The SHG response to the Law Commission consultation on Wildlife Law

The Self Help Group for Farmers, Pet Owners and Others experiencing difficulties with the RSPCA (The SHG) provides support and legal advice to people being investigated or prosecuted for animal related offences, including wildlife crime.

It is very likely that we will be the first port of call for those who run into difficulties with the proposed legislation.

We believe that habitats should be included along with the Animal Welfare Act 2006 (AWA).

We also believe that the right to prosecute under the proposed legislation should be limited to specified prosecutors or the police. Special interest groups whose prosecutions are tainted by political campaigns or the belief that the activities they are investigating and prosecuting should not be legal should not be allowed to bring private prosecutions or to be involved in any way.

We accept that there is a long standing right for any individual to bring a private prosecution but suggest that the prosecution of an often impecunious individual whose understanding of the law is limited by a wealthy campaigning organization more akin to a multi-million pound business than a charity creates such an inequality of arms that a fair trial is never possible.

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

Yes.

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

We agree. Habitat should also be included if the aim is to provide a one stop statutory shop for wildlife law.

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

The welfare offences in the Animal Welfare Act 2006 (AWA) have caused great confusion and, we believe, injustice as applied to Wildlife. For instance, how is one to dispose of a wild animal caught in a live catch trap? Prosecutions have been initiated because grey squirrels were drowned. Advice was given that the way to kill a grey squirrel was to place it in a sack and hit it with a large piece of wood. No explanation was given as to how one should transfer a frightened and vicious squirrel into a sack. More worryingly, no advice was given on how to ensure that a struggling and wriggling animal was actually hit on the head, not on various body parts causing the potential for serious pain and suffering. It is a sign of bad legislation when people are left facing speculative prosecutions by prosecutors attempting to dissuade the public from undertaking legal or required courses of action by making examples of individuals.

Unless there is to be a corresponding complete overhaul of the seriously flawed AWA we believe that the proposed single statute should include the general welfare offences of the AWA and Wild Mammals (Protection) Act 1996 and should specify the circumstances in which welfare becomes an issue.

If welfare is to apply to wildlife management and pest control then clear statements specifying killing methods and application to each species are needed. We also propose that all references

to wildlife be removed from the AWA to prevent confusion.

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

Agreed only if the welfare offences relating to wildlife in the AWA and the Wild Mammals (Protection) Act 1996 cannot be incorporated into the proposed wildlife legislation and with the proviso that there is a guarantee that this will be properly reviewed by the Law Commission

There is scope for confusion if this is not incorporated carefully because of the differences in the aims of the two Acts., the AWA not being specifically restricted to mammals. We would prefer a full accompanying review of the AWA itself.

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

Providing consultation takes place and reasons for decisions are given there is no need to impose restrictive statutory factors. Their very existence limits the freedom to apply other, perhaps more important considerations.

Should factors be imposed there needs to be guidance on which factors are to be given more weight than others and what conditions would need to occur in order to allow the decision maker to vary that weighing, if he is allowed to do so.

It is inevitable that businesses and profit will be vilified by campaigners who will use the existence of a 'welfare' factor as the key to ending all use of or interaction with those animals.

Extending the imposition of factors gold plates the transposition of EC law to UK law. Why not use the same method of accompanying tables as that proposed in 5-7 to differentiate between those sections in which factors apply and those in which there is freedom to apply all relevant considerations?

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

This acts to extend the requirements of the two EU directives in an attempt to merge them into one comprehensive section. It also means they are applicable to species which the EU has not seen fit to legislate on. Experience shows that the result of legislation that gives far broader meaning in its clauses than necessary will lead to an inevitable gold plating and extension of the restrictions. Far better to retain the original wording of the Directives and state clearly what is to apply in which situation.

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

Extending the consideration of Animal Welfare across the board again gold plates existing requirements. Either the Habitats Directive should be included in this legislation or it should not. Including only a part of it is going to lead to confusion and the need for further legislation.

The differences between the factors listed in the Habitats Directive and the Wild Birds Directive represent their differing importance in obtaining the result required by the Directives. To attempt to muddy the waters by imposing the same factors across the board subverts the intentions of the Directive.

Why not simply require a decision maker to list all of the factors that have influenced the decision along with the reasons for the decision.

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

We agree, but find it difficult to understand why the same method of accompanying tables cannot be used to differentiate between the applicable factors in Provisional Proposal 5-4?

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

We agree

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

Agree.

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

Agreed

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

Agreed.

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

Such powers should be temporary and subject to consultation and review if only after the event. It is useful for regulators to have access to such powers in unexpected or emergency situations but equally there has to be proper oversight of their use and application.

There should be a proper compensatory regime for those whose livelihoods or interests turn out on review to have been improperly or unnecessarily interfered with or harmed.

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

Agreed with the proviso that regulation is not extended and gold plated to extend listed species.

Unfortunately we suspect that the result of this legislation will be a series of ongoing campaigns to add species to the list.

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

We believe that licences should be defined in statute to prevent a series of prosecutions designed to show that people were using the wrong licence etc.

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

Agree. Does the reference to licensing a particular method indicate that normally prohibited means of killing might be permitted? Or does it mean that licenses might be used to prevent normally lawful methods of killing?

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

Agreed

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

We are concerned about his proposal. The aim of wildlife law is to protect wildlife and its habitat and to enable controlled interactions between man and his activities and wildlife. It is not to create a whole new range of bureaucratic technical offences which will serve as fodder for campaigning groups who will use such breaches as evidence of cruelty and to damage the reputation of good businesses and individuals.

The right course of action is to remove all such offences except those expressly required by EC law and international agreements. If the breaching of the licence condition leads to an action which is already a crime then it can be dealt with as such. There is no obvious reason why the existence of a licence whose conditions have been breached would prevent such a prosecution.

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

We have concerns that this will not achieve the aim.

Is it intended that there will be a list of definitions and intended interpretations of clauses? If not then prosecutors will inevitably invite the courts to adopt much wider interpretations.

If the protection is intended to apply only to those birds which normally reside in the UK, will birds blown off course, or birds whose territory extends or recedes due to climate changes be excluded? What of birds which might be endangered in their own EU country and either escape from captivity or otherwise find their way into the UK and become successful? Would they too be excluded from protection? Under the preferred alternative interpretation of the Wild Birds Directive this would be the likely result.

What protection, if any, is to be provided either in this legislation or any other, for invasive birds such as monk parakeets? At what stage does an invasive species become native? For instance, most people consider rabbits as being native to the UK and yet they were imported.

What if captive bred British birds escaped or were let free by vandals? What about falconers birds? Would this definition prevent their owners from recapturing them?

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

There have been occasions of self sustaining flocks of domestic poultry in the UK, although a more common scenario is the release of unwanted cockerels in certain areas. The birds are then often fed by the public and treated as a local attraction. In at least one area this led to some anger when other individuals decided that the birds would make a good dinner!

Bantams are quite likely to roost in the trees and be semi-wild even in a domesticated situation.

Domestic pigeons can certainly live in the wild.

It would be an anomaly for any birds living wild to be excluded.

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

The transition from reared bird to released bird does not necessarily create a wild bird capable of sustaining a breeding colony as required by the earlier preferred definition. If it does then as already stated it would be anomalous to exclude any type of bird which achieved this.

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

By express reference. Otherwise special interest prosecutors will argue over it.

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

We do not agree. This is gold plating the Directives. The ECJ is not bound by its previous decisions and may well decide differently in future cases consisting of different facts. If they do then this gold plating would risk putting UK law at odds with EC law. The EU guidance for the transposition of the Habitats Directive defines 'deliberate' for the purposes of the Habitats Directive. It is simply wrong to apply it to other Directives which have different aims and which apply to different conditions and circumstances.

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

We do not believe that such extension of protection should take place with the sole intention of harmonising the degree of protection provided across EC and UK law. Each species should be provided with the degree of protection needed to ensure that a viable population survives in the wild while ensuring that nuisance and damage to property or people caused by individuals of the species can be dealt with where necessary.

The interaction between man and each type of animal is a living dynamic that shifts continually, often driven by circumstances outside the control of man.

The historical protections given to different species reflect the position at the time of the enactment

of the legislation. If more or less protection is believed to now be necessary to reflect the current position of that dynamic then the evidence should be provided and discussed before any changes in the protections provided are permitted.

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

Clearly the term needs to be defined. We would argue that the definitions and examples provided for the Habitats Directive for the term 'disturbance' apply only to that Directive. If they are to be used to define 'disturbance' in the Wild Birds Directive then there is need to define the more stringently required 'significant disturbance' which must require a degree of disturbance over and above that of simple 'disturbance'.

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

We agree with the principle of the proposal but have concerns that gold plating will creep in and that realistic protections will be either lost or more stringent conditions imposed simply to facilitate the convergence of the provisions. It is vital that the proper protections are targeted at the species which need them as opposed to some sort of scatter gun approach to legislation.

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

It depends on the definition of disturbance that applies.

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

We do not think that ordinary reading can equate deterioration with obstruction of entry. For instance, if the site of a resting place was in imminent danger of some sort would the obstruction of entry equate to deterioration?

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

We oppose the removal of this defence. We do not accept the proposal that the offences can be committed by reckless behaviour. Intent is crucial. It is certainly not clear that the ECJ will apply the same criteria in coming to a decision relating to the Wild Birds Directive as it has in relation to the Habitats Directive.

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

We do not support this proposal. There are different levels of protection for different animals with

different needs and potential dangers. These differing levels of protection have been imposed by Parliament on the basis of the facts and evidence before them. If it is believed that those facts have altered in some way or new evidence is available then the levels of protection need to be reconsidered individually in the light of those material differences, not changed in order to tidy up a statute.

If Parliament had intended to harmonise the different protections provided by other Acts it could have done so in the Animal Health Act 1981. That it did not do so suggests that this was not, in fact, the intention of Parliament.

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

The arguments in favour of Article 7 appear to be the fear that the EU might impose a much more stringent requirement for the reporting of numbers of wild birds taken. If that happens in future, that is the time to consider the transposition of Article 7 into the law of England and Wales. Until then it appears that current law is fully compliant and needs not amendment.

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

We are concerned that a large number of differing close seasons would serve only to confuse people to such an extent that accidental breach is inevitable. The difficulty is that for a close season to be of use to any individual species it must relate to the relevant dates for that species. Another problem with fixed close seasons is that they are not flexible enough to take account of early or late seasons.

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

The SHG does not believe that codes of practice are necessary. Where is the evidence that the “wise use” principle is breached by any current activity?

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

We cannot support the introduction of a reverse burden of proof. It is a disgrace that this forms any part of our legal system. It should always be the role of the prosecutor to prove his case.

The SHG does not believe that such codes of practice are necessary or desirable. Either the law has been breached or it has not. This would create an added burden and amounts to gold plating.

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

The SHG has grave misgivings about this. We are thinking particularly of the mess that has been created by the introduction of welfare codes under the AWA. It will open the floodgates for campaigners who believe that all hunting should be prohibited to propose content that will serve to make hunting impossible. It will leave individuals, organisations and businesses in a state of confusion and put them at risk of prosecution for no good reason. This proposal will not serve to simplify the law at all.

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

The SHG tends to favour the proposal but we have some concerns about the lack of a proper definition of 'judicious use' and also wonder what is meant by 'small numbers'. Would this apply to all existing uses of birds? Could it serve to limit currently permitted hunting?

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

Agreed.

Question 7-1: In which of the following ways, (1), (2) or (3), do consultees think that domestically protected species not protected from taking, killing or injuring as a matter of EU law should be protected?
(1) All domestically protected species not protected as a matter of EU law should be protected from being intentionally and recklessly taken, killed or injured.
(2) Badgers and seals should be protected from being intentionally and recklessly killed, taken and injured; all other domestically protected species not protected as a matter of EU law should be protected from being intentionally taken, killed or injured. It would be possible subsequently to move species between the two groups by order.
(3) All domestically protected species not protected as a matter of EU law should be protected from being intentionally taken, killed or injured.

The SHG is in favour of option 3. We believe there should always be a requirement of intent for criminality.

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

How would this affect offers that originated in countries where the sale was legal which appeared in imported magazines or on the internet? We are currently in favour of not including these offences because of the difficulties in ascertaining where such offers originate.

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

The SHG believes that there should be a duty to consult before any amendment. Perhaps removal of species should be made more difficult than addition? So that removal would need primary legislation?

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

We cannot understand what, in any of the poaching acts suggests that poaching has anything to do with the control or protection of species. It is an offence against the rights of the land owner or the owner of the sporting rights. Even the Night Poaching Act is aimed at preventing the use of rights of way passing over land where the poacher would, but for the right of way, be a trespasser.

It might be helpful to think of poaching as a countryside version of burglary, specifically aimed at protecting sporting rights.

As with burglary, if poaching can be proved it is the cherry in the prosecutor's cap but if it can not

then there is no reason why lesser offences such as theft or criminal damage for instance should not apply.

The taking or injuring of a wild animal, the right of taking which belongs to another, is essentially a deprivation of the sporting rights to that animal, or a damage to the value of those rights.

Issues of control or protection of species do not belong in poaching offences.

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

In other situations where a person is lawfully on or in the property of another and he goes on to do something for which he knows he has no permission then for the purposes of that act he becomes a trespasser and that serves to upgrade the offence. Why should poaching be any different?

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

This will create a nightmare in terms of trying to second guess what was in someone's mind when they committed the act. This will be very bad law. It will create great injustice. It will also create lots of work for the legal profession and the courts as the arguments are made and the precedents set.

The owner of the land is not always the same person as the owner of the sporting rights. How would this apply if it was the owner of the land who was taking the animals?

This is not the way to create clarity and certainty.

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

We would like to see this restricted to serious attempts. Poaching covers a wide range of offenders, from youngsters out for a day to commercial enterprises. The SHG can see a danger that lesser offenders will be treated in the same way as large scale offenders. We do not have any faith in the objectivity of prosecutors or that the courts will prevent this from happening.

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

Provisionally agree. Is it intended to move the exact wording over? If not then further discussion is needed.

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

We tend to believe that it should not.

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

We tend to agree but cannot understand why in the example given all available digger operators could not be named on the license?

Our concern is that throughout these proposals, protections are being weakened or imposed without an accompanying public debate on what degree of protection is now relevant for the animals in question.

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

The SHG does not agree. We do not support reverse burdens of proof and despite the case law quoted in the consultation we are not convinced that such reverse burdens of proof are compliant with the requirement of innocence until proven guilty.

The key question is how a captive bred bird is to be defined and recognised?

If that issue can be properly addressed and defined then there is no need for a reverse burden of proof. It it can not then a reverse burden of proof would continue to be a cause of great injustice to bird keepers.

We note that most prosecutions of bird keepers for the possession of wild birds have related to the failure to keep documentation detailing the provenance of the birds. It is now accepted that this breaches EU law.

The SHG believes that all of these cases should be reviewed and hopes that the prosecutors have shown good faith and acted as responsible and fair prosecutors would and notified all of those convicted in contravention of EU laws that their convictions are unsafe.

In order to properly understand whether there is a real problem we ought to be told how many of those cases reported in the consultation paper are affected by this development.

The SHG believes that closed rings should be accepted as proof of being captive bred unless the prosecution can prove otherwise.

In terms of birds eggs, the reverse burden of proof, coupled with the 2004 amendment of the WCA resulted in convictions of those who could not prove their eggs pre-dated 1954. Thanks to the Dodsworth case this amendment has now been declared unlawful. Again we need to be told how many of the numbered cases are affected by this.

We believe these issues need much consideration and discussion to ensure that we do not see a repeat of this shambles. It has to be remembered that the people who have been raided and convicted have suffered severe losses, not just in terms of their possessions but also in the loss of their good name and the inevitable publicity and resulting public condemnation.

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

We do not. No-one should have to prove that their activities were lawful. This has resulted in a proliferation of cases that hinge on expert witness reports on whether a badger sett was occupied or in use. If it is difficult for the prosecution with all of their massive resources to prove a case it becomes almost impossible for an accused with few resources and vanishing legal aid to do so. The result is guilt on accusation.

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

We do not. No evidence of existing failures has been provided to justify the need to impose powers that clearly breach human rights. We suggest that it would be better to wait and see what we are actually required to do under any future EU legislation. and then amend the proposed comprehensive legislation accordingly.

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

We remain to be convinced that there is any need for this. We would also want to see proper safeguards in place.

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

No. It should be to the earliest opportunity for proper parliamentary consideration of the issue or two months, whichever is the soonest. If the emergency listing expires after two months then it should not be possible for the emergency listing to be reinstated without parliamentary scrutiny.

It is important to ensure that emergency listing is not seen or used as a means of avoiding proper consideration and debate.

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

We disagree. The burden is too great. The idea that someone would be guilty because he 'should have' had knowledge is outrageous.

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

Agreed.

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

We would oppose any extension of licensing to cover species that are clearly already being kept without incident.

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

We disagree. We have seen no evidence that there is a need for such powers. Proper controls and checks would need to be put in place.

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

The SHG disagrees with this proposal. We believe that civil sanctions inevitably mean a watering down of the need for a prosecutor having to prove guilt beyond reasonable doubt. People are put in the position of accepting a financial penalty because they see it as a cheaper option to the cost or time of a tribunal or court hearing to prove their innocence. There is no disincentive for a prosecutor who issues defective sanctions.

What is even worse is that such civil penalties come to be seen as just an extra tax on the activity concerned. A tax that is imposed at the whim of the regulator. They are seen by the public as inherently unfair and this brings the law into disrepute and reduces public support. Once public support is lost, it is lost across the board for the full range of offences, not just for those to which civil sanctions would apply. You only have to look at the general public distrust of parking enforcement and speed cameras and the widespread belief that they are only there as fund raising scams for example.

We believe that such sanctions should be removed or reduced, not extended.

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

We disagree. See answer to Provisional Proposal 9-1 above.

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

We note that it was Natural England that was responsible for the issue of licenses with conditions attached demanding documentary evidence of captive breeding that was at the root of the situation referred to in our response to Provisional Proposal 7-11 above.

We do not believe that the relevant regulators are the right bodies to be entrusted with this responsibility.

If this goes ahead they must certainly issue guidance and there must be proper penalties imposed on regulators who get it wrong and provision for statutory compensation for those individuals and businesses who suffer losses as a result of the regulators breaching their own guidelines.

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

Yes.

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

We believe this is too harsh. It should be no more than that for poaching as in Provisional Proposal 9-6. We are concerned that attempts to harmonise are overriding realistic sanctions for different activities.

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

Perhaps a level 2 or 3 fine would be more realistic. We are not sure that there ought to be a term of imprisonment.

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

We do not.

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

We do not.

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

The SHG believes that the presence of vicarious liability offences is a disgrace to any legal system that purports to uphold human rights or the principle of innocent until proven guilty.

We are utterly opposed to making any individual responsible for the actions of any other.

There is either sufficient evidence to warrant a prosecution of an employer for aiding and abetting the offence or for the offence itself, or they should not be prosecuted.

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

We tend to agree, but we note that if an appeal eventually makes its way right up to judicial review the requirement to move through each of the lower tribunals in step is going to make appeals even more costly.

Is there to be any form of legal aid available for such appeals? Not everyone is wealthy enough to employ specialist legal advisers or able enough to handle their own appeal, especially when technical legal argument becomes necessary.

How is it proposed that the system will ensure equal access to justice for these people?

We also question how the time scale of such reviews and appeals will work if a control order is appealed for a fast breeding invasive species?

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

We favour the creation of a new appeals process.

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

The SHG favours option 2. Special interest groups will still have the option of Judicial Review. If they can become involved at early stages it will increase the financial and emotional cost to the applicant.

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

If there is no applicant then the applicant is not going to appeal. If appeals to the tribunals are limited to the applicant then other interested parties already have the normal recourse to Judicial Review. We see no reason to change this system.

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

Neither seems quite appropriate

Anne Kasica & ErnestVine
The SHG