991, set out at paragraph 8.18 above, we have concluded that it should remain a defence for a person to do anything in relation to game in the belief that he or she had lawful authority to do so or that permission would be granted if the holder of the sporting rights knew what the person was doing and the circumstances in which it was being done.

8.29 We are confident that the concerns raised by the National Wildlife Crime Unit can already be addressed by existing principles of criminal liability. This is because a person A entering land for the purpose of flushing game onto land where another person B has the right to kill it or capture it would, in most cases, be capable of being convicted for conspiracy (together with person B) in connection with the crime of entering land in search or pursuit of game for the purpose of killing or capturing the relevant game.[18] In a prosecution of A and B for conspiracy, it would be irrelevant whether the person who killed or captured the animal was A or B.

8.30 We are persuaded that Defra's concerns as to the availability of necessary defences are effectively addressed by our proposed defences replicating the effect of section 1(3) of the Deer Act 1991. These exclude liability for activities carried out, for instance, in pursuance of an order issued under the Animal Health Act 1981. The defence of acting in the belief that consent would be given would, in our view, cover the vast majority of cases – such as "mercy killing" an injured game animal with no reasonable chances of recovering – where the nature of the activity, the circumstances in which the activity is carried out or the relationship between the defendant and the rights holder would make it unreasonable to convict a person of poaching.

[18] See Criminal Law Act 1977, s 1. See generally D Ormerod, *Smith and Hogan Criminal Law* (13th ed 2011) pp 423 to 445.

8.31 We do not, however, find Defra's concerns about removing references to the concept of "trespass" persuasive. We proposed the removal of these references because we concluded that trespass is not relevant to the type of harm with which poaching is fundamentally concerned. Although ensuring that those who are not trespassing could be prosecuted for poaching was not part of our reasoning, in principle, we consider that such people should indeed remain capable of prosecution.[19] There is no reason why poaching by the occupier of land who does not have the relevant shooting rights (or by person invited onto the land for other purposes) should be considered less "clandestine" or harmful than activities carried out by trespassers.[20]

Taking or destroying game at night on a public road, highway or path

8.32 As under the new framework it will not be necessary to establish trespass in order to convict a person of a poaching offence, we have concluded that it is unnecessary to retain the separate offence under section 1 of the Night Poaching Act 1844. Showing that a person killed, injured or captured a listed game animal without the authorisation of the holder of the sporting rights over the relevant land should be sufficient to convict a person of poaching, whether or not the land is a highway.

8.33 More broadly, we have also taken the view that there is no logical reason why it should be a separate offence to kill, injure or capture game during the night. Whilst carrying out such activities at night may well be considered an aggravating factor during sentencing, we have concluded that the new poaching offence should cover day and night time activities without distinction.[21] Entry onto land for the purpose of poaching, whether by night or not, will be an offence under our proposed framework.

[19] As they currently are where the occupier does not hold the sporting rights.

[20] It is worth noting that s 12 of the Game Act 1831 already makes it an offence for the occupier of land to capture or kill game on the land he or she is occupying in circumstances where he or she does not have the right to kill game on that land. The same provision also makes it an offence for the occupier to give permission to any person to do so without the authority of the appropriate right holder.

[21] See Wildlife Law (2012) Law Commission Consultation Paper No 206 para 7.33.

Aggravated offences

8.34 We have also concluded that it is unnecessary to replicate the effect of the existing aggravated "group poaching" or "armed poaching" offences under the new framework. As discussed in Chapter 10 below, we will make recommendations for the crime of poaching to be triable on indictment as well as summarily and punishable by up to two years' imprisonment or a fine (or both).[22] The seriousness of any particular poaching offence, therefore, will be capable of being addressed in sentencing. Nor is it necessary to replicate those existing statutory offences involving violence or the threat of violence,[23] as the criminal behaviour they target will continue to be addressed by offences against the person, in particular assault and battery[24] or the offence of assaulting a constable in the execution of duty.[25]

Animals to which the new poaching offence applies

8.35 In consultation we proposed that the new poaching offence should continue to apply to all animals covered by existing poaching prohibitions. We considered that it would not be appropriate for the Law Commission to recommend extending the definition of poaching to species which are not currently protected. We recognised, nevertheless, that the market in or hunting practices in connection with particular species may change in the future.[26] We provisionally proposed, therefore, that under the new framework there should be a general power to update the list of species to which poaching prohibitions could apply.

8.36 A large majority of consultees agreed. There was, nevertheless, no clear consensus as to the purpose for which such powers should be capable of being exercised. Defra, Natural England and the Wildlife Trusts, for instance, argued that the new poaching offence should extend to any animal or bird that has a financial or amenity value for the landowner. Wildlife and Countryside Link and other organisations simply argued that the power to amend the relevant list of "game" species should only allow for the addition of species to the list; removal from the list of species that have been the subject of poaching laws for centuries should only be possible through primary legislation.

[22] Currently the only effect of the aggravated offences is to raise the maximum fine that may be imposed on summary conviction from level three (£1,000) to level four (£2,500) or five (unlimited). Level five fines are now unlimited by virtue of s 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (see Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No 11) Order 2015 SI 2015 No 504).

[23] See, for instance, the Night Poaching Act 1828, s 2.

[24] Generally considered common law offences, their mode of trial and punishment are provided by the Criminal Justice Act 1988, s 39.

[25] Police Act 1996, s 89.

[26] Wildlife Law (2012) Law Commission Consultation Paper No 206 para 7.25.

8.37 In the light of the broad support for the proposal, we have concluded that under the new framework there should be a power to alter the relevant list by regulations. We have taken the view, however, that it would be inappropriate for us to recommend the creation of a general power to amend the existing list of "game" species by regulations where the effect of that power could be to radically change the underlying principles on which poaching laws have been grounded for centuries. In such circumstances, as a number of stakeholders suggested, primary legislation would be the most constitutionally appropriate mechanism.

8.38 We have taken the view, therefore, that the power to remove a species from a list should only be capable of being exercised in circumstances where the species in question is either extinct, or no longer capable of being hunted (other than in accordance with a wildlife licence). On the other hand, we consider that the power to add a new "game" species to the list should be restricted to species which may be lawfully hunted (otherwise than in accordance with a wildlife licence) and are being, or foreseeably will be, exploited in that way.[27]

8.39 In line with the position we have taken in the consultation paper, we have concluded that the new consolidated poaching offence should continue to apply to deer, hare, rabbit, "game birds" (pheasant, partridge, black grouse, red grouse and ptarmigan), woodcock and snipe.

8.40 Night poaching offences under the Night Poaching Acts 1828 and 1844 continue to extend to the bustard. The bustard was, however, removed from the list of game birds subject to the day poaching offences under the Game Act 1831 more than sixty years ago,[28] presumably on the basis that the great bustard (*Otis tarda*) had been extinct in Great Britain since 1832.[29] While the great bustard is now subject to some reintroduction programmes, neither the great bustard, nor the little bustard, are now huntable birds. We have concluded, therefore, that the "bustard" should not be included in the list of birds subject to the new poaching offence.

8.41 We have also concluded that deer subject to poaching prohibitions should be defined in line with the definition of "deer" for the purpose of wildlife offences.[30] In other words, a deer subject to poaching prohibitions should be any deer other than one which is

(1) kept by a person, by way of business for the production of meat or other foodstuffs, skins or by-products or as breeding stock;

(2) kept by that person on land enclosed by a deer-proof barrier; and

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

[28] Protection of Birds Act 1954, sch 6.

[29] See www.rspb.org.uk/whatwedo/projects/details/282720-reintroducing-the-great-bustard-to-southern-england (last visited 26 October 2015). The little bustard (*Tetrax tetrax*) is only a rare visitor to Great Britain (see http://www.iucnredlist.org/details/22691896/0 (last visited 26 October 2015)).

[30] See Chapter 5, recommendation 70.

(3) conspicuously marked in such a way as to identify it as a deer kept by that person.

8.42 A deer falling within the above description would undoubtedly be considered as constituting personal property. It follows that the killing, injuring or capture of a deer of such description would already be covered by a number of crimes against property, including theft and criminal damage.[31]

Recommendations

Recommendation 191: we recommend that existing poaching prohibitions should be consolidated into a single poaching offence applying in connection with all "game" currently subject to poaching prohibitions other than the bustard.

This recommendation is given effect in the draft Bill by clauses 102 and 107.

Recommendation 192: we recommend that the new poaching prohibition should apply to any deer other than one which is

(1) kept by a person, by way of business for the production of meat or other foodstuffs, skins or by-products or as breeding stock;

(2) kept by that person on land enclosed by a deer-proof barrier; and

(3) conspicuously marked in such a way as to identify it as a deer kept by that person.

This recommendation is given effect in the draft Bill by clause 107(4).

Recommendation 193: we recommend that there should be a power to add or remove – by regulations – "game" species from the list of species subject to poaching prohibitions.

This recommendation is given effect in the draft Bill by clause 107(5).

Recommendation 194: we recommend that the power to remove a species from a list should only be capable of being exercised in circumstances where the species in question is either extinct, or no longer capable of being hunted (otherwise than in accordance with a wildlife licence).

This recommendation is given effect in the draft Bill by clause 107(6).

Recommendation 195: we recommend that the power to add a new "game" species to the list should be restricted to species which are capable of being hunted (other than in accordance with a wildlife licence) and are being, or foreseeably will be, exploited in that way.

This recommendation is given effect in the draft Bill by clause 107(7).

[31] The Theft Act 1968, s 4(4), generally excludes wild animals from the definition of property for the purpose of the Act. The only relevant circumstance in which wild animals can become property is if they have been reduced into possession.

Recommendation 196: we recommend that under the new framework a person should be guilty of a poaching offence if he or she:

(1) intentionally kills, injures or capture any listed game species on any land;

(2) enters or remains on any land in search or pursuit of any listed game species with the intention of killing, injuring or capturing it or of removing it if dead; or

(3) removes any dead game on land, or enters or remains on land with the intention of removing dead game on that land;

unless he or she is authorised to do so on the relevant land by virtue of having a private right to kill or take game on the relevant land (or permission from such person), or any other lawful authority to do the thing in question.

This recommendation is given effect in the draft Bill by clauses 102(1) and 104(1) to (3).

Recommendation 197: we recommend that it should also be a defence that the defendant believed (a) that he or she had lawful authority to carry out the activity giving rise to the charge or (b) that he or she would have the consent of the person having the right to hunt game on the land if that person knew what the defendant was doing and the circumstances in which it was being done.

This recommendation is given effect in the draft Bill by clause 104(4).

Recommendation 198: we recommend that the aggravated offences of "group poaching" and "armed poaching" should not be retained under the new regulatory regime.

Recommendation 199: we recommend that existing differences between night poaching and day poaching should not be retained under the new regulatory regime.

TAKING AND POSSESSION OF EGGS

8.43 Section 24 of the Game Act 1831 prohibits a person (not having the right to kill game on the relevant land, or permission to do so from a person with that right) destroying, taking or possessing the eggs of game birds, or of any swan, wild duck, teal, or widgeon.

8.44 We have concluded that these prohibitions should be replicated under the new framework. The list of birds subject to the prohibition should be capable of being altered in line with our recommendations in connection with the introduction of a power to alter by regulations the existing lists of game subject to poaching prohibitions.

SALE OF POACHED GAME

8.45 As discussed above, section 3A of the Game Act 1831, broadly speaking, makes it an offence to sell game birds that have been poached, and which the person concerned knows or has reason to believe have been poached.[32] Section 10 of the Deer Act 1991, similarly, makes it an offence to sell, as well as to purchase or receive, any venison that comes from a deer that has been killed or taken in contravention, among other things, of the poaching prohibitions under section 1 of the 1991 Act, and which the person concerned knows or has reason to believe have been so taken or killed.

8.46 In consolidating and replicating the above prohibitions under the new framework, we were unable to find any logical reason why the sale of other animals subject to poaching prohibitions, such as hares, or the sale of the eggs of birds that have been taken in contravention of section 24 of the Game Act 1831, should not, in principle, also be prohibited.[33] As the sale or other exchange of the poached animal (whether live or dead) is an obvious economic driver of poaching activities, we have taken the view that under the new framework the sale of an animal, of part of an animal, of anything derived from an animal that has been killed, or the egg of an animal that has been taken, in contravention of poaching prohibitions should constitute a criminal offence.

8.47 In order to simplify the existing framework, we have concluded that the new offence should be drafted in line with section 10 of the 1991 Act. While section 10 is broader than section 3A of the 1831 Act – it also prohibits a person giving away, buying or receiving venison which derives from a poached deer – we have concluded that there is nothing particularly controversial in criminalising both sides of a transaction in something that has been illegally obtained, so long as the buyer or recipient of the relevant animal or egg is not acting in good faith. For this reason, in line with section 10(4) of the 1991 Act, we have concluded that the prohibition should only apply where the prosecution shows that the person concerned knew, or had reason to believe, that the relevant animal had been poached (or egg unlawfully taken).

8.48 Lastly, in line with the general reform of existing secondary activity prohibitions discussed in Chapter 5 above, we have concluded that it should also be an offence to publish advertisements likely to be understood as conveying that the person publishing the advertisement buys or sells or intends to buy or sell any of those things.

[32] As discussed in Chapter 4, paras 4.38 to 4.41, s 3A also makes it an offence to sell birds of game that have been killed or taken in contravention of Part 1 of the Wildlife and Countryside Act 1981. While s 1 of the Wildlife and Countryside Act 1981 does not apply to game birds, s 5 of the Wildlife and Countryside Act 1981 prohibits the use of prohibited methods of killing or capture against both "wild birds" (as defined in s 27 of the Wildlife and Countryside Act 1981) and game birds.

[33] Similarly, we have taken the view that there is no good reason why selling a live deer that has been poached, or anything that derives from a deer (other than venison) that has been poached, should not also constitute a criminal offence.

NIGHT SHOOTING OF HARES AND RABBITS

8.49 Section 6 of the Ground Game Act 1880 makes it an offence for any person having a right to kill hares or rabbits, under the 1880 Act or otherwise, to use firearms for the purpose of killing hares or rabbits at night. By virtue of paragraph 1 of schedule 7 of the Wildlife and Countryside Act 1981, the occupier of land does not commit the offence if (where he does not have the exclusive right) he or she has the written authority of the other person, or one of the persons, entitled to kill and take the ground game on the land.[34]

8.50 We have taken the view, on balance, that there would be no real benefit in integrating section 6 of the 1880 Act into the new regulatory structure. This is simply because the offence constitutes an integral part of a self-contained statutory regime regulating the rights of occupiers of land to kill hares or rabbits. Taking that offence out of that structure would not, therefore, make the law any more clear or accessible. We have concluded, therefore, that section 6 should continue to operate within the structure of the 1880 Act.

Recommendations

Recommendation 200: we recommend that the effect of section 24 of the Game Act 1831 – which prohibits the destruction, taking or possession of the eggs of any game bird, or of any swan, wild duck, teal, or widgeon by a person not having the right to kill game on the relevant land, or permission to do so from a person with such right – should be replicated under the new regime.

This recommendation is given effect in the draft Bill by clause 103.

Recommendation 201: we recommend that the list of birds subject to the prohibition replicating the effect of section 24 of the Game Act 1831 should be capable of being amended in line with recommendations 196 to 198.

This recommendation is given effect in the draft Bill by clause 107(5) to (7).

[34] As discussed in Chapter 5, para 5.223, we have concluded that the residual prohibition to use poison in Greater London for the purpose of killing hares or rabbits is, in our view, redundant and should be repealed.

Recommendation 202: we recommend that it should be a general offence to

(1) sell, offer for sale, or expose for sale;

(2) be in possession of, or transport for the purpose of sale;

(3) buy or receive, or offer to buy;

(4) publish any advertisement likely to be understood as conveying that the person publishing the advertisement buys or sells or intends to buy or sell

any animal, part of an animal, anything derived from an animal or an egg of an animal where the animal has been poached or the egg taken in contravention of a poaching prohibition.

This recommendation is given effect in the draft Bill by clauses 105(1), (2) and (4).

Recommendation 203: we recommend that doing anything prohibited pursuant to recommendation 204 should not constitute an offence unless the prosecution shows that the person concerned knew, or had reason to believe, that the relevant animal or egg had been taken in contravention of the poaching provisions.

This recommendation is given effect in the draft Bill by clause 105(3).

CHAPTER 9
CONTROL OF NON-NATIVE SPECIES, PESTS AND WEEDS

INTRODUCTION

9.1 The law in connection with the control of non-native species and agricultural pests and weeds[1] is currently scattered across a large number of statutes dating back to the beginning of the twentieth century.

9.2 Most of the statutes containing provisions for the control of pests or non-native species were drafted for the purpose of responding to specific threats rather than of creating a consistent framework for the control of species of concern. The result is that the existing regulatory landscape contains gaps, inconsistent language and definitions, complex cross-references between different statutes and inconsistent powers to enforce orders.

9.3 Our Report *Wildlife Law: Control of Invasive Non-native Species*[2] made recommendations for the creation of new powers to compel owners or occupiers of land to control non-native species in their land which, if uncontrolled, may have significant impacts on biodiversity, other environmental interests or other economic interests. These recommendations have now been implemented through sections 23 to 25 of the Infrastructure Act 2015.[3]

9.4 In connection with the control of non-native species, the first part of this chapter will make further recommendations aimed primarily at rationalising and harmonising existing provisions with the purpose of creating a coherent, effective and modern regulatory framework covering the prevention, control, eradication and long term management of invasive non-native species.

9.5 In connection with the control of agricultural pests and weeds, the second part of this Chapter makes recommendations with a view to consolidating existing powers and updating the enforcement provisions connected to those powers in line with the powers to control and eradicate invasive non-native species introduced by the Infrastructure Act 2015.

[1] In this Chapter, unless specified otherwise, the expression "non-native species" broadly refers to all animal or plant species which do not have a natural range including Great Britain or species which are no longer normally present in Great Britain. The expression "pests and weeds" simply refers to the animal or plants species that may be subject to control orders under the Agriculture Act 1947, the Pests Act 1954 and the Weeds Act 1959.

[2] Wildlife Law: Control of Invasive Non-native Species (2014) Law Com 342.

[3] The Infrastructure Act 2015, s 23, inserts a new s 14(4) and sch 9A into the Wildlife and Countryside Act 1981; ss 24 and 25 make consequential amendments to the Act.

NON-NATIVE SPECIES

9.6 As we explained in our Report on the control of invasive non-native species,[4] a species is generally considered "non-native" where it has been introduced by human agency outside its "natural range". The term "natural range" refers to the natural past or present distribution of a species but for any direct human intervention.[5]

9.7 In line with the approach adopted under the Convention on Biological Diversity, non-native species are generally described as "invasive" where their "introduction and/or spread threaten biological diversity or have other unforeseen impacts".[6] The "invasiveness" of a non-native species may often be linked to the absence of natural predators or other natural control mechanisms.

9.8 The appearance of non-native species in new locations is not always a cause for concern. A large number of species that are not native to a habitat, such as most crop plants and many farmed animals, are not considered to be "invasive".[7] Species which establish self-sustaining populations in a new area, however, may often carry the threat of causing harm to the new environment, even though the threat may not always be immediately apparent.[8]

9.9 As was pointed out in our Report on the control of invasive non-native species, invasive non-native species constitute one of the major direct drivers of biodiversity loss worldwide.[9] The economic impact of invasive non-native species is also significant. Their annual economic cost to the economy was estimated at £1.3 billion in England and £125 million in Wales. The annual cost of control measures across the EU was estimated at €12 billion.[10]

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

5 Sixth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, 7 – 19 April 2002 – The Hague, Netherlands, Decision VI/23, n 57.

6 Sixth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, 7 – 19 April 2002 – The Hague, Netherlands, Decision VI/23. Department for Environment, Food and Rural Affairs, *The Invasive Non-native Species Framework Strategy for Great Britain* (2008) para 3.3. The Wildlife and Countryside Act 1981, sch 9A, para 2(2) now defines "invasive species" as a species that, if uncontrolled, would be likely to have a significant adverse impact on biodiversity, other environmental interests, or social or economic interests.

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

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

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

10 F Williams and others, *The Economic Cost of Invasive Non-native Species on Great Britain* (2010) p 11; and European Environment Agency "The impacts of invasive alien species in Europe" *Technical Report No 16/2012* (2012) p 7.

International context

9.10 As discussed in our Report on the control of invasive non-native species, major international agreements dealing with invasive non-native species that have been ratified by the United Kingdom include the Bern Convention[11] and the Convention on Biological Diversity.[12]

9.11 The Convention on Biological Diversity generally requires contracting parties to "prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species".[13] Similarly, the Bern Convention requires contracting parties to "strictly control the introduction of invasive non-native species".[14]

9.12 The Conference of the Parties to the Convention on Biological Diversity, which embodies the global scientific consensus on international biodiversity issues, advocates a hierarchical approach to the control of invasive non-native species. This approach suggests that prevention is generally the most cost effective and environmentally desirable measure. If an invasive non-native species is introduced, rapid control is crucial to prevent their establishment, after which eradication costs may increase rapidly. And, if eradication is not feasible, long-term control and containment measures should be implemented.[15]

EU law

9.13 The European Union is a contracting party to the Convention on Biological Diversity and the Bern Convention. EU law on the protection of species, therefore, includes general requirements to manage the threat of invasive non-native species.

9.14 The Wild Birds Directive, for instance, requires member states to make sure that the introduction of species of bird which do not occur naturally in the wild in the European territory of the member states does not "prejudice" local flora and fauna.[16] Similarly, the Habitats Directive requires member states to ensure that the deliberate introduction into the wild of any species which is not native to their territory is regulated or, if necessary, prohibited so as not to prejudice natural habitats within their natural range or the wild native fauna and flora.[17]

9.15 Beside the general obligations under the Habitats and Wild Birds Directives, until recently legal measures tackling invasive non-native species have been confined to the regulation of specific economic activities such as fish farming.[18]

[11] Bern Convention, art 11.

[12] Convention on Biological Diversity, arts 1 and 8(h).

[13] Convention on Biological Diversity, art 8(h).

[14] Bern Convention, art 11(2)(b).

[15] See also Bern Convention Standing Committee (2003) *European Strategy on Invasive Alien Species*.

[16] Directive 2009/147/EC, art 11.

[17] Directive 92/43/EEC, art 22.

[18] See Council Regulation (EC) No 708/2007 of 11 June 2007 concerning the use of alien and locally absent species in aquaculture, OJ L168/1, 28.06.2007.

9.16 In May 2011 the European Commission announced that it would fill the existing policy gaps by drafting relevant legislation. In September 2013 the Commission published a draft regulation for the prevention and management of the introduction and spread of invasive alien species.[19] The object of the proposed Regulation was to set out rules to prevent, minimise and mitigate the adverse impact of the introduction and spread of invasive alien species on biodiversity within the Union.

9.17 The draft regulation has now come into force as Regulation (EU) No 1143/2014 on the prevention and management of the introduction and spread of invasive alien species (the "Invasive Alien Species Regulation").[20] The main feature of the Invasive Alien Species Regulation is the creation of a list of "species of Union concern" that will be compiled and kept up to date by the Commission after a thorough risk assessment.[21] Member states will have binding obligations to prevent or manage the introduction and spread of these species. The Regulation also expressly makes it possible to retain lists of species of "member state concern" in relation to which equivalent measures may be adopted, insofar as they are compatible with the Treaty on the Functioning of the European Union and are notified to the Commission.[22]

9.18 The Invasive Alien Species Regulation prohibits a broad range of activities in connection with species of Union concern (otherwise than in accordance with a specific permit or authorisation).[23] Prohibited activities include the intentional importation, keeping, breeding, transport, sale and release into the environment of these species.[24]

9.19 The Regulation further provides for the introduction of a number of monitoring, enforcement and eradication obligations which broadly reflect the approach advocated by the Conference of the Parties to the Convention on Biological Diversity. Article 14 requires member states to set up an early surveillance system to collect and record data on the occurrence of invasive alien species. Article 15 requires member states to establish an effective risk based import control system on particular goods. Article 17 requires member states to take effective early eradication measures. If early eradication measures are demonstrated to be technically unfeasible, disproportionately costly or may have adverse impacts on the environment or human health, long term containment and management measures should be taken instead.[25]

[19] Proposal for a Regulation of the European Parliament and of the Council on the prevention and management of the introduction and spread of invasive alien species (COM (2013) 620 fin), art 1.

[20] Official Journal L 317/35 of 4.11.2014. The Regulation officially came into force on 1 January 2015.

[21] The deadline for the adoption of a list of species of "Union concern" is 2 January 2016 (Invasive Alien Species Regulation, art 4(1)).

[22] Invasive Alien Species Regulation, art 12.

[23] Invasive Alien Species Regulation, arts 8 and 9.

[24] Invasive Alien Species Regulation, art 7.

[25] Invasive Alien Species Regulation, arts 18 and 19.

Relevant domestic legislation

9.20 As noted above, the domestic regulation of non-native species is scattered across a large number of inconsistent and often overlapping legal frameworks. In this section we provide a brief description of the legal provisions which are directly relevant to our proposed reform of this area of law. In the next section we provide a short overview of legislation which, whilst relevant to the control of non-native species, has been excluded from the scope of our recommendations. On the basis that the legislation operates in the context of self-contained regimes, we decided that it could not be meaningfully integrated in our proposed regulatory framework.

Wildlife and Countryside Act 1981

9.21 The main substantive prohibitions in relation to activities in connection with non-native species are contained in the Wildlife and Countryside Act 1981.

9.22 Section 14 of the 1981 Act makes it an offence in England and Wales to release into the wild, allow to escape into the wild or, as the case may be, cause to grow in the wild:

(1) any animal of a kind which is not ordinarily resident in and is not a regular visitor to Great Britain in a wild state;

(2) any animal included in part 1A or 1B of schedule 9 to the 1981 Act; or

(3) any plant listed in part 2 of schedule 9 to the 1981 Act.[26]

9.23 Section 14ZA of the 1981 Act further allows the Secretary of State or Welsh Ministers to prohibit trade in any of the species falling within the scope of section 14 by order. This power was recently exercised for the first time in England for the purpose of prohibiting trade in a limited number of non-native plants.[27]

9.24 It is a defence to show that all reasonable steps were taken and due diligence exercised in attempting to avoid the commission of one of the above offences. Activities otherwise prohibited may, in addition, be permitted under a licence issued under section 16(4) of the 1981 Act.[28]

9.25 The Secretary of State has power to issue codes of practice in relation to any animal or plant to which the prohibitions above apply.[29] These can be taken into account by a court in proceedings in respect of offences under section 14 of the 1981 Act.

[26] Wildlife and Countryside Act 1981, s 14(1). Part 1 of sch 9 to the Wildlife and Countryside Act 1981 includes monk parakeets and the grey squirrel. Note, however, that sch 9 currently also lists species which were formerly native as well as species which are both native and ordinarily resident.

[27] Wildlife and Countryside Act 1981 (Prohibition on Sale etc. of Invasive Non-native Plants) (England) Order 2014 SI 2014 No 538.

[28] Wildlife and Countryside Act 1981, ss 14(3) and 16(4).

[29] Wildlife and Countryside Act 1981, s 14ZB. See, by way of example, the Horticultural Code of Practice 2011, https://secure.fera.defra.gov.uk/nonnativespecies/index.cfm?pageid=299 (last visited 26 October 2015).

Conservation of Habitats and Species Regulations 2010

9.26 The Conservation of Habitats and Species Regulations 2010 make it an offence to introduce a non-native species from a ship into any part of the territorial sea of England or Wales in which its introduction threatens wild native flora or fauna or natural habitats.

9.27 It is a defence to show that the release was the result of a discharge of ballast water where this was necessary for the purpose of protecting the safety of any person or ship, and all reasonably practical steps were taken to avoid its occurring in the area where it would give rise to a risk of prejudice to natural habitats or wild fauna and flora and to minimise such risks of prejudice.

9.28 The introduction of non-native species from a ship may be licensed if the relevant licensing authority is satisfied that the action authorised by the licence will not prejudice natural habitats within their natural range or wild native flora and fauna.[30]

Import of Live Fish (England and Wales) Act 1980

9.29 The Import of Live Fish (England and Wales) Act 1980 empowers the Secretary of State or Welsh Ministers to make orders prohibiting the importation, keeping or release of live fish or live eggs of fish of a species which

(1) is not native in England and Wales; and

(2) in the opinion of the Secretary of State might compete with or displace, prey or harm the habitat of freshwater fish or salmon.[31]

9.30 The Secretary of State or Welsh Ministers may also grant licences to allow otherwise prohibited activities for any reason.[32]

9.31 In England and Wales, the 1980 Act is now primarily implemented by the Prohibition of Keeping or Release of Live Fish (Specified Species) (England) Order 2014, which includes a comprehensive prohibition on the keeping and release of any non-native fish belonging to the taxonomic orders specified in part 1 of the schedule (except the specific species listed in part 2 of the schedule).[33] In Wales the 1980 Act is now primarily implemented by a virtually identical order.[34]

[30] SI 2010 No 490, regs 52 and 54.

[31] Import of Live Fish Act 1980, s 1.

[32] Import of Live Fish Act 1980, ss 1(2) and 1(3).

[33] SI 2014 No 143, para 2.

[34] Prohibition of Keeping or Release of Live Fish (Specified Species) (Wales) Order 2015 SI 2015 No 88. See also the Prohibition of Keeping of Live Fish (Crayfish) Order 1996 SI 1996 No 1104, as amended.

Destructive Imported Animals Act 1932

9.32 The Destructive Imported Animals Act 1932 applies to musk rats[35] and to any other "non-indigenous mammalian species" whose "destructive habits" make it desirable, in the opinion of the Secretary of State or Welsh Ministers, that their importation or possession is controlled, or that, when at large, they be destroyed.[36] A "non-indigenous mammalian species" is defined as

> a species that before the commencement of the 1932 Act was not established in the wild state in Great Britain or had only become so established in the preceding 50 years.[37]

9.33 Orders under section 1 may prohibit the unlicensed importation into or keeping within Great Britain of musk rats and of any other non-indigenous mammalian species except where the species was, at the date of the commencement of the 1932 Act, commonly kept in Great Britain in a domesticated state.

9.34 Unless provided otherwise in an order, the 1932 Act also automatically imposes an obligation on occupiers of land to notify the appropriate "government department" of the presence of musk rats or any other non-native destructive mammalian subject to an order under section 1 (unless provided otherwise in the order).[38] Occupiers of land are also under an obligation to cooperate with the relevant authorities where they intend to destroy musk rats or other non-native destructive mammals found on their land. [39]

9.35 The 1932 Act also includes a number of criminal offences in connection with the importation and keeping of relevant animals without a licence. The list of offences includes:

(1) allowing musk rats or other animals to escape;

(2) breaching the conditions of a licence;

(3) failing to notify the appropriate department of the presence of the relevant animals; and

(4) obstructing any authorised person in the execution of his or her duty under the Act.[40]

9.36 Activities otherwise prohibited by the order may be licensed in accordance with the licensing provision laid down in the order.

[35] Destructive Imported Animals Act 1932, s 1.

[36] Destructive Imported Animals Act 1932, s 10.

[37] Destructive Imported Animals Act 1932, s 10(2).

[38] Destructive Imported Animals Act 1932, s 5.

[39] Destructive Imported Animals Act 1932, s 5(3).

[40] Destructive Imported Animals Act 1932, s 6.

Relevant legislation falling outside the scope of the wildlife project

9.37 As discussed above, in this section we provide a brief overview of a number of self-contained regulatory regimes which include provisions which are directly or indirectly relevant to the prevention, control or eradication of non-native species.

Council Regulation (EC) No 708/2007 concerning use of alien and locally absent species in aquaculture

9.38 In essence, Council Regulation (EC) 708/2007[41] regulates the movement of alien aquatic organisms for aquaculture purposes by subjecting their introduction and translocation to a regime of permits managed by the receiving member state. To obtain a permit, aquaculture operators must provide a number of pieces of information, including the potential impacts of the activity on the environment and the measures that will be taken to manage and monitor the movement.[42] In the case of movements that may pose risks to the environment, the Regulation provides that an environmental impact assessment should be carried out so as to determine the risks and conditions subject to which a permit may be granted.[43]

Marine and Coastal Access Act 2009

9.39 Section 232 of the Marine and Coastal Access Act 2009, similarly to the Import of Live Fish (England and Wales) Act 1980, empowers the Secretary of State or Welsh Ministers to prohibit the keeping of fish, their introduction into inland waters or their removal from inland waters.[44] The power extends to any fish, whether native or non-native.

9.40 Section 232 of the 2009 Act is now given effect in England by the Keeping and Introduction of Fish (England and River Esk Catchment Area) Regulations 2015 and in Wales by the Keeping and Introduction of Fish (Wales) Regulations 2014.[45] The two sets of Regulations prohibit – otherwise than in accordance with an authorisation – the keeping or release in inland waters of a large number of fish belonging to the taxonomic orders specified in part 1 of the schedule (except for the specific species listed in part 2 of the schedule). A licence issued in pursuance of the Import of Live Fish (England and Wales) Act 1980, insofar as it overlaps with the scope of the above Regulations, is treated as a valid authorisation under each set of Regulations provided that it was issued before the coming into force of the relevant Regulations.[46]

[41] Council Regulation (EC) 708/2007 is implemented in domestic law by the Alien and Locally Absent Species in Aquaculture (England and Wales) Regulations 2011 SI 2011 No 2292.

[42] Council Regulation (EC) 708/2007, art 6 and annex 1.

[43] Council Regulation (EC) 708/2007, art 9.

[44] "Inland waters" is defined, in line with s 221 of the Water Resources Act 1991, as (a) any river, stream or other watercourse (within the meaning of Chapter II of Part II of this Act), whether natural or artificial and whether tidal or not; (b) any lake or pond, whether natural or artificial, or any reservoir or dock, in so far as the lake, pond, reservoir or dock does not fall within paragraph (a) of this definition; and (c) so much of any channel, creek, bay, estuary or arm of the sea as does not fall within paragraph (a) or (b) of this definition.

[45] See, respectively, SI 2015 No 10 and SI 2014 No 3303.

[46] SI 2015 No 10, art 17; SI 2014 No 3303, art 17.

9.41 The Regulations repeal section 30 of the Salmon and Freshwater Fisheries Act 1975 in England and Wales. Section 30 of the 1975 Act made it an offence for a person to introduce any fish or spawn of fish into "an inland water" or the possession of any fish or spawn of fish with the intention of introducing it into an inland water, unless the person has the consent of the appropriate authority or the inland water is one that consists exclusively of, or of part of, a fish farm and which, if it discharges into another inland water, does so only through a conduit constructed or adapted for the purpose.

The Plant Health Act 1967 and the Animal Health Act 1981

9.42 Under the Plant Health Act 1967, the Secretary of State or Welsh Ministers may, by order, regulate the introduction of plant pests into England or Wales.[47] The Secretary of State and Welsh Ministers also have broad powers to control the spread of plant pests, by prohibiting their distribution or possession or ordering the destruction or treatment of any plant or other material infested with a pest.[48]

9.43 Similarly, under the Animal Health Act 1981, the Secretary of State, Scottish Ministers and Welsh Ministers have broad powers to take measures to prevent the introduction into or spreading within Great Britain of pests or diseases affecting particular animals.

9.44 The above powers have been used to transpose a number of EU obligations in connection with plant and animal health, including, for instance, Council Directive 2000/29/EC on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community.[49]

Bees Act 1980

9.45 Under the Bees Act 1980, provision may be made for the purpose of preventing the introduction into or spreading within Great Britain of pests or diseases affecting bees. Orders may prohibit or regulate the importation into or movement within Great Britain of bees, combs, hives and any other thing which has or may have been exposed to infection with any pest or disease to which the order applies. An order may also authorise entry into any premises in which an authorised person has reasonable grounds for supposing there are or have been any bees subject to control. Any authorised person may destroy bees that are found to be infected with any pest or disease to which the order applies.

[47] Plant Health Act 1967, ss 1 and 2.

[48] Plant Health Act 1967, s 3.

[49] Official Journal No L 169 of 10.7.2000, p 1.

Reform of the law on the control of non-native species

9.46 When we published the consultation paper on wildlife law in August 2012, the scope and structure of the Invasive Alien Species Regulation was still the subject of protracted negotiations at EU level. In the light of the uncertainties as to the scope and structure of that regime, we concluded that a substantive reform of the regulatory regime on the control of non-native species would be premature. We suggested, nevertheless, that the situation was different in connection with the reform of the regulatory and enforcement tools for the control of non-native species. This is because whatever mechanism would be used by the prospective EU Regulation to identify the species that should be subject to relevant prohibitions or control measures, effective domestic enforcement mechanisms would be required to give effect to such obligations.[50] Our general proposal to review existing regulatory and enforcement tools in connection with the control and management of non-native species received overwhelming support in consultation.[51]

9.47 As mentioned above, in the light of the broad support for our provisional proposal to introduce a power to issue species control orders, and to accommodate the Government's intention to introduce early legislation giving effect to that proposal, in February 2014 we published a Report making recommendations for the introduction of such enforcement mechanism in England and Wales.[52] Our recommendations have now been given effect by sections 23 to 25 of the Infrastructure Act 2015.

9.48 Given the broad support in consultation, in the section below we make further recommendations to give effect to our provisional proposal to introduce a power to require specified individuals to notify a competent authority about the presence of specified invasive non-native species.[53]

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

[51] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 8-1.

[52] Wildlife Law: Control of Invasive Non-native Species (2014) Law Com 342.

[53] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposals 8-4 and 8-5.

9.49 Since the Invasive Alien Species Regulation was formally adopted, it has become clear that its binding obligations will be principally relevant to the control of a limited list of invasive non-native species of "Union concern".[54] It follows that, whilst the Regulation encourages member states to take action in connection with invasive alien species that fall outside the "Union concern" list, the control of non-native species of "member state concern" will remain primarily a matter of domestic law and policy.[55] As one of the primary objectives of this project is to rationalise and modernise domestic legislation, below we make further recommendations with a view to reshaping the existing framework in a way that will provide competent authorities with a modern and consistent regulatory toolkit for the effective management and control of invasive non-native species of "member state concern", from prevention to long term management. Within the limits of this exercise, in reforming existing powers and prohibitions we have endeavoured, as far as possible, to ensure consistency between the domestic regulatory regime and the regime introduced by the Invasive Alien Species Regulation.

Reform of regulatory and enforcement tools

POWER TO ISSUE SPECIES CONTROL ORDERS

9.50 As discussed above, we have produced a separate Report on this aspect of the wildlife law project and our recommendations have now been given effect by sections 23 to 25 of the Infrastructure Act 2015.[56] As recommendations in connection with the power to issue species control orders fall outside the scope of the present Report, we have decided not to replicate the effect of sections 23 to 25 of the 2015 Act in the Wildlife Bill. In the event the recommendations in this Report were to be carried forward through legislation reflecting the structure of the Wildlife Bill, nevertheless, we expect that the above provisions would be integrated under the new legislative framework.

[54] "Invasive alien species of Union concern" are those invasive alien species whose adverse impact has been deemed such as to require concerted action at Union level (Invasive Alien Species Regulation, art 3).

[55] Art 12 of the Invasive Alien Species Regulation simply provides that each member state should inform the Commission and other member states of the species they consider as invasive alien species of member state concern and of the relevant control measures that they have put in place. Art 12 allows member states to take similar control measures to those they would have to put in place in connection with invasives of Union concern as long as the measures comply with the Treaty on the Functioning of the European Union.

[56] Wildlife and Countryside Act 1981, sch 9A.

POWER TO MAKE PROVISIONS FOR THE NOTIFICATION OF THE PRESENCE OF CERTAIN INVASIVE NON-NATIVE SPECIES

9.51 An effective surveillance system and the early notification of the presence of invasive species to competent authorities are key preventive measures, ensuring that effective early eradication or control measures are put in place to prevent the introduction, establishment or spread of new invasive non-native species. This is expressly recognised by articles 14 and 16 of the Invasive Alien Species Regulation. It is also consistent with the approach advocated by the Conference of the Parties of the Convention on Biological Diversity, which places a strong emphasis on prevention as the most cost-effective tool for managing the risks posed by invasive non-native species and supports the development of effective systems for monitoring and reporting new invasions of non-native species through the involvement of different sectors.[57]

9.52 Provisions requiring relevant persons to notify a competent authority about the presence of invasive non-native species are not unprecedented in domestic law. Section 5(2) of the Destructive Imported Animals Act 1932, for instance, requires the occupier of any land who knows that musk rats are to be found thereon to give notice to the appropriate government department.[58] The same obligation automatically applies to any other "non-indigenous [destructive] mammalian species" which is specified by an order under section 10 of the 1932 Act.

9.53 A number of stakeholders suggested that the obligation to report the presence of a relevant species under section 5(2) of the 1932 Act is excessively broad as it is not limited by any specific geographical area, any specific point in time or any specific class of persons and applies automatically to any other species specified by order under section 10 of the 1932 Act. The result is that, until very recently,[59] the effect of the Grey Squirrels (Prohibition of Importation and Keeping) Order 1937[60] was to make it an offence for any occupier of land to fail to report the presence of grey squirrels to the relevant government department, thus criminalising virtually any occupier of land in England and Wales.

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

[58] Failure to notify the appropriate government department is a criminal offence (Destructive Imported Animals Act 1932, s 6(1)(f)).

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

[60] SI 1937 No 478.

9.54 In Scotland, the Destructive Imported Animals Act 1932 was repealed by the Wildlife and Natural Environment (Scotland) Act 2011.[61] The notification obligation in section 5(2) of the 1932 Act was replaced by a general power to require particular persons (or types of persons) to notify the presence of specified invasive animals or plants outwith their native range where they are, or become aware, of the presence of such animals or plants.[62] The new order may make provision as to the persons or types of persons required to give notification, the circumstances in which a notification must be made or the times of the year when a notification must be made. The new order-making power in Scotland, in addition, contains two important restrictions. First, an order may only require a person to make a notification if the Scottish Ministers consider that the person (or type of person) has or should have knowledge of, or is likely to encounter, the invasive animal or plant to which the order relates to. Secondly, the criminal offence of failing to comply with a notification requirement is subject to a "reasonable excuse" defence.[63]

9.55 In the consultation paper we provisionally proposed that under the new framework the Secretary of State and Welsh Ministers should have a general power to require certain persons (or types of persons) to notify a relevant authority about the presence of an invasive non-native animal or plant in line with section 14B of the Wildlife and Countryside Act 1981 as it applies to Scotland.[64] This power, as in Scotland, would reform and replace the automatic obligation to notify the presence of "non-indigenous destructive mammalian species" specified by order under section 10 of the 1932 Act.

9.56 This proposal received broad support in consultation. Certain consultees, nevertheless, expressed concern, arguing that nothing would prevent the Secretary of State or Welsh Ministers from imposing disproportionate burdens on the addressees of the notification requirement. It was also argued that a requirement could potentially be imposed upon overly broad classes of individuals or for an excessive period of time.

9.57 The concerns raised in consultation would have been well founded if directed towards a provisional proposal to replicate the general notification obligation under section 5(2) of the 1932 Act. However, we are not persuaded that a power modelled on section 14B of the 1981 Act as it applies to Scotland would raise the same set of problems.

[61] Wildlife and Natural Environment (Scotland) Act 2011, sch 1(2), para 1. The repeal was given effect by The Wildlife and Natural Environment (Scotland) Act 2011 (Commencement No. 4, Savings and Transitional Provisions) Order 2012 SSI 2012 No 175 subject to savings and transitional provisions specified in SSI 2012/175 arts 3(1) and (4).

[62] The power was introduced as s 14B of the Wildlife and Countryside Act 1981 (as it applies to Scotland) by s 14(5) of the Wildlife and Natural Environment (Scotland) Act 2011.

[63] Wildlife and Countryside Act 1981 (as it applies to Scotland), ss 14B(3) and (5).

[64] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposals 8-4 and 8-5.

9.58 First, it is unlikely that the Secretary of State or Welsh Ministers would be able to impose notification requirements upon very broad classes of individuals, on the basis that the power to require notifications will be limited to persons who have or should have knowledge of, or are likely to encounter, animals or plants of a specified species. Secondly, in line with section 14B(1) of the 1981 Act as it applies to Scotland, the obligation to notify the competent authority will only apply to cases where a relevant person is aware, or has become aware, of the presence of a relevant species. The existing power does not appear to allow the Scottish Ministers to require persons to take active steps to discover the presence of a specified invasive non-native species, so we cannot think of any realistic circumstances where a notification requirement could impose real financial burdens on individuals. Thirdly, there are no rational reasons why the Secretary of State or Welsh Ministers would ever consider replicating a notification requirement similar to the one that, until recently, applied in connection with grey squirrels. Such a requirement would be both unenforceable in practice and of no value to the control and management of the relevant species.

9.59 We have concluded, therefore, that under the new framework the Secretary of State or Welsh Ministers should have the power to issue notification requirements in connection with invasive non-native animals or plants, in line with the Scottish Ministers' powers under section 14B of the 1981 Act as it applies to Scotland. In line with section 14B(5), a person failing to notify the relevant authority should not be guilty of an offence where he or she had a reasonable excuse for failing to do so in accordance with the terms of the requirement.

9.60 We have concluded that the definition of "invasive non-native species" that may be subject to a notification requirement under the new framework should be, as far as possible, consistent with the policy underlying the definition of the category of species that may be subject to species control orders under schedule 9A to the 1981 Act. We have concluded, therefore, that a notification requirement should only be capable of being imposed in connection with:

(1) animal or plant species whose natural range does not include any part of Great Britain (a "non-native species"); or

(2) animal species whose natural range includes all or any part of Great Britain which have ceased to be ordinarily resident in, or a regular visitor to, Great Britain (a "species no longer normally present in Great Britain").[65]

9.61 In addition, a non-native species, or a species no longer normally present in Great Britain, should only be capable of being specified in regulations imposing notification requirements if it appears to the Secretary of State or Welsh Ministers that the species is "invasive". In line with paragraph 2(2) of schedule 9A of the 1981 Act we have concluded that a species should be regarded as "invasive" if, uncontrolled, it would be likely to have significant adverse impacts on:

(1) biodiversity;

(2) other environmental interests; or

(3) social or economic interests.[66]

9.62 For the reasons explained below, we have also concluded that a species of fish should also be regarded as "invasive" if, uncontrolled, it might compete with, displace, prey on or harm the habitat of any freshwater fish, shellfish or salmon in England and Wales.[67]

Recommendations

Recommendation 204: we recommend that the Secretary of State or Welsh Ministers should have the power to issue notification requirements in connection with invasive non-native species, in line with the Scottish Ministers' powers under section 14B of the Wildlife and Countryside Act 1981 Act as it applies to Scotland.

This recommendation is given effect in the draft Bill by clause 95.

[65] Wildlife and Countryside Act 1981, sch 9A, paras 2(3) and (5). The reason why we have decided to remove any express reference to sch 9 to the 1981 Act in the context of the definition of "non-native species" under the new framework is because there would have been little value in limiting the exercise of regulation-making powers, such as the power to issue notification orders, with a list of species which may be amended by regulations subject to a virtually identical procedure with no additional restrictions. As in para 2(3)(a) of sch 9A to the 1981 Act "non-native plants" are only defined by reference to the list of species under pt 2 of sch 9 to the 1981 Act, we have decided that, in line with the definition of "non-native animal", a "non-native plant" should similarly be defined as one "whose natural range does not include any part of Great Britain" (all plant species currently listed in pt 2 of sch 9 to the 1981 Act would appear to fall within the above definition). We have also decided to omit the requirement that the species in question "has been introduced into Great Britain or is present in Great Britain because of other human activity". While this is relevant to species control orders, it would be problematic in connection with the exercise of notification requirements or other orders under the new framework, as it would prevent the Secretary of State or Welsh Ministers from issuing orders in connection with non-native species which have not yet been introduced in Great Britain.

[66] Wildlife and Countryside Act 1981, sch 9A, para 2(2).

[67] See para 9.70 to 9.74 below.

Recommendation 205: we recommend that a notification requirement should only be capable of being imposed in connection with animal or plant species whose natural range does not include any part of Great Britain (a "non-native species") or in connection with animal species whose natural range includes all or any part of Great Britain which have ceased to be ordinarily resident in, or a regular visitor to, Great Britain (a "species no longer normally present in Great Britain").

Recommendation 206: we recommend that a non-native species, or a species no longer normally present in Great Britain, should only be capable of being specified in regulations imposing notification requirements if it appears to the Secretary of State or Welsh Ministers that the species is "invasive".

These recommendations are given effect in the draft Bill by clause 95(2), read together with clause 94.

Recommendation 207: we recommend that under the new regime a species should be regarded as "invasive" if, uncontrolled, it would be likely to have significant adverse impacts on:

(1) biodiversity;

(2) other environmental interests; or

(3) social or economic interests.

A species of fish should also be regarded as "invasive" if, uncontrolled, it might compete with, displace, prey on or harm the habitat of any freshwater fish, shellfish or salmon in England and Wales.

This recommendation is given effect in the draft Bill by clauses 94(3) and (4).

Recommendation 208: we recommend that, in line with section 14B(5) of the Wildlife and Countryside Act 1981 as it applies to Scotland, a person failing to notify the relevant authority should not be guilty of an offence where he or she had a reasonable excuse for failing to do so in accordance with the terms of the requirement.

This recommendation is given effect in the draft Bill by clause 95(6).

Reform of the regulatory structure for the control of non-native species

9.63 Existing provisions connected to the control of non-native species are scattered around a number of different legislative instruments including, in particular, the Destructive Imported Animals Act 1932, the Import of Live Fish (England and Wales) Act 1980 and the Wildlife and Countryside Act 1981. As discussed above, the haphazard development of this area of law has given rise to a number of overlapping provisions, inconsistent definitions and inexplicable gaps.

9.64 In line with our general policy of rationalising and modernising wildlife law, in this section we make recommendations with a view to replicating the existing provisions within a coherent regulatory structure containing all relevant powers and obligations of general application which may be necessary to tackle the threat of non-native species effectively, from prevention to long-term management:

(1) a power to control the import of invasive non-native species;

(2) a power to issue notification requirements in connection with invasive non-native species (discussed above);

(3) a power to prohibit being in possession or control of invasive non-native species;

(4) a power to prohibit the sale of invasive non-native species;

(5) a general prohibition on the release of new species;

(6) a power to control and eradicate invasive non-native species (discussed above);

(7) a power to issue codes of practice for the purpose of providing practical guidance in respect of the application of any of the above provisions;

(8) a licensing regime to authorise otherwise prohibited activities.

9.65 The scope of the new framework will broadly reflect the range of measures that all EU member states will have to take in relation to "invasive alien species of Union concern" for the purpose of giving effect to their obligations under the Invasive Alien Species Regulation. Member states are expressly authorised to take such measures in connection with the control of invasive alien species of member state concern.[68]

A POWER TO BAN THE IMPORT OF INVASIVE NON-NATIVE SPECIES

9.66 Article 12 of the Invasive Alien Species Regulation provides that member states may establish a list of invasive alien species of member state concern and for these species they may apply measures equivalent to those provided for in articles 7, 8, 13 to 15, 17, 19 and 20 of the Regulation. Articles 7(1)(a) and 7(1)(d) provide, among other things, that invasive alien species of Union concern may not be intentionally "brought into the territory of the Union, including transit under customs supervision" or "transported to, from or within the Union, except for the transportation of species to facilities in the context of eradication". Article 15 of the Invasive Alien Species Regulation provides for the establishment of official controls to prevent the introduction of invasive alien species of Union concern into the territory of the Union.

9.67 In domestic legislation, the import of "invasive" non-native animals may be currently prohibited under two Acts: the Destructive Imported Animals Act 1932 and the Import of Live Fish (England and Wales) Act 1980.

[68] Invasive Alien Species Regulation, arts 7, 12, 14, 15, 16 and 17.

9.68 Under the 1932 Act, the Secretary of State or Welsh Ministers may prohibit, subject to a licensing regime, the import of musk rats or other "destructive non-indigenous mammalian species" from any place other than an EU member state.[69] "Non-indigenous mammalian species" is currently defined as a mammalian species which on 17 March 1932 was not established in a wild state in Great Britain, or had only become so established during the preceding fifty years, other than any species which was on that date commonly kept in Great Britain in a domesticated state.[70]

9.69 The Import of Live Fish (England and Wales) Act 1980 provides the Secretary of State or Welsh Ministers with the power to prohibit by order the import into any part of England and Wales of live fish, or the live eggs of fish, of a species which is not native to England and Wales and which in the opinion of the Secretary of State or Welsh Ministers might compete with, displace, prey on or harm the habitat of any freshwater fish, shellfish or salmon in England and Wales.[71]

Reform

9.70 We have concluded that the above powers under section 1 of the Import of Live Fish (England and Wales) Act 1980 and sections 1 and 10 of the Destructive Imported Animals Act 1932 should be rationalised into a single power to make regulations to prohibit the import of particular invasive non-native animals or plants from any place into England and Wales.

9.71 We have taken the view, in fact, that there are no rational reasons why the existing powers to regulate the import of invasive non-native species should be limited to "destructive non-indigenous mammalian species" and non-native fish that might have negative impacts on freshwater fish. While the 1932 Act and the 1980 Act were enacted to respond to specific problems created by particular activities, future threats which may require import restrictions may well originate from invasive non-native insects, reptiles or plants falling outside the powers to regulate the import of plant pests under the Plant Health Act 1967.

[69] Destructive Imported Animals Act 1932, ss 1, 10, 11(2). By virtue of the Destructive Imported Animals Act 1932 (Amendment) Regulations 1992 issued under s 2(2) of the European Communities Act 1972, any reference to "importation" under the 1932 Act now excludes importation from a member state.

[70] There are currently three orders in force under the 1932 Act which prohibit the import of "destructive non-indigenous mammalian species": the Non-indigenous Rabbits (Prohibition of Importation and Keeping) Order 1954 SI 1954 No 927, the Grey Squirrels (Prohibition of Importation and Keeping) Order 1937 SI 1937 No 478, and the Musk Rats (Prohibition of Importation and Keeping) Order 1933 SI 1933 No 136.

[71] Import of Live Fish (England and Wales) Act 1980, s 1. There are currently no orders expressly prohibiting the import of invasive live fish in England and Wales.

9.72 In line with the approach adopted by the Invasive Alien Species Regulation, we have also taken the view that there is no reason why other member states should, in principle, be exempted from the power to prohibit the import of an invasive non-native species. Before issuing an import restriction affecting EU member states, of course, the Secretary of State or Welsh Ministers would have to give serious consideration as to whether such restriction could be reasonably justified in the light of the general "free movement of goods" obligations under articles 34 to 36 of the Treaty on the Functioning of the European Union (TFEU).[72]

Species that may be subject to an import ban

9.73 In line with the above policy, we have concluded that the new power to prohibit the import of species of concern should apply to any species of animal or plant that may be subject to a notification requirement under the new framework. In other words, the new power should be capable of being exercised in relation to any non-native species of animal or plant, or any species no longer normally present in Great Britain, which, if uncontrolled, would be likely to have significant adverse impacts on biodiversity, other environmental interests, or social or economic interests.

9.74 We have also concluded that, to replicate fully the effect of section 1(1) of the 1980 Act, the power should also extend to any non-native fish which, if uncontrolled, might compete with, displace, prey on, or harm the habitat of any freshwater fish, shellfish or salmon in England and Wales. This is because replacing the above definition with the "significant adverse impact" test would have carried the risk of significantly narrowing the power of the Secretary of State or Welsh Ministers to prohibit the import of certain non-native fish species. The expression "might compete with, displace, prey or harm", in fact, would appear to impose a significantly lower threshold of risk than the expression "likely to have significant adverse impacts".

A POWER TO PROHIBIT THE POSSESSION OF INVASIVE NON-NATIVE SPECIES

9.75 In line with the power to prohibit the importation of destructive non-indigenous mammalian species, under the Destructive Imported Animals Act 1932 the Secretary of State or Welsh Ministers have equivalent powers to prohibit by order the keeping of such species.

[72] Art 36 TFEU permits, among other things, restrictions on imports that are justified on grounds of public security or the protection of the health and life of animals and plants.

9.76 Similarly, in line with the power to prohibit the import of non-native fish that might compete with, displace, prey on, or harm the habitat of any freshwater fish, shellfish or salmon in England and Wales, under the Import of Live Fish (England and Wales) Act 1980 the Secretary of State or Welsh Ministers have equivalent powers to prohibit the keeping of such species. The two most recent orders issued under the 1980 Act adopt an extremely precautionary approach to the control of non-native fish by prohibiting, subject to a licensing regime, the keeping in England and Wales of over twenty thousand non-native fish species listed by reference to their taxonomic order.[73]

Reform

9.77 Consistently with our recommendations in connection with the reform of the powers to prohibit the import of invasive non-native species in England and Wales and the Scottish reform of those powers under the Wildlife and Natural Environment (Scotland) Act 2011,[74] we have concluded that the above powers should be replaced by a general power to prohibit the possession or control of any invasive non-native species.

9.78 For the same reasons explained above, we have concluded that the new power should be capable of being exercised in relation to any non-native species of animal or plant, or any species no longer normally present in Great Britain, which, if uncontrolled, would be likely to have significant adverse impacts on biodiversity, other environmental interests, or social or economic interests. The power should also extend to any non-native fish which, if uncontrolled, might compete with, displace, prey on, or harm the habitat of any freshwater fish, shellfish or salmon in England and Wales. In this context, it is worth noting that replicating the latter definition is key for retaining the possibility to replicate the existing precautionary approach to the control of non-native fish species under the new framework.

A POWER TO PROHIBIT THE TRADE IN INVASIVE NON-NATIVE SPECIES

9.79 Section 14ZA of the Wildlife and Countryside Act 1981 provides the Secretary of State or Welsh Ministers with the power to issue orders prohibiting the trade in any species that fall within the scope of sections 14(1) and (2) of the 1981 Act. Species that fall within the scope of sections 14(1) and (2) of the 1981 Act include any animal or plant species listed in schedule 9 to the 1981 Act and any animal species that is not ordinarily resident in Great Britain in the wild state.

[73] Prohibition of Keeping or Release of Live Fish (Specified Species) (England) Order 2014 SI 2014 No 143; Prohibition of Keeping or Release of Live Fish (Specified Species) (Wales) Order 2015 SI 2015 No 88.

[74] Wildlife and Natural Environment (Scotland) Act 2011 asp 6 (Scottish Act) Pt 2, s 14(3); see also the Wildlife and Countryside Act 1981 (Keeping and Release and Notification Requirements) (Scotland) Order 2012 SI 2012 No 174.

Reform

9.80 We have concluded that the above power should be replicated under the new framework. The scope of the power, however, should be expressly restricted to the same category of "invasive non-native species" that may be subject to an import or possession prohibition discussed above. We are persuaded that this change will not only ensure consistency with the above powers, but will also reflect the way this provision was originally intended to be used. As the heading of section 14ZA of the 1981 Act suggests, the original intention of the drafters was for the section to be used for the purpose of prohibiting the trade in "invasive non-native species" as opposed to non-native species that would be unlikely, if released, to cause any significant damage. This is because any trade restriction in connection with species that do not pose any significant threat of harm could be potentially inconsistent with the "free movement of goods" principles under the TFEU.[75] The way the power under section 14ZA has been exercised so far further supports our conclusions, on the basis that existing trade prohibitions in England are limited to a limited list of unquestionably invasive plants.[76]

INTRODUCING NEW SPECIES

9.81 Section 14(1) of the Wildlife and Countryside Act 1981 currently makes it an offence to "release" or "allow to escape" into the wild any animal of a kind which is not ordinarily resident in and is not a regular visitor to Great Britain in a wild state or any other animal listed in parts 1A or 1B of schedule 9 to the 1981 Act. Similarly, section 14(2) of the 1981 Act makes it an offence to plant, or cause to grow in the wild any plant which is included in part 2 of schedule 9 to the 1981 Act.

9.82 The above offences significantly overlap with section 6(b) of the Destructive Imported Animals Act 1932, which makes it an offence to "turn loose", or "wilfully allow to escape" any musk rat or other destructive non-indigenous mammalian species specified by an order under section 10 of the Act. They also significantly overlap with the power to issue orders prohibiting the release of non-native fish that might compete with, displace, prey on, or harm the habitat of any freshwater fish, shellfish or salmon in England and Wales under section 1(1) of the Import of Live Fish (England and Wales) Act 1980. This creates potential problems for licensed activities, on the basis that the licensed release of a non-native fish under the 1980 Act would potentially remain an offence under section 14 of the 1981 Act, unless it was also licensed under section 16(4) of the 1981 Act.

Reform

9.83 In the light of the broad and flexible scope of the prohibitions under sections 14(1) and (2) of the 1981 Act – which allow further species falling outside the "not ordinarily resident" definition to be added by order under schedule 9 – we have concluded that under the new framework all of the "release" prohibitions mentioned above should be replaced by a general prohibition on the release of new species replicating the effect of section 14 of the 1981 Act.

[75] TFEU, arts 34 to 36.

[76] Wildlife and Countryside Act 1981 (Prohibition on Sale etc. of Invasive Non-native Plants) (England) Order 2014 SI 2014 No 538.

9.84 In replicating the effect of section 14(1) of the 1981 Act under the new framework, we have taken the view that the expression "release or allow to escape into the wild" should, in line with the Scottish reform of section 14,[77] be replaced by the phrases "releasing from captivity" and "allowing to escape from captivity".

9.85 The first aim of this policy is to simplify the "release" offence by removing unnecessary references to the imprecise concept of the "the wild".[78] As section 14(1) is intended to prevent the release of animals that may have negative impacts on the surrounding environment, whether the environment is a wildlife reserve, a cultivated field, the electricity grid or the London tube network. Whether the release happens "into the wild", as opposed to places that would not usually qualify as "wild", therefore, should not matter. It is also worth noting that many animals can travel long distances. It follows that whether the release of an animal from captivity originally takes place "into the wild" may well be irrelevant to the potential threat that the animal may pose, if uncontrolled, to other areas. The second aim of the policy is to ensure that conduct prohibited under section 6(d) of the Destructive Imported Animals Act 1932 and conduct prohibited under section 1 of the Import of Live Fish Act 1980 could be still fully covered by the new prohibition. Both provisions, in fact, merely require evidence that the animal in question was "released" or "allowed to escape", whether or not the release or escape took place "into the wild".[79]

9.86 We have also noticed that since the enactment of the Wildlife and Countryside Act 1981, a number of animal or plant species have been further subjected to an increasing number of sectoral regimes regulating releases and introductions. Examples of relevant sectoral regimes covered by EU law include the regulation of genetically modified organisms[80] and the regulation of alien or locally absent species in aquaculture.[81] Examples of relevant domestic sectoral regimes include the power to prohibit the introduction of fish into inland waters under section 232 of the Marine and Coastal Access Act 2009.

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

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

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

[80] See Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC, OJ L 106, 17.4.2001, p 1.

[81] Council Regulation (EC) 708/2007.

9.87 As the prohibition replicating the effect of 14(1) of the 1981 Act under the new framework will automatically prohibit the release of an open ended list of animals, we envisaged that it could have the unintended effect of interfering with activities regulated under parallel, sector-specific regimes. As authorising such activities under two or more regulatory regimes would, in most cases, be unnecessary and time consuming, we have concluded that under the new framework the Secretary of State or Welsh Ministers should be granted an express power to restrict the effect of the new general release prohibition in connection with activities or conduct prohibited or authorised under separate enactments.[82]

A POWER TO ISSUE CODES OF PRACTICE

9.88 In line with section 14ZB of the Wildlife and Countryside Act 1981, we have concluded that under the new framework the Secretary of State or Welsh Ministers should have a power to issue or approve codes of practice for the purpose of providing practical guidance in respect of the application of any of the above provisions. As in this context we would normally expect the Secretary of State or Welsh Ministers to consult relevant stakeholders before issuing a code of practice in connection with any of the above prohibitions, we have concluded that under the new framework there should be an express statutory obligation requiring the relevant authorities to consult such persons as they consider appropriate before issuing, revising, revoking or replacing a code of practice.[83]

A DUE DILIGENCE DEFENCE

9.89 Currently, a person who contravenes any of the prohibitions under section 14 or section 14ZA of the Wildlife and Countryside Act 1981 is not guilty of an offence if it is shown that he or she took all reasonable steps and exercised all due diligence to avoid committing the offence. We have concluded that this defence should be replicated under the new framework and extended to the general "keeping" and "import" prohibitions discussed above. This is because in the absence of such defence a person could be otherwise criminalised for purely accidental states of affairs that he or she could not have reasonably avoided.

LICENSING

9.90 All activities in connection with non-native species prohibited under the Wildlife and Countryside Act 1981, the Import of Live Fish (England and Wales) Act 1980 and the Destructive Imported Animals Act 1932 may be currently authorised by a licence which the Secretary of State or Welsh Ministers may issue for any purpose and subject to the conditions they think fit.[84]

[82] A similar power has already been introduced in s 14(2C) of the Wildlife and Countryside Act 1981 as it applies to Scotland.

[83] An express obligation to consult relevant persons will also ensure consistency with the procedure for issuing codes of practices in connection with ragwort (Weeds Act 1959, s 1A) that, as discussed below, will be replicated under the new framework.

[84] Wildlife and Countryside Act 1981, s 16(4); Import of Live Fish (England and Wales) Act 1980, s 1(3); Destructive Imported Animals Act 1932, s 2.

9.91 In consultation we provisionally proposed that, in line with the approach adopted under section 16(4) of the Wildlife and Countryside Act 1981, under the new framework it should be possible to license any prohibited activity in connection with invasive non-native species.[85] In the light of the broad support for our provisional proposal, we have concluded that, in line with section 16(4) of the Wildlife and Countryside Act 1981, under the new framework the Secretary of State or Welsh Ministers should continue to be able to license any otherwise prohibited activity in connection with non-native species.

INTRODUCTION OF NEW SPECIES FROM SHIPS

9.92 As noted above, regulation 52 of the Conservation of Habitats and Species Regulations 2010 makes it an offence to introduce a non-native species from a ship where the introduction gives rise to a risk of prejudice to local fauna or flora. The above is not an offence, however, if it resulted from a discharge of water carried as ballast, the discharge was necessary for the purpose of protecting the safety of any person or ship and all reasonably practicable steps were taken –

(1) to avoid its occurring in an area where it would give rise to a risk of prejudice to natural habitats within their natural range or a risk of prejudice to wild native flora or fauna (whether in the place of introduction or elsewhere); and

(2) to minimise any risk of such prejudice.

9.93 Regulation 52(8) expressly provides that the offence under section 14 of the Wildlife and Countryside Act 1981 does not apply in relation to any act which is an offence under regulation 52. Regulation 54 provides that the relevant licensing body may grant a licence in relation to the introduction of species under regulation 52 if satisfied that the action authorised by the licence will not prejudice natural habitats within their natural range or wild native flora or fauna.

Reform

9.94 As the scope of the above offence overlaps, to some extent, with the reformed "release" offence discussed above, we have considered a number of options for integrating this offence into the new general regime for the control of non-native species. We have concluded, nevertheless, that the scope of the two provisions is significantly different. For instance, while regulation 52 extends to any "invasive" plant, the scope of the release prohibition discussed above only extends to plants listed in part 2 of schedule 9 to the 1981 Act. Another obvious difference is that the offence under regulation 52 only covers introductions from on board a ship, and only when the introduction is carried out in relevant parts of the marine area where the activity would give rise to a risk of prejudice to natural habitats or species in their natural range.

[85] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposals 8-6.

9.95 On balance, we have concluded that, in the light of its sectoral and self-contained nature, the prohibition under regulation 52 of the Conservation of Habitats and Species Regulations 2010 should not be integrated under the new framework on the basis that doing so would not bring any added benefits in terms of simplification and rationalisation of the existing law on the control of non-native species.

Recommendations

Recommendation 209: we recommend that the Secretary of State or Welsh Ministers should have the power to make regulations prohibiting the import of any non-native species of animal or plant, or any species no longer normally present in Great Britain which is "invasive", from a place outside England and Wales.

Recommendation 210: we recommend that the Secretary of State or Welsh Ministers should have the power to make regulations prohibiting the possession or control of any non-native species of animal or plant, or any species no longer normally present in Great Britain which is "invasive".

Recommendation 211: we recommend that the Secretary of State or Welsh Ministers should have the power to make regulations prohibiting any person from selling, offering for sale, exposing for sale, transporting for the purpose of sale or publishing any advertisement likely to be understood as conveying that the person buys or sells any invasive non-native species of animal or plant, or any species no longer normally present in Great Britain which is "invasive", from a place outside England and Wales.

These recommendations are given effect in the draft Bill by clause 96.

Recommendation 212: we recommend that it should be an offence for a person to release from captivity, or allow to escape from captivity, any animal which is of a species that is not ordinarily resident in, or a regular visitor to, Great Britain in a wild state or an animal that is currently listed in parts 1A and 1B of schedule 9 of the Wildlife and Countryside Act 1981.

This recommendation is given effect in the draft Bill by clause 97(1).

Recommendation 213: we recommend that it should be an offence for a person to plant or otherwise cause to grow in the wild any plant which is of a species that is currently listed in part 2 of schedule 9 of the Wildlife and Countryside Act 1981.

This recommendation is given effect in the draft Bill by clause 97(2).

Recommendation 214: we recommend that the Secretary of State and Welsh Ministers should have a power to issue or approve codes of practice for the purpose of providing practical guidance in respect of the application of any of the prohibitions in connection with the provisions giving effect to recommendations 196 to 205.[86]

[86] See chapter 8.

This recommendation is given effect in the draft Bill by clause 101.

Recommendation 215: we recommend that a person who contravenes any import, possession, trade or release prohibition should not be guilty of an offence if he or she shows that all reasonable steps were taken and all due diligence was exercised to avoid committing the offence.

This recommendation is given effect in the draft Bill by clause 98.

Recommendation 216: we recommend that in line with section 16(4) of the Wildlife and Countryside Act 1981, the Secretary of State or Welsh Ministers should have the power to issue licences for the purpose of authorising any otherwise prohibited activity in connection with non-native species.

This recommendation is given effect in the draft Bill by clause 100.

AGRICULTURAL PESTS AND WEEDS

9.96 In this section we make recommendations for the reform of the powers to control particular kinds of agricultural pests and weeds under the Agriculture Act 1947, the Pests Act 1954 and the Weeds Act 1959.

9.97 The principal aim of our recommendations is to restate these provisions in the context of a simple, coherent and modern regulatory structure. The present drafting style, and the significant number of cross-references between the provisions, makes them laborious to read and difficult to understand. The text of the legislation may also mislead the reader as, in places, it continues to refer to repealed pieces of legislation or to long abolished decision-making bodies. We have taken the view, therefore, that restating the existing provisions in modern terms, and in the context of a simpler and more consistent structure, could significantly benefit the clarity and accessibility of this area of law.

9.98 As we have not specifically consulted on this area of law, we have decided to refrain from making recommendations in connection with the substantive reform of the existing powers to control pests and weeds. In line with the general policy of modernising and rationalising the existing regulatory framework, however, we considered that there would be scope for reforming existing regulatory and enforcement tools with a view to aligning them with our recent recommendations in connection with the control of invasive non-native species, as given effect under schedule 9A to the Wildlife and Countryside Act 1981.[87]

Substantive powers: current law

Transfer of functions and devolution

9.99 The powers under the Agriculture Act 1947, the Pests Act 1954 and the Weeds Act 1959 were initially conferred upon the Minister of Agriculture, Fisheries and Food. A number of subsequent instruments, however, have affected the identity of the decision-makers, as well as the way such decision-making powers operate in relation to Wales.

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

9.100 Given the complexity of the legislation which ultimately led to the transfer of the relevant decision-making functions to the Secretary of State (in England) and the Welsh Ministers (in Wales), there follows a short summary of how the functions of the relevant decision-makers evolved in the last sixty years.

9.101 Insofar as Wales is concerned, the powers initially conferred on the Minister of Agriculture, Fisheries and Food were subsequently transferred to the Minister of Agriculture, Fisheries and Food and to the Secretary of State jointly.[88] The powers which had been transferred to the Minister of Agriculture, Fisheries and Food and the Secretary of State jointly were then transferred, insofar as they were exercisable in relation to Wales, to the Secretary of State.[89] They were then transferred to the National Assembly for Wales[90] and, by virtue of the Government of Wales Act 2006, from the National Assembly to the Welsh Ministers.[91]

9.102 Insofar as they were exercisable in relation to England, the powers remained with the Minister of Agriculture, Fisheries and Food alone until they were ultimately transferred to the Secretary of State by virtue of the Ministry of Agriculture, Fisheries and Food (Dissolution) Order 2002.[92]

Agriculture Act 1947

9.103 The Agriculture Act 1947 provisions can be divided into four sets of substantive pest control powers. These powers allow the making of pest control orders, rabbit control orders, captive animal control orders and orders to direct the disposal of pest animals killed or captured in pursuance of one of the above orders.

"PEST CONTROL ORDERS"

9.104 The first set of substantive powers allows the Secretary of State or Welsh Ministers[93] to require a person to take steps to kill, take or destroy certain pest animals on land.[94] The animals to which the power applies include rabbits and other rodents, deer, foxes, moles, wild birds or their eggs (except those listed in the First Schedule to the Protection of Birds Act 1954)[95] and any other animals as prescribed.[96]

[88] Transfer of Functions (Wales) Order 1969 SI 1969 No 388, art 3, and para 5 of sch 2.

[89] Transfer of Functions (Wales) (No 1) Order 1978, art 2(2).

[90] National Assembly for Wales (Transfer of Function) Order 1999, art 2(a).

[91] Government of Wales Act 2006, para 30(1) of sch 11.

[92] SI 2002 No 794, art 2(2).

[93] The text of the Act provides that the relevant decision maker is the "Minister", however, the relevant functions have now been transferred to the Secretary of State in England and the Welsh Ministers in Wales.

[94] Agriculture Act 1947, s 98(1).

[95] This schedule was repealed, along with the Protection of Birds Act 1954, by the Wildlife and Countryside Act 1981.

[96] Agriculture Act 1947, s 98(4).

9.105 Before requiring a person to take the above steps, the Secretary of State or Welsh Ministers must be satisfied that the requirement is expedient to prevent damage to certain resources, including crops, pasture, food, or works on land.[97]

9.106 The power can only require people to take steps if they already possess the rights to do the things required by the order.[98] Further, subject to a number of exceptions the power cannot be used to require people to take steps that are otherwise prohibited by law.[99]

9.107 Lastly, the Secretary of State or Welsh Ministers are expressly authorised to assist a person to carry out activities in pursuance of a "pest control order" by providing services, equipment, appliances and other material[100] and make contributions towards expenses incurred in carrying out the requirements.[101]

"RABBIT CONTROL ORDERS"

9.108 The second set of powers under the Agriculture Act 1947 allow the Secretary of State or Welsh Ministers to require an occupier of land to take steps to destroy rabbit breeding places, exclude rabbits from land, or prevent rabbits spreading to other land.[102] Before issuing such requirement, the Secretary of State or Welsh Ministers must be satisfied that the activity in question is expedient to prevent rabbits from damaging resources such as crops, trees, or any works on land.[103]

9.109 As above, the Secretary of State and Welsh Ministers may assist a person to comply with such a requirement by providing services, equipment, appliances, and other material,[104] and may make contributions towards expenses incurred in carrying out the requirements.[105]

[97] Agriculture Act 1947, s 98(1).

[98] Agriculture Act 1947, s 98(1).

[99] Agriculture Act 1947, s 98(2). For instance, the power can be used to require game to be killed outside the seasons prescribed in the Game Act 1831. The power can also be used to require the killing of rabbits with firearms during night-time hours, which would otherwise be prohibited by the Ground Game Act 1880.

[100] Agriculture Act 1947, s 101(1).

[101] Pests Act 1954, s 3(1).

[102] Agriculture Act 1947, s 98(7). Under s 98(7) the definition of occupier includes a person entitled to occupy unoccupied land.

[103] These purposes are slightly narrower than the power in section 98(1) as they omit the categories of animal or human foodstuff and livestock.

[104] Agriculture Act 1947, s 101(1).

[105] Pests Act 1954, s 3(1).

"CAPTIVE ANIMAL CONTROL ORDERS"

9.110 The third set of powers under the Agriculture Act 1947 allow the Secretary of State or Welsh Ministers to require an occupier of land to take steps to prevent any animals which are being kept in captivity on the land from escaping. Before issuing such requirement, the Secretary of State must be satisfied that it would be expedient to prevent damage to resources such as crops, trees, or any works on land.[106]

DIRECTIONS FOR DISPOSAL

9.111 Finally, the Secretary of State and Welsh Ministers are empowered under the Agriculture Act 1947 to give directions to authorise any animals, birds or eggs killed or taken under pest control orders, rabbit control orders, or captive animal control orders to be disposed of. These directions can include a direction that the animals, birds or eggs be used as food.[107]

Pests Act 1954

9.112 The Pests Act 1954 provides a number of additional powers to deal specifically with wild rabbits.

9.113 First, section 1(1) of the Pests Act provides the Secretary of State or Welsh Ministers with the power to issue "rabbit clearance orders". These orders are additional to the rabbit control order powers outlined above and are based upon the notion that, unless there is some form of coordinated effort within a particular area to remove pest rabbits, the targeting of particular pieces of land under rabbit control orders is unlikely to be effective. Rabbit clearance orders can therefore specify large areas of land which are to be freed from wild rabbits as far as practicable.[108]

9.114 Where orders are made, the occupier of land in a rabbit clearance area must then take steps to kill or remove the wild rabbits living on his or her land. Where it is not practical for the occupier to kill the rabbits on the land, the occupier must instead take other steps to prevent the rabbits from causing damage. An occupier must also comply with any particular directions to remove rabbits in the order.[109]

[106] Agriculture Act 1947, s 99. Note that these purposes are co-extensive with those listed in the power under s 98(1) of the Agriculture Act 1947.

[107] Agriculture Act 1947, s 100(3).

[108] Pests Act 1954, s 1(1).

[109] Pests Act 1954, ss 1(2) and (13). Occupier is defined to be the person entitled to occupy land.

9.115 By virtue of the Ground Game Act 1880, an occupier is entitled to bring one other person onto the land to kill ground game with firearms, but this may not be sufficient to carry out the necessary control operations in all cases.[110] To deal with this issue, the Pests Act 1954 allows occupiers in rabbit clearance areas to apply to the Secretary of State or Welsh Ministers for an authorisation to allow additional persons to use firearms to kill rabbits on their land.[111] Before an authorisation can be given, the Secretary of State or Welsh Ministers must be satisfied that the authorisation is needed and that the occupier has sought the sanction of other third parties who might have rights to kill rabbits on the land.[112]

9.116 The Pests Act 1954 also provides a defence to any offence involving the unlawful destruction or pursuit of game. This defence is available to any person who is authorised by an occupier in the rabbit clearance order area to kill or take rabbits on the land, so long as they are acting in accordance with that authorisation.[113]

Weeds Act 1959

9.117 Under the Weeds Act 1959, the Secretary of State or Welsh Ministers may require an occupier of land[114] to take action as necessary to prevent certain weeds from spreading. A requirement may not be issued unless the Secretary of State or Welsh Ministers are satisfied that a listed weed is present on the land.[115]

9.118 The Secretary of State or Welsh Ministers may also issue a code of practice providing guidance on how to prevent the spread of ragwort. Before making the code, the Secretary of State must consult with appropriate people. A copy of the code must also be laid before Parliament.[116]

Reform of the substantive powers: general issues

9.119 As mentioned above, despite our decision to refrain from substantially altering the nature of the above powers, we think that the law would still benefit significantly, in terms of clarity and accessibility, by the consolidation of the above powers within a coherent and logical structure and by the modernisation of the language and structure of the existing provisions. The following section explains the alterations to the existing provisions that we considered necessary for achieving that policy aim.

[110] *Hansard* (HL), 26 January 1954, vol 185, cols 414 to 435.

[111] Pests Act 1954, s 1(4). This authorisation power is additional to the rights provided to an occupier of land under the Ground Game Act 1880 to kill and take game on that land, and to authorise others in writing to exercise that right.

[112] Pests Act 1954, s 1(3) and (4). Note that, third party authorisation will not have been unreasonably withheld if the third party is instead taking or proposing to take adequate steps to destroy the wild rabbits on the land.

[113] Pests Act 1954, s 1(7).

[114] Weeds Act 1959, s 11(2). Occupier is defined in respect of a public road to mean the authority maintaining the road, and defined for unoccupied land as meaning the person entitled to occupation.

[115] Weeds Act 1959, s 1(1) and (2). The weeds that may be subject to a "weed control order" are the spear thistle, the creeping or field thistle, the curled dock, the broad leaved dock, ragwort and any other weed prescribed by regulation (Weeds Act 1959, s 1(2)).

[116] Weeds Act 1959, s 1A.

Recommendations

Recommendation 217: we recommend that the substantive powers be consolidated and their language modernised, whilst leaving their scope essentially unchanged (subject to the further recommendations below).

This recommendation is given effect by Part 4 of the draft Bill.

Who may exercise the powers

9.120 We considered extending the class of decision-makers empowered to exercise the various powers to include Natural England, the Environment Agency and the Forestry Commissioners (in England) and Natural Resources Wales (in Wales), on the basis that these bodies are now empowered to make similar species control orders under the new provisions of schedule 9A to the Wildlife and Countryside Act 1981.[117] We have ultimately decided that the relevant decision-makers in the legislation should remain the Secretary of State (in England) and the Welsh Ministers (in Wales).

9.121 We have come to this conclusion on the basis that, in England, the Secretary of State is already able, under section 78 of the Natural Environment and Rural Communities Act 2006, to delegate most of the above powers to other bodies. These powers of delegation have already been exercised to permit the exercise of a number of powers under the Agriculture Act 1947, the Pests Act 1954 and the Weeds Act 1959 by Natural England.[118] We consider that these delegations should not be altered.[119]

[117] See the recommendations in: Wildlife Law: Control of Invasive and Non-native Species (2014) Law Com No 342, paras 3.6 to 3.12.

[118] See the Agreement between the Secretary of State and Natural England under s 78 of the Natural Environment and Rural Communities Act 2006 dated 29 September 2006.

[119] The Natural Environment and Rural Communities Act 2006, s 86(4), provides that the delegation power cannot be used to delegate a power to make "subordinate legislation", which is defined to include "orders". Because the new provisions will be exercisable by "order", rather than by notice, this may place them outside the delegation power. We have removed this potential difficulty by clarifying under the Bill that the relevant order-making powers are not to be regarded as powers to make subordinate legislation for the purposes of s 81 of the Natural Environment and Rural Communities Act 2006 (see cl 89(2) of the Wildlife Bill)

9.122 In Wales, similarly, the Welsh Ministers have the power to delegate their functions (other than the power to make, confirm or approve subordinate legislation contained in a statutory instrument) to any public authority[120] or transfer their environmental functions to Natural Resources Wales.[121] To date, a number of functions of the Welsh Ministers relating to the environment have been transferred to Natural Resources Wales through the exercise of the transfer powers under the Public Bodies Act 2011.[122] Although the relevant powers under consideration do not appear to have been delegated or transferred, the capacity to do so clearly exists. Whether or not a transfer or delegation of such powers should occur is therefore a matter to be determined by the Welsh Ministers.

Recommendations

Recommendation 218: we recommend that the decision makers under the consolidated powers to control pests and weeds remain the Secretary of State in relation to England, and the Welsh Ministers in relation to Wales.

This recommendation is given effect in the draft Bill by clause 89(1).

Persons who may be subject to an order

9.123 The existing powers are variously exercisable against different classes of people, and may be exercisable in relation to some or all of the following: those having the relevant rights to do the things required,[123] occupiers of land,[124] those entitled to occupy unoccupied land and authorities maintaining public roads. [125] We have given consideration to whether the subjects of these orders can be unified as between the powers or whether there is an ongoing need for retaining the differences.

9.124 As we could find no reason why each of the above powers should not consistently apply to the same classes of persons, we have concluded that the above powers, should all be capable of being exercised as against:

[120] Government of Wales Act 2006, s 83.

[121] Public Bodies Act 2011, s 13.

[122] The Natural Resources Body for Wales (Functions) Order 2013 SI 2013 No 755 (W 90).

[123] Agriculture Act 1947, s 98(1).

[124] Agriculture Act 1947, ss 98(7) and 99; Pests Act 1954, s 1(2).

[125] Agriculture Act 1947, s 98(7); Weeds Act 1959, s 11(2).

(1) the occupier of premises to which the order relates; or

(2) the person who has such rights in relation to those premises as are sufficient to enable the person to take steps required by the order.

9.125 So as to ensure consistency between the above powers and the recently introduced powers to issue species control orders in connection with invasive non-native species under schedule 9A to the Wildlife and Countryside Act 1981, we have also decided to enable the Secretary of State or Welsh Ministers to issue an order against the owner of premises or any other person who has such rights in relation to the premises as are sufficient to enable the person in question to take the steps required by the order.[126]

A requirement to determine the most appropriate subject of the power

9.126 Because our recommendations above regarding the subjects of the powers have slightly expanded the class of people who may be subject to them, we have concluded that the Secretary of State or Welsh Ministers, before issuing an order that requires any person to take any steps, should be under an obligation to determine who is the most appropriate person to make subject to the order. This is consistent with the approach adopted under the schedule 9A of the Wildlife and Countryside Act 1981 in connection with the issuing of species control orders in circumstances where there may be more than one owner or occupier upon whom the order may be imposed.[127]

Recommendations

Recommendation 219: we recommend that the substantive powers to control pests and weeds should be exercisable against owners, occupiers, and those with the relevant rights to carry out the actions required.

This recommendation is given effect in the draft Bill by clauses 83(3), 84(3), 85(3), 86(2) and 87(3).

Recommendation 220: we recommend that before making a control order, the appropriate authority should be satisfied that, in the relevant circumstances, the person subject to the order is the most appropriate person on whom to impose the requirements of the order in question.

This recommendation is given effect in the draft Bill by paragraph 4(2) of schedule 31.

[126] Wildlife and Countryside Act 1981, sch 9A, para 4(1).

[127] Wildlife and Countryside Act 1981, sch 9A, para 6(3)(b).

A proportionality requirement and a duty to give reasons

9.127 Our Report on the control of invasive non-native species recommended the inclusion of an express requirement that decision-makers be satisfied that the making of an order is proportionate to the ends sought to be achieved, so as to ensure that the requirements imposed by an order would not disproportionately interfere with individual rights to the peaceful enjoyment of their property. We also recommended that reasons be given for both the making of the order and for the imposition of the particular requirements under the order.[128]

9.128 At present, none of the pest animal or plant control powers contain an express proportionality or reasons requirement. However, we see no reason why our recommendations, as adopted in paragraphs 10(3) and 14(3) of schedule 9A of the Wildlife and Countryside Act 1981, should not, for the same reasons, extend to this context. We have concluded, therefore, that under the new framework the Secretary of State or Welsh Ministers should be satisfied, before issuing any of the control orders discussed above, that the provisions of the order are proportionate to the objective to be achieved. In notifying the relevant owner or occupier about the issuing of an order, in addition, the notice should include the reasons for making the order, the reasons for any requirement to take steps imposed by it and the reasons for any proposal to take steps included in it.

Recommendations

Recommendation 221: we recommend that the substantive powers be accompanied by express proportionality and reasons requirements.

This recommendation is given effect in the draft Bill by paragraphs 4(1)(b) and 8(4) of schedule 31.

Nature of the control powers

9.129 In line with the power to issue species control orders introduced in schedule 9A to the Wildlife and Countryside Act 1981, we have concluded that the pest control, rabbit control, rabbit clearance and weed control order powers should all be exercisable by administrative order and come into effect only once notice has been given and any appeal period has expired (save for in circumstances of urgency).[129] This is consistent with the current approach, on the basis that none of the relevant orders or requirements that may currently be issued under the Agriculture Act 1947, the Pests Act 1954 or the Weeds Act 1959 currently require any parliamentary procedure.

Recommendations

Recommendation 222: we recommend that the substantive powers be exercisable by administrative order.

[128] Wildlife Law: Control of Invasive and Non-native Species (2014) Law Com No 342, paras 3.32 to 3.47.

[129] Further detail is provided below regarding the urgent circumstances as well as the applicable obligations of procedural fairness when exercising the powers.

Wild birds that may not be subject to a pest control order

9.130 Section 98(4) of the Agriculture Act 1947 provides that a pest control order may be imposed in connection with any wild bird other than birds of a species listed in schedule 1 to the Protection of Birds Act 1954. Before being repealed by the Wildlife and Countryside Act 1981, schedule 1 to the 1954 Act included a list of bird species protected by special penalties. That list was then replicated and extended in schedule 1 to the Wildlife and Countryside Act 1981.

9.131 In the light of the above developments, we have taken the view that the most appropriate way of giving effect to existing wildlife protection policy preferences whilst replicating the effect of section 98(4) of the 1947 Act would be by replacing the reference to schedule 1 to the 1954 Act with a reference to a list of bird species which replicates schedule 1 to the 1981 Act. In line with the discussion in Chapter 2 of this Report, under the new framework the Secretary of State or Welsh Ministers will have the power to amend that list by regulations.

Recommendations

Recommendation 223: we recommend that the birds against which a pest control order may not be exercised be extended to the list of bird species contained in schedule 1 to the Wildlife and Countryside Act 1981.

This recommendation is given effect in the draft Bill clause 83(4).

Reform of the substantive powers: specific issues

Pest control orders: requiring steps which would otherwise be prohibited by law

9.132 As noted above, the present pest control order powers are expressed so as not to permit the issuing of a requirement to take steps to kill or capture animals when this would be otherwise prohibited by law. We have concluded that this general prohibition should be replicated under the new framework. The present provisions, however, in effect make two exceptions to the above rule: orders may require the killing of game outside season and the killing of wild rabbits with firearms during night time hours.[130] We have concluded that the first exception should not be expressly replicated under the new framework. This is because, as detailed in Chapter 7,[131] the effect of the above exception will be replicated by a general defence authorising any person to kill or capture any bird, including game birds, when acting in pursuance of a pest control order.[132] As discussed in Chapter 7, the Secretary of State or Welsh Ministers will only be capable of issuing a pest control order authorising the killing or capture of protected birds when satisfied that the issuing of the order complies with the same conditions that would have to be satisfied for the purpose of granting a wildlife licence authorising the same activity. As we are not bringing section 6 of the Ground Game Act 1880 within the new regime, the second exception will need to be replicated.

[130] Agriculture Act 1947, s 98(2).

[131] See Chapter 7, paras 7.132 to 7.139 above.

[132] See cls 25 and 69 of the Wildlife Bill.

Recommendations

Recommendation 224: we recommend that pest control order powers continue to be limited so as not to be capable of requiring the taking of steps prohibited by law, subject to the current exception relating to the killing of rabbits during the night. We recommend that the exception relating to the killing of game outside season should not be expressly replicated.

This recommendation is given effect in the draft Bill by paragraph 5 of schedule 31.

Rabbit clearance orders: are they necessary or should they be expanded?

9.133 The obvious overlap between rabbit control orders and rabbit clearance orders led us to give consideration to whether both powers remain necessary. We also considered whether pest control orders and weed control orders could be replaced with orders applicable to wider geographical areas, emulating rabbit clearance orders for different species of pest animals and plants. Ultimately, we have concluded that each of the powers should substantially remain as they are for a number of reasons.

9.134 First, we do not consider that it would be appropriate to extend rabbit clearance orders to other species. The resulting general powers to declare that steps be taken across whole areas (rather than within specific pieces of land) regarding a broader range of species would represent a significant policy change falling outside the scope of this review. Rabbit clearance orders were created for the purpose of responding to particular threats posed by rabbits.[133] We are not in a position to determine whether equivalent threats are, or may be, posed by other pest animal or plant species.

9.135 Secondly, we have considered whether rabbit clearance order powers should be repealed altogether on the basis that, despite the very broad scope of the rabbit clearance order which is currently in force (creating a rabbit clearance area which covers the whole of England and Wales), according to the Department for Environment, Food and Rural Affairs its requirements, in practice, are very rarely enforced. We have concluded, on balance, that we are not in a position to recommend its abolition on the basis that - if used in a more geographically measured way (as is likely to be required by the introduction of the express proportionality requirement discussed above) – it may serve a sensible purpose of facilitating control operations in cases where, given the scope of the threat, imposing rabbit control orders on each occupier of land in a certain area would be unnecessarily burdensome and time consuming.

[133] *Hansard* (HL), 26 January 1954, vol 185, cols 414 to 435.

Recommendations

Recommendation 225: we recommend that rabbit clearance orders be retained.

This recommendation is given effect in the draft Bill by clause 86.

Rabbit clearance orders: the use of additional firearms

9.136 As already noted, the powers to make rabbit clearance orders contain provisions allowing the use of firearms additional to those otherwise permitted under the Ground Game Act 1880. The procedure for authorising the use of additional firearms is highly prescriptive and requires that, before an order authorising the use of additional firearms can be made, the occupier must have requested the right to use firearms from the owner, or any other person having the right to kill rabbits in that land, and have been unreasonably refused.

9.137 We could not see any practical value in expressly replicating those procedural obligations under the new framework. If the use of additional firearms by the occupier of land is necessary for the purpose of controlling rabbits in a certain area, the Secretary of State or Welsh Ministers should be able to authorise it whether or not the occupier has sought prior permission from the landowner. In cases where an order does not authorise the use of additional firearms, the occupier should not use additional firearms unless the landowner, or other relevant right holder, has given permission to do so. If the absence of such permission makes it difficult to carry out the required control operations effectively, the Secretary of State or Welsh Ministers should have the ability to authorise the use of additional firearms, whether or not the reasons why the landowner's refused to give such permission were "reasonable". We have concluded, therefore, that under the new framework the ability to authorise the use of additional firearms should be simply conditional upon the Secretary of State or Welsh Ministers being satisfied that the authorisation is necessary to free the relevant premises of wild rabbits.

Recommendations

Recommendation 226: we recommend that the power to allow the use of additional firearms to carry out a rabbit clearance order be simplified to allow its exercise where the decision-maker considers this necessary to free the premises of rabbits.

This recommendation is given effect in the draft Bill by clauses 86(4) and (5).

Enforcement provisions: current law

9.138 Various enforcement mechanisms support the present substantive powers. In some instances these mechanisms adopt the same procedure, in others they adopt distinct approaches. Some enforcement mechanisms appear sensible and appropriate, whereas others now appear overly elaborate or arcane. As discussed above, we have concluded that there would be value in replacing each of these measures with a simple and consistent scheme based on the enforcement provisions which support species control orders and which were introduced by the Infrastructure Act 2015 into schedule 9A of the Wildlife and

Countryside Act 1981.

Recommendations

Recommendation 227: we recommend that the enforcement provisions be unified and made as consistent as possible with the provisions contained in schedule 9A of the Wildlife and Countryside Act 1981.

This recommendation is given effect in the draft Bill by paragraphs 4 to 18 of schedule 31.

Agriculture Act 1947

PROCEDURAL FAIRNESS SAFEGUARDS

9.139 The express procedural safeguards that accompany the rabbit control order powers[134] require, in essence, that notice given before the rabbit control order powers are exercised must state, amongst other things, a time within which objections can be submitted to the Secretary of State or Welsh Ministers. The order does not then commence until any objections have been considered and a further notice has been served confirming the initial notice (either with or without modifications). [135]

POWERS TO INSPECT, ENTER, AND SECURE COMPLIANCE IN DEFAULT

9.140 Under the present provisions of the Agriculture Act 1947, the Secretary of State or Welsh Ministers may authorise entry onto land to determine whether to exercise the powers under the Act, and to monitor compliance with the Act. Before this power is used, notice must be given.[136]

9.141 Where a pest control order, a rabbit control order, or a captive animal control order is not complied with, the Secretary of State or Welsh Ministers may authorise third parties to enter the relevant land and take steps to enforce compliance.[137] Where this power is exercised to remedy non-compliance by an occupier for the first time, notice must be given beforehand.[138] Notice must also be given when the power of entry is exercised against non-occupiers.[139]

[134] These procedural requirements do not attend the exercise of the powers under ss 98(1) and 99 because, under s 104, the requirements are triggered only where a power requires that an opportunity to make representations be afforded, and no such requirement is to be found in these other sections.

[135] Agriculture Act 1947, ss 98(7) and 104

[136] Agriculture Act 1947, ss 106 (1), (3) and (4).

[137] Agriculture Act 1947, s 100(2).

[138] Agriculture Act 1947, s 106(4).

[139] Agriculture Act 1947, s 106(5)

COST RECOVERY

9.142 The Secretary of State or Welsh Ministers may recover from the addressee of a pest control order the reasonable costs of assisting with compliance where such assistance was requested by the person subject to the order.[140] Where the Secretary of State or Welsh Ministers authorise action by a third party due to a failure to comply with the requirements of a pest control order, they may again recover reasonable costs from the person who has failed to comply.[141] The person may challenge the quantum of the costs through determination by an agreed arbitrator or, failing agreement, by the President of the Royal Institution of Chartered Surveyors.[142]

9.143 Section 100(5) of the Agriculture Act 1947, lastly, expressly provides that any person who has incurred costs in complying with an order may seek an indemnity from any other person with an interest in the land. The court may then grant the indemnity in whole or part or make other orders it considers just.[143]

SERVICE OF NOTICE

9.144 The requirements about serving notices are very technical and specific. For instance, notices will be validly served if delivered to the person, or left at their proper address (being their last known address), or sent by post to them in a registered letter.[144] Likewise, notices will be validly served on an incorporated company or body if served on the secretary or clerk of the company or body by being delivered to them, or left at their proper address (being the registered or principal office of the company or body), or sent by post in a registered letter.[145]

[140] Agriculture Act 1947, s 101(2).

[141] Agriculture Act 1947, s 100(2).

[142] Agriculture Act 1947, s 100(2).

[143] Agriculture Act 1947, s 100(5).

[144] Agriculture Act 1947, ss 107(1) and (3). Reference is also made to section 26 of the Interpretation Act 1889 which formerly provided that service by post would be deemed effective where a letter was properly addressed, prepaid and posted and was deemed to be effected when the letter would be delivered in the ordinary course of the post. Although the 1889 Act has now been repealed, the provision is re-enacted in identical terms under section 7 of the Interpretation Act 1978.

[145] Agriculture Act 1947, ss 107(1), (2) and (3). Again, there is a cross reference to s 26 of the Interpretation Act 1889 in s 107(3) which is now repealed and so taken by s 109(4) to be a reference to the re-enacted provision in s 7 of the Interpretation Act 1979.

9.145 Where a person's details cannot be reasonably found, provision is made for substituted service by delivering the notice to a person on the land, or attaching it to something conspicuous on the land.[146] Very specific provision is also made for service involving Church of England land.[147] Further provisions operating only for agricultural land allow notices to be served by serving an agent or servant of the occupier responsible for the control of the land.[148]

9.146 In addition to the provisions in the Agriculture Act 1947, the Pests Act 1954 contains powers allowing the Secretary of State or Welsh Ministers to require an occupier, or a person who appears to have an interest in the land, to state the nature of their interest and the details of others they know have an interest in the land.[149] A failure to comply with such a requirement, or knowingly misstating information in answer, is a summary offence giving rise to a fine of not more than level one on the standard scale.[150]

OFFENCES

9.147 A failure to comply with a pest control order, a rabbit control order or a captive animal control order is a summary offence and gives rise to a fine not exceeding level two on the standard scale,[151] and to a further fine of no more than five pounds for each day after conviction that the failure continues.[152]

9.148 In addition, it is a summary offence to obstruct the exercise of any power under the Act, including the powers to provide services to assist compliance and the power to enter to secure compliance. These offences give rise to a fine not exceeding level two on the standard scale.[153]

[146] Agriculture Act 1947, s 107(4).

[147] Agriculture Act 1947, s 107(5). Where the notice is to be served upon the owner of land vested in the incumbent of a benefice of the Church of England a copy must also be served on the Diocesan Board of Finance in the relevant diocese.

[148] Agriculture Act 1947, s 100(6). Under s 109(3) land is used for agriculture where it is used for: horticulture, fruit growing, seed growing, dairy farming and livestock breeding and keeping, grazing land, meadow land, osier land, market gardens and nursery grounds, and woodland where that use is ancillary to the farming of land for other agricultural purposes.

[149] Pests Act 1954, s 4(1).

[150] Pests Act 1954, s 4(2). The standard scale of fines was introduced by s 37 of the Criminal Justice Act 1982. Level 1 on the scale currently corresponds to a fine of £200.

[151] Currently £500.

[152] Agriculture Act 1947, s 100(1).

[153] Agriculture Act 1947, s 106(7).

Pests Act 1954

PROCEDURAL FAIRNESS SAFEGUARDS

9.149 Before a rabbit clearance order is made, the Secretary of State or Welsh Ministers must engage in reasonable consultation with those representing the interests of farmers, owners of agricultural land, and workers employed in agriculture and forestry in the area. For this purpose, the Secretary of State or Welsh Ministers must give reasonable notice of the proposed order to those with an interest in land in the area.[154] This notice should include the proposed directions, and state a time within which representations can be made about the proposal. The proposal can only come into effect once the consultation period has ended and the Secretary of State or Welsh Ministers give effect to the proposals (either with or without modification).[155] The resulting rabbit clearance order must then be published in a suitable manner, and the Secretary of State must take reasonable steps to bring it to the attention of anyone affected by it.[156]

SERVICE OF NOTICE

9.150 Also in this context, the Pests Act 1954 copies the relevant Agriculture Act 1947 provisions.[157] As a result, rabbit clearance orders regarding agricultural land can be validly served on an agent or servant of the occupier responsible for the control of the land.[158]

POWERS TO INSPECT AND ENTER LAND TO MONITOR COMPLIANCE

9.151 Section 1(8) of the Pests Act 1954 provides the Secretary of State or Welsh Ministers with the power to authorise entry onto land to determine whether to exercise the powers under the Act and to monitor compliance with obligations flowing from a rabbit clearance order.[159]

OTHER ENFORCEMENT PROVISIONS

9.152 All other relevant enforcement provisions in connection with rabbit clearance orders, including powers of entry to ensure compliance, notice requirements, cost recovery provisions and criminal offences for failing to comply with the requirements of a rabbit clearance are equivalent to the enforcement provisions available under the Agriculture Act 1947.[160]

[154] Pests Act 1954, s 1(11).

[155] Pests Act 1954, s 1(12).

[156] Pests Act 1954, s 1(10).

[157] Pests Act 1954, s 1(9). The Pests Act provides in s 1(9) that ss 100 and 106(2)-(7) of the Agriculture Act apply to the Pests Act as if the provisions of the Pests Act were contained in s 98 of the Agriculture Act

[158] Pests Act 1954 s 1(9) read with Agriculture Act 1947, s 100(6).

[159] Pests Act 1954, s 1(8).

[160] Pests Act 1954, s 1(9). The Pests Act 1954 provides in s 1(9) that ss 100 and 106(2)-(7) of the Agriculture Act 1947 apply to the 1954 Act as if the provisions of that Act were contained in s 98 of the Agriculture Act

Weeds Act 1959

POWERS TO INSPECT, ENTER AND SECURE COMPLIANCE IN DEFAULT

9.153 Under the Weeds Act 1959 the Secretary of State or Welsh Ministers may authorise entry onto land to inspect compliance with a weed control order. Before this power is exercised, the occupier must be served with notice.[161]

9.154 Where an occupier fails to comply with a weed control order, in addition, the Secretary of State or Welsh Ministers may enter land for the purpose of securing compliance with the terms of the order.[162]

COST RECOVERY

9.155 Where the Secretary of State or Welsh Ministers take action to remedy an occupier's default, reasonable costs can be recovered from the occupier or, where the occupier cannot practicably be located, from the owner.[163]

9.156 Where the Secretary of State or Welsh Ministers seek costs but cannot reasonably locate the owner's details, a court application can be made for a local land charge under the Law of Property Act 1934 to secure payment of the sum.[164]

9.157 Owners who have, as a result of the default of the occupier, been required to pay the Secretary of State or Welsh Ministers' costs, or suffered loss from a charge on the land, may recover these losses from the occupier.[165]

OFFENCES

9.158 Unreasonable failure by an occupier to comply with a requirement in a weed control order is a summary offence giving rise to a fine not exceeding level three on the standard scale.[166] Failure within fourteen days of conviction to remedy the failure is itself a further offence liable again to a fine not exceeding level three on the standard scale.[167]

9.159 Obstructing any authorised person from entering land for the purpose of giving effect to a weed control order, in addition, is a summary offence giving rise to a fine not exceeding level three on the standard scale.[168]

[161] Weeds Act 1959, s 4(1).

[162] Weeds Act 1959, s 3(1).

[163] Weeds Act 1959, s 3(1). Under s 11(2) of the Weeds Act an owner is defined to include the holder of a lease interest or other limited estate in the land.

[164] Weeds Act 1959, ss 3(2) and (3). The application is made to the County Court or High Court as appropriate according to the amount and the respective jurisdictional limits of the courts. On enforcement of the charge, the Secretary of State has the powers and remedies under the Law of Property Act, and the powers and remedies of a mortgagee by deed having powers of sale and lease, surrender of lease, and appointment of a receiver

[165] Weeds Act 1959, s 3(4).

[166] Weeds Act 1959, s 2(1). Level 3 corresponds to a fine of £1,000.

[167] Weeds Act 1959, s 2(2).

[168] Weeds Act 1959, s 4(2).

DELEGATION OF POWERS

9.160 The Secretary of State or Welsh Ministers may authorise local authorities to exercise any of their powers under the Act (other than powers to make regulations).[169]

SERVICE OF NOTICE

9.161 The Weeds Act 1959, broadly speaking, replicates the service provisions in section 107(1) to (5) of the Agriculture Act 1947, which are set out above.[170]

Enforcement provisions: reform

9.162 As noted above, we have concluded that under the new framework the various control powers discussed above should be supported by one consistent set of enforcement provisions which reflect, as far as possible, the set of enforcement provisions available in connection with the power to issue species control orders recently introduced in schedule 9A of the Wildlife and Countryside Act 1981.

Consultation

9.163 At present, some of the existing pest control powers contain express obligations to consult relevant persons before issuing an order (rabbit control and rabbit clearance orders) whereas others, for no apparent reason, are silent as to whether relevant persons should be consulted before the issuing of a control order (pest control, captive animal control, and weed control orders). On balance, we have concluded that under the new framework the Secretary of State or Welsh Ministers should be under an express obligation to consult any person they consider appropriate before issuing any control order. We do not think that such requirement would be particularly onerous on the basis that in this context, we would expect the Secretary of State or Welsh Ministers always to consult, as a matter of practice, any person who would be directly or indirectly affected by a control order.

Recommendations

Recommendation 228: we recommend that before making a control order or a rabbit clearance order the appropriate authority should be under an obligation to consult those who will be affected.

This recommendation is given effect in the draft Bill by paragraph 4(1)(a) of schedule 31.

Service of notice and reasons

9.164 As noted above, the current notice provisions are complex and unnecessarily prescriptive. We have concluded, as a result, that they should be simplified in line with the more flexible notice requirements that have been introduced in paragraph 13 of schedule 9A of the Wildlife and Countryside Act 1981 in connection with the issuing of species control orders.

[169] Weeds Act 1959, s 5. This power would appear to now overlap with the power contained in s 78 of the Natural Environment and Rural Communities Act 2006 to delegate functions of Defra. This is dealt with further below.

[170] Weeds Act 1959, s 6(5).

9.165 In line with the existing approach, notice of a pest control, rabbit control, captive animal control and weed control order should be given to every person affected by the order. By contrast, in line with section 10(5) of the Pests Act 1954, a rabbit clearance order should be brought to the attention of those affected by it in a reasonable manner.

9.166 The current provisions in connection with pest control, rabbit control, captive animal control and weed control orders require formal service upon the subject of the order. We have concluded that this is an unnecessarily prescriptive and inflexible manner of achieving the basic object of bringing the making of an order, or the intention to exercise entry powers, to the attention of the person affected. In line with paragraph 14 of schedule 9A to the 1981 Act we have concluded that the existing notice provisions could be substituted by a simple requirement that notice be given, without prescribing an exhaustive list of mechanisms that should be employed to achieve that end.

9.167 As anticipated above, we have also concluded that, in line with paragraph 14(3) of schedule 9A to the 1981 Act, whenever notice of an order is served, it should consistently include a statement explaining the reasons for making the order and the reasons for any requirement, or proposal to take steps, included in the order. This requirement has the benefit of improving the transparency of the process and allowing the appeal procedure discussed below to be meaningfully exercised.

Recommendations

Recommendation 229: we recommend that the mechanism for giving notice of control orders or rabbit clearance orders should be simplified. The exercise of rabbit clearance order powers should simply be brought to the attention of those affected in a reasonable manner. The exercise each of the other powers should require that notice be given to all those affected. Whenever notice of an order is served, it should include a statement explaining the reasons for making the order and the reasons for any requirement, or proposal to take steps, included in the order.

This recommendation is given effect in the draft Bill by paragraph 8 of schedule 31.

Appeal rights

9.168 Except for the limited rights to submit objections to the Secretary of State or Welsh Ministers in connection with the making of a rabbit control order, at present there is no consistent provision for appeal against the making of the above orders. Following our recommendations regarding species control orders in connection with invasive non-native species,[171] and in the light of the virtually identical nature of the control powers available in connection with pests and weeds, we have concluded that under the new framework equivalent appeal rights should be available in connection with the making and content of orders to control pests, weeds, rabbits and captive animals. We have concluded, therefore, that under the new framework any person directly affected by the order should have the right to appeal to the First-tier Tribunal.

9.169 In line with schedule 9A to the Wildlife and Countryside Act 1981, we have concluded that – other than in circumstances where the making of an order is considered an emergency – the above orders should not come into force before the end of the period in which an appeal may be made under the First-tier Tribunal rules.[172]

Recommendation

Recommendation 230: we recommend that those affected by the exercise of control orders or rabbit clearance orders should have a right of appeal to the First-tier Tribunal, and that orders should not come into effect until the period for appealing the order has expired.

This recommendation is given effect in the draft Bill by paragraph 10 of schedule 31.

[171] See Wildlife Law: Control of Invasive and Non-native Species (2014) Law Com No 342, paras 3.185 to 3.193.

[172] Wildlife and Countryside Act 1981, sch 9A, para 12(2)(a) and Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 SI 2009 No 1976. To give effect to this policy in practice we suggest that consequential provisions under the Wildlife Bill should be made to amend r 22(1)(b) of the 2009 rules with a view to ensuring that, for the purpose of para 10 of sch 31 of the Wildlife Bill, the time limit for appealing a decision before the Tribunal starts from the date of publication of the order or the day notice has been served.

Emergency provision

9.170 At present no different regime operates in circumstances where the Secretary of State or Welsh Ministers consider that the making of a control order is urgently necessary. As a result of our recommendations to align the procedural fairness provisions available in connection with the above orders with the procedural fairness provisions available in connection with species control orders issued under schedule 9A to the Wildlife and Countryside Act 1981, we have taken the view that provision should also be made allowing their relaxation in cases of urgency. In this regard, the 1981 Act provisions allow a species control order to be made in circumstances where the relevant authority considers that the making of the order is urgently necessary.[173] The most important aspect of such an emergency order is to allow the order to come into effect immediately, rather than after the period in which an appeal may be made has expired.

Recommendations

Recommendation 231: we recommend that in cases where the decision-maker considers the making of the order to be urgently necessary a control or rabbit clearance order should be capable of coming into force immediately.

This recommendation is given effect in the draft Bill by paragraph 7(3) of schedule 31.

Powers to enter land, secure compliance, and recover costs of doing so

9.171 In line with the general scope of the existing control powers, we have concluded that under the new framework the Secretary of State or Welsh Ministers should have consistent powers to enter land and carry out pest or weed control activities directly, and recover the costs of doing so from the person who has failed to carry out the required activities. Provisions allowing equivalent actions to be taken were included in the species control order powers introduced under schedule 9A of the Wildlife and Countryside Act 1981.[174] We have concluded, therefore, that under the new framework the powers to enforce compliance with control orders in connection with rabbits, pests, weeds and captive animals should be modelled on those provisions.

9.172 As discussed above, section 3 of the Weeds Act 1959 allows the relevant authority to register a land charge over land whose owner cannot be located for the purpose of recovering expenses for control operations carried out by the relevant authority in that land. For the purpose of ensuring consistency across the enforcement powers available in connection with different orders, we have decided, on balance, that the effect of section 3 of the Weeds Act 1959 should not be replicated under the new framework. Such a mechanism is not currently available in connection with any other control orders and we do not consider it indispensable for the purpose of ensuring the effective recovery of expenses from the owner or occupier of the land in question.

[173] Wildlife and Countryside Act 1981, sch 9A, para 10(2)(c).

[174] Wildlife and Countryside Act 1981, sch 9A, paras 18(1) to (4).

Recommendations

Recommendation 232: we recommend that the powers to enter land to secure compliance with an order, and to recover the costs of doing so, should be consistent with those in schedule 9A of the Wildlife and Countryside Act 1981.

This recommendation is given effect in the draft Bill by paragraphs 11 and 14(1)(e) of schedule 31.

Offences

9.173 In line with the existing offences, and the equivalent offences available for the purpose of ensuring compliance with species control orders, we have concluded that under the new framework a person who, without reasonable excuse, fails to comply with a requirement imposed by a control order should be guilty of an offence. A person should also be guilty of an offence if he or she intentionally obstructs another person from taking steps which are required under a control order. This will extend the obstruction offence to the weed control order provisions which, for unclear reasons, is currently unavailable under the Weeds Act 1959.

Recommendations

Recommendation 233: we recommend that failing to comply with a control order or rabbit clearance order, and obstructing compliance with such an order, should constitute a criminal offence.

This recommendation is given effect in the draft Bill by paragraph 12 of schedule 31.

Liability

9.174 In line with paragraph 20 of schedule 9A to the Wildlife and Countryside Act 1981, we have concluded that a person or, as the case may be, the relevant authority, should be exempt from civil liability for doing anything required to be done by, or in pursuance of a requirement of, a control order in connection with pests, weeds, rabbits or captive animals.

Recommendations

Recommendation 234: we recommend that those complying with a control order or rabbit clearance order be exempted from civil liability.

This recommendation is given effect in the draft Bill by paragraph 13 of schedule 31.

Powers of entry

9.175 As noted, the present provisions, broadly speaking, allow for entry onto land to investigate whether the issuing of a control order is needed and for the purpose of securing compliance with the requirements of an order. In line with our general policy of ensuring consistency across equivalent powers, we have concluded that the present assortment of powers to enter and secure compliance should be replaced by a consistent set of powers reflecting the scope of the powers of entry applicable to control orders in connection with invasive non-native species.[175] In other words, we have concluded that under the new framework it should be possible to authorise entry onto land the following reasons:

(1) assisting a decision-maker to determine whether any of the powers under the Act should be exercised, or whether to make or revoke an order;

(2) investigating suspected non-compliance with an order made;

(3) carrying out work as necessary to ensure that action is taken in the way specified in an order; and

(4) placing a notice.

9.176 In line with paragraph 21(2) of schedule 9A to the 1981 Act, we have taken the view that under the new framework the power to enter land for the purpose of determining whether one of the species which may be subject to an order is present should not be capable of being exercised unless the relevant decision-maker has reasonable grounds to suspect that such a species is present.[176]

9.177 Paragraph 22 of schedule 9A to the 1981 Act requires a warrant to be obtained from a justice of the peace in certain circumstances, including where the premises consist of a dwelling, the premises are unoccupied or entry is in pursuance of an emergency control order. As discussed in our Report on the control of invasive non-native species, these provisions introduce appropriate safeguards for the purpose of ensuring that interference with property rights affected by entry powers is proportionate and compliant with the European Convention on Human Rights. On the same grounds, we have concluded that equivalent provisions to those contained in paragraph 22 of schedule 9A to the 1981 Act should be replicated under the new framework in connection with the exercise of powers of entry for the purpose of giving effect to orders for the control of pests, weeds, rabbits and captive animals.

Recommendations

Recommendation 235: we recommend that the powers of entry in connection with control orders and rabbit clearance orders should be consistent with those applying to species control orders and provide equivalent safeguards.

This recommendation is given effect in the draft Bill by paragraphs 14 to 17 of schedule 31.

[175] Wildlife and Countryside Act 1981, sch 9A, paras 21 to 24.

[176] Wildlife Bill, sch 31, para 14(2).

Compensation and expenses

9.178 At present, provisions for the recovery of costs of control operations vary depending on the nature of the order in question. We have concluded that – in line with paragraph 13(2) of schedule 9A to the Wildlife and Countryside Act 1981 – under the new framework any pest, weed, rabbit or captive animal control order should be capable of including provisions on payments to be made by the Secretary of State or Welsh Ministers to the persons subject to the order in respect of reasonable costs of the required operations as well as payments that an owner may have to make in respect of the reasonable costs incurred by the Secretary of State or Welsh Ministers in carrying out a control operation.

9.179 In line with our general policy, we have concluded that – in line with paragraph 25 of schedule 9A to the Wildlife and Countryside Act 1981 – under the new framework provision should be made for powers allowing compensation to be paid to the subject of an order by the Secretary of State or Welsh Ministers for financial loss resulting from compliance with an order or the exercise of entry powers.

Recommendations

Recommendation 236: we recommend that the Secretary of State or Welsh Ministers should have a power to provide compensation to those who have suffered loss resulting from compliance with a control order or rabbit clearance order.

This recommendation is given effect in the draft Bill by paragraph 18 of schedule 31.

Codes of practice

9.180 In line with section 1A of the Weeds Act 1959, we have concluded that under the new framework the Secretary of State or Welsh Ministers should have the power to issue codes of practice regarding the spread of ragwort.

Recommendations

Recommendation 237: we recommend that the powers under section 1A of the Weeds Act 1959 to make a code of practice regarding ragwort be replicated in the new regime.

This recommendation is given effect in the draft Bill by clause 92.

Direction for disposal of species taken or killed

9.181 As noted above, the Agriculture Act 1947 and the Pests Act 1954 provide the Secretary of State or Welsh Ministers with the power to make provision for the disposal of animals killed or captured in pursuance of a pest control, rabbit control, and captive animal control orders. We have concluded that this power should be replicated under the new framework and extended to any relevant control order.

Recommendations

Recommendation 238: we recommend that there be a power for the Secretary of State or Welsh Ministers to direct how the animals, plants, birds or eggs affected by a control order or rabbit clearance order should be disposed of.

This recommendation is given effect in the draft Bill by paragraph 6(2)(c) of schedule 31.

POWERS OF ENTRY ONTO LAND FOR THE PURPOSE OF KILLING OR CAPTURING SEALS

9.182 Section 11 of the Conservation of Seals Act 1970 provides the Secretary of State or Welsh Ministers with a power to authorise any person to enter land to obtain information relating to seals for the purpose of any of the functions of the Secretary of State or Welsh Ministers under the 1970 Act or for the purpose of killing or capturing seals for the purpose of preventing damage to fisheries by seals.[177]

9.183 As we have not consulted in connection with the exercise of this power, we have concluded that its effect should be replicated under the new framework. In the light of informal discussions in connection with the above power with officials from the Department of Environment, Food and Rural Affairs, the Welsh Government and the Marine Management Organisation, however, it would not appear that this power was ever exercised by the Welsh Ministers or the Marine Management Organisation. Nor is there any record of this power being exercised by the Secretary of State in recent years. We suggest, therefore, that some thought should be given to whether this power should be retained at all or whether it could be simplified and consolidated with the existing pest control powers discussed in Chapter 9.

9.184 In replicating the effect of the above powers under the Wildlife Bill we have had to consider the meaning of the expression "obtaining information relating to seals for the purpose of any of the functions of the Secretary of State under this Act".

9.185 The functions of the Secretary of State or Welsh Ministers under the 1970 Act are now limited to the power to make an order prohibiting the killing of seals in certain areas,[178] the power to amend the list of prohibited firearms[179] and the power to authorise a person to enter land for the purpose of killing or capturing seals.[180]

[177] Notice requirements in connection with the exercise of the power under s 11 are located in s 12 of the Conservation of Seals Act 1970.

[178] Conservation of Seals Act 1970, s 3.

[179] Conservation of Seals Act 1970, s 1(2).

[180] Conservation of Seals Act 1970, s 11(1)(b).

9.186 We have concluded that under the new framework the expression “any of the functions of the Secretary of State under this Act” should only be replicated as a reference to the function of authorising a person to enter land for the purpose of killing or capturing a seal. This is because the power to enter land for the purpose of obtaining information about seals is clearly irrelevant to the power to prohibit particular firearms by order. Whilst in principle the power to enter land for the purpose of obtaining information about seals could be relevant to the power to prohibit the killing of seals in certain areas, it is unclear why any landowner or occupier would ever refuse entry for the general purpose of monitoring the population of seals in certain areas.

Recommendations

Recommendation 239: we recommend that the power of the Secretary of State or Welsh Ministers to authorise any person to enter land to obtain information about seals or enter land to kill or capture seals for the purpose of preventing damage to fisheries should be replicated under the new regime.

This recommendation is given effect in the draft Bill by clause 109.

Recommendation 240: we recommend that the power to enter land for the purpose of obtaining information about seals should only be capable of being exercised in connection with the function of authorising a person to subsequently enter land for the purpose of killing or capturing seals.

This recommendation is given effect in the draft Bill by clause 109(1)(b).

Recommendation 241: we recommend that consideration be given to whether the powers to authorise entry onto land for the purpose of obtaining information about seals, or for the purpose of killing or capturing seals, should be repealed or, if still relevant, consolidated with the existing pest control powers.

CHAPTER 10
CRIMINAL LIABILITY, ENFORCEMENT AND SANCTIONS

INTRODUCTION

10.1 In this Chapter we make recommendations with the aim of simplifying, rationalising and reforming the mechanisms for ensuring effective compliance with the substantive prohibitions discussed in Chapters 4 to 9 of this Report. For presentational purposes we have decided to structure the discussion under three main headings: criminal liability, enforcement powers and sanctions for non-compliance.

10.2 The first part of this Chapter discusses the extent to which criminal liability for a wildlife crime should be attributed to persons or entities that did not physically carry out the prohibited activity. In this part we discuss, in particular, the circumstances in which employers and principals should be liable for wildlife crimes committed by their employees or agents and the effect of the Environmental Crime Directive[1] on the liability of corporations, partnerships and unincorporated organisations for certain wildlife offences, secondary participation and attempts.

10.3 The second part of this Chapter focuses on the simplification and rationalisation of the existing enforcement toolkit available to constables, wildlife inspectors and the courts in connection with wildlife crimes and poaching, including stop and search powers, powers of arrest, powers to enter premises for the purpose of investigating a crime and forfeiture powers. As wildlife legislation is currently scattered around a large number of Acts dating back to the early nineteenth century, the scope and language of existing enforcement provisions is often inconsistent and, in the context of poaching, significantly outdated. The aim of our recommendations in this part of the Chapter is to replicate the effect of the existing enforcement provisions in a modern and coherent structure which applies consistently across equivalent substantive offences.

10.4 The third part of this Chapter focuses on civil and criminal sanctions for wildlife crimes. As highlighted by a large number of stakeholders from all sides of the spectrum, wildlife crimes are very rarely prosecuted; when prosecutions are brought against offenders, the available penalties (six months' imprisonment or a fine or both) are often an insufficient deterrent. Available penalties may be easily absorbed by individuals and businesses and are inconsistent with the significantly higher penalties available in other areas of environmental law. In line with our consultation proposals, in this part we make recommendations for extending the application of the existing regime for issuing civil sanctions to all relevant wildlife crimes under the new framework. We also make recommendations for raising the level of available criminal sanctions, making substantive wildlife offences triable on indictment and punishable for a maximum of two years' imprisonment or a fine or both.

[1] Directive 2008/99/EC on the protection of the environment through criminal law, Official Journal 2008 L 328 of 6.12.2008 p 28.

CRIMINAL LIABILITY FOR WILDLIFE CRIMES

Extending criminal liability to the ultimate beneficiaries of wildlife crime

10.5 In the consultation paper[2] we proposed the introduction of a version of the "vicarious liability" offence recently introduced in Scotland by the Wildlife and Natural Environment (Scotland) Act 2011.[3] That offence, broadly speaking, makes an employer or principal liable for certain wild bird offences committed by a person under their control, unless the employer or principal can demonstrate that they took all reasonable steps to prevent the commission of the offence by the subordinate. The creation of the offence in the Wildlife and Natural Environment (Scotland) Act 2011 was driven by a perceived need to help prevent raptor persecution, particularly on grouse moors.

10.6 We, however, saw the logic in having a wider offence which applied to all wildlife crime. There were two reasons behind our original proposal. First, the person in control, or the company employing an individual, could very well be the ultimate beneficiary of wildlife crime committed by their agent or employee. As a result, holding them liable for wildlife crime committed by those under their control in circumstances where they directed, or could have prevented, the relevant transgression would ensure that the ultimate beneficiary of the activity is appropriately punished. Secondly, extending liability to employers or principals would enhance the deterrent effect of the legislation by encouraging employers and principals to take steps to prevent the commission of wildlife crimes by those who act for their benefit. To minimise their potential liability, those in control would have to exercise due diligence by providing adequate information and training for those under their control concerning the proper conduct of their work.

10.7 Although the majority of consultees supported the above policy, the proposal was strongly opposed by Defra and many businesses including, in particular, stakeholders from the farming and the shooting industries. The argument against the introduction of a "vicarious liability" offence, in essence, was that it would constitute an unjust extension of criminal liability and that it would have the effect of imposing excessive burdens on businesses.

10.8 Whilst we remain convinced of the need for an offence which fulfils the policies set out above, we have accepted that creating a "vicarious liability" offence of general application would result in the extension of the normal principles of criminal liability beyond the threshold that would be necessary to fulfil our desired policy outcomes. The Scottish version of "vicarious liability" imposes a reverse burden of proof upon the employer or principal and creates a novel form of liability. A "vicarious liability" offence of general application could carry the risk of imposing significant additional burdens on all those whose activity may affect wildlife, including farmers and developers.

[2] Wildlife Law (2012) Law Commission Consultation Paper No 206, Question 9-9.

10.9 After extensive discussions with stakeholders, we concluded that our policy could be more simply achieved by making it an offence for a principal knowingly to cause or permit the commission of a wildlife crime (including poaching) by a person under his or her control. We are persuaded that this formulation would be more proportionate and fair than the offence of "vicarious liability" as we originally conceived it. The reason why the "vicarious liability" offence stretches the normal principles of criminal liability is because it has the effect of making the defendant automatically liable for all offences committed by a subordinate unless he or she can demonstrate that reasonable steps had been taken to prevent the commission of the offence and that he or she did not know that an offence was being committed by the subordinate. The "knowingly causing or permitting" offence is different, as in that context the burden of proof lies entirely on the prosecution. "Causing" or "permitting" offences are also relatively common in wildlife law, being already widely used in the context of secondary activity and methods and means offences. [4]

10.10 Broadly speaking, under the new framework a person will be found to have "knowingly caused" another person to commit a wildlife offence only in circumstances where the prosecution shows that the offence was committed under the actual authority of the defendant or in consequences where he or she controlled or influenced the acts of the subordinate, and that the defendant contemplated that the prohibited act would ensue.[5] A person will be found to have "knowingly permitted" the commission of a wildlife offence where the prosecution shows that the defendant knew that a person under his or her control was committing a wildlife offence and was unwilling to prevent that person from committing the relevant offence. Unwillingness to prevent the wildlife offence in question would, in most cases, be inferred from evidence showing that the defendant failed to take reasonable steps readily available to prevent it.[6]

Recommendations

Recommendation 242: we recommend that it should be a general offence for a person to knowingly cause or permit another person under his or her control to commit any substantive offence under the new regime.

This recommendation is given effect in the draft Bill by clause 121.

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

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

[5] See, for instance, *Attorney General of Hong Kong v Tse Hung-lit* [1986] AC 876, at [883].

[6] See, by analogy, *R v Brock (John Terrence)* [2001] 1 WLR 1159, at [23-25] by Rose LJ.

Implementation of the Environmental Crime Directive

10.11 The Environmental Crime Directive seeks to meet concerns relating to the effectiveness of environmental law[7] by imposing minimum standards of criminal liability and penalties in connection with activities carried out in serious breach of certain core prohibitions under a list of EU environmental protection obligations.

10.12 For present purposes, the Directive requires that the following should constitute a criminal offence, when unlawful and committed intentionally or with at least serious negligence:

(1) 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

(2) 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.[8]

10.13 For the purpose of the prohibitions in the first subparagraph above, article 2(b)(i) of the Environmental Crime Directive provides that a "protected wild fauna or flora species" is a species listed in annex 4 to the Habitats Directive or annex 1 to the Wild Birds Directive. For the purpose of the prohibitions of trading in the second subparagraph, a "protected wild fauna or flora species" means a species listed in annex A or B to Council Regulation (EC) No 338/97.[9] As discussed in previous chapters, Council Regulation No 338/97 gives effect to the Convention on International Trade in Endangered Species of Fauna and Flora (CITES) in the EU legal order; the trade prohibitions under the Convention cover a number of species, such as peregrine falcons or cetaceans, trade in which is also prohibited by the Wild Birds and Habitats Directives.

10.14 The Directive further provides that member states must ensure that inciting, aiding and abetting prohibited conduct mentioned above is also punishable as a criminal offence,[10] and that the offences referred to above are punishable by effective, proportionate and dissuasive sanctions.[11]

[7] Directive 2008/99/EC on the protection of the environment through criminal law, preamble.

[8] Directive 2008/99/EC, art 3(f) and (g).

[9] Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein.

[10] Directive 2008/99/EC, art 4.

[11] Directive 2008/99/EC, art 5.

10.15 Article 6 of the Environmental Crime Directive imposes minimum levels in connection with the extension of criminal liability to legal persons[12] for relevant environmental crimes. Article 6(1) provides that the liability of legal persons is to be engaged when an offence has been committed by natural persons "in a leading position"[13] within the organisation; article 6(2) provides that liability should also be engaged where the lack of supervision or control by a natural person "in a leading position" has made possible the commission of an offence. The offence must be committed for the "benefit" of the legal person.[14] Whilst the term "benefit" is left undefined, it would appear that its effect is to allow member states to exempt legal persons from criminal liability in circumstances where a relevant person carried out an activity which was completely unrelated to the company's business.

10.16 Member states are under a general obligation to ensure that legal persons found liable pursuant to article 6 are punishable by effective, proportionate and dissuasive penalties (whether of a "civil" or "criminal" nature).[15]

Secondary participation

10.17 The Environmental Crime Directive requires member states to extend liability for serious wildlife crimes falling within the scope of the Habitats and Wild Birds Directive to any person aiding and abetting the commission of a crime. The extension of criminal liability to persons found to have aided, abetted, counselled or procured the commission of an offence is a long standing common law doctrine which applies to all criminal offences, unless expressly or impliedly excluded by statute.[16] By virtue of section 44(1) of the Magistrates' Courts Act 1980 and section 8 of the Accessories and Abettors Act 1861, a person found to have aided, abetted, counselled or procured the commission of an offence will be treated as being guilty of the same offence. As the above obligation is already appropriately given effect in law, we have concluded that it is unnecessary to create an express statutory provision making it an offence to aid or abet the commission of a wildlife offence.

10.18 The Environmental Crime Directive further requires member states to criminalise acts of "incitement" in connection with serious infringements of species-specific protection provisions under the Habitats and Wild Birds Directives.

[12] Directive 2008/99/EC, art 2(d), defines "legal person" as "any legal entity having such status under national law, except public bodies of a state exercising sovereign rights and public international organisations".

[13] Directive 2008/99/EC, art 6(1), provides that the "leading position" of the natural person must be based on a power of representation of the legal person; an authority to take decisions on behalf of the legal person; or an authority to exercise control within the legal person.

[14] Directive 2008/99/EC, arts 6(1) and (2).

[15] Directive 2008/99/EC, art 7.

[16] *R v Jefferson* [1994] 1 All ER 270.

10.19 The common law offence of incitement was abolished by section 59 of the Serious Crimes Act 2007[17] and replaced by a number of generally applicable statutory offences of encouraging or assisting the commission of a crime under sections 44 to 46 of the 2007 Act. As the scope of sections 44 to 46 of the 2007 Act would appear to fully cover the scope of the "incitement" prohibition required by the Environmental Crime Directive, we have concluded that it is unnecessary to expressly introduce a free-standing offence of incitement under the new framework.

Criminal liability of corporate bodies

10.20 As indicated above, article 6 of the Environmental Crime Directive requires member states to extend liability for the commission of serious wildlife offences prohibited under the Wild Birds and the Habitats Directives to "legal persons" in cases where such offences have been committed for the benefit of the legal person by any person who has a "leading position" within that legal person or where the lack of supervision or control by a natural person in a "leading position" has "made possible the commission of an offence".

10.21 All wildlife offences in domestic law expressly refer to "persons". By virtue of paragraph 5 of schedule 1 to the Interpretation Act 1978, any reference to a "person" should be read as implicitly including "a body of persons corporate or unincorporated". This means, in essence, that existing wildlife offences are to be interpreted as being applicable to corporate or unincorporated bodies of persons unless a contrary intention appears from the statute.[18]

10.22 The general principles for ascribing criminal liability to a corporation in England and Wales have been developed through case law. Criminal liability is traditionally attributed to corporate bodies on the basis of the "identification doctrine" as expressed in the leading case of *Tesco Supermarkets Ltd v Nattrass*.[19] In this case the House of Lords held that a company may be held criminally liable only for the blameworthy acts of

> …the board of directors, the managing director and perhaps other superior officers of a company [who] carry out the functions of management and speak and act as the company[20]

or, more generally, of a person

> …who is in actual control of the operations of a company or of part of them and who is not responsible to another person in the company

[17] With effect from 1 October 2008 (Serious Crime Act 2007 (Commencement No. 3) Order 2008 SI 2008 No 2504).

[18] It is worth noting that the earlier Interpretation Act 1889, repealed by the Interpretation Act 1978, treated corporations differently from unincorporated associations, such that "person" only included corporations, for the purpose of criminal liability. The Interpretation Act 1978 retained the application of the 1889 Act in relation to statutes passed prior to the 1889 Act. It follows that the above presumption does not apply to poaching and wildlife offences under the Game Act 1831.

[19] [1972] AC 153.

[20] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 171 by Lord Reid.

> for the manner in which he discharges his duties in the sense of being under his orders.[21]

10.23 This traditional approach has been relaxed in a number of more recent cases following the *Meridian Global* case,[22] where the Privy Council took a more flexible approach to the issue of corporate liability, suggesting that whether a particular act is to be attributed to a corporation should be a question of statutory construction.[23]

REFORM

10.24 In terms of compliance with article 6 of the Environmental Crime Directive, the above common law doctrine would already appear to give full effect to the requirements of article 6(1) on the basis that the identification doctrine, as developed in *Tesco Supermarkets Ltd v Nattrass*, attributes criminal liability to a corporate body in circumstances where the prohibited activity in question was committed by a person in a leading position in that body.[24] Current domestic case-law on corporate liability, on the other hand, does not appear to impose liability on legal persons where the mere "lack of supervision or control" by their officers has "made possible" the commission of the offence. Since wildlife protection legislation contains no express statutory provisions extending the criminal liability of corporate bodies in those circumstances, it would appear that article 6(2) of the Environmental Crime Directive is currently inappropriately transposed in domestic law.

10.25 At the beginning of this section we made recommendations for extending criminal liability to any person who knowingly caused or permitted the commission of a wildlife offence by a person under his or her control. We have considered, therefore, whether the extension of criminal liability in those circumstances would be sufficient to cover the existing transposition gap in connection with article 6(2) of the Directive. On balance, we were not convinced that the introduction of a general "knowingly causing or permitting" offence would fully cover the existing gap. Article 6(2), in fact, appears to require member states to impose a stricter form of liability, in that it only requires the prosecution to show that the management of the corporate body failed to "supervise" or "control", whether or not they had knowledge that a particular wildlife offence was being committed.

[21] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 187 by Viscount Dilhorne.

[22] *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

[23] See generally, D Ormerod, *Smith & Hogan Criminal Law* (13th ed 2011) pp 261 to 262.

[24] Arguably domestic law even goes further than the requirements of the Environmental Crime Directive in relation to one aspect: the action for the purposes of liability does not need to be "for the benefit of the legal person. In *Moore v I Bresler Ltd* [1944] 2 All ER 515, the company was convicted for making false returns with intent to deceive contrary to the Finance (No 2) Act 1940, when returns were made by the company secretary and branch sales manager, despite the fact that the reason for such false returns was to conceal the fraudulent sale by those two officers of the company's property. The decision in *Moore v I Bresler* was cited with approval in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, 512 by Lord Hoffman.

10.26 We have concluded, therefore, that for the purpose of appropriately giving effect to article 6(2) of the Environmental Crime Directive, under the new framework there should be a free-standing offence extending the criminal liability of legal persons to circumstances where a person has committed an offence while acting as employee or agent of the legal person and the relevant offence would not have been committed but for the failure of an officer of the legal person to exercise supervision or control over the employee or agent in question.[25]

10.27 Given the potentially significant extension of criminal liability involved, we have concluded that the application of the above offence should be strictly limited to the species and prohibited activities expressly referred to in articles 3(f) and (g) read together with article 2(b) of the Directive.[26]

10.28 We have also concluded that it should be a defence for the legal person to show that all reasonable steps were taken and all due diligence was exercised to avoid the commission of the offence. While we acknowledge that, strictly speaking, the Directive does not cater for this defence, we concluded that a due diligence defence must be implied in the wording of article 6(2). This is because in the absence of such defence a body corporate could potentially be held liable for any wildlife offence committed by an employee or agent on the basis that, in every case, the prosecution could always establish that – had the company aggressively micromanaged every action of their employees or agents – an offence would not have been committed.

10.29 The Environmental Crime Directive, in theory, does not apply to "cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species".[27] We have decided not to expressly transpose such restriction on the basis that it is not for us to determine what quantities and impacts are negligible and that simply incorporating the concept of "not negligible" into our Bill would create an unacceptable degree of legal uncertainty in connection with the prosecution of wildlife crimes.

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

[26] As was indicated in paras 10.13 to 10.16 above, for the purpose of the killing, etc offences the species are those protected by the Habitats and Wild Birds Directives, whilst for the purpose of the trading offence they are the species protected by CITES. A number of species protected by the Habitats and Wild Birds Directives are also protected by CITES, though a number are not. The Habitats and Wild Birds Directives also contain prohibitions on trade, discussed in Chapter 4 above. The implementation of Regulation 338/97 (which gives effect to CITES) is outside the scope of this project. However, the obligation under the Environmental Crime Directive to extend the liability of legal persons in connection with prohibited trade is not limited to national offence provisions that are conceived, at national level as existing in compliance with CITES. We have therefore taken the view that the prohibited trade offences in the Wildlife Bill should be accompanied by the extended corporate liability required by the Environmental Crime Directive where – but only where – a species protected by the Habitats or Wild Birds Directive is also protected by CITES and covered by the Control of Trade in Endangered Species (Enforcement) Regulations 1997 SI 1997 No 1372, which give effect domestically to CITES.

[27] Directive 2008/99/EC, arts 3(f) and 3(g).

10.30 We have also decided to refrain from expressly transposing the expression limiting the effect of article 6(2) to acts committed "for the benefit" of the legal person on the basis that the concept of "benefit" is both unclear and arguably unhelpful. This is because in many circumstances it would be difficult to show that a wildlife crime was committed for the "benefit" as opposed to the detriment of the legal person. We have taken the view that the concept of "benefit" should be simply transposed by restricting the criminal liability of the legal person to offences committed by persons while they were acting as the employee or agent of the legal person, on the basis that when a person acts as the employee or agent of a legal person he or she would generally be considered as acting for the benefit of the relevant legal person.

CRIMINAL LIABILITY OF THE OFFICERS OF A BODY CORPORATE FOR OFFENCES COMMITTED BY THE BODY CORPORATE

10.31 In line with the existing approach under the Conservation of Habitats and Species Regulations 2010,[28] the Wildlife and Countryside Act 1981,[29] the Protection of Badgers Act 1992[30] and the Deer Act 1991,[31] we have concluded that where any wildlife offence committed by a body corporate that has been proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, the relevant officer should be guilty of the same offence and should be liable to be proceeded against accordingly.

Recommendations

Recommendation 243: we recommend that a body corporate should be guilty of a wildlife offence listed in articles 3(f) and 3(g) in respect of species respectively listed in articles 2(b)(i) and (ii) of the Environmental Crime Directive where:

(1) A person commits an offence while acting as employee or agent of the body corporate; and

(2) The relevant offence would not have been committed but for the failure of a director, manager, secretary or similar officer of the body corporate to exercise proper supervision or control over the actions of the agent or employee.

This recommendation is given effect in the draft Bill by clauses 122(1) to (5).

Recommendation 244: we recommend that in proceedings for such an offence, it should be a defence for the body corporate to show that all reasonable steps were taken and all due diligence exercised to avoid the commission of the offence.

This recommendation is given effect in the draft Bill by clause 122(6).

[28] SI 2010 No 490, reg 124.

[29] Wildlife and Countryside Act 1981, s 69.

[30] Protection of Badgers Act 1992, s 12B.

[31] Deer Act 1991, s 14.

Recommendation 245: we recommend that where any wildlife offence committed by a body corporate has been proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, the relevant officer should also be guilty of the same offence and should be liable to be proceeded against accordingly.

This recommendation is given effect in the draft Bill by clauses 163(1) to (3).

Criminal liability of partnerships and unincorporated associations

10.32 As discussed above, article 6 of the Environmental Crime Directive extends to all "legal persons", defined as any legal entity having such status under national law.[32] This poses interesting questions in connection with the status of partnerships or other unincorporated associations in domestic criminal law.

10.33 More broadly, we think that clarifying the criminal liability of partnerships and other unincorporated associations under the new framework would be useful, on the basis that many regulatory addressees in the context of wildlife law may be organised through such business structures.

Criminal liability of partnerships and unincorporated associations in domestic law

10.34 As discussed above, schedule 1 to the 1978 Act provides, among other things, that the word "person" should be generally interpreted as including "a body of persons corporate or unincorporated".[33] The earlier Interpretation Act 1889, repealed by the 1978 Act, treated corporations differently from unincorporated associations. The result is that any statute passed before 1889 does not attract the presumption that the word "person" should include an unincorporated association.

10.35 As is demonstrated by a number of Court of Appeal rulings,[34] while the existence of the statutory presumption has made it possible to prosecute partnerships and unincorporated associations as separate entities in a number of cases, the practical effects of attributing criminal liability to partnerships and unincorporated associations are far from being settled.

[32] Environmental Crime Directive, art 2(d).

[33] Section 5 of the Interpretation Act 1978 provides that unless the contrary intention appears, words and expressions listed in schedule 1 to the 1978 Act should be construed in accordance with their definition in that schedule.

[34] See, in particular, *R v RL and JF* [2008] EWCA Crim 1970, [2009] 1 All ER 786 and *R v W Stevenson and sons (a partnership)* [2008] EWCA Crim 273, [2008] 2 Criminal Appeal Reports 14.

10.36 In *R v RL*, for instance, the Court of Appeal concluded that a necessary consequence of the different nature of an unincorporated association was that all its members remain jointly and severally liable for the actions done with their authority. The result was that because the 900-odd members of a golf club were all maintainers of the tank from which a prohibited substance entered controlled waters in contravention of section 85 of the Water Resources Act 1991, they could be all found guilty of the strict liability offence of causing the leakage.[35] Smith and Hogan expressed concerns about the "very serious ramifications [of the above ruling] for presumably tens of thousands of members of unincorporated bodies that exist in England and Wales".[36]

10.37 The effect of criminal liability on partnerships and unincorporated associations has, to some extent, been clarified in a number of more recent statutes which make specific provision for the way such bodies may be held criminally liable and the effect of the criminal liability on the partners or the members of the unincorporated association.

10.38 Section 77 of the Health Act 2006, for instance, clarifies that proceedings for an offence alleged to have been committed by a partnership or an unincorporated association must be brought in the name of the partnership or unincorporated association in question (and not in the name of the partners or members). It also clarifies that a fine imposed on a partnership or an unincorporated association upon its conviction for an offence must be paid out of the partnership's assets or the funds of the association. Similarly to regulation 124 of the Conservation of Habitats and Species Regulations 2010, section 76 of the 2006 Act then provides that when an offence committed by a partnership or unincorporated association is proved to have been committed with the consent or connivance of a partner, an officer of the association or a member of the governing body of the association, or may be attributable to any neglect on their part, the partner, officer or member of the governing body should also be guilty of an offence and liable to be proceeded against and punishable accordingly.

Reform

10.39 As a matter of policy, we have taken the view that under the new framework it should be clear that partnerships and unincorporated associations should be capable of being prosecuted in their own name, on the basis that that the effectiveness of the current wildlife protection regime should not be undermined by the choice of organisation made by the regulated community.

[35] *R v RL and JF* [2008] EWCA Crim 1970, [2009] 1 All ER 786 at [33]. The Court of Appeal, nevertheless, noted that any offence requiring evidence of a particular mental element would be likely to raise different questions because of the personal and individual nature of a guilty mind.

[36] D Ormerod, *Smith and Hogan Criminal Law* (13th ed 2011) p 269.

10.40 We have concluded, therefore, that their criminal liability, and the liability of their members, should be clarified by introducing provisions replicating the effect of sections 76 and 77 of the Health Act 2006. Such provisions would ensure that when a criminal prosecution is brought against a partnership or any other unincorporated association, criminal liability could only be attributed to the body in question, unless the offence is proved to have been committed with the consent or connivance, or any neglect on the part of a relevant officer of the body in question.

10.41 Of course, as discussed by the Court of Appeal in *R v RL*,[37] the benefits of prosecuting a partnership or an unincorporated association, as opposed to the individual officers who were directly responsible for the commission of the offence, would be something which would have to be determined on a case by case basis, by taking into account the structure, assets and management of the body in question.

Compliance with the Environmental Crime Directive

10.42 Whilst at common law partnerships and other unincorporated associations are not legal persons and could not, therefore, incur criminal liability,[38] for the reasons discussed above, the situation is different in the context of statutory offences. On this basis, we have concluded that for the purpose of giving effect to article 6(2) of the Environmental Crime Directive, there is no good reason why partnerships or unincorporated associations should be treated differently from bodies corporate. While in general terms such bodies would not be regarded as "legal persons" in domestic law, the possibility, under the existing legislation, to bring criminal proceedings against such bodies in their own name for a wildlife offence implies that for the purpose of such criminal proceedings they have some form of legal personality which allows them to exist as separate entities from their membership.

10.43 We have concluded, therefore, that under the new framework a partnership or unincorporated association should also be capable – to the extent that the Environmental Crime Directive requires it in the case of Habitats and Wild Birds Directive species – of being prosecuted for an offence committed by an employee or agent in circumstances where the offence would not have been committed but for the failure of a partner, an officer of the association or a member of its governing body to exercise supervision or control over the actions of the employee or agent.

Recommendations

Recommendation 246: we recommend that partnerships and other unincorporated associations should be capable of being prosecuted for a wildlife (or poaching) offence in their own name.

[37] *R v RL and JF* [2008] EWCA Crim 1970 [2009] 1 All ER 786 at [33].

[38] D Ormerod, *Smith and Hogan Criminal Law* (13th ed 2011) p 267 to 268.

Recommendation 247: we recommend that proceedings for an offence alleged to have been committed by a partnership or an unincorporated association should be brought in the name of the partnership or unincorporated association, and a fine imposed on a partnership or an unincorporated association upon its conviction for an offence should be paid out of the partnership's assets or the funds of the association.

This recommendation is given effect in the draft Bill by clause 164.

Recommendation 248: we recommend that when an offence committed by a partnership or unincorporated association is proved to have been committed with the consent or connivance of a partner, an officer of the association or a member of the governing body of the association, or may be attributable to any neglect on their part, the partner, officer or member of the governing body should also be guilty of an offence and liable to be proceeded against and punishable accordingly.

This recommendation is given effect in the draft Bill by clauses 163(4) and (5).

Recommendation 249: we recommend that a partnership or unincorporated association should also, in principle, be capable of being prosecuted for an offence committed by an employee or agent in circumstances where the relevant wildlife offence (an offence listed in articles 3(f) and 3(g) in respect of species respectively listed in articles 2(b)(i) and (ii) of the Environmental Crime Directive) would not have been committed but for the failure of a partner, an officer of the association or a member of its governing body to exercise supervision or control over the actions of the employee or agent.

This recommendation is given effect in the draft Bill by clause 122.

Criminal liability for attempts

General legislation on attempts

10.44 Currently section 1 of the Criminal Attempts Act 1981 makes it an offence to attempt the commission of any offence which is triable in England and Wales as an indictable offence,[39] apart from among other things, an offence of conspiracy or an offence of aiding, abetting, counselling, procuring or suborning the commission of an offence.

10.45 Section 1(1) of the 1981 Act provides that a person is guilty of attempting to commit an offence if, with intent to commit an offence, he or she does an act which is more than merely preparatory to the commission of the offence.

10.46 Since, apart from a limited number of offences in connection with the release of non-native species, most offences under the current wildlife legislation are triable only summarily, section 1 of the 1981 Act is currently not applicable to most wildlife crimes.

[39] The expression "triable…as an indictable offence" in s 1(4) suggests that s 1(1) would automatically apply to any offence which is triable either summarily or on indictment. This is confirmed by sch 1 of the Interpretation Act 1978, which provides that "indictable offence" means an offence which, if committed by an adult, is triable on indictment, whether it is exclusively so triable or triable either way".

Express provisions on attempts under current wildlife law

10.47 The Conservation of Habitats and Species Regulations 2010 and the Wildlife and Countryside Act 1981 and the Conservation of Seals Act 1970 contain provisions of general application, making it an offence to attempt the commission of any substantive wildlife offence contrary to those pieces of legislation.[40]

10.48 The corresponding provisions under the Deer Act 1991 are drafted slightly more narrowly: the provision on attempts does not apply to poaching offences under section 1 or offences relating to the sale and purchase of venison under section 10 of the 1991 Act.[41] Section 1(2)(a) of the Deer Act 1991, nevertheless, expressly makes it an offence for a person intentionally to take, kill or injure, or attempt to take, kill or injure, any deer without the consent of the owner or occupier of the land or other lawful authority.

10.49 The Protection of Badgers Act 1992, insofar as it applies to England and Wales,[42] does not contain any generally applicable provision on attempts. Section 1 of the 1992 Act, however, expressly makes it an offence to attempt to kill, injure or take a badger.

10.50 A number of earlier Acts which are relevant to the current review contain no reference to criminal attempts. Those include the Game Acts from the Night Poaching Act 1828 onwards, the Pests Act 1954 and the Protection of Animals Act 1911.[43]

[40] Conservation of Habitats and Species Regulations 2010, reg 116(1); Wildlife and Countryside Act 1981, s 18(2).

[41] Deer Act 1991, s 5. For technical reasons, s 5 of the 1991 Act also excludes the offence of breaching a licensing condition under s 8(5) of the 1991 Act. While this was an offence under the Deer Act 1963, its removal from the scope of s 5 o f the 1991 Act was recommended by the Law Commission in the consolidation report which led to the 1991 Act. In its recommendations, the Law Commission explained that the application of s 4 of the Deer Act 1963 to the offence of breaching a licence condition had been an unintentional consequence of certain subsequent changes that had been made to the structure and provisions of the Bill for the 1963 Act. Such changes, according to the Law Commission's report, also unintentionally resulted in cl 4(1) and 4(2) of the 1963 Bill (the equivalent to ss 5(1) and 5(2) of the Deer Act 1991) accidentally applying to each other (see Deer Bill: Report on the Consolidation of Certain Enactments Relating to Deer (1991) Law Commission Report No 197, p 2).

[42] The Nature Conservation (Scotland) Act 2004, sch 6, para 26(9) introduced in relation to Scotland a general statutory attempt provision analogous to ss 18(1) and (2) of the Wildlife and Countryside Act 1981.

[43] According to the Law Commission Final Report on attempts, conspiracy and incitement that led to the drafting of the Criminal Attempts Act 1981, also the common law of attempt appears to have been traditionally applicable to indictable offences only (see Attempt and Impossibility in relation to Attempt, Conspiracy and Incitement (1980) Law Com No 102, paras 2.102 to 2.105).

Reform

10.51 As was anticipated at the beginning of this Chapter, we shall recommend, in the last section of the Chapter, making all substantive wildlife offences triable either summarily on indictment. The effect of that recommendation is that section 1 of the Criminal Attempts Act 1981 will make all substantive offences under the new framework capable of being committed by attempt.[44]

10.52 In practice the application of section 1 of the Criminal Attempts Act 1981 to all wildlife offences under the new framework would only extend criminal liability in connection with an extremely limited number of offences, given that the great majority of existing offences are already covered by specific statutory attempt provisions.

10.53 Our view is that – apart from significantly simplifying the consolidation of the existing criminal offences – the extension of liability in relation to offences which are currently not capable of being attempted would only have positive effects in terms of prevention, enforcement and prosecution of certain criminal offences. For instance, there would appear to be no logical reasons why a person may not be currently prosecuted for attempting to sell a live badger or attempting to destroy a badger sett in contravention of the Protection of Badgers Act 1992. Similarly, it is difficult to see why a person attempting to enter land without the consent of the owner in circumstances suggesting a clear intention to pursue game may not be prosecuted for attempting to poach a relevant game animal.

10.54 We have concluded, therefore, that under the new framework a person should be guilty of an offence if he or she attempts to commit any wildlife offence (including poaching). The reason why the Wildlife Bill does not contain any express references to attempts is that, if our recommendations to make all wildlife offences under the new framework triable on indictment are accepted, all of those offences will be automatically capable of being attempted by operation of section 1 of the Criminal Attempts Act 1981.

Recommendations

Recommendation 250: we recommend that all wildlife offences, including poaching offences, should be capable of being committed by attempt.

Criminal liability for being in possession of a prohibited item with the intention to commit an offence

10.55 The Conservation of Habitats and Species Regulations 2010[45] and the Wildlife and Countryside Act 1981[46] also provide that a person commits a wildlife offence if – for the purpose of committing an offence – he or she is in possession of anything capable of being used for committing the offence.

[44] Our proposal that it should remain an offence to attempt the commission of wildlife offences under the new framework received overwhelming support in consultation (see Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 7-7).

[45] SI 2010 No 490, reg 116(2).

[46] Wildlife and Countryside Act 1981, s 18(2).

10.56 This offence represents an extension of the offence of attempting to commit a wildlife offence, as it is capable of covering preparatory activities which are excluded from the definition of "attempt" in section 1 of the Criminal Attempts Act 1981. Nevertheless, it would not appear to expand the liability of the defendant unduly, as a successful prosecution would depend on showing that the defendant was in possession of the article with a prohibited purpose in mind. Our 2007 consultation paper on conspiracy and attempts suggested that a prosecution in such cases would only be successful in cases where there is "cogent evidence of that purpose, perhaps because the preparations were so far advanced that an attempt to commit the intended offence was evidently imminent". [47]

10.57 As in the context of attempts, the above offence currently applies to any wildlife offence under the Conservation of Habitats and Species Regulations 2010[48] and the Wildlife and Countryside Act 1981.

10.58 Under the Deer Act 1991 the offence is limited to a list of prohibited items and does not apply to poaching or the unlawful sale of venison. Arguably, however, the list of prohibited articles under the Deer Act 1991 is broad enough to cover the great majority of instances in which the prosecution would be able prove that the defendant possessed the articles for the purpose of committing an offence under those sections. This is because it would be unlikely that the prosecution would be able to prove that a person intended to kill a deer during the close season unless he or she was found in possession of an item commonly used to kill deer.

10.59 Under the Conservation of Seals Act 1970 the offence is limited to the possession of certain specific items the use of which for the purpose of killing, injuring or capturing seals is prohibited under the 1970 Act.[49] In the context of the 1970 Act, in other words, the offence does not apply to a person who is in possession of any weapon (other than a prohibited firearm) with the purpose of killing a seal during a specified close season. We were unable to find any logical reason why section 8(2) of the 1970 Act does not cover the possession of a firearm (other than a prohibited firearm) or any other article capable of being used for killing, taking or injuring a seal during the close season.

[47] Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, para 14.63.

[48] Under the Conservation of Habitats and Species Regulations 2010, this offence also applies in connection with the offence of making a false statement for the purpose of obtaining a licence and the offence of breaching a licence condition.

[49] Conservation of Seals Act 1970, s 8(2).

10.60 Our view is that an open-ended list of articles would not unduly extend the criminal liability of fishermen in the context of the offences replicating section 2(2) of the 1970 Act (killing a seal during the close season). While an open-ended list would include a number of items that could be commonly found in a fishing boat, such as hooks or nets, a prosecution could only be brought in cases where there was cogent evidence that the fisherman intended to unlawfully kill, capture or injure seals during the close season or in circumstance in which the preparations for the commission of such prohibited activity were "so far advanced that an attempt to commit the intended offence was evidently imminent".[50] It is also worth noting that, as discussed in Chapter 5, regulation 43 of the 2010 Regulations prohibits the use of a list of items in connection with the killing or capture of all species of seal which have a natural range including Great Britain. As the prohibition on possessing the means of committing an offence[51] applies to regulation 43, the effect of the 2010 Regulations is to make it already an offence to possess articles such as nets or semi-automatic weapons with the intention of killing, capturing or injuring a seal.

10.61 In line with our recommendations in connection with attempts, we have concluded that under the new framework there should be a general offence of possessing anything capable of being used for committing a substantive wildlife offence for the purpose of committing that offence. On balance, we have taken the view that this offence should also extend to poaching, on the basis that there may well be circumstances in which a person may be found in possession of items in circumstances which clearly show that he or she intended to kill or capture game without authority.

10.62 The above offence currently extends to the offence of making a false statement for obtaining a licence or registration and to the offence of breaching the condition of a licence. Whilst we think that it would be unlikely that many prosecutions would ever be brought on those grounds, we have taken the view that there may well be realistic circumstances where persons could be successfully prosecuted for such offences. For instance, it would not be unthinkable to hold a person criminally liable for possessing an article for the purpose of committing the above offence in circumstances where he or she was found in possession of false documents intended for the purpose of making a false statement to obtain a licence or registration. As from the text of the 2010 Regulations and the 1981 Act it transpires that the drafters clearly intended to cover such cases, we have concluded, on balance, that the existing approach should be replicated under the new framework.

Recommendations

Recommendation 251: we recommend that possessing anything capable of being used for committing a wildlife or poaching offence for the purpose of committing that offence should be a general offence under the new regime.

This recommendation is given effect in the draft Bill by clause 114.

[50] Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183, para 14.63

[51] Conservation of Habitats and Species Regulations 2010 SI 2010 No 490, reg 116(2).

Criminal liability for making a false statement to obtain a licence or registration

10.63 Under the Wildlife and Countryside Act 1981[52] and the Conservation of Habitats and Species Regulations 2010[53] it is, as has just been mentioned, currently an offence to make a false statement for the purpose of obtaining a registration[54] or a licence.

10.64 We have concluded that this offence should be replicated and extended to all applications for a licence or registration under the new framework. This is because a person who obtains a licence by making a false statement will be shielded from criminal liability for the commission of any otherwise prohibited activities carried out in accordance with the conditions of the licence until the licence is revoked by the relevant licensing authority. As a matter of policy, it would be absurd if such person could not be prosecuted for an offence, given that making a false statement to obtain a licence or registration not only constitutes wrongful conduct in itself, but may also have negative repercussions on the population of a protected species.

Recommendations

Recommendation 252: we recommend that making a false statement for the purpose of obtaining a registration or a wildlife licence under the new regime should constitute a criminal offence.

This recommendation is given effect in the draft Bill by clause 119.

GENERAL ENFORCEMENT POWERS FOR WILDLIFE CRIMES

10.65 In this section we make recommendations for the simplification and rationalisation of existing enforcement powers in connection with the wildlife offences discussed in Chapters 4, 5, 6 and 9 and in connection with the poaching prohibitions discussed in Chapter 8.

[52] Wildlife and Countryside Act 1981, s 17.

[53] Conservation of Habitats and Species Regulations 2010, reg 57.

[54] Registration refers in particular to the obligation to register certain birds in accordance with regulations issued by the Secretary of State or Welsh Ministers under s 7 of the Wildlife and Countryside Act 1981.

Wildlife offences: constables' powers

Powers to stop, search and seize items

10.66 Regulation 112 of the Conservation of Habitats and Species Regulations 2010 and section 19(1) of the Wildlife and Countryside Act 1981 provide constables with the power to stop and search any person, without a warrant, if the constable suspects, with reasonable cause, that evidence of the commission of an offence is to be found on that person. They also provide constables with the power to search and examine anything in the person's possession if the constable suspects, with reasonable cause, that evidence of an offence is to be found in or on that thing, as well as to seize and detain anything which may be evidence of the commission of an offence – including animals, plants, anything in respect of which the offence was committed or any vehicle, animal, weapon or other thing which was used to commit the offence.

10.67 As the above powers are at least as extensive as equivalent enforcement powers in the Protection of Badgers Act 1992, the Deer Act 1991 and the Conservation of Seals Act 1970, we have concluded that under the new framework constables should have equivalent powers to those provided under regulation 112 of the 2010 Regulations and section 19(1) of the 1981 Act. The above powers should extend to all wildlife offences discussed in Chapters 4, 5 6 and 9 of this Report.

Powers of entry and inspection

10.68 Regulation 109(1) of the Conservation of Habitats and Species Regulations 2010, section 12 of the Deer Act 1991 and section 19(2) of the Wildlife and Countryside Act 1981 further provide constables with the power to enter premises, other than dwellings, for the purpose of exercising the powers discussed above, or arresting a person in accordance with section 24 of the Police and Criminal Evidence Act 1984, in circumstances where the constable suspects with reasonable cause that any person is committing or has committed a wildlife offence. In the context of the 1991 Act, the same power extends to poaching offences and related trade offences under sections 1 and 10 of the 1991 Act.

10.69 Under regulation 109(3) of the 2010 Regulations and section 19(3) of the 1981 Act a constable is also expressly provided with the power to enter a dwelling for the purpose of exercising the above enforcement functions if authorised by a warrant signed by a justice of the peace.

10.70 We have concluded that the above powers should be replicated under the new framework and extended to all wildlife offences discussed in Chapters 4, 5, 6 and 9 of this Report. While the above powers do not currently apply in connection with offences committed under the Protection of Badgers Act 1992 or the Conservation of Seals Act 1970, we do not think that there is any good policy reason why constables should not have the power to enter premises for the purpose of exercising powers of arrest or powers to collect evidence for the purpose of enforcing or investigating crimes in connection with badgers and seals.

10.71 In the light of our general policy of making all wildlife offences triable on indictment, we have concluded that it is unnecessary to replicate the power to enter dwellings with a warrant on the basis that an equivalent power of general application is available for all indictable offences under the Police and Criminal Evidence Act 1984.[55]

Powers in relation to samples

10.72 Regulation 113 of the Conservation of Habitats and Species Regulations 2010 and section 19XA of the Wildlife and Countryside Act 1981 provide constables with the power to take samples from species in pursuance of their enforcement and inspection powers. This power is subject to the following restrictions:

(1) no sample may be taken from an animal other than by a veterinary surgeon; and

(2) no sample may be taken from a live animal or plant unless the person taking it is satisfied on reasonable grounds that taking it will not cause lasting harm to the specimen.[56]

10.73 We have concluded that the effect of the above power should be retained in the new framework and extended to all wildlife offences discussed in Chapters 4, 5, 6 and 9 of this Report on the basis that we do not see any good policy reason why constables should not be capable of obtaining samples for the purpose of investigate offences in connection with badgers, deer or seals.

Recommendations

Recommendation 253: we recommend that constables' powers to stop, search and seize items under regulation 112 of the Conservation of Habitats and Species Regulations 2010 and section 19(1) of the Wildlife and Countryside Act 1981 should be consolidated, replicated under the new regime and extended to all wildlife crimes.

This recommendation is given effect in the draft Bill by clause 129(1).

Recommendation 254: we recommend that constables' powers of entry and inspection under regulation 109 of the Conservation of Habitats and Species Regulations 2010 and section 19(2) of the Wildlife and Countryside Act 1981 should be consolidated, replicated under the new regime and extended to all wildlife crimes.

This recommendation is given effect in the draft Bill by clauses 129(2) and (3).

[55] See, in particular, Police and Criminal Evidence Act 1984, s 8.

[56] Conservation of Habitats and Species Regulations 2010, reg 115; Wildlife and Countryside Act 1981, s 18F.

Recommendation 255: we recommend that constables' powers to take samples under regulation 113 of the Conservation of Habitats and Species Regulations 2010 and section 19XA of the Wildlife and Countryside Act 1981 (as respectively restricted by regulation 115 and section 18F) should be consolidated, replicated under the new regime and extended to all wildlife crimes.

This recommendation is given effect in the draft Bill by clauses 130 and 141.

Wildlife inspectors

10.74 Under the Conservation of Habitats and Species Regulations 2010 and the Wildlife and Countryside Act 1981 a number of enforcement functions may also be exercised by wildlife inspectors. A wildlife inspector is a person authorised in writing by the Secretary of State or Welsh Ministers.[57]

Powers of entry and inspection

PREMISES OTHER THAN DWELLINGS

10.75 Regulation 110 of the Conservation of Habitats and Species Regulations 2010 provides wildlife inspectors with the power to enter and inspect any premises (including a ship within the marine area as well as any other vehicle or mode of transport) other than a dwelling for the purpose of ascertaining whether a "species offence"[58] is being or has been committed or for the purpose of verifying any statement or representation made, or document or information supplied, by an occupier of the premises in connection with an application for, or the holding of, a licence granted under regulation 53. The scope of the powers of entry of wildlife inspectors under regulation 110 of the 2010 Regulations is virtually identical to the scope of the powers of wildlife inspectors under section 18B of the Wildlife and Countryside Act 1981 in relation to "group 1" offences.[59]

10.76 In line with the approach that we have adopted above in connection with constables' powers of entry, we have concluded that the above inspection powers should be retained and extended to all wildlife offences discussed in Chapters 4, 5, 6 and 9 of this Report other than offences falling under the list of "group 2" offences (discussed below). We have further concluded that the powers of wildlife inspectors to board ships should be restricted in line with regulations 110(2) to (6) of the 2010 Regulations and in line with the equivalent restrictions imposed upon marine enforcement officers in connection with the enforcement of wildlife offences under sections 237(9) to (12) of the Marine and Coastal Access Act 2009.

[57] SI 2010 No 490, reg 108; Wildlife and Countryside Act 1981, s 18A

[58] A "species offence" is an offence under regs 41, 43, 45 and 58 of the Conservation of Habitats and Species Regulations 2010 SI 2010 No 490, reg 126.

[59] "Group 1" offences are offences under ss 1, 5, 9(1), (2) or (4), 11, 13(1) or 14ZA of the Wildlife and Countryside Act 1981.

10.77 We have noticed that the powers of wildlife inspectors to board ships in the marine area for the purpose of ascertaining whether a wildlife offence is or has been committed, or verifying statements, documents or information supplied in connection with the application of a wildlife licence overlap with the powers available to marine enforcement officers to enforce the same provisions in the marine area.[60] We have considered whether a rationalisation of the functions of wildlife inspectors and marine enforcement officers may benefit the current enforcement regime. As we have not officially consulted the interested parties on this issue, nevertheless, we have decided to refrain from making recommendations for the rationalisation of the existing enforcement powers on the basis that such recommendations, at least in England, would have necessarily have an impact on existing institutional arrangements between different regulatory bodies.

PREMISES INCLUDING DWELLINGS

10.78 Section 18D of the Wildlife and Countryside Act 1981 further provides wildlife inspectors with the power to enter any premises without a warrant, including private dwellings, in a restricted set of circumstances. Broadly speaking, the powers allow wildlife inspectors to enter dwellings occupied by persons who hold, or have applied for, a licence in connection with activities that would otherwise be prohibited by a "group 2" offence or have registered a bird the possession of which would be otherwise prohibited by section 7 of the 1981 Act.[61] The entry must be for purposes connected with a "group 2" licence or an application for a "group 2" licence or registration.[62]

10.79 It would appear that the main rationale behind the extension of wildlife inspectors' powers of inspections under section 18D of the 1981 Act is to prevent persons who are carrying out a licensed business from being shielded from routine inspections merely because the business is being carried out in private dwellings.

10.80 On the face of it, this provision appears inconsistent with the Home Office Powers of Entry Gateway Guidance.[63] The Gateway Guidance states that entry into private dwellings should never be allowed, except in circumstances where "a warrant has been obtained and the court is satisfied that there is good reason to suspect that there may be evidence of wrongdoing on the premises that requires further investigation". In support of this general policy, the Gateway Guidance refers to the case of *Funke v France*,[64] where the European Court of Human Rights considered the absence of a judicial warrant a key factor that made, in that case, the power of French tax inspectors to enter private dwellings to investigate breaches of tax law a disproportionate interference with article 8 of the European Convention on Human Rights.

[60] See, in particular, Marine and Coastal Access Act 2009, ss 237 and 247.

[61] A "group 2" offence is an offence under ss 6, 7, 9(5), 13(2) or 14.

[62] Wildlife and Countryside Act 1981, s 18D(3)(a).

[63] Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/98386/powers-entry-guidance.pdf (last visited 26 October 2015).

[64] (1993) 16 EHRR 297, at [57].

10.81 On balance, we have taken the view that the Gateway Guidance's broad rationale for requiring a warrant in all cases where a power of entry is exercised in connection with private dwellings would not appear to fit this specific case. We have concluded, therefore, that the effect of section 18D of the 1981 should be replicated under the new framework for the following reasons. First, section 18D of the 1981 Act does not apply to all dwellings, but only to dwellings occupied by a narrow category of persons who hold, or have applied for, specific wildlife licences. Section 18D, therefore, could be seen as a standard condition attached to certain wildlife licences. The effect of such standard condition is that a person who decides to apply for a licence to carry out an otherwise prohibited "group 2" activity, in essence, will be treated as having automatically accepted that he or she may be subject to routine inspections wherever the licensed activity is carried out. Secondly, requiring the wildlife inspector to satisfy a justice of the peace that he has a reasonable suspicion that an offence has been committed would be incompatible with the purpose of this power of entry, which is to enable wildlife inspectors to carry out routine inspections. Lastly, as opposed to the power of entry that was challenged in *Funke v France*, the power of entry in section 18D does not include any powers to seize items, except for a limited power to take samples from relevant species.[65]

10.82 For the purpose of ensuring that the above power of entry is applied in a consistent set of cases, we have concluded that under the new framework it should be extended to all wildlife offences which prohibit the trade in protected species.

Powers to examine specimens and take samples

10.83 Section 18C of the Wildlife and Countryside Act 1981 and regulation 114 of the Conservation of Habitats and Species Regulations 2010 provide wildlife inspectors with powers to take samples and examine any specimen when they have exercised their powers of entry under, respectively, section 18B of the 1981 Act and regulation 110 of the 2010 Regulations. Section 18E of the 1981 Act provides wildlife inspectors with equivalent powers in connection with powers of entry exercised in connection with "group 2" offences. The above powers to take samples and examine specimens are subject to the same restrictions as apply to the taking of samples by constables discussed above.

10.84 We have concluded that the above powers should be consolidated and replicated under the new framework in connection with all wildlife offences.

Power to issue codes of practice

10.85 Regulation 120 of the Conservation of Habitats and Species Regulations 2010 provide the Secretary of State and Welsh Ministers with the power to issue codes of practice in connection with the enforcement powers of wildlife inspectors. We have concluded that this power should be retained and extended to all enforcement powers of wildlife inspectors under the new framework.

[65] Wildlife and Countryside Act 1981, s 18E.

Recommendations

Recommendation 256: we recommend that under the new regime the Secretary of State and Welsh Ministers should retain the power to appoint wildlife inspectors.

This recommendation is given effect in the draft Bill by clause 132.

Recommendation 257: we recommend that the existing wildlife inspectors' powers to enter premises other than dwellings under regulation 110 of the 2010 Regulations and section 18B of the Wildlife and Countryside Act 1981 (in relation to "group 1" offences) should be consolidated, replicated under the new regime and extended to the investigation of all wildlife offences other than "group 2" offences.

This recommendation is given effect in the draft Bill by clause 133.

Recommendation 258: we recommend that existing wildlife inspectors' powers to enter dwellings occupied by persons who hold, or have applied for, a licence in connection with activities that would otherwise be prohibited by a "group 2" offence or have registered a bird the possession of which would be otherwise prohibited by section 7 of the Wildlife and Countryside Act 1981 should be retained and extended to all equivalent wildlife offences under the new regime.

This recommendation is given effect in the draft Bill by clause 135.

Recommendation 259: we recommend that consideration should be given to whether a rationalisation of the functions of wildlife inspectors and marine enforcement officers may benefit the current enforcement regime.

Recommendation 260: we recommend that existing wildlife inspectors' powers to take samples and examine specimens under regulation 110 of the Conservation of Habitats and Species Regulations 2010 and section 18B of the Wildlife and Countryside Act 1981 (as respectively restricted by regulation 115 and section 18F) should be consolidated, replicated under the new regime and extended to all wildlife crimes.

This recommendation is given effect in the draft Bill by clauses 134 and 136.

Recommendation 261: we recommend that the Secretary of State and Welsh Ministers should retain the power to issue codes of practice in connection with the enforcement powers of wildlife inspectors.

This recommendation is given effect in the draft Bill by clause 143.

Marine enforcement officers

10.86 Marine Enforcement Officers may be appointed by the Marine Management Organisation (in England) or Welsh Ministers (in Wales). Commissioned officers of any of Her Majesty's ships or any person in command or charge of any aircraft or hovercraft of the Royal navy, the Army or the Royal Air Force also qualify as "marine enforcement officers".

10.87 As highlighted above, marine enforcement officers may currently exercise a number of enforcement powers in connection with wildlife protection legislation, including all substantive offences under the Conservation of Habitats and Species Regulations 2010, the Wildlife and Countryside Act 1981 and the Conservation of Seals Act 1970,[66] as long as they are exercised in a "relevant enforcement area" as defined in sections 237(3) to (13) of the Marine and Coastal Access Act 2009. The same enforcement powers may be exercised in connection with the enforcement of fisheries and marine licensing legislation.

10.88 In the light of our decision to refrain from making recommendations that may alter existing institutional arrangements between existing enforcement authorities, we have concluded that it would make little sense to replicate the above enforcement powers under the new framework, given that those powers would have to remain under the 2009 Act for the purpose of enforcing other marine legislation. Of course, consequential amendments would be necessary to replace the current reference to the 2010 Regulations, the 1981 Act and the 1970 Act with a reference to wildlife offences under the new Wildlife Bill.

Recommendations

Recommendation 262: we recommend that the powers of marine enforcement officers should be left under the Marine and Coastal Access Act 2009.

This recommendation is given effect in the draft Bill by clause 145.

Other authorised persons

10.89 Section 1(5) of the Protection of Badgers Act 1992 provides that if a person is found committing an offence under section 1, it is lawful for the owner or occupier of the land or any servant of the owner or occupier, or any constable, to require that person to leave the land and to give his or her name or address. If the person refuses to do so, he or she is guilty of an offence.

10.90 While, as discussed below, we will make recommendations for retaining an equivalent power in the context of poaching offences, we fail to see any good reason for retaining this power in the context of offences under the Protection of Badgers Act 1992. Poaching, as opposed to offences under section 1 of the 1992 Act, is an offence which directly affects the interests of the landowner or person with the rights over the game in that land. The killing, injury or capture of a badger is a wildlife crime, and should be treated, for enforcement purposes, in the same way as any other equivalent prohibited activity.

Recommendations

Recommendation 263: we recommend that the power of an owner or occupier of land, or any constable, to require a person found committing an offence under section 1 of the Protection of Badgers Act 1992 to leave the land and give his or her name and address should not be replicated under the new framework.

[66] Marine and Coastal Access Act 2009, ss 237(1) and (2).

Advice and assistance with enforcement action from nature conservation bodies

10.91 Section 24(4) of the Wildlife and Countryside Act 1981 and regulation 121(1) of the Conservation of Habitats and Species Regulations 2010 provide that the appropriate conservation body (Natural England in relation to England and Natural Resources Wales in relation to Wales) may advise or assist any constable or wildlife inspector (and, in the context of the Wildlife and Countryside Act, any proper officer of a local authority) in, or in connection with, any enforcement action in relation to relevant provisions. We have concluded that the above power should be consolidated and replicated under the new framework.

Recommendations

Recommendation 264: we recommend that the existing powers of appropriate conservation bodies to advise and assist any constable or wildlife inspector in, or in connection with, any enforcement action in relation to relevant provisions should be consolidated, replicated under the new regime and extended to all wildlife crimes.

This recommendation is given effect in the draft Bill by clause 144.

Forfeiture, disqualification and powers of sale

Current legislation

10.92 The courts' forfeiture powers are similar across wildlife legislation. In the Conservation of Habitats and Species Regulations 2010,[67] the Wildlife and Countryside Act 1981[68] and the Protection of Badgers Act 1992,[69] broadly speaking, the court by which a person is convicted is under an obligation to order the forfeiture of animals or plants or other things in respect of which the offence was committed. In addition the court has the power to order the forfeiture of vehicles, weapons and other things used to commit the relevant offence. Section 21(6)(b) of the Wildlife and Countryside Act 1981 further provides that in the context of offences committed in connection with the trade of invasive non-native species or the release of new species, the court may order the forfeiture of animals or plants of the same kind as that in respect of which the offence was committed.

[67] SI 2010 No 490, reg 122.

[68] Wildlife and Countryside Act 1981, s 21(6).

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

10.93 The forfeiture provisions under the Deer Act 1991[70] and the Conservation of Seals Act 1970[71] are slightly different on the basis that they merely provide the relevant court with a power (rather than an obligation) to issue a forfeiture order in relation to the animals or parts of animals that have been illegally obtained. This difference should be seen, in our view, in the light of separate provisions under both Acts which authorise constables to sell the animal in question or, in the case of deer, venison derived from the animal in question.[72]

10.94 Lastly, section 13 of the Protection of Badgers Act 1992 provides that where a dog has been used or was present at the commission of an offence under section 1(1), 2 or 3 of the 1992 Act, the court may, either in substitution or in addition to any punishment order the destruction or other disposal of the dog or an order disqualifying the offender, for such period as it thinks fit, for having custody of a dog.

Discussion

10.95 We have concluded that the basic forfeiture powers discussed above should be consolidated and replicated under the new framework and extended to all wildlife offences discussed in Chapters 4, 5, 6 and 9 of this Report. We have taken the view, however, that under the new framework the court in question should simply have a power, as opposed to an obligation, to order the forfeiture of animals, plants or other things in respect of which the offence was committed, on the basis that there may well be instances where a general obligation to make a forfeiture order may constitute an overly inflexible approach to things in respect of which a wildlife offence was committed.

10.96 In line with section 21(6)(b) of the 1981 Act, we have also concluded that in the context of offences in connection with non-native species, under the new framework the courts should retain the power to order the forfeiture of animals or plants of the same kind as that in respect to which the offence was committed. Similarly, in line with section 13 of the 1992 Act, we have also concluded that the powers to disqualify for having custody of a dog a person convicted of a badger offence in circumstances where a dog was present or was used in connection with the offence and to order the destruction or other disposal of the dog in question should be replicated under the new framework in connection with the relevant badger offences to which it currently applies.

[70] Deer Act 1991, s 13(1).

[71] Conservation of Seals Act 1970, s 6.

[72] Deer Act 1991, s 12(3) and Conservation of Seals Act 1970, s 4(2).

10.97 We have concluded, on the other hand, that the provision in section 4(2) of the 1970 Act authorising a constable to sell seals or seal skins in respect of which an offence had been committed should not be replicated under the new framework. This is primarily because it is difficult to see how a general authorisation to sell products that derive from seals that have been illegally obtained could comply with the EU legislation on seal products in article 3 of Regulation 1007/2009[73] and article 5 of Regulation 737/2010.[74]

10.98 As discussed below, we have concluded that the power to sell illegally captured deer or venison should be consolidated with similar powers to authorise the sale of other game animals that have been seized.

Recommendations

Recommendation 265: we recommend that existing forfeiture powers should be consolidated, replicated under the new regime and extended to all relevant wildlife crimes.

This recommendation is given effect in the draft Bill by clause 124.

Recommendation 266: we recommend that provision under section 4(2) of the Conservation of Seals Act 1970 Act authorising a constable to sell seals or seal skins in respect of which an offence had been committed should not be replicated under the new regime.

Defences to wildlife offences that may otherwise be committed in the exercise of certain enforcement powers

10.99 As discussed in Chapters 4, 5, 6 and 9 the new framework will generally prohibit, subject to a licensing regime, the injuring of a number of protected animal species as well as the possession or control of a number of protected animal or plant species. The result of such prohibitions is that in the absence of a licence or defence, constables, wildlife inspectors and marine enforcement officers would also, as a general rule, be criminally liable when taking a sample from an animal for the purpose of investigating an offence or when seizing a protected animal, egg or plant in respect of which a wildlife offence may have been committed.

[73] Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, Official Journal 2009 L 286/36.

[74] Commission Regulation (EU) No 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products, Official Journal 2010 L 216/1.

10.100 To address the above problem, the Conservation of Habitats and Species Regulations 2010 introduced a number of general defences to the injuring of protected species through sampling and to the possession and transport of protected species in pursuance of the enforcement powers discussed above.[75] To ensure compliance with the Habitats Directive, the 2010 Regulations further provide that the above defences do not apply where it is shown by the prosecution that there were other satisfactory alternatives or that the action was detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range.[76]

10.101 Because, as a matter of policy, we agree that as a general rule acting in pursuance of the above enforcement powers should not constitute a wildlife offence, we have concluded that the effect of the above defences should be replicated under the new framework and extended to offences which are not currently covered by regulations 42 and 46 of the 2010 Regulations, such as offences in connection with wild birds, badgers, deer and seals. As alternative to criminal defences of general application, of course, the above activities could also be covered by general licences. Given that, for the purpose of ensuring the effectiveness of the enforcement regime, criminal liability for such activities would always need to be excluded, we have concluded, on balance, that statutory defences would appear to constitute a more effective option in this context.

Recommendations

Recommendation 267: we recommend that activities carried out in pursuance of relevant enforcement powers that interfere with protected species should not constitute a wildlife offence. This defence should not apply where it is shown by the prosecution that there were other satisfactory alternatives or that the action was detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range.

This recommendation is given effect in the draft Bill by clause 142.

Offences in connection with enforcement powers

10.102 Section 19XB of the Wildlife and Countryside Act 1981 and regulations 118 and 119 of the Conservation of Habitats and Species Regulations 2010 create offences of

[75] SI 2010 No 490, regs 42(3), (4), 46(1) and (2). The defence extends to a number of criminal offences under Part 1 of the Wildlife and Countryside Act 1981, species offences under the Offshore Marine Conservation (Natural Habitats) Regulations 2007 and offences under the Control of Trade in Endangered Species (Enforcement) Regulations 1997 SI 1997 No 1372.

[76] SI 2010 No 490, regs 43(9) and (10). It is worth noting that we do not think that, in practice, such restrictions would have any significant impact on the scope of the above defence. Their presence is nevertheless required for the purpose of demonstrating compliance with the Habitats Directive on the basis that in Case C-6/04 *Commission v United Kingdom* [2005] ECR I-9017 the absence of such express conditions in similar contexts (mercy killing and tending injured animals) was held to constitute a breach of art 16 of the Habitats Directive.

(1) intentionally obstructing a wildlife inspector exercising powers of entry, inspection and sampling;

(2) failing, without reasonable excuse, to give assistance reasonably required (or to make available any specimen in accordance with a requirement) by a wildlife inspector in pursuance of his or her powers to require assistance;

(3) failing, without reasonable excuse, to give assistance reasonably required (or to make available any specimen in accordance with a requirement) by a constable in pursuance of his or her powers to require assistance;

(4) falsely pretending – with intent to deceive – to be a wildlife inspector.

10.103 We have concluded that the above obstruction offences should be replicated under the new framework. The absence of an express offence in connection with the obstruction of a constable under the Wildlife Bill is due to the fact that wilfully obstructing constables in the exercise of their duties is already an offence under section 89(2) of the Police Act 1996.

Recommendations

Recommendation 268: we recommend that the following acts should constitute an offence under the new regime:

(1) intentionally obstructing a wildlife inspector exercising powers of entry, inspection and sampling;

(2) failing, without reasonable excuse, to give assistance reasonably required (or to make available any specimen in accordance with a requirement) by a wildlife inspector in pursuance of his or her powers to require assistance;

(3) failing, without reasonable excuse, to give assistance reasonably required (or to make available any specimen in accordance with a requirement) by a constable in pursuance of his or her powers to require assistance;

(4) falsely pretending – with intent to deceive – to be a wildlife inspector.

This recommendation is given effect in the draft Bill by clauses 131 and 137.

Jurisdiction of the courts

10.104 Section 21(7) of the Wildlife and Countryside Act 1981 provides that any offence under Part 1 of the 1981 Act is deemed, for the purpose of conferring jurisdiction, to have been committed in any place where the offender is found or to which the offender is first brought after the commission of the offence. The same approach is reflected in regulation 123(1) of the Conservation of Habitats and Species Regulations 2010 and section 7 of the Conservation of Seals Act 1970. We have concluded, therefore, that the effect of section 21(7) of the 1981 Act should be replicated under the new framework and extended to all wildlife offences under the new framework.

Recommendations

Recommendation 269: we recommend that any wildlife offence committed under the new regime should be deemed, for the purpose of conferring jurisdiction, to have been committed in any place where the offender is found or to which the offender is first brought after the commission of the offence.

This recommendation is given effect in the draft Bill by clause 123.

Enforcement powers in connection with poaching offences

Citizens' arrest powers

10.105 A number of nineteenth century statutes on poaching give occupiers of land, gamekeepers and other persons having the right to kill game a number of enforcement powers.

10.106 Section 2 of the Night Poaching Act 1828 provides that where any person is found on any land committing an offence as set out in section 1 of that Act, it is lawful for the owner or occupier of the land, the lord of the manor, any gamekeeper or servant of any of these people or any person assisting the gamekeeper or servant to seize and apprehend the offender on the land or, in case of pursuit, in any other place to which the offender may have escaped, and to deliver him as soon as possible into custody so that he can be brought before a justice of the peace. Section 1 of the Night Poaching Act 1844 extends the above provision to any public road, highway or path, so that any owner or occupier of land adjoining either side of the public road, highway or path, their gamekeeper or servant, any person assisting their gamekeeper or servant and all persons authorised under the 1828 Act have the power to apprehend any person committing a crime under the 1828 Act.

10.107 As regards poaching during daytime, the Game Act 1831 contains a number of equivalent powers. Section 31 provides that if a person is found on any land in the daytime in search or pursuit of game, woodcocks, snipes or rabbits, it is lawful for any person having the right to kill game on that land, any occupier, any gamekeeper or servant of either of them or anyone authorised by either of them to require that person to leave the land and to give his or her name or address. If the person refuses to give their name or address or wilfully continues to return to the land, they can be apprehended and brought before a justice of the peace. Section 36 further provides that if a person is found on any land (during the day or night) in search or pursuit of game, and has in his or her possession any game which appears to be recently killed, it shall be lawful for the persons mentioned above to demand from the person so found such game in his possession. If the person does not immediately deliver up the game, any of these people can seize it and take it from him or her, for the use of the person entitled to the game.

10.108 The above powers are the reflection of a different historical era, where gamekeepers had a police-like role in the countryside. Anecdotal evidence that we received in connection with the above provisions from a number of relevant stakeholders, including the National Wildlife Crime Unit and the National Gamekeepers' Organisation, suggests that the above powers of arrest and seizure are now very rarely (if ever) used in practice. This is very likely because of the obvious physical risks involved in directly confronting armed poachers and the risk for the relevant gamekeepers or landowners of being themselves prosecuted.

10.109 We have concluded that the above powers of arrest and seizure should not be replicated under the new framework. Our view is that this would change very little in practice for two principal reasons. First, as discussed, the above powers of arrest are virtually never used. Secondly, as a result of our recommendations to make poaching crimes triable on indictment, a general citizens' power of arrest would be available to the above persons under section 24A of the Police and Criminal Evidence Act 1984. Section 24A of the 1984 Act authorises any person other than a constable to arrest without warrant anyone who is in the act of committing an indictable offence, anyone whom he or she has reasonable grounds for suspecting to be committing an indictable offence and, where an indictable offence has been committed, anyone who is guilty of the offence or whom he or she has reasonable grounds for suspecting to be guilty of it.[77] The above power can be exercised for the purpose of preventing the person in question, among other things, from absconding before a constable can assume responsibility for him or when it appears to the person making the arrest that it is not reasonably practicable for a constable to make the arrest instead.[78]

[77] Police and Criminal Evidence Act 1984, ss 24A(1) and (2).

[78] Police and Criminal Evidence Act 1984, ss 24A(3) and (4).

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

10.110 As discussed above, section 31 of the Game Act 1831 provides that if a person is found on any land in the daytime in search or pursuit of game, woodcock, snipe or rabbits, it is lawful for any person having the right to kill game on that land, any occupier, any gamekeeper or servant of either of them or anyone authorised by either of them to require that person to leave the land and give his or her name or address. If the person refuses to give their name or address or wilfully continues to return to the land, he or she can be apprehended and brought before a justice of the peace.

10.111 Section 1(4) of the Deer Act 1991 similarly provides that if any "authorised person" suspects with reasonable cause that any person is committing or has committed a poaching offence on any land, he or she may require that person to give his or her full name and address and quit the land forthwith.[79] Differently from section 31 of the Game Act 1831, section 1(4) of the 1991 Act does not provide the relevant authorised person with the power to arrest a person who fails to comply with the above requirements. It provides, nevertheless, that any person who fails to comply with a requirement shall be guilty of an offence.

10.112 We have taken the view that a power to require an alleged poacher to leave the land and give his or her name or address may still be useful in certain circumstances. For the reasons explained above, nevertheless, we have concluded that – in line with section 1(4) of the Deer Act 1991 – instead of being backed by a citizen's power of arrest,[80] under the new framework the above power should be simply backed by a criminal offence of failing to comply with the above instructions.

Constables' powers of search and seizure

10.113 Section 2 of the Poaching Prevention Act 1862 provides that it is lawful for any constable or "peace officer"[81] in any highway, street or public place to search any person who he may have good cause to suspect of coming from any land where he has been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his or her possession any game unlawfully obtained or any gun or part of gun. By virtue of section 3(2) of the Game Laws (Amendment) Act 1960, this provision also applies to cartridges and other ammunition, and in relation to nets, traps, snares and other devices of a kind used for the killing or taking of game.

10.114 Section 2 of the 1862 Act further provides that it is also lawful to stop and search any cart or other conveyance in or on which the constable or peace officer has good cause to suspect any such game or article or thing is being carried by the person. If any game, article or thing is found on any such person, cart or other conveyance, it is lawful to seize and detain such game, article or thing.

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

[80] See Game Act 1831, s 31.

[81] The ancient term "peace officer" described various officials with functions relating in part to keeping the peace.

10.115 As the above powers to stop, search and seize items in connection with poaching offences are virtually identical to the powers to stop, search and seize items in connection with wildlife offences under the Conservation of Habitats and Species Regulations and the Wildlife and Countryside Act 1981, we have concluded that under the new framework the powers to stop, search and seize items in connection with poaching offences should be harmonised with the equivalent enforcement powers in connection with wildlife offences.

Powers of entry

10.116 Section 2(1) of the Game Laws (Amendment) Act 1960 provides that a constable who has reasonable grounds for suspecting that a person is committing a poaching offence on any land may enter the land for the purpose of exercising the powers under section 31A of the Game Act 1831 or arresting the person in accordance with section 24 of the Police and Criminal Evidence Act 1984.[82] We have concluded that the effect of the above power should be replicated under the new framework.

Forfeiture

10.117 We have concluded that the effect of the existing forfeiture powers in connection with poaching offences under sections 12 and 13 of the Deer Act 1991 and sections 4 and 4A of the Game Laws (Amendment) Act 1960 should be consolidated and replicated under the new framework.

10.118 We have also concluded, on balance, that the powers to sell illegally captured game under section 12(3) of the 1991 Act and section 3(4) of the 1960 Act should be replicated under the new framework and harmonised in favour of the procedure set out in section 3(4) of the 1960 Act. Section 3(4) of the 1960 Act authorises the sale of illegally obtained game only by written direction of a justice of the peace and further provides that if no conviction takes place the game or other thing seized, or the value thereof, should be restored to the person from whom it was seized. Whilst the effect of section 12(3) of the 1991 Act is virtually identical to section 3(4) of the 1960 Act (on the basis that the proceeds of the sale would be liable to be forfeited by the Court in question), it automatically authorises the sale of seized game without any judicial authorisation. We have taken the view that, on balance, the procedure set out in section 3(4) appeared more transparent and should therefore be preferred to section 12(3) of the 1991 Act.

[82] The application of this provision to Crown land and land occupied by particular authorities is defined in ss 2(2) and (3).

Disqualifications

10.119 Under sections 13(2) and (3) of the Deer Act 1991 the court is provided with a power to cancel any firearm or shotgun certificate held by a person convicted of an offence under sections 1 (poaching) and 10 (selling venison that has been poached or otherwise illegally killed or taken). We have concluded that the effect of this power should be retained under the new framework. As there is no reason why the above power should only apply to poaching offences in connection with deer – as opposed to poaching offences in connection with other game – we have taken the view that it should be extended to all poaching offences, including all offences in connection with the sale of poached game.

Defences to wildlife offences that would otherwise be committed in the exercise of certain enforcement powers

10.120 It is worth noting that because poached animals may also be protected species under the new framework for conservation purposes (so as to give effect, for instance, to the UK's obligations under the Wild Birds Directive), we have concluded that the defences available to persons exercising enforcement powers in the context of wildlife offences should extend to constables exercising enforcement powers in the context of poaching offences.

Offences in connection with enforcement powers

10.121 As discussed above, obstructing an officer in the exercise of his or her duties is already an offence under section 89(2) of the Police Act 1996. We have concluded, therefore, that it is unnecessary to create an express offence with the same effect under the new framework.

Recommendations

Recommendation 270: we recommend that existing landowners or gamekeepers' powers of arrest and seizure in the context of poaching legislation should not be replicated under the new framework.

Recommendation 271: we recommend that under the new regime if the owner or occupier of the land or any person authorised by the owner or occupier (including any person having the right to take or kill deer on the land) or a constable suspects with reasonable cause that any person is committing or has committed a poaching offence on the relevant land, he or she should have the power to require that person to give his or her full name and address and leave the land immediately. Failure to do so should constitute a criminal offence.

This recommendation is given effect in the draft Bill by clause 139.

Recommendation 272: we recommend that constables' stop and search powers under the Poaching Prevention Act 1862 and the Game Laws (Amendment) Act 1960 should be harmonised with the equivalent enforcement powers in connection with wildlife offences.

This recommendation is given effect in the draft Bill by clause 129(1).

Recommendation 273: we recommend that the existing constables' powers to enter the land for the purpose of exercising the powers under section 31A of the Game Act 1831 or arresting the person in accordance with section 24 of the Police and Criminal Evidence Act 1984 should be replicated under the new regime.

This recommendation is given effect in the draft Bill by clause 129(2), (3).

Recommendation 274: we recommend that the effect of the existing forfeiture powers in connection with poaching offences under sections 12 and 13 of the Deer Act 1991 and sections 4 and 4A of the Game Laws (Amendment) Act 1960 should be consolidated and replicated under the new regime.

This recommendation is given effect in the draft Bill by clause 125.

Recommendation 275: we recommend that the procedure for authorising the sale of poached game set out in section 3(4) of the Game Laws (Amendment) Act 1960 should be applicable in connection to all poaching offences under the new regime.

This recommendation is given effect in the draft Bill by clause 140.

Recommendation 276: we recommend that under the new regime a court should have the power to cancel any firearm or shotgun certificate held by a person convicted of a poaching offence.

This recommendation is given effect in the draft Bill by clause 126.

Recommendation 277: we recommend that the defences applicable to enforcement powers in connection with wildlife crimes should extend to the enforcement of poaching offences.

This recommendation is given effect in the draft Bill by clause 142.

Application of enforcement powers to the Crown

10.122 Whilst nothing would appear to restrict a constable or wildlife inspector from entering Crown land for the purpose of investigating a wildlife offence committed under the Conservation of Habitats and Species Regulations 2010, section 66A of the Wildlife and Countryside Act 1981 provides that the powers of entry in connection with the enforcement of wildlife offences under Part 1 of the 1981 Act may not be exercised in premises occupied by the Crown. Powers of entry for the purpose of enforcing poaching legislation may be exercised on Crown land, including land belonging to Her Majesty in person, but not on land occupied by certain Government bodies.[83]

[83] Game Laws (Amendment) Act 1960, s 2.

10.123 We have taken the view that under the new framework all enforcement powers should be capable of being exercised in any land (including land covered by water) in England and Wales, whoever the occupier of the land in question is, on the basis that excluding Crown land, or even land occupied by the Crown, may have the effect of compromising the effectiveness of the existing enforcement powers in relation to very large areas of land in England and Wales. The exclusion of Crown land from the scope of the current enforcement powers could also potentially constitute a breach of the general duty to take all necessary steps to comply with the obligations in the Habitats and Wild Birds Directives.[84]

Recommendations

Recommendation 278: we recommend that all enforcement powers under the new regime should be capable of being exercised in any land (including land covered by water) in England and Wales, whoever the occupier of the land in question is.

This recommendation is given effect in the draft Bill by clause 167.

SANCTIONS FOR NON-COMPLIANCE

Civil sanctions for wildlife crimes

10.124 In the consultation paper we noted that criminal sanctions are not the only, nor necessarily the most effective, method of regulating all unlawful activity concerned with wildlife.[85] In the 2000s, the greater use of civil sanctions began to be explored, especially in the context of environmental law. At that time the position in the UK was in marked contrast to other systems, particularly that of the United States, where the Environmental Protection Agency was already making considerable use of administrative penalties for the purpose of ensuring compliance with environmental legislation.[86] The Hampton and Macrory reviews[87] had a significant impact on the UK's position in connection with the use of alternative approaches to the criminal law for the purpose of ensuring effective compliance with environmental legislation. The two reviews, in particular, led to the Regulatory Enforcement and Sanctions Act 2008, which introduced a general system for the issuing of civil sanctions as an alternative to criminal prosecutions in the context of a broad range of regulatory regimes.

[84] Treaty on the European Union, art 4(3).

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

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

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

Regulatory Enforcement and Sanctions Act 2008

10.125 Under Part 3 of the Regulatory Enforcement and Sanctions Act 2008, Ministers of the Crown and Welsh Ministers can make provision for civil sanctions to be issued by "regulators" for "relevant offences".[88] Before conferring power on a regulator to issue civil sanctions, Ministers must be satisfied that the regulator will act in a way which is "transparent, accountable, proportionate and consistent", and that regulatory activities will be "targeted only at cases in which action is needed".[89]

10.126 "Regulators", for the purpose of the 2008 Act, are either "designated regulators", as listed in schedule 5, or entities that have enforcement functions for enactments listed in schedule 6.[90] "Relevant offences" are either those in respect of which a "designated regulator" has an enforcement function and which were contained in legislation passed before the 2008 Act or those contained in enactments listed under schedule 6 in respect of which a regulator (other than a "designated regulator") has an enforcement function.[91] An "enforcement function" is "a function (whether or not statutory) of taking any action with a view to or in connection with the imposition of any sanction, criminal or otherwise, in a case where the offence is committed".[92]

10.127 While the 2008 Act contains a power to add "regulators" and "relevant offences", the power is limited to enactments listed in schedule 7. Where an order is made under an enactment listed in schedule 7 creating an offence, the relevant enforcement authority for that new offence can be treated as a regulator and the offence as a "relevant offence".[93]

10.128 As discussed in the consultation paper,[94] civil sanctions available under the 2008 Act are fixed monetary penalties, discretionary requirements, stop notices, and enforcement undertakings.[95] Where regulators are given the power to issue civil sanctions, they must issue guidance including the circumstances in which they are likely to use any of the available civil sanctions, the circumstances in which the relevant civil sanctions may not be imposed, the amount of the penalty and the relevant rights of appeal available to the person against which a civil sanction has been imposed.[96]

10.129 The 2008 Act contains specific provisions for appeals, such that appeals must go either to the First-tier Tribunal or to another tribunal created under another enactment.[97]

[88] Regulatory Enforcement and Sanctions Act 2008, ss 36, 37 and 38.

[89] Regulatory Enforcement and Sanctions Act 2008, ss 5(2) and 66.

[90] Regulatory Enforcement and Sanctions Act 2008, ss 37(1) and (2).

[91] Regulatory Enforcement and Sanctions Act 2008, s 38.

[92] Regulatory Enforcement and Sanctions Act 2008, s 71(1).

[93] Regulatory Enforcement and Sanctions Act 2008, s 62.

[94] Wildlife Law (2012) Law Commission Consultation Paper No 206, paras 9.26 to 9.39.

[95] Regulatory Enforcement and Sanctions Act 2008, ss 39, 42, 46 and 50.

[96] Regulatory Enforcement and Sanctions Act 2008, ss 63 and 64.

[97] Regulatory Enforcement and Sanctions Act 2008, s 54(1).

Current powers to issue civil sanctions for wildlife offences

10.130 The Environmental Civil Sanctions (England) Order 2010,[98] made in exercise of the powers contained in Part 3 of the Regulatory Enforcement and Sanctions Act 2008, currently makes provision for Natural England to issue civil sanctions in relation to a number of wildlife offences falling within the scope of our wildlife project.[99]

10.131 The 2010 Order provides for six specific types of civil sanction which may be imposed in connection with wildlife crimes: fixed monetary penalties, variable monetary penalties, compliance notices, stop notices, restoration notices and enforcement undertakings.[100] Variable monetary penalties, compliance notices, stop notices and restoration notices may currently be issued in connection with a number of wildlife offences under the Wildlife and Countryside Act 1981.[101] The whole range of civil sanctions listed above may be issued in connection with the offence of interfering with a badger sett and the offences of breaching a licence condition under the Protection of Badger Act 1992 and the Deer Act 1991.[102] A limited range of civil sanctions are also available in connection with a number of offences in connection with the exercise of enforcement powers under the Pests Act 1954, the Weeds Act 1959 and the Wildlife and Countryside Act 1981. Offences under the Conservation of Habitats and Species Regulations 2010 are excluded from the scope of the Order on the basis that the 2010 Regulations have been enacted after the 2008 Act and therefore fall outside the scope of the regime.

Case for reform

10.132 In the consultation paper we provisionally proposed the creation of a comprehensive regime for issuing civil sanctions under the new framework which would be additional to the current regime for criminal sanctions and that would replace the current limited civil sanctions regime applicable to wildlife offences.[103]

[98] SI 2010 No 1157.

[99] A similar Order was issued in Wales but does not currently include any wildlife offence which is relevant to the current project (see Environmental Civil Sanctions (Wales) Order 2010 SI 2010 No 1821).

[100] Variable monetary penalties, compliance notices and restoration notices are examples of the three types of "discretionary requirements".

[101] Wildlife and Countryside Act 1981, ss 1 to 14.

[102] Protection of Badgers Act 1992, ss 3 and 10(8); Deer Act 1991, s 8(5).

[103] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 9-1.

10.133 We suggested that the system contained in the Regulatory Enforcement and Sanctions Act 2008 provides a viable model for the creation of a "transparent, accountable, proportionate and consistent" regime of regulatory sanctions for wildlife offences. Because, subject to limited exceptions, it is not possible for any new regulatory regime to use the civil sanctions available under the 2008 Act directly, we proposed that an equivalent regime should be replicated under the new framework, in line with the approach adopted under a number of Acts that came into force after the 2008 Act.[104]

10.134 In the consultation paper we noted, among other things, that the current regime which provides Natural England (and, potentially, Natural Resources Wales) with the power to issue civil sanctions in connection with wildlife offences does not currently apply in connection with any wildlife offence under the Conservation of Habitats and Species Regulations 2010 or the Conservation of Seals Act 1970. We also noted that, for unclear reasons, it only applies in connection with a very limited number of offences under the Protection of Badgers Act 1992 and the Deer Act 1991. We provisionally proposed that the full range of civil sanctions should be available for all substantive wildlife offences under the new framework and that, in line with the regime under the 2008 Act, that the relevant regulators issue guidance as to how they will use their civil sanctions.[105]

CONSULTATION

10.135 In general, consultees favoured the creation of a comprehensive scheme for civil sanctions, accepting that our provisional proposals could usefully improve the consistency and effectiveness of the existing enforcement regime.

10.136 Several consultees, nevertheless, expressed a general opposition to the use of civil sanctions as an enforcement mechanism complementary to criminal proceedings. In particular, a number of conservation and animal welfare organisations argued that the creation of a regime for issuing civil sanctions in connection with all wildlife crimes would necessarily result, in practice, in the decriminalisation of wildlife offences and a weakening of police powers. Other consultees opposed the use of civil sanctions, not because of a disagreement with the concept itself, but because of a general lack of trust in the relevant regulatory bodies that would have the power to administer civil sanctions under the new framework.

[104] See, in particular, the Marine and Coastal Access Act 2009, ss 93 to 97 and sch 7.

[105] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposals 9-2 and 9-3.

10.137 We disagree with the idea that the creation of a mechanism for civil sanctions would lead to the decriminalisation of wildlife offences.[106] The creation of a civil sanctions regime has no effect whatsoever on the existence of the underlying offence and, if used in a transparent, accountable, proportionate, consistent and targeted way, is unlikely to interfere with the use of criminal sanctions for the purpose of responding to serious criminal activities. Our view is that the existence of a regime allowing regulators to issue civil sanctions could allow gaps to be filled in the current regime where the commission of an existing offence is not investigated, or, if investigated, is not prosecuted. For example, the breach of a licence condition offence is not one that lends itself to either police investigation (as they would not naturally know about the terms of the licences issued), or, in many cases, a court case; the appropriate enforcement mechanism may be remedying the damage caused by the relevant activity, or a fine or the obligation to cease the activity until alternatives are agreed with the regulator.

10.138 The suggestion that the creation of a civil sanctions regime would weaken existing police powers is also, in our view, misguided, given that the power to create civil sanctions regimes under the 2008 Act has not been regarded as detrimental to the underlying criminal regime. Our view is that the opposite is more likely to be true: in circumstances where resource limitations have an impact on the effectiveness of the enforcement regime, the ability to focus on the core of the public bodies' function is vital. The enforcement regime, as presently constituted, leaves the police as essentially the sole regulator for wildlife crime, thus affecting their ability to focus time and resources on the most serious criminal activities affecting wildlife. We agree, of course, that effective cooperation and communication between the regulatory agencies, the police, the Crown Prosecution Service and other environmental organisation involved in the prosecution of wildlife offences will be key to ensuring that the whole enforcement regime functions effectively and transparently.

10.139 In the light of the above discussion, we have concluded that the existing regime for issuing civil sanctions should be replicated under the new framework and that the whole range of civil sanctions should be available in connection with all substantive wildlife offences under the new framework.

GOVERNMENT POLICY IN CONNECTION WITH CIVIL SANCTIONS

10.140 In November 2012, the Department for Business, Innovation and Skills announced that the general Government policy in connection with the use of civil sanctions is that powers to impose Fixed Monetary Penalties, Variable Monetary Penalties and Restoration Notices should, as a general rule, only be granted where their use is restricted to undertakings with more than 250 employees.[107]

[106] As an aside, it is worth noting that since the Environmental Civil Sanctions (England) Order 2010 SI 2010 No 1157 came into force, Natural England has not yet issued any civil sanctions in connection with wildlife offences (see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/366743/Public-register-civil-sanctions-prosecutions.xls (last visited 26 October 2015)).

[107] Written Ministerial Statement of Rt Hon Michael Fallon, Minister of State for Business and Enterprise, Department for Business, Innovation and Skills (8 November 2012), available at: http://news.bis.gov.uk/Press-Releases/Use-of-Civil-Sanctions-Powers-Contained-in-the-Regulatory-Enforcement-and-Sanctions-Act-2008-682e6.aspx (last visited 26 October 2015).

10.141 In the context of environmental regulation, this policy was vocally criticised by a number of stakeholders. In a letter to the relevant Minister, the UK Environmental Law Association, for instance, explained that if the aim of the Government policy was to reduce the regulatory burden on small and medium enterprises, it would appear illogical that the only enforcement action available to regulators against such businesses should be criminal prosecutions. It was further pointed out that the 250 employee threshold also fails to take account of different business models and could, therefore, give rise to inconsistencies, on the basis that a number of large companies with high turnovers operate outsourced business models employing fewer than 250 employees.[108]

10.142 In line with the above considerations, we do not propose introducing the 250 employee threshold into the civil sanctions regime that will be available under the new framework for the enforcement of wildlife offences. First, our policy of replicating the existing approach was supported by a wide range of consultees, including representatives of the regulated community that the Government policy purported to protect by restricting the application of the new civil sanctions regime. Secondly, adherence to the rules set out above would mean that the vast majority of actors within the existing regulated community would fall outside the regime for civil sanctions. Thirdly, in line with the arguments put forward by the UK Environmental Law Association, we are persuaded that restricting the use of civil sanctions to businesses which employ more than 250 employees would have the perverse result of making a reactive, cost-effective and graduated regulatory regime only available against large businesses, leaving small and medium enterprises with the traditional binary "criminal or not" regime reliant on potentially expensive legal proceedings.

Power to impose civil sanctions under the new framework

10.143 As anticipated above, we have taken the view that Part 3 of the Regulatory Enforcement and Sanctions Act 2008 provides a viable model for the creation of a "transparent, accountable, proportionate and consistent" regime for issuing civil sanctions under the new framework. As the 2008 regime, subject to limited exceptions, cannot be extended to legislation enacted after 2008, we have concluded that an equivalent regime should be replicated under the new framework, subject to a number of limited changes discussed in the paragraphs below.

[108] UKELA, Letter to Rt Hon Michael Fallon MP (20 December 2012).

THE RELEVANT REGULATORS

10.144 In line with the 2008 Act, under the new framework civil sanctions should be administered by the relevant regulatory bodies. In England, most statutory functions under the new framework (enforcement, licensing, monitoring and advisory functions, for instance) will be carried out by Natural England and the Marine Management Organisation. Certain functions in relation to the control of invasive non-native species, however, will also be carried out by the Environment Agency and Forestry Commissioners.[109] In Wales, most statutory functions will be carried out by Natural Resources Wales, which has taken over the responsibilities of the Countryside Council for Wales, the Environment Agency Wales and the Forestry Commission Wales.

10.145 So as to avoid complex questions as to the nature of the "enforcement functions" of the above authorities in connection with relevant offences under the new framework,[110] we have decided that the above regulatory bodies should be expressly listed as relevant regulators under the new regime. In line with the 2008 Act, however, the decision as to which regulator should be capable of issuing civil sanctions in connection with relevant wildlife offences should ultimately remain one for the Secretary of State and Welsh Ministers. So as to ensure that the class of relevant regulators may be expanded in line with future institutional changes, we have taken the view that, in line with the 2008 Act, the Secretary of State or Welsh Ministers should have the power to list any other regulatory body with an enforcement function in connection with a relevant wildlife offence.[111]

RELEVANT OFFENCES

10.146 In line with our provisional proposal,[112] we have concluded that the whole range of civil sanctions under Part 3 of the 2008 Act should be available to the relevant regulators in relation to all substantive wildlife offences discussed in Chapters 4, 5, 6 and 9 of this Report. We have taken the view that, in line with the scope of the Environmental Civil Sanctions (England) Order 2010, it should also be possible for the Secretary of State or Welsh Ministers to extend the application of the whole or part of the civil sanctions regime to any other offence under the new framework that does not fall under the above categories. Those would include, for instance, all offences in connection with enforcement powers and offences created under secondary legislation.

[109] See, in particular, schedule 9A to the Wildlife and Countryside Act 1981. The Environment Agency is currently also the relevant enforcement authority in connection with the Import of Live Fish (England and Wales) Act 1980.

[110] See Wildlife Law (2012) Law Commission Consultation Paper No 206, paras 9.46 to 9.61.

[111] In line with section 37(3) of the Regulatory Enforcement and Sanctions Act 2008, the Secretary of State or Welsh Ministers should not be able to include the Crown Prosecution Service or a member of a police force in England and Wales as relevant regulators.

[112] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 9-2.

CRITERIA FOR IMPOSING STOP NOTICES

10.147 Section 46 of the 2008 Act provides that stop notices may only be imposed where the regulator reasonably believes that the activity carried out by a person is causing, or presents significant risks of causing serious harm to

(1) human health;

(2) the environment (including the health of animals and plants); and

(3) the financial interests of consumers.

10.148 The Environmental Civil Sanctions (England) Order 2010, which applies to wildlife offences as well as other pollution offences, restricts the above list of protected interests to human health or the environment (including the health of animals and plants) on the basis that the financial interests of consumers are hardly relevant to wildlife or pollution offences.

10.149 Amongst the above three factors, it would appear that the only one which is relevant to the new wildlife law framework is "serious harm to the environment (including the health of animals or plants)." We have concluded, therefore, that under the new framework a stop notice should be capable of being imposed only where, among other things, the regulator reasonably believes that the activity as carried on by the person in question is causing, or presents a significant risk of causing, serious harm to the environment.

10.150 Given the specific nature of the regulatory framework under which the new civil sanctions regime will operate, we have taken the view that it would be beneficial, in terms of clarity and transparency, to break down the term "environment" into an illustrative, non-exhaustive list of instances of environmental harm that would be relevant in the context of the new framework. We suggest, therefore, that the concept of "significant risk of harm to the environment", under the new framework, should expressly include the risk of causing a serious adverse impact on

(1) biodiversity;

(2) animal welfare; and

(3) the conservation of the species of animals and plants protected under the Wildlife Bill.

APPEALS

10.151 The regime for civil sanctions contained in Part 3 of the 2008 Act requires the establishment of an appropriate appeals mechanism for challenging decisions of the regulator to impose a civil sanction in connection with a relevant offence. The 2008 Act provides that such appeals may be made to the First-tier Tribunal or another tribunal created under an enactment.[113]

10.152 In the consultation paper, we suggested that we could see no reason why appeals against civil sanctions imposed by a relevant regulator for relevant offences under the new framework should not – in line with the Environmental Civil Sanctions (England) Order 2010 – be heard by the First-tier Tribunal. We provisionally proposed, therefore, that the appropriate appeals forum for appeals against civil sanctions in relation to wildlife offences should remain the First-tier Tribunal (Environment). In line with the overwhelming support by consultees for this provisional proposal, we have concluded that appeals against civil sanctions issued under the new framework should be brought before the First-tier Tribunal.

10.153 In line with our provisional proposal, therefore, we have concluded that the appropriate forum to rule on appeals against civil sanctions under the new framework should be the First-tier Tribunal (Environment), a specialised jurisdiction of the General Regulatory Chambers that currently hears appeals against environmental civil sanctions.

Recommendations

Recommendation 279: we recommend that the existing regime for issuing civil sanctions for wildlife crimes under the Regulatory Enforcement and Sanctions Act 2008 should be replicated under the new framework.

This recommendation is given effect in the draft Bill by clause 146 and schedule 34.

Recommendation 280: we recommend that the whole range of civil sanctions should be available in connection with all substantive wildlife offences (other than poaching) under the new framework. The Secretary of State or Welsh Ministers, in addition, should have the power to extend the civil sanctions regime, or part of that regime, to all offences in connection with enforcement powers and offences created under secondary legislation.

This recommendation is given effect in the draft Bill by paragraph 2 of schedule 34.

Recommendation 281: we recommend that the application of the new civil sanctions regime should not be restricted to undertakings with more than 250 employees.

[113] Regulatory Enforcement and Sanctions Act 2008, s 54(1). Appeals against civil sanctions are assigned to the General Regulatory Chamber of the First-tier Tribunal by virtue of article 3 of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010 SI 2010 No 2655. The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 SI 2009 No 1976, amended by SI 2010 No 2653, sets out procedural rules relating to such appeals.

Recommendation 282: we recommend that the regulatory bodies capable of issuing civil sanctions under the new regime should include Natural England, the Marine Management Organisation, the Environment Agency, the Forestry Commissioners (in England) and Natural Resources Wales (in Wales), or any other body with an enforcement function in relation to a wildlife offence. The decisions as to which regulator should be capable of issuing civil sanctions, nevertheless, should ultimately be one for the Secretary of State or Welsh Ministers.

This recommendation is given effect in the draft Bill by paragraph 1 of schedule 34.

Recommendation 283: we recommend that appropriate forum to hear appeals against civil sanctions under the new framework should be the First-tier Tribunal.

This recommendation is given effect in the draft Bill by paragraph 27 of schedule 34.

Criminal sanctions for wildlife crimes

Current penalties available for wildlife crimes

10.154 Currently, substantive offences under the Wildlife and Countryside Act 1981 and the Conservation of Habitats and Species Regulations 2010 are triable summarily in the magistrates' court with maximum penalties of either six months' imprisonment or a fine up to level 5 on the standard scale or both.[114] By virtue of section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, offences punishable by a magistrates' court on summary conviction with a maximum fine at level 5 may now be punished with an unlimited fine.[115]

10.155 The 1981 Act provides an exception in relation to offences in connection with the sale of invasive non-native species and in connection with the release of new species under sections 14ZA and 14. Such offences may also be tried summarily with a maximum term of imprisonment of six months or the statutory maximum fine, or both,[116] or tried on indictment in the Crown Court for a maximum term of imprisonment of two years or a fine, or both.[117]

[114] See, Wildlife and Countryside Act 1981, s 21(1) and the Conservation of Habitats and Species Regulations 2010 SI 2010 No 490, regs 41(8), 43(6) and 45(7).

[115] See Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No 11) Order 2015 SI 2015 No 504.

[116] Wildlife and Countryside Act 1981, s 21(4)(a). The statutory maximum is £5,000 or such an amount is substituted by order (Interpretation Act 1978, sch 1, read together with the Magistrates' Courts Act 1980, s 32(9)). By virtue of s 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, offences punishable on summary conviction with a maximum fine of £5,000 may now be punishable by an unlimited fine.

[117] Wildlife and Countryside Act 1981, s 21(4)(b).

10.156 The main offences under the Protection of Badgers Act 1992, such as killing, capture or injuring, being in possession of a dead badger or anything derived from it, cruelty offences and disturbance offences are triable summarily in the magistrates' court with maximum penalties of either six months' imprisonment or a fine up to level 5 on the standard scale (now unlimited), or both.[118]

10.157 Substantive offences under the Game Act 1831 (beside section 3A, which was recently added by the Regulatory Reform (Game) Order 2007)[119] have the lowest penalties, ranging from a fine up to level 1 on the standard scale[120] to a fine up to level 4 of the standard scale.[121]

Reform

10.158 In consultation we asked whether consultees considered the current levels of criminal sanctions sufficient.[122] A significant majority of consultees expressed the view that the current sanctions for wildlife crimes were insufficient. Consultees who supported an increase in criminal sanctions presented two main arguments against current levels.

10.159 First, a number of consultees, including the Department for Environment, Food and Rural Affairs, pointed out that current penalties are an insufficient deterrent and can be easily absorbed by many offenders. In connection with the above argument, some suggested that the current level of sanctions may constitute, therefore, a breach of the Environmental Crime Directive. Article 5 of the Environmental Crime Directive provides that offences committed by natural persons involving the killing, destruction, possession or taking of a number of specimens protected under the Wild Birds and Habitats Directive should be punishable by effective, proportionate and dissuasive criminal penalties. For legal persons, similarly, penalties need to be "effective, proportionate and dissuasive" but do not need to be criminal.[123]

10.160 Secondly, a number of consultees highlighted the fact that current sanctions are disproportionately lenient compared to similar environmental offences. Offences under the Control of Trade in Endangered Species (Enforcement) Regulations 1997, for instance, are punishable, on conviction on indictment, to maximum terms of imprisonment ranging from two to five years.

[118] Protection of Badgers Act 1992, s 12(1).

[119] SI 2007 No 2007, art 5. A person committing an offence under section 3A of the Game Act 1831 is liable on summary conviction to a fine not exceeding level 5 on the standard scale or to imprisonment for a term not exceeding six months or to both (Game Act 1831, s 3A(1)).

[120] Game Act 1981, ss 3 and 24. The Criminal Justice Act 1982, s 37(2), provides that a level 1 fine is equivalent to £200.

[121] Game Act 1831, s 30 (poaching by five or more persons). The Criminal Justice Act 1982, s 37(2), provides that a level 4 fine is equivalent to £2500.

[122] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 9-4 (see also Provisional Proposals 9-5 to 9-8).

[123] Directive 2008/99/EC, arts 3, 5 and 7.

10.161 Consultees made further arguments in relation to the types of criminality that are encountered that led us to the conclusion that making the offences triable on indictment would be the most appropriate reform option. It became apparent in consultation that a sizable proportion of wildlife crimes are committed by organised criminal enterprises. This is the sort of activity that it is appropriate to sentence in the Crown Court rather than in a magistrates' court, as in such cases the question is not only about the appropriate level of a fine, but also about appropriate and effective levels of custodial sentencing.[124]

10.162 We have concluded, therefore, that in line with the penalties currently available for offences in connection with the release or sale of non-native species and offences in connection with the international trade in endangered species, substantive wildlife offences under the new framework, including poaching offences, should be punishable on summary conviction for a period not exceeding six months or to a fine (or both) and on indictment for a period not exceeding two years or to a fine (or both).

10.163 In consultation we also highlighted that the Wildlife and Countryside Act 1981,[125] the Protection of Badgers Act 1992[126] and the Deer Act 1991[127] currently provide, broadly speaking, that where an offence was committed in respect of more than one animal or plant, the maximum fine which may be imposed should be determined as if the person convicted had been convicted of a separate offence in respect of each animal or plant.[128] In the light of the decision to recommend that wildlife offences under the new framework be made triable on indictment, and in the light of the fact that available fines on summary convictions are now unlimited in connection with a large number of wildlife offences, we have concluded that such a provision would not serve any useful purpose under the new framework. As an aside, it is also worth noting that a number of consultees persuasively argued that a "sentence multiplier" based on the number of specimens that were affected by the prohibited activity would not appear to be the most adequate tool to determine the gravity of the defendant's conduct in the context of wildlife offences. A more relevant consideration, as some suggested, should be the impact of a certain activity on the conservation status of the relevant species.

[124] See also Environmental Audit Committee (2012) Wildlife Crime, Third Report of Session 2012-13, pp 33 to 34.

[125] Wildlife and Countryside Act 1981, s 21(5).

[126] Protection of Badgers Act 1992, s 12(2).

[127] Deer Act 1991, s 9(2).

[128] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposal 9-7.

Penalties for offences in connection with enforcement action

FAILURE TO COMPLY WITH A LICENCE CONDITION

10.164 We have concluded that breaching the condition of a licence should be triable either way and carry the same maximum sentence as substantive wildlife offences discussed above. While we envisage that most prosecutions for this offence will be for the purpose of enforcing technical requirements, such as monitoring obligations, licensing conditions may potentially impose significant burdens on licensees. As a result, the availability of the same maximum penalties is necessary to ensure that the potential costs resulting from non-compliance with a condition are higher than the costs of complying with the relevant licensing conditions.

FALSE STATEMENTS MADE FOR OBTAINING A REGISTRATION OR LICENCE

10.165 We have also concluded that making a false statement for the purpose of obtaining a licence should be triable either way and punishable with the same maximum sentences of substantive wildlife offences for two reasons.

10.166 First, a person committing this offence may, in many circumstances, be as blameworthy as a person committing fraud within the meaning of section 2 of the Fraud Act 2006, an offence which is punishable on conviction on indictment to imprisonment for a term not exceeding 10 years or a fine (or to both).

10.167 Secondly, our understanding of the existing statutory framework is that a licence which is obtained on the basis of a false representation would only appear to be voidable once the relevant licensing authority finds out about the false statement. This means that during that period the licensee will be shielded from any prosecution for the commission of acts which would otherwise constitute substantive wildlife offences.

ATTEMPTS AND "GOING EQUIPPED" OFFENCES

10.168 In line with the existing approach, we have concluded that person who attempts to commit a wildlife offence or, for the purposes of committing a wildlife offence, is in possession of anything capable of being used for committing such an offence, should be punishable in the same manner as for that offence. It follows that attempting to commit a wildlife offence, or being in possession of an article capable of being used for committing a wildlife offence with the intention to commit that offence should also be punishable on summary conviction with imprisonment for a period not exceeding six months or a fine (or both) and on indictment with imprisonment for not more than two years or a fine (or both).

FALSELY PRETENDING TO BE A WILDLIFE INSPECTOR WITH THE INTENTION TO DECEIVE

10.169 The offence of "falsely pretending to be a wildlife inspector" under regulation 119(2) of the Conservation of Habitats and Species Regulations 2010 and section 19XB(4) of the Wildlife and Countryside Act 1981 is currently triable either way and punishable on summary conviction by imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum (now unlimited) or both, or on indictment to imprisonment not exceeding two years or to a fine (or both). We have concluded that the same penalties should be available under the new framework.

10.170 Under the Conservation of Habitats and Species Regulations 2010 the intentional obstruction of a wildlife inspector acting in the exercise of powers conferred under the Regulations is punishable on summary conviction by a fine not exceeding level 5 on the standard scale (now unlimited).[129] The Wildlife and Countryside Act 1981 takes the same approach,[130] except for obstruction offences in circumstances where the relevant persons are exercising powers to ascertain whether an offence under section 14 or 14ZA has been committed. In that case a person is liable on summary conviction to a fine not exceeding the statutory maximum (now unlimited) or on conviction on indictment to a fine.[131]

10.171 By way of comparison, under the Animal Welfare Act 2006 equivalent offences are punishable on summary conviction by a fine up to level four and/or imprisonment up to six months.[132] Under the Animal Health Act 1981 similar offences are punishable on summary conviction by a fine up to level five or imprisonment up to six months (or both).[133] Under section 89(2) of the Police Act 1996, a person intentionally obstructing an officer in the exercise of his or her duties is liable on summary conviction to imprisonment for a term not exceeding one month or to a fine not exceeding level three on the standard scale, or to both.

10.172 We were unable to find any particularly convincing reason for introducing the availability of custodial sentences for the above offences. Where violence is used against a constable or a wildlife officer, the defendant may be charged with more serious offences of general application. The main aim of the above sanctions, it would appear, is to prevent interferences with investigations or other lawful activities rather than imposing any particular moral stigma on the defendant. We have concluded, therefore, that sanctions for the above offences should be limited, on summary conviction, to a fine. All remaining offences in connection with enforcement powers, for equivalent reasons, should carry the same penalty.

Recommendations

Recommendation 284: we recommend that substantive offences under the new framework, including poaching offences, should be punishable on summary conviction by imprisonment for a period not exceeding six months or a fine (or both) and on indictment by imprisonment for a period not exceeding two years or a fine (or both).

This recommendation is given effect in the draft Bill by clauses 26, 70, 82, 93(3) 99(2), 106, 108(3), 115(3) and 122(8).

Recommendation 285: we recommend that the "sentence multiplier" provisions under the Wildlife and Countryside Act 1981, the Protection of Badgers Act 1992 and the Deer Act 1991 should not be replicated under the new framework.

[129] Conservation of Habitats and Species Regulations 2010, reg 119.

[130] Wildlife and Countryside Act 1981, s 21(4AA).

[131] Wildlife and Countryside Act 1981, s 21(4B).

[132] Animal Welfare Act 2006, ss 32(4) and sch 2, para 7.

[133] Animal Health Act 1981, ss 62C(2), 62F(4) and 75.

Recommendation 286: we recommend that the following offences:

(1) failing to comply with a licence condition;

(2) making a false statement for the purpose of obtaining a registration or a licence;

(3) attempting to commit an offence; and

(4) falsely pretending to be a wildlife inspector;

should also be punishable on summary conviction by imprisonment for a period not exceeding six months or a fine (or both) and on indictment by imprisonment for a period not exceeding two years or a fine (or both).

This recommendation is given effect in the draft Bill by clauses 120 and 137(6).

Recommendation 287: we recommend that any other "enforcement offence" should be punishable, on summary conviction, by a fine.

This recommendation is given effect in the draft Bill by clauses 137(4) and 131.

CHAPTER 11
RECOMMENDATIONS

CHAPTER 1

11.1 Recommendation 1: we recommend that the territorial extent of the new regulatory framework should be limited to territorial waters.

This recommendation is given effect in the draft Bill by clause 168.

CHAPTER 2

11.2 Recommendation 2: we recommend that the new regulatory regime should take the form of a single statute, or a pair of materially identical statutes, incorporating legislation on the protection, control and exploitation of wild fauna and flora in England and Wales.

11.3 Recommendation 3: we recommend that the new regulatory regime should exclude the Hunting Act 2004, the Animal Welfare Act 2006, the Wild Mammals (Protection) Act 1996 and the Salmon and Freshwater Fisheries Act 1975.

11.4 Recommendation 4: we recommend that, subject to existing exceptions, the new regulatory regime should be organised into schedules containing lists of species that should be protected or controlled, so as to allow different provisions to apply to individual species or groups of species.

11.5 Recommendation 5: we recommend that existing monitoring and surveillance obligations under regulations 48 to 51 of the Conservation of Habitats and Species Regulations 2010 should be replicated under the new regulatory framework.

Recommendation 6: we recommend that consideration should be given to the possibility of extending the existing monitoring and surveillance obligations to other species of concern, including, in particular, wild bird species protected under the Wild Birds Directive.

These recommendations are given effect in the draft Bill by clauses 148 to 155.

11.6 Recommendation 7: we recommend that section 26 of the Wildlife and Countryside Act 1981 should be adopted as the general model for the procedure to make secondary legislation under the new framework.

This recommendation is given effect in the draft Bill by clause 166.

11.7 Recommendation 8: we recommend that all schedules listing animal or plant species that should be protected by wildlife legislation, prohibited methods of killing or capturing and prohibited times during which particular animals may not be killed or captured should be reviewed every five years.

This recommendation is given effect in the draft Bill by clause 158(1) and (2).

11.8 Recommendation 9: we recommend that quinquennial review of the schedules to the new Wildlife Act should be carried out by the GB conservation bodies acting through the Joint Nature Conservation Committee.

This recommendation is given effect in the draft Bill by clause 158(1).

11.9 Recommendation 10: we recommend that following the review of the relevant schedules, the Joint Nature Conservation Committee should advise the Secretary of State and Welsh Ministers as to the amendments, if any, they consider should be made to the schedules under review.

This recommendation is given effect in the draft Bill by clauses 158(4) and (5).

11.10 Recommendation 11: we recommend that the UK Government, the Welsh Government and the Scottish Government consider cooperating for the purpose of re-defining the involvement of the three GB conservation bodies in the quinquennial review process.

11.11 Recommendation 12: we recommend that if the Secretary of State or Welsh Ministers decide not to follow the advice of the Joint Nature Conservation Committee in connection with the amendment of a relevant schedule, they should have a duty to make a statement giving reasons for that decision.

This recommendation is given effect in the draft Bill by clauses 158(6) and (7).

11.12 Recommendation 13: we recommend that when updating the schedules of the new regulatory framework outside the quinquennial review process, the Secretary of State or Welsh Ministers should consult whichever ones of the advisory bodies they consider is best able to advise them as to whether the schedule should be updated.

This recommendation is given effect in the draft Bill by clauses 159 and 160.

11.13 Recommendation 14: we recommend that if the Secretary of State or Welsh Ministers decide not to follow the advice of the relevant advisory body, they should have a duty to make a statement giving reasons for that decision.

This recommendation is given effect in the draft Bill by clauses 159(5) and (6).

11.14 Recommendation 15: we recommend that the Secretary of State or Welsh Ministers should be able to add species to the schedules replicating schedules 5 and 8 to the Wildlife and Countryside Act 1981 for any reason. Species should only be capable of being removed if, in their opinion:

(1) the animal or plant is not endangered or unlikely to become endangered;

(2) the listing of that animal or plant in a schedule is unnecessary for the protection of the animal or plant in question (by reason of an equivalent entry added, or proposed to be added, to any other schedule); or

(3) the removal of the plant or animal from that schedule is necessary in order to comply with an international obligation.

This recommendation is given effect in the draft Bill by clause 160(8).

11.15 Recommendation 16: we recommend that the Secretary of State or Welsh Ministers should have the power to alter schedules containing prohibited methods of killing or capture of animals for any reason and in accordance with the standard procedure prescribed by section 26 of the Wildlife and Countryside Act 1981.

This recommendation is given effect in the draft Bill by clause 160.

11.16 Recommendation 17: we recommend that under the new regulatory framework the Secretary of State or Welsh Ministers should have the power to introduce, alter or remove close seasons or prohibited periods by regulation in connection with any animal species (other than a bird listed in annex 2 to the Wild Birds Directive).

Recommendation 18: we recommend that the power to introduce, alter or remove close seasons should be capable of being exercised in relation to specific areas in England and Wales.

Recommendation 19: we recommend that the existing close seasons and prohibited periods in connection with animals (other than birds) should be replicated under the new regulatory framework and subjected to the same regulation-making powers.

These recommendations are given effect in the draft Bill by clause 160.

11.17 Recommendation 20: we recommend that the power to create areas of special protection for wild birds under section 3 of the Wildlife and Countryside Act 1981 should be replicated under the new framework.

This recommendation is given effect in the draft Bill by clauses 18 and 19.

11.18 Recommendation 21: we recommend that in the light of our recommendations on the reform of the powers to regulate hunting activities in connection with wild birds, consideration should be given as to whether retaining a power replicating the effect of section 3 of the 1981 Act adds anything useful to the new regulatory regime.

11.19 Recommendation 22: we recommend that the effect of section 3 of the Conservation of Seals Act 1970 should be replaced by a general power to prohibit, by regulation, the killing, capturing or injuring of any wild animal in a particular geographical area.

This recommendation is given effect in the draft Bill by clauses 60 and 160(1).

11.20 Recommendation 23: we recommend that the Secretary of State or Welsh Ministers should have the power to prohibit the use of a particular method of killing, injuring or capturing a protected species with respect to particular areas of England and Wales, particular times of the day or particular times of the year.

This recommendation is given effect in the draft Bill by clause 160(1) and (4).

CHAPTER 3

11.21 Recommendation 24: we recommend that consideration should be given as to whether there remains a case for continuing not to prohibit the means of killing or capture detailed in the UK's reservations to the Bern Convention.

11.22 Recommendation 25: we recommend that the term "deliberate" in the context of the Bern Convention, the Habitats Directive and the Wild Birds Directive should be defined in domestic criminal law in line with the Court of Justice's ruling in *Commission v Spain.*

Recommendation 26: we recommend that under the new regulatory framework a person should be found to have acted "deliberately" if

(1) he or she intended to commit the prohibited result;

(2) his or her actions presented a serious risk to animals of the relevant species unless reasonable precautions were taken and he or she was aware that that was the case but failed to take reasonable precautions; or

(3) his or her actions presented a serious risk to animals of the relevant species whether or not reasonable precautions were taken, and he or she was aware that that was the case.

Recommendation 27: we recommend that the concept of "serious risk" should be understood by reference to the probability of one of more animals or plants being affected by the actions in question, the effect of the actions on the distribution or abundance of the local population of the relevant species, or a combination of the two factors.

Recommendation 28: we recommend that in determining whether the steps taken by the defendant for the purpose of preventing a prohibited activity from happening were reasonable, a court should be capable of taking into account relevant guidance, permits or directions issued by public authorities subject to the duty under regulation 9(1) of the Conservation of Habitats and Species Regulations 2010 (duties relating to compliance with the Directives) in pursuance of their nature conservation functions listed under regulation 9(2) of the 2010 Regulations (as well as relevant guidance, permits and directions issued by any relevant pubic authority under the new regulatory framework).

These recommendations are given effect in the draft Bill by clauses 2, 7, 8, 9, 11, 18, 29, 34, 49, 51, 72 and 161.

11.23 Recommendation 29: we recommend that the transposition of the prohibition on "disturbance" under the Bern Convention, the Wild Birds Directive and the Habitats Directive should be uniform.

Recommendation 30: we recommend that under the new framework a person should be guilty of "deliberate disturbance" in connection with wild birds and other animals protected under the Bern Convention, the Wild Birds Directive or the Habitats Directive if the person's actions caused disturbance to the population of

the relevant protected species in the area in which the action was carried out.

Recommendation 31: we recommend that any reference to causing disturbance to the population of a protected species in an area should include, in particular

(1) actions that are likely to impair the ability of the relevant species to survive, breed or rear their young, hibernate or migrate; or

(2) actions that are likely to have a significant effect on the distribution or abundance of the population of the species in the area.

Recommendation 32: we recommend that other species currently protected against individual disturbance under section 9(4) of the Wildlife and Countryside Act 1981 be protected from individual disturbance.

Recommendation 33: we recommend that consideration should be given to whether species protected under the Bern Convention, the Wild Birds Directive and the Habitats Directive should be protected against individual disturbance.

Recommendation 34: we recommend that the Secretary of State or Welsh Ministers should have the power to issue codes of practice for the purpose of providing practical guidance in respect of the application of the disturbance provisions in relation to specific species or geographical areas.

These recommendations are given effect in the draft Bill by clauses 11, 51, 52 and 127.

11.24 Recommendation 35: we recommend that animals (including birds) which are currently protected against "harassment" under relevant international treaties should be protected against individual disturbance of specimens of that species.

These recommendations are given effect in the draft Bill by clauses 10 and 52.

CHAPTER 4

11.25 Recommendation 36: we recommend that protected wild bird species should be protected by reference to the definition of "wild bird" under article 1 of the Wild Birds Directive.

This recommendation is given effect in the draft Bill by clause 1(2)(a).

11.26 Recommendation 37: we recommend that the Secretary of State or Welsh Ministers should have the power to list specific bird species that fall outside the general definition of "wild bird" for the purpose of protecting them from the same set of prohibitions.

This recommendation is given effect in the draft Bill by clauses 1(2)(b) and 160.

11.27 Recommendation 38: we recommend that the definition of "wild bird" should expressly exclude captive-bred birds, unless they have been lawfully released into the wild as part of a re-population or re-introduction programme.

This recommendation is given effect in the draft Bill by clauses 1(3) and (5).

11.28 Recommendation 39: we recommend that a bird of a protected species should be presumed to be wild unless the defendant shows that it was captive-bred, but a bird should not be treated as captive-bred unless the defendant shows that its parents were lawfully in captivity when the egg was laid.

This recommendation is given effect in the draft Bill by clause 1(4).

11.29 Recommendation 40: we recommend that the Secretary of State or Welsh Ministers should have the power to make regulations specifying particular ringing, marking or other registration requirements. A bird ringed, marked or otherwise registered in accordance with the regulations should be presumed to be captive-bred unless the prosecution proves that the bird was not captive-bred and that the defendant knew, or had reason to believe at the time of the alleged offence that it was not captive-bred.

This recommendation is given effect in the draft Bill by clause 27.

11.30 Recommendation 41: we recommend that the current express exclusion of "poultry" from the definition of "wild bird" should not be retained.

11.31 Recommendation 42: we recommend that the common pheasant and the Canada goose should be deemed to be wild birds falling within the scope of the protection provisions available to all other bird species falling within the scope of the definition of article 1 of the Wild Birds Directive.

This recommendation is given effect in the draft Bill by clause 1(2)(b) and schedule 1.

11.32 Recommendation 43: we recommend that "game birds" should continue to be protected by killing, capture and sale offences irrespective of their "wild" or "captive-bred" status.

This recommendation is given effect in the draft Bill by clause 2(1)(a)(ii) and schedule 2.

11.33 Recommendation 44: we recommend that the terms "intentional" and "intentional or reckless" in the context of wild bird offences be replaced with the term "deliberate" as defined in recommendations 25 to 28.

This recommendation is given effect in the draft Bill by clauses 2, 7, 8, 11 and 12.

11.34 Recommendation 45: we recommend that the prohibition of "deliberate" killing, capture or injury should extend to:

(1) birds of species naturally occurring in a wild state within the European territory of any member state to which the TFEU applies (excluding captive-bred birds, unless lawfully released into the wild as part of a re-population or re-introduction programme);

(2) the common pheasant and Canada goose, subject to the same exclusion;

(3) birds of other species that are expressly listed by the Secretary of State or Welsh Ministers, subject to the same exclusion; and

(4) the pheasant, partridge, grouse (or moor game), black game (or heath game) and ptarmigan.

This recommendation is given effect in the draft Bill by clause 2.

11.35 Recommendation 46: we recommend that the existing international and EU obligations in connection with the protection of nests, eggs, breeding sites and resting places should be transposed in domestic law through the following offences:

(1) An offence prohibiting the taking of eggs of a "wild bird" from the wild and "deliberate" damage to or destruction of eggs of a "wild bird" (including anything done which prevents the egg from hatching);

(2) An offence prohibiting "deliberate" damage to, destruction or removal of, and obstruction of access to, a nest of a "wild bird" whilst the nest is being used or being built, or a nest of a listed wild bird of a species that re-uses its nests;

(3) An offence prohibiting the "deliberate" damage to, destruction or deterioration of, or obstruction of access to, a breeding site or resting place of a wild bird of a species listed in annex 2 to the Bern Convention that has a natural range including Great Britain.

This recommendation is given effect in the draft Bill by clauses 7, 8 and 9.

11.36 Recommendation 47: we recommend that the Secretary of State or Welsh Ministers should have the power to issue codes of practice for the purpose of providing practical guidance in respect of the application of the provisions in connection with damage to, destruction or deterioration of breeding places or resting sites of wild birds listed in appendix 2 to the Bern Convention that have a natural range including Great Britain.

This recommendation is given effect in the draft Bill by clause 127.

11.37 Recommendation 48: we recommend that hunting activities in connection with birds of a species listed in annex 2 to the Wild Birds Directive (including game birds) which is currently huntable in domestic legislation outside the close season should be regulated by a single provision giving effect to article 7 of the Wild Birds Directive.

11.38 Recommendation 49: we recommend that the effect of the new provision should be to authorise any activity otherwise prohibited by the primary activity prohibitions in connection with wild birds as long as the hunting is undertaken

(1) outside the close season specified for that species in a dedicated schedule;

(2) outside any period (not exceeding 14 days) designated by regulation as a period of special protection; and

(3) in compliance with any provision made by regulations.

These recommendations are given effect in the draft Bill by clause 21 and schedule 11.

11.39 Recommendation 50: we recommend that the Secretary of State and Welsh Ministers should be under a positive obligation to amend the close seasons in connection with protected birds if it appears to them necessary to do so to ensure that the period include

(1) the whole of the breeding season for the species concerned;

(2) the times when birds of the species undergo the various stages or reproduction; and

(3) in connection with migratory species, the times when birds of those species return to their breeding area.

This recommendation is given effect in the draft Bill by clause 21(5).

11.40 Recommendation 51: we recommend that regulations introducing periods of special protection (not exceeding 14 days) should not be subject to parliamentary scrutiny and should not require prior consultation in line with section 26(4)(a) of the Wildlife and Countryside Act 1981 (other than consultation of representatives of persons interested in the hunting of birds to which the regulation relates).

This recommendation is given effect in the draft Bill by clauses 21(4), 166(6) and 166(11).

11.41 Recommendation 52: we recommend that the Secretary of State and Welsh Ministers should have a positive obligation to ensure that the hunting of birds of relevant bird species

(1) does not jeopardise conservation efforts in their distribution area;

(2) complies with the principles of “wise use” and “ecologically balanced control”; and

(3) is compatible with any measures resulting from article 2 of the Wild Birds Directive.

This recommendation is given effect in the draft Bill by clause 21(6).

11.42 Recommendation 53: we recommend that regulations should be capable of imposing conditions for the purpose of enabling the Secretary of State or Welsh Ministers to monitor the hunting of birds of the species to which the regulation relates.

This recommendation is given effect in the draft Bill by clause 22.

11.43 Recommendation 54: we recommend that the list of prohibited methods giving effect to article 8 of the Wild Birds Directive and article 8 to the Bern Convention should apply to “wild birds”, the common pheasant and Canada goose, other birds that have been specifically listed by the Secretary of State or Welsh Ministers and “game birds”.

This recommendation is given effect in the draft Bill by clause 5(4).

11.44 Recommendation 55: we recommend that a person should be guilty of an offence if he or she used a prohibited item or substance, or carried out a prohibited activity for the purpose of or in connection with killing, injuring or capturing a protected bird. In line with the definition of “deliberate”, a person should also be guilty of an offence if

(1) His or her actions presented a serious risk to protected birds unless reasonable precautions were taken and he or she was aware that that was the case, but failed to take reasonable precautions.

(2) His or her actions presented a serious risk to protected birds whether or not reasonable precautions were taken and he or she was aware that that was the case.

This recommendation is given effect in the draft Bill by clause 5(3).

11.45 Recommendation 56: we recommend that the use of a device which is indiscriminate or capable of having a significant effect on the abundance of, or causing serious disturbance to, the population of a protected bird species in the area in which it is used should constitute a stand-alone offence.

This recommendation is given effect in the draft Bill by clause 5(2)(b).

11.46 Recommendation 57: we recommend that the list of prohibited methods under the new framework should reflect and consolidate the lists in annex 4 of the Wild Birds Directive, appendix 4 to the Bern Convention and section 5 of the Wildlife and Countryside Act 1981 by giving precedence, as a general rule, to the most stringent formulation of the prohibition.

This recommendation is given effect in the draft Bill by clause 5(2)(a) and schedule 4.

11.47 Recommendation 58: We recommend that the “keeping” prohibitions giving effect to articles 5(c) and (e) of the Wild Birds Directive should be drafted by reference to the possession, control or transport of any live or dead "wild bird”, common pheasant, Canada goose or other bird that has been specifically listed by the Secretary of State or Welsh Ministers, any part of such a bird, anything derived from such a bird or an egg, or any part of an egg, of such a bird.

This recommendation is given effect in the draft Bill by clause 12.

11.48 Recommendation 59: we recommend that a person should not be guilty of a possession offence in respect of a live or dead wild bird, part of a bird, or anything derived from a bird if he or she shows that the bird:

(1) had not been killed or captured;

(2) had been lawfully killed or captured in the European territory of a member state to which the Treaty applies;

(3) had been killed or captured in the European territory of a member state to which the Treaty applies before the implementation date of the Wild Birds Directive; or

(4) had been killed or captured otherwise than within the European territory of a member state to which the Treaty applies.

This recommendation is given effect in the draft Bill by clauses 13(1) and (4).

11.49 Recommendation 60: we recommend that a person should not be guilty of a possession offence in respect of an egg of a protected wild bird if he or she shows that the egg:

(1) had not been taken from the wild;

(2) had been taken from the wild in the European territory of a member state to which the treaty applies before the implementation date of the Wild Birds Directive; or

(3) had been taken from the wild otherwise than within the European territory of a member state to which the treaty applies.

This recommendation is given effect in the draft Bill by clauses 13(3) and (4).

11.50 Recommendation 61: we recommend that the current regulatory regime for controlling the trade in protected bird species and their eggs should cease to expressly prohibit the trade in captive-bred birds. The existing regime should be replaced by a general prohibition making it an offence to sell, offer for sale, expose for sale, be in possession for the purpose of sale any wild bird of a protected species (including "game birds"), any part of such a bird, anything derived from such bird or the egg, or any part of an egg, of such bird.

This recommendation is given effect in the draft Bill by clauses 14(1) and (2).

11.51 Recommendation 62: we recommend that the boundary between the market in captive-bred birds and the market in wild birds should be policed by the presence of a reverse burden of proof. Any person involved in trade in birds, in other words, should be presumed to be trading in wild birds unless the bird is ringed, marked or otherwise registered in accordance with regulations made by the Secretary of State or Welsh Ministers.

This recommendation is given effect in the draft Bill by clause 27.

11.52 Recommendation 63: we recommend that, in line with section 6(2) of the Wild Birds Directive, the general prohibition on the trade in wild birds should not apply to wild birds (any part of such a bird, anything derived from such bird or the egg, or any part of an egg, of such bird) of a species listed in part A of annex 3 to the Wild Birds Directive, including "game birds", unless the prosecution shows that

(1) the bird had been killed or captured in contravention of domestic legislation or the law of other member states giving effect to the Wild Birds Directive and the defendant knew or had reason to believe that this was the case; or

(2) the bird had been sold to the defendant in the European territory of a member state in contravention of domestic legislation or the law of other member states giving effect to the Wild Birds Directive, and the defendant knew, or had reason to believe that the sale was unlawful.

This recommendation is given effect in the draft Bill by clauses 14(3) to (8).

11.53 Recommendation 64: we recommend that a person should not be guilty of an offence of selling a wild bird of a protected species, a part a such a bird, anything derived from such a bird, an egg, or any part of an egg of such a bird if he or she shows that the bird or egg in question was killed, captured or otherwise taken from the wild

(1) before the implementation date of the Wild Birds Directive; or

(2) outside the European territory of a member state to which the TFEU applies.

This recommendation is given effect in the draft Bill by clause 15.

11.54 Recommendation 65: we recommend that it should remain an offence for a person to publish or cause to be published any advertisement likely to be understood as conveying that the person buys or sells or intends to buy or sell things the sale of which is prohibited.

This recommendation is given effect in the draft Bill by clause 16.

11.55 Recommendation 66: we recommend that the effect of sections 6(3) and 7 of the Wildlife and Countryside Act 1981 should be replicated under the new regulatory regime.

This recommendation is given effect in the draft Bill by clauses 17 and 20.

CHAPTER 5

11.56 Recommendation 67: we recommend that "wild animal" should be defined as any animal other than a captive-bred animal, unless the captive-bred animal has been lawfully released into the wild as part of a re-population or re-introduction programme.

This recommendation is given effect in the draft Bill by clause 28(3).

11.57 Recommendation 68: we recommend that the prohibitions replicating the current protection regime in connection with badgers, seals and hares should apply to "wild animals" of such species.

This recommendation is given effect in the draft Bill by clauses 43, 49, 52, 57, 59, 60 and 62.

11.58 Recommendation 69: we recommend that an animal should be presumed to be a wild animal unless the defendant shows that it was captive-bred, but an animal should not be treated as captive-bred unless the defendant shows that the animal in question was bred in captivity using animals which were lawfully in captivity.

This recommendation is given effect in the draft Bill by clauses 28(4) and (6).

11.59 Recommendation 70: we recommend that the protection provisions replicating the effect of the Deer Act 1991 should not apply to any deer which is

(1) kept by a person, by way of business for the production of meat or other foodstuffs, skins or byproducts or as breeding stock;

(2) kept by that person on land enclosed by a deer-proof barrier; and

(3) conspicuously marked in such a way as to identify it as a deer kept by that person.

This recommendation is given effect in the draft Bill by clause 162(2).

11.60 Recommendation 71: we recommend that all activities interfering with protected wild animals that are currently prohibited if committed "wilfully" or "intentionally or recklessly" should be prohibited under the new regulatory regime when committed "deliberately", as defined in recommendations 25 to 28.

11.61 Recommendation 72: we recommend that it should be an offence to kill, injure or capture the following animal species "deliberately":

(1) wild animals of a species listed in appendix 2 to the Bern Convention (except birds) that have a natural range including Great Britain;

(2) wild animals of a species listed in appendix 1 to the Bonn Convention (except birds) that have a natural range including Great Britain;

(3) wild animals of a species listed in annex 4(a) of the Habitats Directive that have a natural range including Great Britain;

(4) wild animals of the species *Meles meles* (badgers).

This recommendation is given effect in the draft Bill by clause 29 and schedule 12.

11.62 Recommendation 73: we recommend that it should be an offence to intentionally kill, injure or capture wild animals of the species currently listed in schedule 5 to the Wildlife and Countryside Act 1981, other than those covered by Recommendation 72.

This recommendation is given effect in the draft Bill by clause 30.

11.63 Recommendation 74: we recommend that it should be offence to capture relevant species of deer intentionally during the relevant close season and hares during the relevant prohibited period.

This recommendation is given effect in the draft Bill by clause 60(1).

11.64 Recommendation 75: we recommend that it should be an offence to kill, injure or capture relevant species of seals "deliberately" during the relevant close season

This recommendation is given effect in the draft Bill by clauses 60(2) and (3).

11.65 Recommendation 76: we recommend that consideration be given to further simplifying provisions on close seasons by harmonising the prohibited mental element.

11.66 Recommendation 77: we recommend that it should be an offence to take or "deliberately" damage or destroy (including doing anything which prevents hatching) the egg of a wild animal of the following species:

(1) wild animals of a species listed in appendix 2 to the Bern Convention (except birds) that have a natural range including Great Britain;

(2) wild animals of a species listed in annex 4(a) of the Habitats Directive that have a natural range including Great Britain.

This recommendation is given effect in the draft Bill by clause 34.

11.67 Recommendation 78: we recommend that it should be an offence to intentionally take, damage or destroy (including doing anything which prevents hatching) the eggs of an animal of a species currently listed in schedule 5 to the Wildlife and Countryside Act 1981.

This recommendation is given effect in the draft Bill by clauses 34(8) and 35.

11.68 Recommendation 79: we recommend that it should be an offence to damage, destroy, cause the deterioration or obstruct access to the breeding site or resting place of wild animals of the following species:

(1) Wild animals of a species listed in appendix 2 to the Bern Convention (except birds) that have a natural range including Great Britain;

(2) Wild animals of a species listed in annex 4(a) of the Habitats Directive that have a natural range including Great Britain.

This recommendation is given effect in the draft Bill by clause 48.

11.69 Recommendation 80: we recommend that the Secretary of State or Welsh Ministers should have the power to issue codes of practice for the purpose of providing practical guidance in respect of the application of the provisions in connection with the damage, destruction or deterioration of breeding places or resting sites of wild animals (other than birds) protected under the Bern Convention and the Habitats Directive that have a natural range including Great Britain.

This recommendation is given effect in the draft Bill by clause 127.

11.70 Recommendation 81: we recommend that it should be an offence "deliberately" to damage, destroy, cause the deterioration of, or obstruct access to any structure or place that is used for shelter or protection by a wild animal of the following species:

(1) an animal of a species currently listed in schedule 5 to the Wildlife and Countryside Act 1981;

(2) a wild animal of the species *Meles meles* (a badger).

This recommendation is given effect in the draft Bill by clause 49.

11.71 Recommendation 82: we recommend that the Secretary of State or Welsh Ministers should have the power to issue codes of practice for the purpose of providing practical guidance in respect of the application of the provisions in connection with damage to, destruction or deterioration of structures or places used for shelter or protection.

This recommendation is given effect in the draft Bill by clause 124.

11.72 Recommendation 83: we recommend that it should be an offence "deliberately" to disturb a wild animal of the species *Meles meles* (a badger) in circumstances where the animal in question is occupying a structure or place that it uses for shelter or protection.

This recommendation is given effect in the draft Bill by clause 52.

11.73 Recommendation 84: we recommend that it should be an offence to "deliberately" cause a dog to enter a badger sett.

This recommendation is given effect in the draft Bill by clauses 62(7) and (8).

11.74 Recommendation 85: we recommend that the offences of "cruelly ill-treating a badger", "digging for a badger" and "marking, attaching any ring, tag or other marking device to a badger other than one which is lawfully in a persons' possession by virtue of a licence" should be replicated under the new regulatory framework.

This recommendation is given effect in the draft Bill by clauses 62(1) to (6).

11.75 Recommendation 86: we recommend that the reverse burden of proof in the context of the offences of "digging for a badger" and "attempting to kill, injure or capture a badger" should be retained.

This recommendation is given effect in the draft Bill by clauses 62(3) and (5).

11.76 Recommendation 87: we recommend that consideration should be given to reviewing animal welfare legislation insofar as it applies to wild animals falling outside the scope of the Animal Welfare Act 2006 with a view to ensuring consistency across the protection regimes applying to similar categories of animals.

11.77 Recommendation 88: we recommend that existing methods and means prohibitions of general application, including the prohibition on the use of unregulated spring traps under the Pests Act 1954 and the prohibition on the use of poison under the Protection of Animals Act 1911, should be consolidated into a single offence of using a listed device, substance of method for or in connection with the purpose of killing, injuring or capturing any wild animal other than protected wild animals.

11.78 Recommendation 89: we recommend that it should be an offence to use a snare, other than a self-locking snare, unless the snare

(1) is inspected at least once in every 24 hour period that it is in use; and

(2) complies with, and is operated in accordance with, such other requirement, if any, as may be prescribed by regulations.

These recommendations are given effect in the draft Bill by clause 37.

11.79 Recommendation 90: we recommend that it should be an offence to use leghold traps for the purpose of killing, injuring or capturing any wild animal (including wild birds).

This recommendation is given effect in the draft Bill by clause 108.

11.80 Recommendation 91: we recommend that the methods and means prohibitions giving effect to article 8 of the Bern Convention, article 15 of the Habitats Directive and section 5 of the Wildlife and Countryside Act 1981 should apply to the following species:

(1) Species listed in appendixes 2 and 3 to the Bern Convention with a natural range including Great Britain (other than those subject to the UK's reservations); and

(2) Species listed in annex 4(a) and 5 to the Habitats Directive with a natural range including Great Britain.

11.81 Recommendation 92: we recommend that a person should be guilty of a methods and means offence if he or she "deliberately" uses the item or substance, or carries out the activity.

11.82 Recommendation 93: we recommend that the use of a device or substance which is indiscriminate or capable of having a significant effect on the abundance of, or causing serious disturbance to, the population of a protected animal species in the area in which it is used should constitute a stand-alone offence.

11.83 Recommendation 94: we recommend that the list of prohibited methods under the new framework should reflect and consolidate the lists in annex 6 of the Habitats Directive, appendix 4 to the Bern Convention and section 11(2) of the Wildlife and Countryside Act 1981 by giving precedence, as a general rule, to the most stringent formulation of the prohibition.

11.84 Recommendation 95: we recommend that the use of all traps and nets in connection with the killing, injuring or capture of animals of a protected species should be generally prohibited.

These recommendations are given effect in the draft Bill by clauses 36 and 46 and schedule 15.

11.85 Recommendation 96: we recommend that the protection of stoats, weasels and deer from the use of methods of killing or capture prohibited under the Bern Convention should be restricted in accordance with the wording of the UK's reservations to the Bern Convention.

11.86 Recommendation 97: we recommend that wild animals of the species *Mustela erminea* (stoats) should, for the purpose of ensuring compliance with the International Agreement on Humane Trapping Standards, be additionally protected from the use of any trap or snare.

These recommendations are given effect in the draft Bill by clauses 38, 39, 40 and 41 and schedules 17, 18, 19, 20 and 67(10).

11.87 Recommendation 98: subject to recommendations 100 to 103, we recommend that the residual methods and means prohibitions under Protection of Badgers Act 1992, the Deer Act 1991, the Conservation of Seals Act 1970, the Pests Act 1954, the Protection of Animals Act 1911 and the Ground Game Act 1880 should be replicated under the new framework.

This recommendation is given effect in the draft Bill by clause 43 and schedule 21.

11.88 Recommendation 99: we recommend that the prohibition on using poison for the purpose of killing seals under section 1(1)(a) of the Conservation of Seals Act 1970 should not be replicated under the new framework.

11.89 Recommendation 100: we recommend that the list of prohibited methods of killing or capturing hares under section 3 of the Game Act 1831 should not be replicated under the new framework.

11.90 Recommendation 101: we recommend that the specific prohibition on the use of spring traps in connection with the purpose of killing hares and rabbits under section 10 of the Protection of Animals Act 1911 and section 9 of the Pests Act 1954 should not be replicated under the new framework.

11.91 Recommendation 102: we recommend that the prohibition on using poison for the purpose of killing rabbits or hares in Greater London (other than the outer London boroughs) should not be replicated under the new framework.

11.92 Recommendation 103: we recommend that any reference to grains, footpounds and inches should be replaced by references to multiples of the kilogram, joule and metre. In line with article 3 of the Directive, references to grains, footpounds and inches should be retained, in brackets, as supplementary indicators.

11.93 Recommendation 104: we recommend that all trade prohibitions in relation to protected animals should cover the following conduct:

(1) sale;

(2) offering for sale;

(3) exposing for sale;

(4) being in possession for the purpose of sale

(5) transporting for the purpose of sale;

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

This recommendation is given effect in the draft Bill by clauses 54(1) and 56.

11.94 Recommendation 105: we recommend that, subject to the existing exceptions, the possession, control, transport and trade in wild animals of a species listed in annex 4(a) to the Habitats Directive or the eggs of oviparous animals of a species listed in annex 4(a) to the Habitats Directive should be expressly prohibited.

This recommendation is given effect in the draft Bill by clauses 54(2) and 56.

11.95 Recommendation 106: we recommend that a person should not be guilty of an offence of possessing or selling a wild animal of a species listed in annex 4(a) of the Habitats Directive, a part a such an animal, anything derived from such an animal, or an egg of such an animal (or any part of an egg of such an animal) if he or she shows that the animal or egg in question was killed, captured or taken from the wild

(1) before the implementation date of the Habitats Directive (as long as the killing, capture or taking was lawful); or

(2) outside the European territory of a member state to which the TFEU applies.

This recommendation is given effect in the draft Bill by clauses 55(1), (2) and (8).

11.96 Recommendation 107: we recommend that it should be an offence to be in possession, be in control or transport wild animals, any part of a wild animal, anything derived from a wild animal or the eggs of a wild animal of a species listed in schedule 5 to the Wildlife and Countryside Act 1981 (other than a species listed in annex 4(a) of the Habitats Directive) or a wild animal of a species *Meles meles* (badger).

This recommendation is given effect in the draft Bill by clause 57.

11.97 Recommendation 108: we recommend that the exceptions listed in section 9(3) of the Wildlife and Countryside Act 1981 should be replicated under the new framework subject to the following modifications:

(1) the term "lawful" should be redefined as restricted to activities carried out without contravention of the new Wildlife Act, the Wildlife and Countryside Act 1981 or the Protection of Badgers Act 1992.

(2) the exceptions should expressly extend to the possession of the eggs of relevant oviparous animals;

(3) in proceedings for a possession offence in connection with the possession of a dead badger it should be a defence to show that the badger, or part of the badger, had been sold to a person and that person had no reason to believe that the animal had been unlawfully killed.

This recommendation is given effect in the draft Bill by clauses 58(1), (3), (4) and (5).

11.98 Recommendation 109: we recommend that the trade prohibitions under section 9(5) and 9(6) of the Wildlife and Countryside Act 1981 should be replicated under the new framework and apply to the following species:

(1) Any live or dead wild animal, any part of or derivative of such a wild animal or the eggs of a wild animal of any species listed in schedule 5 of the Wildlife and Countryside Act 1981 that is not listed in annex 4(a) to the Habitats Directive;

(2) Live wild animals of the species *Meles meles* (badgers).

This recommendation is given effect in the draft Bill by clauses 59(3) and (4).

11.99 Recommendation 110: we recommend that under the new framework it should be an offence to

(1) sell;

(2) offer or expose for sale;

(3) possess or transport for the purpose of sale;

(4) publish or cause to be published any advertisement likely to be understood as conveying that a person buys or sells or intends to buy or sell;

venison which comes from a deer which has been killed in circumstances which constitute a wildlife offence and which the person knows, or has reason to believe has been so taken or killed.

This recommendation is given effect in the draft Bill by clause 66.

11.100 Recommendation 111: we recommend that the Hares Preservation Act 1892 should be repealed and replicated, if necessary, by a prohibition of killing, injuring or capturing hares during particular periods of the year.

11.101 Recommendation 112: we recommend that the effect of sections 8(1)(b) and (c) of the Pests Act 1954 and section 8(a) of the Protection of Animals Act 1911 should be expressly replicated through a general prohibition to sell, give away, offer for sale, expose for sale, be in possession for the purpose of sale, transport for the purpose of sale, or to publish or cause to be published any advertisement likely to be understood as conveying that a person sells or buys, or intends to sell or buy, any scheduled item, including spring traps and grains or seeds that have been rendered poisonous.

This recommendation is given effect in the draft Bill by clauses 114 and 115.

11.102 Recommendation 113: we recommend that section 43 of the Natural Environment and Rural Communities Act 2006 prohibiting the possession of pesticides listed by order should be integrated into the new regulatory regime.

This recommendation is given effect in the draft Bill by clauses 111, 112 and 113.

CHAPTER 6

11.103 Recommendation 114: we recommend that "wild plant" should be generally defined as "any plant that is growing wild or has, at any time, grown wild".

Recommendation 115: we recommend that a plant should be presumed to be wild unless the contrary is shown.

Recommendation 116: we recommend that "wild plant" should be defined as including fungi and algae.

Recommendation 117: we recommend that "wild plant" should also be defined as including a reference to a plant at any stage of its biological cycle, including bulbs, corms, rhizomes, spores and seeds.

These recommendations are given effect in the draft Bill by clause 71.

11.104 Recommendation 118: we recommend that it should be an offence "deliberately" to pick, collect, cut, uproot or destroy a wild plant of a species listed in appendix 1 to the Bern Convention or annex 4(b) to the Habitats Directive that has a natural range including Great Britain.

This recommendation is given effect in the draft Bill by clause 72.

11.105 Recommendation 119: we recommend that it should be an offence to intentionally pick, collect, cut, uproot or destroy a wild plant of a species listed in schedule 8 of the Wildlife and Countryside Act 1981.

This recommendation is given effect in the draft Bill by clause 73.

11.106 Recommendation 120: we recommend that it should be an offence for a person, other than an "authorised person", to intentionally uproot a wild plant, other than a protected plant, that is established in Great Britain in the wild.

Recommendation 121: we recommend that the definition of "authorised person" under section 27(1) of the Wildlife and Countryside Act 1981 should be extended to include any person authorised by the Secretary of State, the Welsh Ministers, Natural England and the Forestry Commissioners.

These recommendations are given effect in the draft Bill by clause 74.

11.107 Recommendation 122: we recommend that it should be an offence to possess, control, transport, sell, offer for sale, expose for sale or publish (or causing to be published, any advertisement likely to be understood as conveying that a person sells, or intends to buy or sell a wild plant of a species listed in annex 4(b) to the Habitats Directive.

This recommendation is given effect in the draft Bill by clauses 76 and 78.

11.108 Recommendation 123: we recommend that a person should not be guilty of an offence of possessing or selling a wild plant of a species listed in annex 4(b) of the Habitats Directive, a part a such a plant, or anything derived from such a plant if he or she shows that the plant in question was taken from the wild

(1) before the implementation date of the Habitats Directive (as long as the taking of the relevant plant was lawful); or

(2) outside the European territory of a member state to which the Treaty on the Functioning of the European Union applies.

This recommendation is given effect in the draft Bill by clause 77.

11.109 Recommendation 124: we recommend that the trade prohibitions under sections 13(2)(a) and (b) of the Wildlife and Countryside Act 1981 should be replicated under the new regulatory regime and apply in connection with wild plant species listed in schedule 8 to the 1981 Act other than species listed in that schedule that are also listed in annex 4(b) o the Habitats Directive.

This recommendation is given effect in the draft Bill by clause 79.

CHAPTER 7

11.110 Recommendation 125: we recommend that the relevant licensing authorities under the new regulatory regime should be the Secretary of State or Welsh Ministers. We would expect that existing arrangements will be replicated through the existing powers to delegate or transfer functions to other public bodies.

11.111 Recommendation 126: we recommend that the relevant licensing authorities should have a general obligation to consult, from time to time, the appropriate nature conservation body as to the exercise of their licensing functions. The relevant licensing authority should not grant a licence of any description unless the appropriate nature conservation body has advised as to the circumstances in which, in its opinion, licences of that description should be granted.

This recommendation is given effect in the draft Bill by clauses 117(1) to (3).

11.112 Recommendation 127: we recommend that the relevant licensing authority should be under an obligation to give reasons in connection with any decision to grant or refuse a licence.

This recommendation is given effect in the draft Bill by clauses 117(4) and (5).

11.113 Recommendation 128: we recommend that the meaning of "individual", "class" or "general licence" should be left undefined.

11.114 Recommendation 129: we recommend that under the new framework the licensing authority should be expressly authorised to grant licences to a particular person, a class of persons or persons generally.

This recommendation is given effect in the draft Bill by clauses 24(1)(b), 68(1)(b), 81(1)(b), 100(2)(b) and 116(2)(b).

11.115 Recommendation 130: we recommend that wildlife licences should not be subject to any express maximum length requirements.

Recommendation 131: we recommend that it should be for the relevant licensing authority to determine the circumstances where reporting requirements would be necessary.

11.116 Recommendation 132: we recommend that failing to comply with the condition of a wildlife licence should constitute a criminal offence, unless the defendant shows that he or she took all reasonable precautions and exercised all due diligence to avoid the commission of the offence or that the commission of the offence was otherwise due to matters beyond his or her control.

This recommendation is given effect in the draft Bill by clause 118.

11.117 Recommendation 133: we recommend that compliance of judicial review with the access to justice requirements of the Aarhus Convention should be kept under close review.

11.118 Recommendation 134: we recommend that the relevant licensing authority should not grant a wildlife licence authorising otherwise prohibited activities interfering with protected birds, including game birds, unless it is satisfied that:

(1) there is no other satisfactory way of achieving the purpose for which the licence is granted;

(2) granting the licence will not be detrimental to the maintenance of the population of any species of bird at a favourable conservation status in its natural range; and

(3) granting the licence is not contrary to the UK's obligation to comply with the Bonn Convention, the African-Eurasian Waterbirds Agreement and the Agreement on the Conservation of Albatrosses and Petrels.

This recommendation is given effect in the draft Bill by clause 23(6)

11.119 Recommendation 135: we recommend that grounds for which a licence should be capable of being granted under the new regulatory regime should reflect the grounds listed in article 9(1) of the Wild Birds Directive.

This recommendation is given effect in the draft Bill by clauses 23(2) and (4).

11.120 Recommendation 136: we recommend the relevant licensing authority may only grant a licence whose effect is to authorise the capture, possession or other "judicious use" of birds if satisfied that

(1) the activity will be carried out under strictly supervised conditions, on a selective basis and to a limited extent;

(2) the licence is consistent with the principle that no more than a "small number" of birds from any given population of protected birds should be captured, possessed or otherwise used.

This recommendation is given effect in the draft Bill by clauses 23(4) and (5)

11.121 Recommendation 137: we recommend that "judicious use" licences should also

(1) specify the maximum number of birds that may be captured, possessed or otherwise "used" under the licence; and

(2) include appropriate conditions requiring reports to be made to the appropriate authority about the things done under the licence and otherwise enabling the appropriate authority to monitor the things done under the licence.

This recommendation is given effect in the draft Bill by clause 23(8).

11.122 Recommendation 138: we recommend that activities causing the destruction, damage or deterioration of breeding sites or resting places of relevant protected bird species prohibited under the new framework should be capable of being authorised under a licence on grounds of "overriding public interest".

This recommendation is given effect in the draft Bill by clause 23(3).

11.123 Recommendation 139: we recommend that wildlife licences issued in connection with activities interfering with protected birds should specify

(1) the species of bird in respect of which the activity may be carried out;

(2) the means, arrangements or methods which may or must be used in doing so; and

(3) the places, times, or periods in which the activity may be carried out.

This recommendation is given effect in the draft Bill by clause 23(7).

11.124 Recommendation 140: we recommend that acting in pursuance of an order under the Animal Health Act 1981 or a pest control order should remain a defence to primary activity prohibitions.

This recommendation is given effect in the draft Bill by clause 25.

11.125 Recommendation 141: we recommend that the Secretary of State or Welsh Ministers should only be able to issue an order under the Animal Health Act 1981 or a pest control order which would affect a protected bird if satisfied that

(1) the order is issued for one of the purposes listed in article 9(1) of the Directive;

(2) there is no other satisfactory way of achieving the purpose for which the order is made;

(3) making the order will not be detrimental to the maintenance of the population of the relevant bird at a favourable conservation status within its natural range; and

(4) the making of the order is not contrary to the UK's international obligations (where applicable) under the Bonn Convention, the African-Eurasian Migratory Waterbirds Agreement and the Agreement on the Conservation of Albatrosses and Petrels.

This recommendation is given effect in the draft Bill by clause 110 and paragraph 2 of schedule 31.

11.126 Recommendation 142: we recommend that a person (P) should not be guilty of an offence only by reason of capturing a bird if the bird had been disabled otherwise than by P's unlawful act, P captures the bird for the purpose of tending it when no longer disabled (and retains possession of it only for that purpose) and capturing the bird

(1) Is the only satisfactory way to help it recover; and

(2) Is not detrimental to the maintenance of the population of the species of bird at a favourable conservation status in its natural range.

This recommendation is given effect in the draft Bill by clauses 3(1) and 13(2).

11.127 Recommendation 143: we recommend that a person (P) should not be guilty of an offence only by reason of killing a bird, or capturing a bird for the purpose of killing it if the bird had been disabled otherwise than by P's unlawful act, it has no reasonable chance of recovery and killing it

(1) Is the only satisfactory way to end its suffering; and

(2) Is not detrimental to the maintenance of the population of the species of bird at a favourable conservation status in its natural range.

This recommendation is given effect in the draft Bill by clause 3(2).

11.128 Recommendation 144: we recommend that consideration should be given to the option of generally repealing "mercy killing" and "tending" defences and replicating their effect, where necessary, by means of general or class licences.

11.129 Recommendation 145: we recommend that the "incidental results" defence constitutes a breach of article 9 of the Wild Birds Directive and should not, therefore, be replicated under the new framework.

11.130 Recommendation 146: we recommend that the defences under sections 4(3)(a) to (c) of the Wildlife and Countryside Act 1981 should all be replicated under the new framework subject to the conditions currently contained in sections 4(4) and 4(6).

Recommendation 147: we recommend that the reasons for which the defences under sections 4(3)(a) to (c) of the Wildlife and Countryside Act 1981 may be relied on should be harmonised with the equivalent reasons for which a wildlife licence may be granted.

Recommendation 148: we recommend that to rely on the defences under sections 4(3)(a) to (c) of the Wildlife and Countryside Act 1981 under the new regulatory framework the "authorised person" should be required to show that the action

(1) was the only satisfactory way of achieving that purpose,

(2) had to be taken urgently if it was to achieve that purpose; and

(3) was not detrimental to the maintenance of the population of the species of bird at a favourable conservation status in its natural range.

These recommendations are given effect in the draft Bill by clause 4.

11.131 Recommendation 149: we recommend that the effect of the defences in sections 5(4) and (4A) of the Wildlife and Countryside Act 1981 should not be replicated under the new framework.

11.132 Recommendation 150: we recommend that the effect of the defence in section 5(5) of the Wildlife and Countryside Act 1981 should not be replicated under the new framework.

11.133 Recommendation 151: we recommend that grounds for which a licence should be capable of being granted in connection with activities interfering with animals (other than birds) protected under the Bern Convention, the Bonn Convention and the Habitats Directive should reflect, as a general rule, the grounds listed in article 16 of the Habitats Directive.

This recommendation is given effect in the draft Bill by clause 67(2), (3).

11.134 Recommendation 152: we recommend that licences authorising the capture or possession of species for reasons other than one of the listed purposes should only be granted to species that are not listed in annex 5(a) to the Habitats Directive and licences authorising "other judicious exploitation" should only be granted in connection with species listed in the Bern Convention which are not listed under the Habitats Directive.

This recommendation is given effect in the draft Bill by clause 67(3).

11.135 Recommendation 153: we recommend the relevant licensing authority may only grant a licence whose effect is to authorise the capture, possession or other "judicious use" of protected animals other than for one of the listed purposes if satisfied that

(1) the activity will be carried out under strictly supervised conditions, on a selective basis and to a limited extent;

(2) the licence is consistent with the principle that no more than a "small number" of individuals from any given population of protected animals should be captured, possessed or otherwise used.

This recommendation is given effect in the draft Bill by clauses 67(3) and (4).

11.136 Recommendation 154: we recommend that licences granted for other than one of the listed purposes should also

(1) specify the maximum number of animals that may be captured, possessed or otherwise "used" under the licence; and

(2) include appropriate conditions requiring reports to be made to the appropriate authority about the things done under the licence and otherwise enabling the appropriate authority to monitor the things done under the licence.

This recommendation is given effect in the draft Bill by clause 67(7).

11.137 Recommendation 155: we recommend that the relevant licensing authority should not grant a wildlife licence authorising otherwise prohibited activities interfering with animals protected under the Bern Convention, the Bonn Convention and the Habitats Directive unless it is satisfied that

(1) there is no other satisfactory way of achieving the purpose for which the licence is granted;

(2) granting the licence will not be detrimental to the maintenance of the population of any species of animal at a favourable conservation status in its natural range; and

(3) granting the licence is not contrary to the UK's obligation to comply with the Bonn Convention or the Agreement on International Humane Trapping Standards.

This recommendation is given effect in the draft Bill by clause 67(5).

11.138 Recommendation 156: we recommend that wildlife licences issued in connection with activities interfering with animals protected under the Bern Convention, the Bonn Convention or the Habitats Directive should specify

(1) the species of animals in respect of which the activity may be carried out;

(2) the means, arrangements or methods which may or must be used in doing so; and

(3) the places, times, or periods in which the activity may be carried out.

This recommendation is given effect in the draft Bill by clause 67(6).

11.139 Recommendation 157: we recommend that acting in pursuance of an order under the Animal Health Act 1981 or a pest control order should remain a defence to primary activity prohibitions, subject to equivalent conditions to those specified in recommendation 142 (modified in line with the differences between the derogation regime under the Wild Birds Directive and the derogation regime under the Bern Convention and the Habitats Directive).

This recommendation is given effect in the draft Bill by clauses 69, 110 and paragraph 3 of schedule 31.

11.140 Recommendation 158: we recommend that – subject to the conditions discussed in recommendations 142 and 143 – a person should not be guilty of an offence by reason of killing an animal of a species protected under the Bern Convention, the Bonn Convention or the Habitats Directive when the action is done solely for the purpose of ending its suffering or of capturing an animal solely for the purpose of tending it and subsequently releasing it.

This recommendation is given effect in the draft Bill by clause 31.

11.141 Recommendation 159: we recommend that a person should not be capable of relying on the "tending" defence in connection with an animal of a species protected under the Bern Convention, the Bonn Convention or the Habitats Directive unless he or she shows that the possession, control or transport of the animal in question was solely for the purpose of

(1) tending it and releasing it when no longer disabled;

(2) releasing it after it had been tended; or

(3) disposing of it after its death.

This recommendation is given effect in the draft Bill by clause 55(5)

11.142 Recommendation 160: we recommend that a person should not be capable of relying on the "mercy killing" in connection with an animal of a species protected under the Bern Convention, the Bonn Convention or the Habitats Directive defence unless he or she shows that the possession, control or transport of the animal in question was solely for the purpose of

(1) killing it; or

(2) disposing of it after its death.

This recommendation is given effect in the draft Bill by clauses 55(6) and (7).

11.143 Recommendation 161: we recommend that the defences to the use of otherwise prohibited methods under section 11 of the Wildlife and Countryside Act 1981 should not be replicated under the new regulatory framework.

11.144 Recommendation 162: we recommend that acting in pursuance of an order under the Animal Health Act 1981 constitute a defence to methods and means prohibitions in connection with animals protected under the Bern Convention, the Bonn Convention or the Habitats Directive, subject to equivalent conditions specified in recommendation 153.

This recommendation is given effect in the draft Bill by clauses 69, 110 and paragraph 3 of schedule 31.

11.145 Recommendation 163: we recommend that the effect of sections 6(3) and (4) of the Deer Act 1991 should be replicated under the new framework, subject to the conditions discussed in recommendations 142 and 143.

This recommendation is given effect in the draft Bill by clause 42.

11.146 Recommendation 164: we recommend that the effect of section 4(5) of the Deer Act 1991 should be replicated under the new framework.

This recommendation is given effect in the draft Bill by clause 47.

11.147 Recommendation 165: we recommend that the existing licensing regimes for authorising otherwise prohibited activities in relation to species protected as a matter of domestic policy should be simplified and consolidated in line with the licensing regime designed to give effect to article 9 of the Bern Convention.

11.148 Recommendation 166: we recommend that the new licensing regime should not extend to prohibited activities that may not currently be licensed.

These recommendations are given effect in the draft Bill by clause 67.

11.149 Recommendation 167: we recommend that existing defences in connection with activities prohibited as a matter of domestic law should be consolidated and, where relevant, harmonised with the equivalent exceptions in connection with animals protected as a matter of international and EU law.

This recommendation is given effect in the draft Bill by clauses 32, 33, 44, 45, 50, 53, 61, 63, 69 and 93(2).

11.150 Recommendation 168: we recommend that serious consideration should be given to further simplifying this area of law by repealing unnecessary, or overly specific defences, and replacing them with relevant licences.

11.151 Recommendation 169: we recommend that acting in pursuance of an order under the Animal Health Act 1981 or a pest control order should be a defence to primary activity prohibitions in connection with animals protected as a matter of domestic policy.

This recommendation is given effect in the draft Bill by clause 69.

11.152 Recommendation 170: we recommend that the Secretary of State or Welsh Ministers should not make an order under the Animal Health Act 1981 or a pest control order unless they are satisfied that

(1) the order is issued for one of the purposes listed in article 9(1) of the Bern Convention;

(2) there is no other satisfactory way of achieving the purpose for which the order is made; and

(3) making the order in relation to a protected species will not be detrimental to the maintenance of the population of the relevant animal at a favourable conservation status within its natural range.

This recommendation is given effect in the draft Bill by clause 110 and paragraph 3 of schedule 31.

11.153 Recommendation 171: we recommend that – subject to the conditions discussed in recommendations 142 and 143 – a person should not be guilty of an offence by reason of killing an animal generally protected as a matter of domestic policy when the action is done solely for the purpose of ending its suffering. A person should not be guilty of an offence by reason of capturing an animal generally protected as a matter of domestic policy when the action is done solely for the purpose of tending it and subsequently releasing it.

This recommendation is given effect in the draft Bill by clauses 31, 58(2) and (3).

11.154 Recommendation 172: we recommend that the defence under section 10(2) of the Wildlife and Countryside Act 1981 should be retained insofar as it applies to animals protected solely as a matter of domestic policy.

This recommendation is given effect in the draft Bill by clause 49(6).

Recommendation 173: we recommend that the section 10(5) of the Wildlife and Countryside Act 1981 has currently no effect and should not, therefore, be retained under the new regime.

11.155 Recommendation 174: we recommend that in replicating and consolidating the existing “incidental results” defences in connection with activities interfering with animals protected as a matter of domestic policy, their effect should not extend to possession or trade offences.

11.156 Recommendation 175: we recommend that consideration should be given to repealing existing “incidental results” defences in connection with activities interfering with wild animals or plants protected for domestic policy reasons.

11.157 Recommendation 176: we recommend that in replicating existing defences allowing authorised persons to take actions without a licence in circumstances where applying for an individual licence would be ineffective, the defences should be subject to an express "urgency" requirement.

This recommendation is given effect in the draft Bill by clauses 33(2), 50(2), 53(2) and 63(2).

11.158 Recommendation 177: we recommend that the defence of doing anything to a badger which is authorised under the Animals (Scientific Procedures) Act 1986 should be limited to "cruelty" prohibitions under section 2 of the Protection of Badgers Act 1992.

This recommendation is given effect in the draft Bill by clause 63(1).

11.159 Recommendation 178: we recommend that consideration should be given to whether the same defence should extend to equivalent prohibitions in connection with other animals.

11.160 Recommendation 179: we recommend that the defence authorising a person to be in possession of a live badger in the course of his or her business as a carrier should not be replicated under the new regime.

11.161 Recommendation 180: we recommend that the following defences should apply in connection with the prohibition on the killing or capturing protected animals during the close season:

(1) A defence authorising the capture of an animal which has been disabled – otherwise than by the defendant's unlawful act – when the animal is captured solely for the purpose of tending it and releasing it when no longer disabled;

(2) A defence authorising the killing or injuring of any animal which has been disabled – otherwise than by the defendant's unlawful act – and has no reasonable chance of recovering; and

(3) A defence authorising the killing, injuring or capture of an animal when it is shown that this was the incidental result of a lawful operation and could not reasonably have been avoided.

This recommendation is given effect in the draft Bill by clauses 61(1) to (3).

11.162 Recommendation 181: we recommend that generally prohibited methods of killing or capturing wild animals (other than protected animals), including the use of poison, should be capable of being licensed in line with section 16(3) of the Wildlife and Countryside Act 1981.

This recommendation is given effect in the draft Bill by clause 67(9).

11.163 Recommendation 182: we recommend that the grounds on which a licence should be capable of being issued under section 16(3) of the Wildlife and Countryside Act 1981 should be harmonised with the grounds listed in article 9 of the Bern Convention.

This recommendation is given effect in the draft Bill by clauses 67(2) to (4).

11.164 Recommendation 183: we recommend that the use or sale of spring traps or the sale of poisoned grains should be capable of being licensed for any reason.

This recommendation is given effect in the draft Bill by clause 67(9) and schedule 16, part 1.

11.165 Recommendation 184: we recommend that defences in connection with the use of poison against certain pests should be simply replicated under the new framework and, where relevant, simplified and modernised.

This recommendation is given effect in the draft Bill by clause 90.

11.166 Recommendation 185: we recommend that the defence under section 8(b) of the Protection of Animals Act 1911 in connection with the use of poison should be replicated subject to the following modifications:

(1) omitting the express requirement to take reasonable precautions to prevent harm to wild birds; and

(2) replacing the reference to "dogs, cats, fowl or other domestic animals" with a reference to the definition of "protected animal" under the Animal Welfare Act 2006.

This recommendation is given effect in the draft Bill by clause 90(2).

11.167 Recommendation 186: we recommend that in replicating the defence under section 8(b) of the Protection of Animals Act 1911, consideration should be given to replacing the expression "other small ground vermin" with a clear list of relevant animals that should not be covered by the general prohibition on the use of poison.

11.168 Recommendation 187: we recommend that the grounds on which a licence should be capable of being granted in connection with activities interfering with plants protected under the Bern Convention and the Habitats Directive should reflect the licensing grounds for which a licence should be capable of being granted in connection with activities interfering with wild animals protected under the same instruments (see recommendations 153 to 157).

Recommendation 188: we recommend that the grounds for which a licence should be capable of being granted in connection with activities interfering with plants protected for domestic policy reasons should reflect the licensing grounds for which a licence should be capable of being granted in connection with activities interfering with wild plants protected under the Bern Convention.

Recommendation 189: we recommend that under the new regime a person (other than an authorised person) should not be capable of obtaining a licence for uprooting wild plants other than protected plants.

These recommendations are given effect in the draft Bill by clause 80.

11.169 Recommendation 190: we recommend that the "incidental result" defence should be replicated under the new framework insofar as it applies to plants protected for domestic policy reasons.

This recommendation is given effect in the draft Bill by clause 75.

CHAPTER 8

11.170 Recommendation 191: we recommend that existing poaching prohibitions should be consolidated into a single poaching offence applying in connection with all "game" currently subject to poaching prohibitions other than the bustard.

This recommendation is given effect in the draft Bill by clauses 102 and 107.

11.171 Recommendation 192: we recommend that the new poaching prohibition should apply to any deer other than one which is

(1) kept by a person, by way of business for the production of meat or other foodstuffs, skins or by-products or as breeding stock;

(2) kept by that person on land enclosed by a deer-proof barrier; and

(3) conspicuously marked in such a way as to identify it as a deer kept by that person.

This recommendation is given effect in the draft Bill by clause 107(4).

11.172 Recommendation 193: we recommend that there should be a power to add or remove – by regulations – "game" species from the list of species subject to poaching prohibitions.

This recommendation is given effect in the draft Bill by clause 107(5).

11.173 Recommendation 194: we recommend that the power to remove a species from a list should only be capable of being exercised in circumstances where the species in question is either extinct, or no longer capable of being hunted (otherwise than in accordance with a wildlife licence).

This recommendation is given effect in the draft Bill by clause 107(6).

11.174 Recommendation 195: we recommend that the power to add a new "game" species to the list should be restricted to species which are capable of being hunted (other than in accordance with a wildlife licence) and are being, or foreseeably will be, exploited in that way.

This recommendation is given effect in the draft Bill by clause 107(7).

11.175 Recommendation 196: we recommend that under the new framework a person should be guilty of a poaching offence if he or she:

(1) intentionally kills, injures or capture any listed game species on any land;

(2) enters or remains on any land in search or pursuit of any listed game species with the intention of killing, injuring or capturing it or of removing it if dead; or

(3) removes any dead game on land, or enters or remains on land with the intention of removing dead game on that land;

unless he or she is authorised to do so on the relevant land by virtue of having a private right to kill or take game on the relevant land (or permission from such person), or any other lawful authority to do the thing in question.

This recommendation is given effect in the draft Bill by clauses 102(1) and 104(1) to (3).

11.176 Recommendation 197: we recommend that it should also be a defence that the defendant believed (a) that he or she had lawful authority to carry out the activity giving rise to the charge or (b) that he or she would have the consent of the person having the right to hunt game on the land if that person knew what the defendant was doing and the circumstances in which it was being done.

This recommendation is given effect in the draft Bill by clause 104(4).

11.177 Recommendation 198: we recommend that the aggravated offences of "group poaching" and "armed poaching" should not be retained under the new regulatory regime.

11.178 Recommendation 199: we recommend that existing differences between night poaching and day poaching should not be retained under the new regulatory regime.

11.179 Recommendation 200: we recommend that the effect of section 24 of the Game Act 1831 – which prohibits the destruction, taking or possession of the eggs of any game bird, or of any swan, wild duck, teal, or widgeon by a person not having the right to kill game on the relevant land, or permission to do so from a person with such right – should be replicated under the new regime.

This recommendation is given effect in the draft Bill by clause 103.

11.180 Recommendation 201: we recommend that the list of birds subject to the prohibition replicating the effect of section 24 of the Game Act 1831 should be capable of being amended in line with recommendations 196 to 198.

This recommendation is given effect in the draft Bill by clause 107(5) to (7).

11.181 Recommendation 202: we recommend that it should be a general offence to

(1) sell, offer for sale, or expose for sale;

(2) be in possession of, or transport for the purpose of sale;

(3) publish any advertisement likely to be understood as conveying that the person publishing the advertisement buys or sells or intends to buy or sell:

any animal, part of an animal, anything derived from an animal or an egg of an animal where the animal has been poached or the egg taken in contravention of a poaching prohibition.

This recommendation is given effect in the draft Bill by clauses 105(1), (2) and (4).

11.182 Recommendation 203: we recommend that doing anything prohibited pursuant to recommendation 204 should not constitute an offence unless the prosecution shows that the person concerned knew, or had reason to believe, that the relevant animal or egg had been taken in contravention of the poaching provisions.

This recommendation is given effect in the draft Bill by clause 105(3).

CHAPTER 9

11.183 Recommendation 204: we recommend that the Secretary of State or Welsh Ministers should have the power to issue notification requirements in connection with invasive non-native species, in line with the Scottish Ministers' powers under section 14B of the Wildlife and Countryside Act 1981 Act as it applies to Scotland.

This recommendation is given effect in the draft Bill by clause 95.

11.184 Recommendation 205: we recommend that a notification requirement should only be capable of being imposed in connection with animal or plant species whose natural range does not include any part of Great Britain (a "non-native species") or in connection with animal species whose natural range includes all or any part of Great Britain which have ceased to be ordinarily resident in, or a regular visitor to, Great Britain (a "species no longer normally present in Great Britain").

11.185 Recommendation 206: we recommend that a non-native species, or a species no longer normally present in Great Britain, should only be capable of being specified in regulations imposing notification requirements if it appears to the Secretary of State or Welsh Ministers that the species is "invasive".

These recommendations are given effect in the draft Bill by clause 95(2), read together with clause 94.

11.186 Recommendation 207: we recommend that under the new regime a species should be regarded as "invasive" if, uncontrolled, it would be likely to have significant adverse impacts on:

(1) biodiversity;

(2) other environmental interests; or

(3) social or economic interests.

A species of fish should also be regarded as "invasive" if, uncontrolled, it might compete with, displace, prey on or harm the habitat of any freshwater fish, shellfish or salmon in England and Wales.

This recommendation is given effect in the draft Bill by clauses 94(3) and (4).

11.187 Recommendation 208: we recommend that, in line with section 14B(5) of the Wildlife and Countryside Act 1981 as it applies to Scotland, a person failing to notify the relevant authority should not be guilty of an offence where he or she had a reasonable excuse for failing to do so in accordance with the terms of the requirement.

This recommendation is given effect in the draft Bill by clause 95(6).

11.188 Recommendation 209: we recommend that the Secretary of State or Welsh Ministers should have the power to make regulations prohibiting the import of any non-native species of animal or plant, or any species no longer normally present in Great Britain which is "invasive", from a place outside England and Wales.

11.189 Recommendation 210: we recommend that the Secretary of State or Welsh Ministers should have the power to make regulations prohibiting the possession or control of any non-native species of animal or plant, or any species no longer normally present in Great Britain which is "invasive".

11.190 Recommendation 211: we recommend that the Secretary of State or Welsh Ministers should have the power to make regulations prohibiting any person from selling, offering for sale, exposing for sale, transporting for the purpose of sale or publishing any advertisement likely to be understood as conveying that the person buys or sells any invasive non-native species of animal or plant, or any species no longer normally present in Great Britain which is "invasive", from a place outside England and Wales.

These recommendations are given effect in the draft Bill by clause 96.

11.191 Recommendation 212: we recommend that it should be an offence for a person to release from captivity, or allow to escape from captivity, any animal which is of a species that is not ordinarily resident in, or a regular visitor to, Great Britain in a wild state or an animal that is currently listed in parts 1A and 1B of schedule 9 of the Wildlife and Countryside Act 1981.

This recommendation is given effect in the draft Bill by clause 97(1).

11.192 Recommendation 213: we recommend that it should be an offence for a person to plant or otherwise cause to grow in the wild any plant which is of a species that is currently listed in part 2 of schedule 9 of the Wildlife and Countryside Act 1981.

This recommendation is given effect in the draft Bill by clause 97(2).

11.193 Recommendation 214: we recommend that the Secretary of State and Welsh Ministers should have a power to issue or approve codes of practice for the purpose of providing practical guidance in respect of the application of any of the prohibitions in connection with the provisions giving effect to recommendations 196 to 205.[1]

This recommendation is given effect in the draft Bill by clause 101.

11.194 Recommendation 215: we recommend that a person who contravenes any import, possession, trade or release prohibition should not be guilty of an offence if he or she shows that all reasonable steps were taken and all due diligence was exercised to avoid committing the offence.

This recommendation is given effect in the draft Bill by clause 98.

11.195 Recommendation 216: we recommend that in line with section 16(4) of the Wildlife and Countryside Act 1981, the Secretary of State or Welsh Ministers should have the power to issue licences for the purpose of authorising any otherwise prohibited activity in connection with non-native species.

This recommendation is given effect in the draft Bill by clause 100.

11.196 Recommendation 217: we recommend that the substantive powers be consolidated and their language modernised, whilst leaving their scope essentially unchanged (subject to the further recommendations below).

This recommendation is given effect by Part 4 of the draft Bill.

11.197 Recommendation 218: we recommend that the decision makers under the consolidated powers to control pests and weeds remain the Secretary of State in relation to England, and the Welsh Ministers in relation to Wales.

This recommendation is given effect in the draft Bill by clause 89(1).

11.198 Recommendation 219: we recommend that the substantive powers to control pests and weeds should be exercisable against owners, occupiers, and those with the relevant rights to carry out the actions required.

This recommendation is given effect in the draft Bill by clauses 83(3), 84(3), 85(3), 86(2) and 87(3).

11.199 Recommendation 220: we recommend that before making a control order, the appropriate authority should be satisfied that, in the relevant circumstances, the person subject to the order is the most appropriate person on whom to impose the requirements of the order in question.

[1] See chapter 8, p 313.

This recommendation is given effect in the draft Bill by paragraph 4(2) of schedule 31.

11.200 Recommendation 221: we recommend that the substantive powers be accompanied by express proportionality and reasons requirements.

This recommendation is given effect in the draft Bill by paragraphs 4(1)(b) and 8(4) of schedule 31.

11.201 Recommendation 222: we recommend that the substantive powers be exercisable by administrative order.

11.202 Recommendation 223: we recommend that the birds against which a pest control order may not be exercised be extended to the list of bird species contained in schedule 1 to the Wildlife and Countryside Act 1981.

This recommendation is given effect in the draft Bill clause 83(4).

11.203 Recommendation 224: we recommend that pest control order powers continue to be limited so as not to be capable of requiring the taking of steps prohibited by law, subject to the current exception relating to the killing of rabbits during the night. We recommend that the exception relating to the killing of game outside season should not be expressly replicated.

This recommendation is given effect in the draft Bill by paragraph 5 of schedule 31.

11.204 Recommendation 225: we recommend that rabbit clearance orders be retained.

This recommendation is given effect in the draft Bill by clause 86.

11.205 Recommendation 226: we recommend that the power to allow the use of additional firearms to carry out a rabbit clearance order be simplified to allow its exercise where the decision-maker considers this necessary to free the premises of rabbits.

This recommendation is given effect in the draft Bill by clauses 86(4) and (5).

11.206 Recommendation 227: we recommend that the enforcement provisions be unified and made as consistent as possible with the provisions contained in schedule 9A of the Wildlife and Countryside Act 1981.

This recommendation is given effect in the draft Bill by paragraphs 4 to 18 of schedule 31.

11.207 Recommendation 228: we recommend that before making a control order or a rabbit clearance order the appropriate authority should be under an obligation to consult such persons as appear to the authority to be appropriate.

This recommendation is given effect in the draft Bill by paragraph 4(1)(a) of schedule 31.

11.208 Recommendation 229: we recommend that the mechanism for giving notice of control orders or rabbit clearance orders should be simplified. The exercise of rabbit clearance order powers should simply be brought to the attention of those affected in a reasonable manner. The exercise each of the other powers should require that notice be given to all those affected. Whenever notice of an order is served, it should include a statement explaining the reasons for making the order and the reasons for any requirement, or proposal to take steps, included in the order.

This recommendation is given effect in the draft Bill by paragraph 8 of schedule 31.

11.209 Recommendation 230: we recommend that those affected by the exercise of control orders or rabbit clearance orders should have a right of appeal to the First-tier Tribunal, and that orders should not come into effect until the period for appealing the order has expired.

This recommendation is given effect in the draft Bill by paragraph 10 of schedule 31.

11.210 Recommendation 231: we recommend that in cases where the decision-maker considers the making of the order to be urgently necessary a control or rabbit clearance order should be capable of coming into force immediately.

This recommendation is given effect in the draft Bill by paragraph 7(3) of schedule 31.

11.211 Recommendation 232: we recommend that the powers to enter land to secure compliance with an order, and to recover the costs of doing so, should be consistent with those in schedule 9A of the Wildlife and Countryside Act 1981.

This recommendation is given effect in the draft Bill by paragraphs 11 and 14(1)(e) of schedule 31.

11.212 Recommendation 233: we recommend that failing to comply with a control order or rabbit clearance order, and obstructing compliance with such an order, should constitute a criminal offence.

This recommendation is given effect in the draft Bill by paragraph 12 of schedule 31.

11.213 Recommendation 234: we recommend that those complying with a control order or rabbit clearance order be exempted from civil liability.

This recommendation is given effect in the draft Bill by paragraph 13 of schedule 31.

11.214 Recommendation 235: we recommend that the powers of entry in connection with control orders and rabbit clearance orders should be consistent with those applying to species control orders and provide equivalent safeguards.

This recommendation is given effect in the draft Bill by paragraphs 14 to 17 of schedule 31.

11.215 Recommendation 236: we recommend that the Secretary of State or Welsh Ministers should have a power to provide compensation to those who have suffered loss resulting from compliance with a control order or rabbit clearance order.

This recommendation is given effect in the draft Bill by paragraph 18 of schedule 31.

11.216 Recommendation 237: we recommend that the powers under section 1A of the Weeds Act 1959 to make a code of practice regarding ragwort be replicated in the new regime.

This recommendation is given effect in the draft Bill by clause 92

11.217 Recommendation 238: we recommend that there be a power for the Secretary of State or Welsh Ministers to direct how the animals, plants, birds or eggs affected by a control order or rabbit clearance order should be disposed of.

This recommendation is given effect in the draft Bill by paragraph 6(2)(c) of schedule 31.

11.218 Recommendation 239: we recommend that the power of the Secretary of State or Welsh Ministers to authorise any person to enter land to obtain information about seals or enter land to kill or capture seals for the purpose of preventing damage to fisheries should be replicated under the new regime.

This recommendation is given effect in the draft Bill by clause 109.

11.219 Recommendation 240: we recommend that the power to enter land for the purpose of obtaining information about seals should only be capable of being exercised in connection with the function of authorising a person to subsequently enter land for the purpose of killing or capturing seals.

This recommendation is given effect in the draft Bill by clause 109(1)(b).

11.220 Recommendation 241: we recommend that consideration be given to whether the powers to authorise entry onto land for the purpose of obtaining information about seals, or for the purpose of killing or capturing seals, should be repealed or, if still relevant, consolidated with the existing pest control powers.

CHAPTER 10

11.221 Recommendation 242: we recommend that it should be a general offence for a person to knowingly cause or permit another person under his or her control to commit any substantive offence under the new regime.

This recommendation is given effect in the draft Bill by clause 121.

11.222 Recommendation 243: we recommend that a body corporate should be guilty of a wildlife offence listed in articles 3(f) and 3(g) in respect of species respectively listed in articles 2(b)(i) and (ii) of the Environmental Crime Directive where:

(1) A person commits an offence while acting as employee or agent of the body corporate; and

(2) The relevant offence would not have been committed but for the failure of a director, manager, secretary or similar officer of the body corporate to exercise proper supervision or control over the actions of the agent or employee.

This recommendation is given effect in the draft Bill by clauses 122(1) to (5).

11.223 Recommendation 244: we recommend that in proceedings for such an offence, it should be a defence for the body corporate to show that all reasonable steps were taken and all due diligence exercised to avoid the commission of the offence.

This recommendation is given effect in the draft Bill by clause 122(6).

11.224 Recommendation 245: we recommend that where any wildlife offence committed by a body corporate has been proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, the relevant officer should also be guilty of the same offence and should be liable to be proceeded against accordingly.

This recommendation is given effect in the draft Bill by clauses 163(1) to (3).

11.225 Recommendation 246: we recommend that partnerships and other unincorporated associations should be capable of being prosecuted for a wildlife (or poaching) offence in their own name.

11.226 Recommendation 247: we recommend that proceedings for an offence alleged to have been committed by a partnership or an unincorporated association should be brought in the name of the partnership or unincorporated association, and a fine imposed on a partnership or an unincorporated association upon its conviction for an offence should be paid out of the partnership's assets or the funds of the association.

This recommendation is given effect in the draft Bill by clause 164.

11.227 Recommendation 248: we recommend that when an offence committed by a partnership or unincorporated association is proved to have been committed with the consent or connivance of a partner, an officer of the association or a member of the governing body of the association, or may be attributable to any neglect on their part, the partner, officer or member of the governing body should also be guilty of an offence and liable to be proceeded against and punishable accordingly.

This recommendation is given effect in the draft Bill by clauses 163(4) and (5).

11.228 Recommendation 249: we recommend that a partnership or unincorporated association should also, in principle, be capable of being prosecuted for an offence committed by an employee or agent in circumstances where the relevant wildlife offence (an offence listed in articles 3(f) and 3(g) in respect of species respectively listed in articles 2(b)(i) and (ii) of the Environmental Crime Directive) would not have been committed but for the failure of a partner, an officer of the association or a member of its governing body to exercise supervision or control over the actions of the employee or agent.

This recommendation is given effect in the draft Bill by clause 122.

11.229 Recommendation 250: we recommend that all wildlife offences, including poaching offences, should be capable of being committed by attempt.

11.230 Recommendation 251: we recommend that possessing anything capable of being used for committing a wildlife or poaching offence for the purpose of committing that offence should be a general offence under the new regime.

This recommendation is given effect in the draft Bill by clause 114.

11.231 Recommendation 252: we recommend that making a false statement for the purpose of obtaining a registration or a wildlife licence under the new regime should constitute a criminal offence.

This recommendation is given effect in the draft Bill by clause 119.

11.232 Recommendation 253: we recommend that constables' powers to stop, search and seize items under regulation 112 of the Conservation of Habitats and Species Regulations 2010 and section 19(1) of the Wildlife and Countryside Act 1981 should be consolidated, replicated under the new regime and extended to all wildlife crimes.

This recommendation is given effect in the draft Bill by clause 129(1).

11.233 Recommendation 254: we recommend that constables' powers of entry and inspection under regulation 109 of the Conservation of Habitats and Species Regulations 2010 and section 19(2) of the Wildlife and Countryside Act 1981 should be consolidated, replicated under the new regime and extended to all wildlife crimes.

This recommendation is given effect in the draft Bill by clauses 129(2) and (3).

11.234 Recommendation 255: we recommend that constables' powers to take samples under regulation 113 of the Conservation of Habitats and Species Regulations 2010 and section 19XA of the Wildlife and Countryside Act 1981 (as respectively restricted by regulation 115 and section 18F) should be consolidated, replicated under the new regime and extended to all wildlife crimes.

This recommendation is given effect in the draft Bill by clauses 130 and 141.

11.235 Recommendation 256: we recommend that under the new regime the Secretary of State and Welsh Ministers should retain the power to appoint wildlife inspectors.

This recommendation is given effect in the draft Bill by clause 132.

11.236 Recommendation 257: we recommend that the existing wildlife inspectors' powers to enter premises other than dwellings under regulation 110 of the 2010 Regulations and section 18B of the Wildlife and Countryside Act 1981 (in relation to "group 1" offences) should be consolidated, replicated under the new regime and extended to the investigation of all wildlife offences other than "group 2" offences.

This recommendation is given effect in the draft Bill by clause 133.

11.237 Recommendation 258: we recommend that existing wildlife inspectors' powers to enter dwellings occupied by persons who hold, or have applied for, a licence in connection with activities that would otherwise be prohibited by a "group 2" offence or have registered a bird the possession of which would be otherwise prohibited by section 7 of the Wildlife and Countryside Act 1981 should be retained and extended to all equivalent wildlife offences under the new regime.

This recommendation is given effect in the draft Bill by clause 135.

11.238 Recommendation 259: we recommend that consideration should be given to whether a rationalisation of the functions of wildlife inspectors and marine enforcement officers may benefit the current enforcement regime.

11.239 Recommendation 260: we recommend that existing wildlife inspectors' powers to take samples and examine specimens under regulation 110 of the Conservation of Habitats and Species Regulations 2010 and section 18B of the Wildlife and Countryside Act 1981 (as respectively restricted by regulation 115 and section 18F) should be consolidated, replicated under the new regime and extended to all wildlife crimes.

This recommendation is given effect in the draft Bill by clauses 134 and 136.

11.240 Recommendation 261: we recommend that the Secretary of State and Welsh Ministers should retain the power to issue codes of practice in connection with the enforcement powers of wildlife inspectors.

This recommendation is given effect in the draft Bill by clause 143.

11.241 Recommendation 262: we recommend that the powers of marine enforcement officers should be left under the Marine and Coastal Access Act 2009.

This recommendation is given effect in the draft Bill by clause 145.

11.242 Recommendation 263: we recommend that the power of an owner or occupier of land, or any constable, to require a person found committing an offence under section 1 of the Protection of Badgers Act 1992 to leave the land and give his or her name and address should not be replicated under the new framework.

11.243 Recommendation 264: we recommend that the existing powers of appropriate conservation bodies to advise and assist any constable or wildlife inspector in, or in connection with, any enforcement action in relation to relevant provisions should be consolidated, replicated under the new regime and extended to all wildlife crimes.

This recommendation is given effect in the draft Bill by clause 144.

11.244 Recommendation 265: we recommend that existing forfeiture powers should be consolidated, replicated under the new regime and extended to all relevant wildlife crimes.

This recommendation is given effect in the draft Bill by clauses 124.

11.245 Recommendation 266: we recommend that provision under section 4(2) of the Conservation of Seals Act 1970 Act authorising a constable to sell seals or seal skins in respect of which an offence had been committed should not be replicated under the new regime.

11.246 Recommendation 267: we recommend that activities carried out in pursuance of relevant enforcement powers that interfere with protected species should not constitute a wildlife offence. This defence should not apply where it is shown by the prosecution that there were other satisfactory alternatives or that the action was detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range.

This recommendation is given effect in the draft Bill by clause 142.

11.247 Recommendation 268: we recommend that the following acts should constitute an offence under the new regime:

(1) intentionally obstructing a wildlife inspector exercising powers of entry, inspection and sampling;

(2) failing, without reasonable excuse, to give assistance reasonably required (or to make available any specimen in accordance with a requirement) by a wildlife inspector in pursuance of his or her powers to require assistance;

(3) failing, without reasonable excuse, to give assistance reasonably required (or to make available any specimen in accordance with a requirement) by a constable in pursuance of his or her powers to require assistance;

(4) falsely pretending – with intent to deceive – to be a wildlife inspector.

This recommendation is given effect in the draft Bill by clauses 131 and 137.

11.248 Recommendation 269: we recommend that any wildlife offence committed under the new regime should be deemed, for the purpose of conferring jurisdiction, to have been committed in any place where the offender is found or to which the offender is first brought after the commission of the offence.

This recommendation is given effect in the draft Bill by clause 123.

11.249 Recommendation 270: we recommend that existing landowners or gamekeepers' powers of arrest and seizure in the context of poaching legislation should not be replicated under the new framework.

11.250 Recommendation 271: we recommend that under the new regime if the owner or occupier of the land or any person authorised by the owner or occupier (including any person having the right to take or kill deer on the land) or a constable suspects with reasonable cause that any person is committing or has committed a poaching offence on the relevant land, he or she should have the power to require that person to give his or her full name and address and leave the land immediately. Failure to do so should constitute a criminal offence.

This recommendation is given effect in the draft Bill by clause 139.

11.251 Recommendation 272: we recommend that constables' stop and search powers under the Poaching Prevention Act 1862 and the Game Laws (Amendment) Act 1960 should be harmonised with the equivalent enforcement powers in connection with wildlife offences.

This recommendation is given effect in the draft Bill by clause 129(1).

11.252 Recommendation 273: we recommend that the existing constables' powers to enter the land for the purpose of exercising the powers under section 31A of the Game Act 1831 or arresting the person in accordance with section 24 of the Police and Criminal Evidence Act 1984 should be replicated under the new regime.

This recommendation is given effect in the draft Bill by clause 129(2), (3).

11.253 Recommendation 274: we recommend that the effect of the existing forfeiture powers in connection with poaching offences under sections 12 and 13 of the Deer Act 1991 and sections 4 and 4A of the Game Laws (Amendment) Act 1960 should be consolidated and replicated under the new regime.

This recommendation is given effect in the draft Bill by clause 125.

11.254 Recommendation 275: we recommend that the procedure for authorising the sale of poached game set out in section 3(4) of the Game Laws (Amendment) Act 1960 should be applicable in connection to all poaching offences under the new regime.

This recommendation is given effect in the draft Bill by clause 140.

11.255 Recommendation 276: we recommend that under the new regime a court should have the power to cancel any firearm or shotgun certificate held by a person convicted of a poaching offence.

This recommendation is given effect in the draft Bill by clause 126.

11.256 Recommendation 277: we recommend that the defences applicable to enforcement powers in connection with wildlife crimes should extend to the enforcement of poaching offences.

This recommendation is given effect in the draft Bill by clause 142.

11.257 Recommendation 278: we recommend that all enforcement powers under the new regime should be capable of being exercised in any land (including land covered by water) in England and Wales, whoever the occupier of the land in question is.

This recommendation is given effect in the draft Bill by clause 167.

11.258 Recommendation 279: we recommend that the existing regime for issuing civil sanctions for wildlife crimes under the Regulatory Enforcement and Sanctions Act 2008 should be replicated under the new framework.

This recommendation is given effect in the draft Bill by clause 146 and schedule 34.

11.259 Recommendation 280: we recommend that the whole range of civil sanctions should be available in connection with all substantive wildlife offences (other than poaching) under the new framework. The Secretary of State or Welsh Ministers, in addition, should have the power to extend the civil sanctions regime, or part of that regime, to all offences in connection with enforcement powers and offences created under secondary legislation.

This recommendation is given effect in the draft Bill by paragraph 2 of schedule 34.

11.260 Recommendation 281: we recommend that the application of the new civil sanctions regime should not be restricted to undertakings with more than 250 employees.

11.261 Recommendation 282: we recommend that the regulatory bodies capable of issuing civil sanctions under the new regime should include Natural England, the Marine Management Organisation, the Environment Agency, the Forestry Commissioners (in England) and Natural Resources Wales (in Wales), or any other body with an enforcement function in relation to a wildlife offence. The decisions as to which regulator should be capable of issuing civil sanctions, nevertheless, should ultimately be one for the Secretary of State or Welsh Ministers.

This recommendation is given effect in the draft Bill by paragraph 1 of schedule 34.

11.262 Recommendation 283: we recommend that appropriate forum to hear appeals against civil sanctions under the new framework should be the First-tier Tribunal.

This recommendation is given effect in the draft Bill by paragraph 27 of schedule 34.

11.263 Recommendation 284: we recommend that substantive offences under the new framework, including poaching offences, should be punishable on summary conviction by imprisonment for a period not exceeding six months or a fine (or both) and on indictment by imprisonment for a period not exceeding two years or a fine (or both).

This recommendation is given effect in the draft Bill by clauses 26, 70, 82, 93(3) 99(2), 106, 108(3), 115(3) and 122(8).

11.264 Recommendation 285: we recommend that the "sentence multipliers" provisions under the Wildlife and Countryside Act 1981, the Protection of Badgers Act 1992 and the Deer Act 1991 should not be replicated under the new framework.

11.265 Recommendation 286: we recommend that the following offences:

(1) failing to comply with a licence condition;

(2) making a false statement for the purpose of obtaining a registration or a licence;

(3) attempting to commit an offence; and

(4) falsely pretending to be a wildlife inspector;

should also be punishable on summary conviction by imprisonment for a period not exceeding six months or a fine (or both) and on indictment by imprisonment for a period not exceeding two years or a fine (or both).

This recommendation is given effect in the draft Bill by clauses 120 and 137(6).

11.266 Recommendation 287: we recommend that any other "enforcement offence" should be punishable, on summary conviction, by a fine.

This recommendation is given effect in the draft Bill by clauses 137(4) and 131.

(Signed) DAVID BEAN,[2] *Chairman*
NICK HOPKINS[3]
STEPHEN LEWIS
DAVID ORMEROD
NICHOLAS PAINES

ELAINE LORIMER, *Chief Executive*
2 November 2015

[2] Lord Justice Lloyd Jones was Chairman of the Law Commission at the time this report was drafted and approved in principle. He was succeeded by Lord Justice Bean on 1 August 2015.

[3] Professor Elizabeth Cooke was a Law Commissioner at the time this report was drafted and approved in principle. She was succeeded by Professor Hopkins on 1 October 2015.

APPENDIX A
INDEX OF CONSULTEES

INTRODUCTION

A.1 This appendix lists consultees who responded to our consultation paper.

Name	Organisation
Kevin Heath	
Mike Price	
Sharon Pickfor	
Terry Pickfor	
Michael Bolden	
John Olley	
Stuart Pryor	
Peter Hewitson	
Micky Cooper	
Jimmi Hill	
Marcus Fry	
Gerard Hopley	
Roy Mosley	
David Peace	
Sue Wood	
Belinda Wiggs	
Annabelle Kennedy	
Dave Falcon	
Christopher Evans	
	Friends of the North Kent Marshes
Andrew Reid	Rural Beat Officer
Toby Everett	
Anthony Chamberlain	
John Bryant	Humane Urban Wildlife Deterrence
Professor E L Jones	
Spiro Ozer	
Phil Sanderson	West Yorkshire Police (Wildlife Crime Department)
Sir Jeremy Sullivan (Senior President of Tribunals)	
Prof Richard Macrory	
Nicholas Crampton	
Jean M Hodgetts	
	Baker Consultants Ltd.
	The Association of British Fungus Groups
Richard Wilson (IEEM consultant)	
R. Dawkins	
	Richard Graves Consultants
Barry Sampson	
Paul Smith	
Brynn McDonagh	
	Yorkshire Coast Nature
Peter Rowberry	
Mr A. Southey	

Brian Shepherd	
Marjorie Lewis	
Pam	
Marian Newell	
Gill Gilbert	
	Cornwall Seal Group
Janet and Roger Makin	
Phil Charleton LDC	
Christopher Jessel	
	New forest Non-Native Plants Project Hampshire and Isle of Wight Wildlife Trust
Richard Cowen	Durham Group of RSPB and Durham Bird Club
Richard Cowen	
Dr John Plackett	
J and L Solven	
Sara Cadbury (member of the British Mycological Society and founder member of the Hampshire Recording Group)	
Stuart Wight	
Simon Baker	
	Thames Water Ltd
Keith Miller	
	British Marine Federation
Alison Hunt	
Professor Stuart R Harrop	
Christine Wieloch	
Colin Clark, Lee Fribbins, Stewart Wardrop, David Higgins, Jim Hooper, Geof Bennet, Gordon Burton, Eugene Fitzgerald, Ian Noble.	Pigeon Racing UK and Ireland, Welsh Homing Pigeon Union, Scottish Pigeon Union, Irish Homing Pigeon Union, North West Pigeon Union, Royal Pigeon Racing Association, North of England Homing Union.
Tilak Ginige	
Prof Colin T Reid	
Gary Wall	
Jennifer Harrison	
	International Wildlife Consultants Ltd
Mick Green (IEEM Member)	
	Institute of Chartered Foresters
	British Bird Council
	Council of Hunting Associations
Garry J Humphreys	
	Animal Aid
Larry Burrows (IEEM Member)	
	The Moorland Association
Derek Gould	
David R Smart	
	The British Association for Shooting and Conservation
	Clwyd Badger Group
	Whale and Dolphin Conservation
Charles George QC	
Steve Bridges	
	Game Farmers' Association
	Hawk Board
	Central Committee of Fell Packs
A S Perry	

	Masters of Basset Hounds Associations
Paul Timson	
	Angling Trust and Fish Legal
	Northumbria's Student Law Think Tank (Northumbria University, School of Law)
	Veterinary Association for Wildlife Management
	International Ornithological Association
	Marine Management Organisation
Ernie Scales	
Dejan Djordjevic	
Judith Smith	
	Countryside Council for Wales
Deborah Willingale	
	Liverpool Law Society's Environmental Law Sub-Committee
	Scottish Association for Country Sports
John P Harris	
	Flora Locale
	Countryside Alliance
	The Association of Masters of Harriers and Beagles
	Masters of Foxhounds Association
	Greater Exmoor Shoots Association and the Exmoor and District Deer Management Society
	Royal Society for the Prevention of Cruelty to Animals (RSPCA)
	Nottinghamshire County Council
Earl of Lytton	
Mr P A Williamson	
	Somerset Badger Group
	National Anti Snaring Campaign; Against Corvid Traps; West Sussex Wildlife Protection
	The Badger Trust
	National Wildlife Crime Unit
	Amphibian and Reptile Conservation Trust
	The Bar Council
	British Entomological and Natural History Society
	National Museums Scotland
Dr John Plackett	
Dr Sandra Baker	
	Conservatives Against Fox Hunting
	Scottish Raptor Study Groups
	National Farmers' Union
	International Fund for Animal Welfare
	Humane Society International UK
	Tim Brayford Landscapes
Philippa Lennox	
	National Council for Aviculture
	Derbyshire Wildlife Trust
Alison Plackett	
Philippa Goodwin	
	Amateur Entomologists' Society

	National Gamekeepers' Organisation
	Ornamental Aquatic Trade Association Ltd
	BT Group Plc
	Forestry Commission (England, Wales and Great Britain)
	Plantlife
	Bedford Group of Drainage Boards
	London Invasive Species Initiatives
W D O Valentine	
Mike Toulson	
	Student Invasive Non-Native Group
	Scottish Natural Heritage
	Devon Badger Group
	Justices' Clerks' Society
	British Shooting Sports Council
	British Falconers' Club
	Canal & River Trust
	Invertebrate Link
	The Law Society (Planning and Environmental Law Committee)
	J M Osborne & Co
	Institute of Ecology and Environmental Management
	International Association for Falconry and Conservation of Birds of Prey
	Bat Conservation Trust
	Wales Biodiversity Partnership (Invasive Non-Native Group).
	Salmon & Trout Association and Atlantic Salmon Trust
Bridget Martin (Senior Lecturer at Lancashire Law School)	
	Secret World Wildlife Rescue
	Natural England
	AMEC Environment & Infrastructure UK Ltd
	Union of Country Sports Workers
	Royal Society for the Protection of Birds (RSPB)[1]
	Magistrates' Association
	National Farmers' Union CYMRU
	The Wildlife Trust
	UK Environmental Law Association (Nature Conservation Working Group)
	World Society for the Protection of Animals
	OneKind
	Universities Federation for Animal Welfare (James Kirkwood)
	Ribble Rivers Trust (on behalf of the

[1] In addition to their formal response, the RSPB ran a campaign encouraging responses to our consultation on particular issues. As a result we received 280 similar responses from individuals addressing those issues. As with all of the responses we received, these responses helped inform our recommendations. While we do not list the names of these consultees here they are available on request. Information on the RSPB's campaign is available online here: http://www.rspb.org.uk/joinandhelp/campaignwithus/current/betterwildlifelaws.aspx (last visited 26 October 2015).

	Lancashire Invasive Species Project)
	Country Land & Business Association
Reece Fowler	
	Western Power Distribution (SW) plc
Dr Angus Nurse	
Reverend Chris Goble	
	Chichester Wildfowlers Association
John Lowther	
Hugh Watson	
	British Aggregates Association
Norris Atthey	
	The Self Help Group for Farmers, Pet Owners and Others experiencing difficulties with the RSPCA (SHG)
	Game & Wildlife Conservation Trust
	Save Me
	Wildfowl and Wetlands Trust
	Woodland Trust
Patricia Kitchin	
Dr A Martyn Ainsworth	
Derek Canning	
	Northern England Raptor Forum
	Chief Fire Officers Association
	CONFOR: promoting forestry and wood
Rob Yorke	
	Wildlife and Countryside Link
	Eastern Federation of British Bird Fanciers
	The Deer Initiative Ltd
	League Against Cruel Sports
Rose Seabrook	
	Masters of Deerhounds Association
	British Wildlife Management
Brian Shepherd	
Colin Ray	
	Department for Environment, Food and Rural Affairs (DEFRA)
	Fishmongers' Company
Alan Bowers	
	British Veterinary Zoological Society
	Institute of Fisheries Management
	National Federation of Fishermen's Organisations (NFFO)
	British Veterinary Association
	Birds & Mule Club