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## Wildlife Offences

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#### CPS Public Consultations

We want to hear your views about our prosecution policy and so we conduct consultations to help inform our policy making.

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#### ▶ CPS website survey

When you have **finished** browsing our website, please let us know what you think by completing our survey.

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## Principles

The conservation of wildlife is an area in which the police play an investigative and enforcement role and where the CPS are called upon to prosecute in accordance with the provisions of the

Code for Crown Prosecutors. See also Relations with Other Prosecutions Agencies, elsewhere in the legal guidance.

## Statutes involved

There are a variety of statutes, not commonly encountered elsewhere in the criminal law, which must be considered. The principal is the Wildlife and Countryside Act 1981 (WCA), as amended by Section 81 and Schedule 12 of the Countryside and Rights of Way Act 2000 (CROW). The Food and Environment Protection Act 1985 (FEPA), the Wild Mammals (Protection) Act 1996 (WMPA), the Protection of Badgers Act 1992 (PBA), the Deer Act 1992 (DA), The Pest Act 1954, and the Poisons Act 1972 are all of relevance.

Furthermore, you may be required to prosecute under both EC and domestic legislation which has been passed in compliance with the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES).

This is an area in which an element of specialised knowledge is an advantage. Information about the specimens who feature in this type of case, however basic it may be, will assist both your understanding of the case and your presentation before the court. However, you will almost certainly require the assistance of expert evidence as well.

## Wildlife Crime Officer

Most Police Forces have appointed a designated Wildlife Crime Officer (WCO). Upon receipt of a wildlife prosecution file you should check to see if your force WLO has been involved with the investigation. If he or she has not done so, it will be advisable to involve that person in any observations you may have to make about the evidence and/or requests for further inquiries to be made.

## Wildlife Coordinators

Most CPS Areas have a wildlife coordinator. Wildlife coordinators are usually responsible for wildlife cases although this may not be the case in

all CPS Areas.

## CPS Group Communication Managers and HQ Press Office

It is also worth remembering that wildlife prosecutions can generate major media interest and also the attention of environmental and animal rights activists. If you are involved in such a case it will be advisable to notify your Group Communication Manager at an early stage. They will contact HQ Press Office if necessary and can then decide jointly how to handle any ensuing publicity. Cases in this category which may not result in a prosecution should also be notified in brief terms to the Group Communication Manager, who may receive media enquiries about them.

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## Guidance

### Wildlife and Countryside Act 1981

#### Protection of wild birds

For the purposes of Part 1 of the Wildlife and Countryside Act 1981 a 'wild bird' is defined at Section 27 as "any bird of a species, which is ordinarily resident in, or a visitor to the European Territory of any member state in a wild state but does not include poultry (Domestic fowl, geese, ducks, guinea-fowl, pigeons, quail and turkey) or, except in Sections 5 and 16, any game bird" (i.e. Pheasant, Partridge, Grouse or moor game, Black or heath game or Ptarmigan). The same section also defines both "poultry" and "game bird".

You may require the assistance of an expert in order to establish that the bird in question is either "ordinarily resident in" or a "visitor" to the European Territory of any member state. See section 27 WCA 1981 as amended by The Wildlife and Countryside Act 1981 (England and Wales)

(Amendment) regulations 2004.

## Wild bird Proviso

Section 1 WCA 1981 then specifies a number of offences relating to wild birds, their nests and eggs. However, section 1 (6) contains a proviso in relation to "wild birds" which relates only to that section. It reads: "In this section "wild bird" does not include any bird which is shown to have been bred in captivity." See section 1(6) WCA1981.

## Criminal Attempts

Under section 18(1) of the WCA 1981 "any person who attempts to commit any offence under Part 1 of the Act shall be guilty of an offence". This provision effectively extends the provisions of section 1 Criminal Attempts Act 1981 to the summary offences contained in Part 1 of this Act.

## The killing, injuring and taking of wild birds

Under section 1(1) (a) WCA 1981 it is an offence to intentionally kill, injure or take any wild bird. To "take" in this context means to capture a live bird. See *Robinson v Everett and W. & F.C. Bonham & Son Ltd (1988) CLR 699*. (See *Robinson v Everett and W. & F.C. Bonham & Son Ltd (1980 Crim. LR 699)*).

The taking of a wild bird may occur in the context of international trade in such birds and the possibility that offences have been committed under the Control of Trade in Endangered Species (Enforcement) Regulations (COTES) should be also be considered. See also "International Trade in Endangered Species- CITES & COTES" below.

## Defences: Exceptions to section 1 Wildlife and Countryside Act 1981

### *Sporting species*

- By virtue of section 2(1) WCA 1981 no offence is committed if a bird listed in Part 1 of Schedule 2 of the Act is killed, taken, or injured in an attempt to kill, outside the close season for such a bird. A "close

season" is in general, the nesting season for a particular species. The various close seasons for the birds listed in Part 1 of Schedule 2 are listed at section 2(4). See schedule 2 part 1 (birds which may be killed or taken outside the close season) WCA 1981 and section 2(4) WCA 1981.

- Birds specified in Schedule 1 Part 2: Goldeneye, Greylag Goose (in Outer Hebrides, Caithness, Sutherland and Wester Ross only) and Pintail are also protected during the Close Season.

### *Close Seasons*

#### **Close season for part 2 schedule 1 birds and part 1 schedule 2 birds**

##### **Capercaille and Woodcock**

1 February - 30 September

##### **Snipe**

1 February - 11 August

##### **Wild duck or geese (below high watermark of ordinary spring tides)**

21 February - 31 August

##### **All other birds**

1 February - 31 August

**Note: GAME BIRDS are subject to their own Close seasons:**

#### **Game Birds**

##### **Partridges**

1 February - 1 September

##### **Pheasants**

1 February - 1 October

##### **Grouse (muirfowl) and Ptarmigan**

10 December - 12 August (the glorious 12th)

##### **Black game (black grouse or Heathfowl)**

10 December - 20 August

### *Public health, safety and protection of crops and livestock*

Under section 4(3) WCA 1981 an authorised person shall not be guilty of an offence of killing or injuring a wild bird, other than a Schedule 1 bird, if s/he shows that this action was necessary for the purpose of: See section 4(3) WCA 1981.

- Preserving public health or air safety; or
- Preventing the spread of disease; or
- Preventing serious damage to livestock, foodstuff for livestock, crops, vegetables, fruit, growing timber or fisheries.

"Authorised person" is defined at section 27 WCA 1981. It includes the owner or occupier of land on which the action is taken, or a person authorised by him or her. See section 27 WCA 1981.

### *Pest species*

The statutory framework of the Wildlife and Countryside Act 1981 states that all birds are protected, and section 1 creates the basic offence of killing or taking a wild bird, the taking of eggs or the destruction of a nest. There are however exceptions and defences to this basic offence. Thus section 2(2) states:

"Subject to the provisions of this section, an authorised person shall not be guilty of an offence under section 1 by reason of:

- the killing or taking of a bird included in Part 2 of Schedule 2 or the injuring of such a bird in the course of an attempt to kill it;
- the taking, damaging or destruction of a nest of such a bird; or
- the taking or destruction of an egg of such a bird."

An authorised person for the purpose of the WCA 1981 is defined by section 27 of the Act as:

"(a) the owner or occupier, or any person authorised by the owner or occupier of the land on which the action authorised is taken."

By means of Statutory Instrument (The Wildlife and Countryside Act 1981 (variation of Schedules 2 and 3) Order 1992) 1992 (No. 3010), the WCA 1981 was amended so that with effect from 1st January 1993 the list of species found in Schedule 2, Part 2 of the Act was deleted. Instead the legislation created general licences applicable to all authorised persons, and under the legislation it is not necessary for any individual to apply for or be issued with a licence.

## The General Licence

Section 16 Wildlife and Countryside Act 1981 creates the power to issue such general licences. See Section 16 WCA 1981.

(See also general licences re: trapping of wildbirds; see trapping of wildbirds, below in this section.

The operative words of Section 16(1) WCA 1981 are:

"Sections 1, 5, 6(3), 7 and 8 and orders under Section 3 do not apply to anything done for ..."

Then there is set out a long list of purposes (referred to in *RSPCA v CUNDEY Administrative Court 22 October 2001 [2001] EWHC Admin 906*) as the Statutory Purposes.

The Subsection finishes with the words:

"If it is done under and in accordance with the terms of the licence granted by the appropriate authority."

The Statutory purposes are:

for scientific, research or educational purposes;

- for the purpose of ringing or marking, or examining any ring or mark on, any wildbirds;
- for the purpose of conserving wildbirds;
  - for the purposes of the re-population of an area with, or the re-introduction into the area of, wild birds, including any breeding necessary for those purposes;

- for the purpose of conserving flora and fauna;
- for the purpose of protecting any collection of wildbirds;
- for the purposes of falconry or aviculture;
- for the purposes of any public exhibition or competition;
- for the purposes of taxidermy;
- for the purpose of photography;
- for the purposes of preserving public health or air safety;
- for the purposes of preventing the spread of disease; or
- for the purposes of preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber,(fisheries or inland waters).

The issue of whether a person was entitled to rely on the protection of a licence issued by the appropriate authority arose in *RSPCA v Cundey*, QBD 22 October 2001; see transcript of *RSPCA v Cundey* "ANNEX A" Neutral Citation No:[2001] EWHC Admin 906.

An information had been preferred on behalf of the RSPCA against Mr Cundey, that he had attempted to kill certain wildbirds, namely Starlings, contrary to section 1 (1) WCA 1981. Cundey had admitted to shooting at the birds by means of an air rifle within the bounds of his garden. The garden extended to one and a half acres.

The defendant sought to rely upon two general licences issued by the Department of the Environment, Transport and the Regions ("DETR") and the Ministry of Agriculture, Fisheries and Food ("MAFF").

The RSPCA contended that, on the true construction of the licences, it had to be shown:

- that the birds attempted to be killed were in the list of pest species to which the licence applied,

- that the method of attempted killing was permitted; and
- that the purpose of the wrongful act fell within the purposes for which the licence was issued under the statutory purpose set out in section 16(1) WCA 1981, namely one of the statutory purpose.

The first two requirements were not in dispute.

The appeal centred on the interpretation of the two licences.

Namely, did the purpose of the attempted killing fall under the statutory purposes as caused the licence to be issued or once the licence had been issued, it was irrelevant that the act complained of was not carried out for a statutory purpose.

The DETR licence allowed the taking of pest species to preserve public health or safety, whilst the MAFF licence related to the spread of disease and the prevention of serious damage to livestock and crops.

The court held that a person could only rely upon a licence issued under Section 16 WCA 1981 provided the act was for one of the statutory purposes as defined.

For examples of licences see MAFF licence at "Annex B" and DETR licence at "Annex C".

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## Injured birds

It is a defence for a person to show, under section 4(2) WCA 1981, that

1. In relation to the taking of a wild bird, it had been disabled otherwise than by his unlawful act and was taken solely for the purpose of tending it and releasing it when no longer disabled; see section 4(2)(a) WCA 1981.
2. In relation to the killing of a wild bird, it had been so seriously disabled otherwise by his unlawful act that there was no reasonable chance of it recovering; see section 4(2)(b) WCA 1981.

These defences must be considered with care. Where it is claimed that an injured bird was taken for the purpose of tending it, that intent must be shown to have been present at the time the taking occurred. Furthermore, "tending" should be interpreted as meaning "tending properly" and an injured bird that has been tended improperly following captivity may lead to consideration of a charge of causing unnecessary suffering under the Protection of Animals Act 1911. A veterinary surgeon can give evidence as to whether an injured bird has been tended properly. Note: Only a registered veterinary surgeon may carry out veterinary surgery; see section 19 Veterinary Surgeons Act 1966.

A defence may also be raised under section 4(2)(a) that a bird has been "injured" and disabled from living in the wild by becoming "imprinted" into regarding its human keeper as its source of food. Where a person has deliberately allowed a bird to "imprint" in this manner the statutory defence will not apply. However, the scientific concept of animal imprinting is a complex one and where a defence is raised based on such a premise you will need to employ a suitably qualified expert. See section 4(2) WCA 1981.

## The destruction etc of wild birds' nests

Under section 1(1)(b) WCA 1981 it is an offence to intentionally take or destroy the nest of any wild bird while that nest is in use or is being built. This includes the nests of birds listed at Part 1 of Schedule 2. See section 1(1)(b) WCA 1981, and Part 1 of Schedule 2 WCA 1981.

## Intentional or Reckless disturbance of a Schedule 1 bird

It is also an offence under section 1(5) to either intentionally or recklessly disturb any wild bird included in Schedule 1 of the Act while it is building a nest or is in, on, or near a nest containing eggs or young; or to either intentionally or recklessly disturb the dependent young of such

a bird. Schedule 1 birds are, generally speaking rare in the British Isles. See section 1(5) WCA 1981 and Schedule 1 WCA 1981.

Such disturbance may be caused by persons who are intending, either then or later, to steal the eggs or the young of Schedule 1 birds. Relevant evidence to prove the offence may include anything tending to rebut claims of accidental presence near to the site.

## Egg collections

Under section 1(1)(c) WCA 1981 it is an offence to intentionally take or destroy an egg of any wild bird. See section 1(1)(c) WCA 1981.

Under section 1 (2)(b) WCA 1981 it is also an offence for a person to have in their possession or control an egg of a wild bird. See section 1(2)(b) WCA 1981.

The possession etc of an egg of a wild bird contrary to section 1(2)(b) is an offence of strict liability: see *Kirkland v Robinson, (1987) 151 JP 377* because the word "intentionally" is omitted from the offence and a specific defence is provided at section 1(3). See section 1(3) WCA 1981.

Statutory defence under Section 1(3) Wildlife and Countryside Act 1981 as amended by the WCA 1981 (England and Wales) (Amendment) Regulations 2004

It is a defence at section 1(3) to show that an egg had not been taken, or had either been taken or lawfully sold to himself or another.

Possession of one or more eggs may be inferred from the circumstances in which they are found. Where several persons are potentially in possession (e.g. eggs found in a car containing several occupants) it may be possible to prove joint enterprise by reference to other items found in the same place (e.g. maps, walking or climbing gear, thermos flasks which may be lined with grass for the transport of eggs etc). There are clear analogies to be drawn with drugs cases.

It should be noted that under section 18(2) WCA the possession of anything capable of being used

to commit an offence under Part 1 of the Act is itself an offence and punishable in like matter to that offence. See section 18(2) WCA 1981.

The species of wild birds to which eggs belong to must be identified by a sufficiently experienced ornithologist. Once the content of an egg has been removed by blowing there is no scientific method of establishing the age of the shell.

An information may refer to more than one egg, but if there is any doubt about the origin of some (i.e. they may have been taken before the Act came into effect thus being in lawful possession) they should form the subject of a separate information. A similar distinction should be drawn between the eggs of Schedule 1 birds, and those of other wild birds.

## Possession or control of any live or dead wild bird

It is an offence under section 1(2)(a) for a person to have in his possession or control any live or dead wild bird or any part of it, or anything derived from, such a bird. See section 1(2)(a) WCA 1981.

This is also an offence of strict liability, and the statutory defence under section 1(3) will apply. It should be noted that while section 1(2)(a) refers to a "live or dead" wild bird, the statutory defence in section 1(3) refers to a bird that has been "killed". There is a clear distinction between "dead" and "killed" since only the former will include death from natural causes such as starvation, old age, or disease.

The distinction between the possession of a wild bird, which was dead as opposed to "killed" was considered, but not determined, see *Robinson v. Everett etc* (1988) Crim. LR 699. However, that case did establish that a "dead bird" remains a dead bird though later stuffed and mounted.

So far as the alleged unlawful possession of live wild birds is concerned cases usually involve either birds of prey or songbirds. The status of such a bird as a wild bird must be established and, as a result of section 1(6), any bird bred in

captivity will be excluded from the ambit of the offence. The origin of a bird (i.e. born in captivity or raised in the wild) may be inferred from its behaviour by an expert.

Alternatively, the defendant may seek to establish captive birth by means of breeding records, examination of these records may reveal a breeding rate which is biologically impossible or highly improbable. DNA analysis can also confirm or deny alleged bloodlines.

The possession of a wild bird may indicate the existence of an international trade in such birds and the possibility that offences have been committed under the Control of Trade in Endangered Species (Enforcement) Regulations (or COTES) should be considered. See guidance below.

## Defence of general application

Under section 4(2)(c) a person shall not be guilty of an offence under section 1 if s/he shows that the act was the accidental result of a lawful operation and could not reasonably have been avoided. See section 4(2)(c) WCA 1981.

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## Prohibited methods of killing and taking wild birds

Generally speaking, the use of traps to kill or take wild birds is prohibited under section 5 of the Act. There are however, circumstances when the use of certain types of traps are permitted when operated under a licence granted under section 16 of the Act, (The Open General Licence) see the Open General Licence below.

Under section 5(1)(a) and (b) WCA 1981 it is an offence to either set in position or use an article which is of a nature and is calculated to either cause bodily injury to, or to kill or take alive, any wild bird coming into contact with it.

The word "calculated" is not defined in the Act, but the definition of the word which appears in section 5 of the House to House Collections Act 1939 and in section 173(1) Road Traffic Act 1988 ("likely to deceive"). It is therefore submitted that in the present context "calculated" refers to the foreseeable likelihood of causing bodily injury. See Animal traps and snares, below.

The articles in question are defined as;

Any spring trap, gin (a form of spring trap with toothed jaws designed to hold prey not kill), snare, hook, and line, any electrical device for killing stunning or frightening, any poisonous, poisoned or stupefying substance, any net, baited board, bird-lime (a sticky substance which can be smeared on twigs and other perching points), or substance of a like nature to bird-lime. This would include both the illegal pole trap placed in a nest to catch the parent and a legal trap, if used incorrectly (e.g. a fenn trap set on a pole to catch birds of prey. See section 5(1)(a) and (b) WCA 1981.

## Larsen cage traps

A "Larsen cage trap" means a cage trap which has a closed compartment for confining a live decoy bird and a spring activated trap door which is either top or side mounted.

The use of the Larsen trap is permitted under a general licence to be issued from the 1st January 2002 by The Department for Food and Rural Affairs DEFRA. The licence is renewed annually.

The current DETR licence is issued under Section 16(1)(c)(d) and (k) Wildlife and Countryside Act 1981. See Annex D. The licence is subject to certain purposes "Statutory Purposes".

It is submitted that operation of the Larsen trap must be in accordance with the statutory provisions.

The purposes are as follows:

- For conserving wild birds, protecting any collection of wild birds and preventing serious damage to livestock, foodstuffs, crops, vegetables, fruit, growing timber or

fisheries.

- Subject to the terms and conditions of the licence, the licence permits any authorised person to keep or not confine any of the bird species listed in the licence in a Larsen trap, the dimensions of which do not satisfy the requirements of Section 8(1) WCA 1981

The terms and conditions are as follows:

- No bird other than a species included in the following list may be kept or confined in a Larsen cage-trap as a decoy:
  - Crow
  - Jackdaw
  - Jay
  - Magpie
  - Rook
- Any bird not listed above which may become confined in the cage-trap must be released immediately on being found.
- Each Larsen cage-trap, which contains as a decoy a live bird, must be inspected on at least one occasion in any 24-hour period. Where Larsen cage-traps are left in the open but not in use, they must be rendered incapable of holding or catching birds.
- The decoy bird must be provided with adequate food, water, shelter and a perch for the entire period during which it is used. The decoy bird must be removed when the trap is not in use.
- The current licence applies to England and is valid, unless previously revoked, for the period from 12 January 2000 to 31 December 2001.

In this licence "authorised person" has the same meaning as in Section 27 of the Wildlife and Countryside Act 1981.

**Note:** The Scottish Executive in respect of Scotland and the National Assembly for Wales in respect of Wales have issued a licence in similar terms.

See DETR licence (Larsen Cage-trap) ANNEX D.

## Cage-traps

A General Licence to kill or take certain birds has been issued by MAFF (now DEFRA).

The licence permits the use of cage-traps (or nets or by any other method prohibited by Section 5 of the Wildlife and Countryside Act 1981) or to take, damage or destroy their nests of, or to take or destroy the eggs, of certain pest species.

The pest species which an "authorised person" in all counties of England may take between 1 January and 31 December 2001 are as follows:

- Crow
- Dove Collard
- Gull, Greater Black-backed
- Gull, Lesser Black-backed
- Gull, Herring
- Jackdaw
- Jay
- Magpie
- Pigeon, Feral
- Rook
- Sparrow, House
- Starling
- Woodpigeon

The licence also permits shooting of the said species, providing always that the provisions of Section 5 WCA 1981 are complied with.

## Licence conditions

1. An "authorised person" means:
  - The owner or occupier, or any person authorised by the owner or occupier, of the land on which the action authorised is taken;
  - Any person authorised in writing by

the local authority for the area within which the action authorised is taken;  
and

- Any person authorised in writing by: English Nature, a water authority or any other statutory water undertakes, or a local fisheries committee constituted under the Sea Fisheries Regulation Act 1966.
  - The authorisation of any person for the purposes of this definition shall not confer any right of entry upon land.
2. An authorised person on a daily basis shall inspect every cage trap used under authority of this licence when the cage trap is in use except where this is not possible because of severe weather conditions e.g. as a result of heavy snowfall. In such cases, every effort must be made to inspect the cage trap as soon as possible. At each inspection any birds caught in the trap shall be removed from it.
  3. Where cage traps are left in the open but not in use, they must be rendered incapable of holding or catching birds.
  4. Any birds killed under the authority of this licence shall be killed quickly and humanely but no method of killing shall be used which is prohibited by section 5 of the Act.
  5. For the purpose of this licence, "to kill" includes accidentally to wound, whilst attempting to kill.
  6. For the purposes of this licence, "livestock" includes captive game birds.

See Annex B.

For the use of traps against animals, see "Animal Traps, Snares and Poisons" below.

## Poisonous and stupefying substances

It is important to distinguish between "poisonous and stupefying" substances when laying an information. In *Robinson v Hughes [1987] Crim.LR 644* the accused set in position birds eggs containing a substance known as Alpha-chloralose. He was subsequently summoned under section 5(1)(a), with setting in position a poisoned substance. However, an analytical chemist gave evidence that the substance was a "narcotic" and the defence successfully argued that as there was no evidence that the substance Alpha-chloralose, was a "poisonous substance" there was no case to answer. The Divisional Court upheld that decision on the basis that a substance, which was narcotic, had the effect of inducing sleep or stupor, precisely within the definition of stupefying. The Court added per curiam, that if doubt existed as to whether a substance was "poisonous", "poisoned" (as where a carcass is treated with a poisonous substance), or "stupefying" alternative informations should be laid.

#### **Statutory defence; section 5(4)**

It is a defence under section 5(4) WCA 1981 to show that the article was set in position for the purpose of killing or taking in the interests of public health, agriculture, or nature conservation any wild animal which could be lawfully taken by those means, and that all reasonable precautions were taken to prevent injury to wild birds. See section 5(4) WCA 1981.

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## **Prohibited Use of weapons, decoys, vehicles**

Section 5(1) (c) prohibits the use of various forms of weapons either to kill or take wild birds. These include crossbows, night-sights, automatic or semi-automatic weapons and shotguns with wide barrels. See Section 5(1) WCA 1981.

Section 5(1)(d) prohibits the use of a decoy to kill or take any wild bird, or any sound recording or a

live bird or animal which is tethered, secured, blind, maimed or injured.

The use of any vehicle (or aircraft, hovercraft or boat) see section 27 WCA 1981 in immediate pursuit of a wild bird; 5(1)(e).

## Causing or Permitting

Knowingly causing or permitting any such act.5 (1)(f).

## The sale of live or dead wild birds, and eggs

Under section 6 (1) (a) WCA 1981 it is an offence to sell, offer for sale or possess for sale any wild bird, other than those specified in Part 1 of Schedule 3, or any egg of any wild bird at all.

As section 6 (5) WCA 1981 makes plain, a Part 1, Schedule 3 bird must be a bird that was bred in captivity; and it must also have been ringed or marked in accordance with the Wildlife and Countryside (Ringling of Certain Birds) Regulations 1982.

Under section 6 (2) (a) WCA 1981 it is an offence for any person to sell etc any dead wild bird other than those specified in Parts 2 or 3 of Schedule 3 WCA 1981.

## Registration of captive Schedule 4 birds

Under section 7 (1) WCA 1981 it is an offence for any person to keep, or have in his or her possession or control, any bird listed in Schedule 4 WCA 1981, which has not been registered and marked in accordance with the Wildlife and Countryside (Registration and Ringling of Certain Captive Birds) Regulations 1982.

It is also an offence, under section 7 (3) WCA 1981 for any person, who has been convicted of any offence (other than a spent conviction) under this Act within five years for which a special penalty is provided, or three years for any other offence, to keep etc any Schedule 4 bird. There is however nothing to prevent a person so

disqualified from transferring ownership to a member of his or her own household who may then lawfully register the birds in order to comply with the regulations above.

## Protection of captive birds

Under section 8 (1) WCA 1981 it is an offence for any person to keep or confine any bird whatever (except poultry and the exception provided under the general licence re trapping of pest species), in a cage or other receptacle which is of insufficient volume to allow the bird to stretch its wings freely. See section 8 (1) WCA 1981.

It is also an offence under section 8(3) WCA 1981, to promote, take part in etc any event in which captive birds are released for the purpose of being immediately shot.

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## Protection of Wild Animals

See also Wild Mammals (Protection) Act 1996 below.

Schedule 5 Wildlife and Countryside Act 1981

Schedule 5 of the WCA 1981 lists a large number of animals, which are protected under Section 9 of the Act.

It includes: all species of bat, species of Dolphin, amphibians including all species of Newt, species of frog and toad, reptiles, porpoise, otter and many species of insects. See Schedule 5 Wildlife and Countryside Act 1981.

## Offences under Section 9 WCA 1981

- Section 9 (1): intentionally, killing or taking any such animal.
- Section 9 (2): possession or control of any live or dead animal included in Schedule 5, or any part of, or anything derived

therefrom,

- Section 9 (4): Intentional or recklessly damaging, destroying or obstructing access to any structure or place which such animal uses for shelter or protection,
- Section 9 (5)(a): selling, or possessing or transporting for sale, any such animal live or dead, or anything derived therefrom,
- Section 9(5)(b): advertising for such a purpose.

## Presumption (of a Wild animal)

In any proceedings under subsections 9 (1), (2) and (5)(a) the animal in question will be presumed to have been a wild animal unless the contrary is shown Section 9 (6).

## Defences

- It is a defence to an allegation under section 9 (2) (killing or taking) to show that the animal had not been killed or taken, or had been killed or taken otherwise in contravention of the relevant provisions (i.e. before they came into force on September 28 1982). See section 9(3).
- It is a defence to an allegation under section 9 (4) to show that the damage etc of a structure etc took place within a dwelling house. See section 10 (c).

However, in the case of Horseshoe and Typical Bats this defence is restricted to the living areas of dwelling houses unless the Nature Conservancy Council has been notified and been given reasonable time to advise if the destruction etc should be carried out and, if so, by what method. See Section 10 (5).

- Pest and Disease control. That the action was required by MAFF (now DEFRA), or by the Secretary of State under section 98 of the Agriculture Act 1947, or in pursuance of an order under the Animal Health Act 1981. See section 10(1) WCA 1981.

- Injured animals. That the animal was disabled otherwise than by the offender's unlawful act and was either taken solely for the purpose of tending and later releasing it, or, in the event of serious disability so that there was no reasonable chance of recovery, was killed. See Section 10 (3).
- A lawful operation. That the animal was killed, injured or taken as the incidental result of a lawful operation which could not reasonably be avoided. See Section 10 (3).
- Protection of Livestock, Crops or Fisheries. That the killing or injury by an authorised person was necessary for the purpose of preventing serious damage to livestock, crops or fisheries. See Section 10(4).

## Schedule 6 Wildlife and Countryside Act 1981

Schedule 6 prohibits certain methods of killing and taking animals listed in the schedule (i.e. indigenous wild animals not regarded as pests).

(Note: Some species listed in Schedule 6 also appear in Schedule 5).

Under section 11(2)(a) and (b) WCA 1981 a person commits an offence if s/he either sets in position any trap, snare, electrical device for killing or stunning or any poisoned or stupefying substance so placed as to be calculated to cause bodily injury to any wild animal listed in Schedule 6 of the Act or uses any such article or net for the purpose of killing or taking a Schedule 6 animal.

See also Poisonous and stupefying substances, above.

## Defence to Section 11(2)(a)

Under section 11(6) it is a defence to show that the article was set in position by the accused for the purpose of killing or taking, in the interests of public health, agriculture, forestry, fisheries, or nature conservation, any wild animals which could

lawfully killed or taken by those means and that s/he took all reasonable precautions to prevent injury thereby to any wild animals included in Schedule 6. (N.B., this defence is not available to an offence under section 11(2)(b).)

## Prohibited weapons and methods used to kill or take Schedule 6 animals

Under section 11 (2)(c), (d) and (e) it is an offence to kill or take a Schedule 6 animal by using:

- Any automatic or semi-automatic weapon;
- Any device for illuminating a target, or a night sight;
- Any form of artificial light, mirror or other dazzling device;
- Any smoke or gas;
- Any decoy by means of a sound recording;
- Any mechanically propelled vehicle (or aircraft, hovercraft or boat-see Section 27 (1) WCA) in immediate pursuit of an animal.

## Animal Traps and Snares

The deployment of poisons, snares and traps against wild animals is not prohibited entirely, but their use is heavily circumscribed.

Section 11(1) WCA 1981 prohibits the following methods of killing or taking any wild animal:

- Setting in position any self-locking snare "calculated" to cause injury to any wild animal; see "Prohibited methods of killing and taking wild birds" above.
- Using a self-locking snare.
- Using a bow, crossbow or explosive other than firearm ammunition to kill any wild animal.
- Using any live mammal or bird as a decoy in order to kill or take any wild animal.

■

Knowingly causing or permitting such an act to be done. (see Section 11(1)).

- A "self-locking" snare is not defined in the Act.

Snares are simply a running noose secured to a fixed point and detain an animal by closing around a limb or neck as it passes by. They may be hand made from a variety of materials or produced commercially,

A snare is "set" when it is placed in readiness to catch an animal or bird and "used" when an animal is caught.

Self-locking snares are illegal (see above) and once securing the animal a self-locking snare will progressively tighten and will not relax once the animal ceases to struggle. They can inflict severe and prolonged pain.

Free running snares are considered more humane because they stop tightening and may even relax when the animal ceases to struggle. They are not prohibited.

It is a question of fact as to whether a particular snare was operating as a self-locking snare and a suitably qualified expert must inspect the snare.

Under Section 11(2)(3) a person who has either set (or caused or permitted) a snare to trap any wild animal is under a duty to visit every snare at least once a day. Failure to do so is an offence.

Advice on snares and all aspects of avian and mammalian trapping may be obtained from the British Association for Shooting and Conservation Ltd, Marford Mill, Rossett, Wrexham, LL12 0HL. See [www.basc.org.uk](http://www.basc.org.uk)

Other legislation relating to animal traps, poisons and pesticides

## Spring Traps

Pest and Predator control is an integral part of conservation and wildlife management. Over the years a range of techniques have been developed to control a variety of pests and predators.

Spring Traps must be approved for use by orders made under the Pests Act 1954.

The most recent order is the Spring Traps approval order 1995 S.I. 1995/2427.

Under Section 8(1) of the Pests Act 1954 it is an offence to:

- Use or knowingly permit the use of an unapproved spring trap for the purposes of killing or taking animals. (For example: a gin trap, a form of spring trap with toothed jaws.)
- Use or knowingly permit an approved spring trap for animals or circumstances for which it is not approved for (For example: a Fenn trap placed on a pole to catch birds of prey.)
- To sell, offer for sale, or possess any spring trap for such an unlawful purpose, as above.

**Note:** Under Section 8(5), Subsection (1) does not apply to traps of any description specified by order of MAFF (now DEFRA) as being adapted solely for the destruction of rats, mice or other small ground vermin. See Section 8 Pests Act 1954.

(Break-back traps designed to catch rats and mice or the type commonly used for taking moles in their runs as these are made an exception under the Small Ground Vermin Traps Order 1958).

Section 9 Pest Act 1954 prohibits the use (other than under a DEFRA (MAFF) licence) of an approved spring trap for the killing or taking of hares or rabbits elsewhere than in a rabbit hole. See Section 9 Pest Act 1954.

Both offences under the Pest Act are triable summarily, and are punishable by a fine of £1,000 (level 3).

### Inspection of traps

Section 10 of the Protection of Animals Act 1911 places a duty upon any person setting a spring trap to catch a rabbit or a hare to inspect the trap at least once a day between sunrise and sunset. Failure to do so is a summary offence punishable by a £200 fine (level 1).

See the Protection of Animals Act 1911.

## Pesticides

The Food and Environmental Protection Act 1985 (FEPA)

Sections 16 to 22 of FEPA lay out a regulatory framework for the use of pesticides. Some chemicals are banned and the conditions for the use of others are regulated. Under section 16 (12) an either way offence is committed by any person who, without reasonable excuse, contravenes, causes or permits any other person to contravene any such regulation etc. See Food & Environmental Protection Act 1985.

See also the Control of Pesticides Regulations 1986/1510 (CPR).

## Attempts to commit offences

A person attempting to commit any offence under Part 1 WCA 1981 ( which covers all WCA offences discussed herein) shall be guilty of an offence and shall be punishable in like manner as for the full offence.

## Causing or permitting offences

When reviewing the evidence obtained in the course of an inquiry the following points must be born in mind:

- The identity of the employer and if (different) of the person who has delegated responsibility for an employee/Gamekeeper.
- The identification of specific offences committed by the employer/gamekeeper.
- Whether offences committed by the gamekeeper have been caused or permitted by a supervisor.

Where sufficient evidence exists it will usually be appropriate to prosecute all those involved to allow the court to fairly balance culpability.

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## Protection of Wild Plants

Under Section 13(1)(a), WCA 1981 it is an offence to intentionally pick, uproot, or destroy any wild plant included in Schedule 8 and, under section 13(1)(b), an offence for anyone other than an authorised person to uproot any wild plant. It is a defence, under section 13(3), to show that the act was an incidental result of a lawful operation. See Section 13(1)(a), 13(1)(b), 13(3), and Schedule 8 WCA 1981.

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## Introduction of New Species of Animals and Plants into the wild

Under Section 14(1) WCA 1981 it is an either way offence to release into the wild, or to allow the escape of, any animal which is not ordinarily resident, or a regular visitor to, Great Britain in a wild state: or which is included in Part 1 of Schedule 9. See section 14(1) WCA 1981 and Schedule 9.

Similarly under Section 14(2) WCA 1981 it is an offence to plant in the wild, or otherwise cause to grow there, any plant included in Part 2 of Schedule 9. See section 14(2) and Part 2 of Schedule 9 WCA 1981.

In either instance, however, it is a defence under section 14 (3) WCA 1981 that the accused took all reasonable steps and exercised all due diligence to avoid committing the offence. See section 14 (3) WCA 1981.

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## Wildlife Inspectors

Under section 19ZA WCA 1981, (introduced under

schedule 12, paragraph 8 of the Countryside and Rights of Way Act 2000, affectionately known as CROW) powers of entry to premises and inspection are granted to wildlife inspectors authorised in writing by the Secretary of State.

A person who intentionally obstructs a wildlife inspector acting within those powers, or who fails without reasonable excuse to give any assistance reasonably required by an inspector, commits an offence under section 19 ZA (7). Under section 19 ZA (8) it is also an offence to falsely pretend to be a wildlife inspector with intent to deceive.

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## Tissue Sampling

Under section 19 ZB (1) WCA 1981, (introduced under schedule 12, paragraph 8 of CROW) a constable who suspects that an offence has been committed in relation to a specimen found as a result of exercising his powers of search and seizure may require that a sample of blood or tissue be taken from it to determine its identity or ancestry.

No such sample may be taken from a live bird or other animal except by a veterinary surgeon and no sample may be taken from any live specimen unless the person taking it is reasonably satisfied that the taking of the sample will not cause lasting harm to the specimen.

Under section 19ZB(9) a person commits an offence if s/he fails to make a specimen available for tissue sampling or fails to provide any assistance reasonably required for that purpose.

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## Powers of Arrest, Search and Seizure

Under section 24(2) Police and Criminal Evidence Act, as amended by Schedule 12, paragraph 13 of the Countryside and Rights of Way Act, 2000 (the CROW Act,) the following are arrestable offences:

- Any offence under sections 1(1), 1(2) or 6 WCA 1981 in respect on any Schedule 1 bird, or part thereof (taking, possessing, selling etc of any wild birds).
- Any offence under section 1 (5) WCA 1981 (disturbance of wild birds).
- Any offence under sections 9, 13(1)(a) or (2) WCA 1981 (taking, possessing, selling etc of Schedule 5 wild animals or Schedule 8 plants).
- Any offence under section 14 WCA 1981 (introduction of new species etc).

Under section 19(1) WCA 1981 a constable who has reasonable cause to suspect that any person is committing/has committed an offence under Part 1 WCA may:

- Stop and search that person
- Search and examine any thing which that person may be using or have in his or her possession if the constable reasonably suspects that evidence of the offence may be found there;
- Seize and detain anything which may be evidence of an offence or liable to be forfeited under section 21(6) WCA 1981.

Under section 19(3) WCA 1981 a justice of the peace who is satisfied by information on oath that any offence under Part 1 WCA 1981 has been committed may grant a search warrant to a constable to enter upon and search premises for the purpose of obtaining evidence relating to that offence.

Time Limits and Penalties for offences under WCA 1981 (as amended by the Countryside and Rights of Way Act 2000, Sch 12 and by the Natural Environment and Rural Communities Act 2006, Sch 6)

All offences under Part I WCA 1981 are summary only, except for offences under sections 14, 19ZA(7) and (8) which are either way.

Under section 20(2) WCA 1981 proceedings for any offence under Part I of the Act may be brought within a period of six months from the

date on which evidence sufficient in the opinion of the prosecutor to warrant proceedings came to his knowledge; but no proceedings shall be brought more than two years after the commission of the offence. See section 20 (2) WCA 1981.

Prosecutors usually certify the date on which they receive the evidence by (this can be typed up with the prosecutor's name

Most offences are punishable on summary conviction by six month's imprisonment and/or by a maximum fine of £5,000 (level 5). Where an offence is committed in respect of more than one bird, nest, egg etc the maximum fine shall be determined as if the person had been convicted of a separate offence in respect of each such item. See Section 21(5) WCA 1981.

Offences under section 14, 14A and 19 XB(4) are punishable on conviction on indictment to a term not exceeding two years imprisonment and/or a fine or both.

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## Powers of Forfeiture under WCA 1981 and generally

Wherever appropriate, courts should be reminded of their power to make such orders.

Under section 21(6)(a) WCA 1981 a court shall, following conviction for such an offence, order the forfeiture of any bird, egg, animal, plant etc in respect of which the offence was committed.

Under s.21 (6) b a court may in the same circumstances order the forfeiture of any vehicle, animal, weapon or other thing used to commit the offence found in the offender's possession. Forfeiture of a vehicle is often likely to be an effective means of deterring repeat offences relating, for example, to rare birds and eggs as well as of incapacitating an offender's future ability to conduct such activities.

Use may also be made of the provisions of the

Police (Property) Act 1897 as a means of challenging claims of ownership to property which may not be legitimate, e.g. bird's eggs where there is sufficient evidence to show on a balance of probabilities that they were possessed illegally, but insufficient to establish an offence under section 1(2)(b) WCA.

Following conviction for other wildlife offences a court should be invited to consider forfeiture of such items under the provisions of section 143 of the Powers of Criminal Courts (Sentencing) Act 2000.

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## Deer Act 1991

### Prohibited methods of taking or killing deer

Section 4 of the Deer Act 1991 prohibits the taking or killing of deer (species listed at Schedule 1 of the Act) by means which are similar (but not identical) to those prohibited by section 11 WCA 1981.

### Enter land in pursuit

It is also an offence under section 1(1) Deer Act, 1991 to enter any land without the consent of the owner, occupier or other lawful authority in search or pursuit of any deer with the intention of taking, killing or injuring it.

### Unlawful acts whilst upon land

Sub-section 2 also penalises the acts, while on any land, of:

- Intentionally taking, killing or injuring any deer, or attempting to do so;
- Searching for, or pursuing any deer with such an intention;
- Removing the carcass of any deer, without the consent of the owner, or occupier or other lawful authority.

See S.1(2) Deer Act 1991.

## Defence

It is a defence to a charge under either section 1(1) or (2) to show that the accused acted in the belief that s/he would have had the consent of the owner or occupier of the land if he knew the circumstances of it, or that he had other lawful authority.

## Close Seasons

Section 2(1) prohibits the taking or killing of deer during the respective close seasons for each species as listed in Schedule 1. However, this applies only to 'free-range' deer (not a phrase used in the Act) and under section 2(3) exceptions apply to deer kept on enclosed land by way of business. See section 2(1), Schedule 1 and section 2(3) Deer Act 1991.

## Taking or intentionally killing deer at night

Section 3 prohibits the taking or intentional killing of deer by night (between the expiry of the first hour after sunset and the beginning of the last hour before sunrise), subject to exceptions contained in section 6 and 8.

All of the above offences under DA 1991 are triable summarily and punishable by a fine of £2,500 (level 4) or three months imprisonment.

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## Protection of Badgers Act 1992

Badgers, the largest indigenous and predatory wild animals in the British Isles, are protected under the provisions of the Protection of Badgers Act 1992. They are sometimes hunted by persons seeking to obtain a live animal to set against a pack of dogs in a confined space. The 'hunting' normally consists of digging a badger out of its burrow, or "sett". The Act is principally one of

welfare as opposed to conservation.

## Kill injure or take a badger

Under section 1(1) Protection of Badgers Act, 1992 it is an offence to wilfully kill, injure or take a badger, or to attempt to do so. Where evidence exists from which it could be reasonably concluded that the accused was attempting to kill etc a badger there is a rebuttable presumption that such was the offender's intention.

## Defence

It is a defence for a person to show, under section 6 PBA 1992, that:

- In relation to the taking of a badger; that it was disabled otherwise than by his act and was taken solely for the purpose of tending it;
- In relation to the killing of a badger; that it appeared to be so seriously injured or in such a condition that to kill it would be an act of mercy;
- That a badger was unavoidably killed or injured as an incidental result of a lawful action.

## Possession of a dead badger or part thereof

It is also an offence, under section 1(3), for a person to possess a dead badger, or part thereof, unless he can prove that the badger had not been killed in contravention of either PBA 1992, or its predecessor, the Badgers Act 1973. See section 1(3) PBA 1992.

## Prohibited actions - Ill-treat, Use badger tongs, Digging; Use of prohibited firearms

Under section 2 PBA 1992 it is an offence to:

Cruelly ill-treat a badger;  
Use badger tongs (not defined in the Act ) in the course of killing or taking a badger;  
Dig for a badger;  
Kill or take a badger using any firearm other than a smooth bore weapon of not less than 20 bore or a high powered rifle, (as defined).

## Intentional or reckless disturbance with a badger sett

Under section 3 PBA 1992 it is an offence to either intentionally or recklessly interfere with a badger's sett by:

- Damaging a sett, or any part of it;
- Destroying a badger sett;
- Obstructing access to, or any entrance of, a badger sett;
- Causing a dog to enter a badger sett; or
- Disturbing a badger when it is occupying a badger sett.

Badgers' sett is defined at section 14 as any structure or place indicating current use by a badger. However, in *Green and Others v DPP* (*The Times*, 20/6/2000) the Court of Appeal said that the purposes of section 3 PBA a badgers' sett consisted of 'the tunnels and chambers created by badgers and the areas immediately outside the entrance holes to those tunnels' as well other places, such as 'coverts or disused sheds' which badgers might occupy.

See *Green and Others v DPP and section 3 PBA 1992*.

The court also specifically excluded the volume of soil etc above the system of tunnels and chambers and extending upwards to the surface of the ground from the definition. It is suggested that where suspects are apprehended whilst digging down towards a badgers sett, but where no penetration of tunnels or chambers has occurred, consideration be give to proceeding with a charge under section 2 of digging for a badger instead of an offence under section 3.

## Expert Evidence

Expert evidence is likely to play a part in any prosecution under PBA 1992. In particular such evidence is likely to be required to prove that an alleged sett 'displays signs indicating current use by a badger'. Ensure that any defence expert evidence is served in sufficient time to allow for proper evaluation before the date of the trial.

## Defence Claims

The defence may claim lack intent to kill, interfere with etc a badger on one or more of the following grounds:

- A heavily built breed of dog like a bull terrier is required to tackle a badger. Absence of such dogs does not indicate a lack of interest in badgers. Smaller breeds, such as the Jack Russell, are used to enter a sett and locate badgers underground.
- Light nets, sometimes called fox nets, are not strong enough to trap badgers. Such nets can still be used to restrain a bolting badger until it is secured.
- The absence of specialised equipment, such as badger tongs, or delving rods for tracing tunnels. It does not follow that persons were not after badgers. A spade can be used not only for digging, but also for disabling a badger.

## Statutory Defence

It is a statutory defence to a charge under either section 1(1), or section 3, to show that the killing etc of a badger, or interference with a badger sett, was necessary for the purpose of preventing serious damage to land, crops, poultry or any other form of property.

However, such a defence will not apply if it had become apparent that such action would be necessary and a licence under section 10 authorising the action had not been applied for as soon as was reasonably practicable. See sections

7 and 8 PBA 1992. See section 10 PBA 1992 and sections 7 and 8.

Licenses may be issued under section 10 PBA 1992 for a variety of purposes to kill, take or possess live badgers or, as the case may be, to interfere with a badger sett.

## Obstruction of the entrance to a badger sett by Fox Hunts

An authorised person from a registered Hunt may also temporarily obstruct the entrance to a badger sett for the purpose of hunting foxes; see section 8(4)-(9) PBA 1992.

However, the following conditions apply:

- That no action is taken other than to obstruct sett entrances;
- The tops and sides of the sett must not be dug into;
- Only specified materials must be used to obstruct the entrances and must be placed and removed as specified in the Act;
- The person obstructing the sett entrances must have the authority of the owner or occupier of the land and the authority of a recognised hunt.

Materials permitted for obstructing setts for the purpose of fox hunting must only be:

- untainted straw or hay, or leaf litter, or bracken or loose soil, or
- a bundle of sticks or faggots, or paper sacks either filled with untainted straw or hay, or leaf litter, or bracken or loose soil.

Material in paragraph (a) can only be placed in the sett entrances on the day of the hunt or after midday of the preceding day, and do not need to be removed;

Materials in paragraph (b) can only be placed in the sett entrance on the day of the hunt and must be removed the same day. Materials must not be packed hard into the entrances.

Many foxhunts interpret "loose soil" as large, heavy lumps of clay or rock, packed hard into a sett entrance, making it impossible for badgers to exit.

However, *RSPCA v Lovett* QBD 1998 provides a legal definition of loose soil, which states that loose soil must be *eiusdem generis* with the other materials permitted in the Act, that is, "light, easily removable and of an obstructive character which is not permanent". Clay, if used, must be "sufficiently broken up". "Spit-sized lumps" are not "loose soil".

## To sell offer for sale or possess a live badger

Under section 4 PBA 1992 it is an offence to sell, or offer for sale, or possess a live badger except (see section 9) in the course of business as a carrier, or in accordance with the provisions of a license issued under section 10 by a Conservancy Council authority. See section 4, 9 and 10 PBA 1992.

## Sentencing

Offences punishable under sections 1(1) or (3), 2 or 3 are summary only and punishable by six months imprisonment or a fine of £5,000 (level 5). All other offences are punishable by fine only. See section 12 PBA 1992.

## Use of Dogs

Where a dog was used, or was present at, the commission of an imprisonable offence the court has power to order its destruction and/or disqualify the offender from having custody of a dog for such period as the court sees fit. See section 13 PBA 1992.

## National Federation of Badger Groups

For advice and information on badger-related issues, contact The Conservation Officer, National Federation of Badger Groups, (NFBG),

2 Cloisters Business Centre, 8 Battersea Park Road, London SW8 4BG.

Tel: 020 7498 3220 or 0976 153389; Fax: 020 7627 4212 (January, 2002).

[www.nfbg.org.uk](http://www.nfbg.org.uk).

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## Wild Mammals (Protection) Act 1996 (WMPA 1996) (C.3)

Under section 1 WMPA 1996 it is an offence for any person, with intent to inflict unnecessary suffering, to mutilate, kick, beat, nail or otherwise impale, stab, burn, stone, crush, drown, drag or asphyxiate any wild mammal.

### Defence

However, the following will amount, under section 2 WMPA 1996, to a defence to such a charge:

- The attempted killing of a seriously disabled wild mammal as an act of mercy, so long as that disability was not caused by the accused's unlawful act and the animal had no reasonable chance of recovery;
- The killing in a swift and humane manner of a wild mammal injured or taken in the course of a lawful hunting or pest control activity;
- Any act done by the use of a lawful trap or snare, dog or bird;
- The lawful use of any poisonous or noxious substance.

### Definition

"Wild mammal" means any mammal, which is not a domestic or captive animal within the meaning of the Protection of Animals Act 1911. See section 3 WMPA 1996 and Offences involving Domestic and Captive Animals, elsewhere in the

legal guidance.

A 'mammal' is defined in the OED as those animals, which secrete milk for the nourishment of their young. Badgers are, of course, mammals but it will usually be appropriate to make use of the Protection of Badgers Act (see below) for offences concerning them. Neither fish, birds, amphibians, reptiles or insects are mammals.

## Sentencing

Offences under WMPA are summary only and are punishable by a £5,000 fine and/or six months imprisonment.

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# International Trade in Endangered Species: CITES and COTES

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is an international agreement to control the trade in endangered species of plants and animals to which the United Kingdom is a signatory.

Customs and Excise are responsible under the Customs and Excise Management Acts for the enforcement of CITES controls on trade between the UK and non-EC states while enforcement within the UK is the responsibility of the police with assistance from DEFRA which is the 'Management Authority' for this country.

## Appendices 1, 2 and 3 to the Convention

The convention allocates endangered species to one of three Appendices:

- Appendix 1 covers species threatened with extinction in which 'commercial' trade (buying and selling with a view to financial profit) is prohibited and 'non-commercial'

trade is strictly regulated through the use of export and import permits and certificates. See Appendix 1.

- Appendix 2 covers species, which are at some risk of being threatened with extinction. 'Commercial' trade is permitted provided the formalities are complied with, including export permits. See Appendix 2.
- Appendix 3 contains species added by signatory countries because they require the co-operation of other countries to control trade in a species which may be scarce in a particular country, though not globally. The formalities are similar to those, which apply to Appendix 2 species. See Appendix 3.

## EC Council and Commission Regulations

The Convention is given effect by EC Council and Commission Regulations.

Currently, these are Council Regulations (EC) No.338/97 (the 'Principal Regulation') which implements the protection of species of wild flora and fauna by regulating trade therein.

And (EC) no. 939/97 (the Subsidiary Regulation) which implements the Principal Regulation. See(EC) no. 939/97.

A Statutory Instrument made under section 2(2) of the European Communities Act 1972 and known as the Control of Trade in Endangered species (Enforcement) Regulations 1997 No. 1372, or COTES, makes provision for the enforcement of the Principal Regulation in this country.

## Annexes A, B, C and D

Annexes A, B, C and D to the "Principal Regulation" list the species to which the enforcement provisions of COTES apply. In brief, the species included in each Annex are defined at article 3 of the Principal Regulation as follows:

- Annex A. Any species which is, or may be, in demand for utilisation in the EC or for

international trade and which is either threatened with extinction or so rare that any level of trade would imperil its survival. See Annex A.

- Annex B. Any species subject to levels of international trade, which might not be compatible with its global survival, or with the survival of populations in certain countries. See Annex B.
- Annex C. Species listed in Annex II to the Convention of which a reservation has been entered, or listed in Annex III for which the Member States has not entered a reservation. See Annex C.
- Annex D. Species not listed in Annexes A to C, which are imported into the EC in such numbers as to warrant monitoring. See Annex D.

## Offences under COTES

The whole system of international trade in endangered species depends on the proper issue and use of the forms accompanying the export and import of the animals or plants concerned.

## False Statements

Under Regulation 3(1) of COTES it is an offence, for the purpose of obtaining the issue of a permit or certificate, to:

- Knowingly or recklessly make a statement or representation which is false in a material particular; or
- Knowingly or recklessly furnish a document or information which is false in material particular; or
- For any purpose in connection with the Principal or Subsidiary Regulations, knowingly or recklessly use or furnish a false, falsified or invalid permit or certificate or one altered without authorisation. See Regulation 3(1) of COTES.

## False import notification

Under Regulation 3(2) of COTES it is an either way offence, and subject to the same penalties, to make an import notification which is false in a material particular.

## Alter Permit or Certificate

Under Article 4(1) of COTES it is an offence to knowingly falsify or alter any permit or certificate.

## Wrongful use of a permit, certificate or import notification

Under Article 4(2) of COTES it is an offence to knowingly use a permit, certificate or import notification for any specimen other than that for which it was issued.

## Use Specimen in contravention of authorisation

Under Article 4(3) of COTES a person who knowingly uses a specimen of a species listed in Annex A of the Principal Regulation otherwise than in accordance with the authorisation given at the time of issue of the import permit or subsequently, shall be guilty of an offence.

## Contravene any condition or requirement of permit or certificate

Under Article 6 of COTES it is an offence to knowingly contravene any condition or requirement of a permit or certificate issued in accordance with the Principal or Subsidiary Regulation.

## Transfer Specimen to an unauthorised address

An import permit or certificate issued in respect of a live specimen of a species listed in Annex A of the Principal Regulation may specify an address at which the specimen must be kept. Under Article 7(1) of COTES it is an offence for any person without reasonable excuse or prior written authorisation to transfer that specimen from that address or keeps it at other premises.

## Purchase, acquire for commercial purposes, or sell etc, any Annex A specimen

Under Article 8(1) it is an offence to purchase, acquire for commercial purposes, sell etc any specimen of a species listed at Annex A of the Principal Regulation. See Article 8(1).

## Purchase, acquire for commercial purposes, or sell etc, any unlawfully obtained Annex B specimen

Under 8(2) it is similarly an offence to purchase, acquire for commercial purposes, sell etc any specimen of a species listed at Annex B of the Principal Regulation which as been imported or acquired unlawfully. See Article 8 (2) of COTES.

The identification of the specimen involved must be clearly established. This should be done on the basis of expert zoological or botanical evidence from a person who is both academically qualified and practically experienced. DNA profiling may be the only way to obtain definite proof, provided a DNA profile from a 'proved' specimen exists.

## Defence

It is a defence under Article 8(5) to prove that at the time a specimen first came into a person's possession s/he made such enquiries (if any) as in the circumstances were reasonable to ascertain whether it was imported or acquired unlawfully,

and that at the time the alleged offence was committed s/he had no reason to believe that the specimen was imported or acquired unlawfully. See Article 8(5) of COTES.

Offences under Regulations 3 to 8 are either way. They are punishable summarily by a fine not exceeding £5,000 and/or three months imprisonment, and on indictment to imprisonment for two years and/or a fine.

In determining mode of trial it is suggested that the following factors are likely to indicate that Crown Court trial would be appropriate:

- Multiple offences in respect of Annex A species.
- Group activity - others involved whether prosecuted or not.
- Potential profit exceeds the maximum fine available at summary trial.

## Proof of lawful import or export

Under Article 5 a person commissioned or authorised by Customs and Excise may, where any specimen is being imported or exported, require any person possessing or having control of that specimen to furnish proof that its importation or exportation is not unlawful by virtue of the Principal and Subsidiary Regulations. See to Article 5 of COTES.

## Joint Operations by UKBA and the Police

Some cases will result from joint operations between UKBA and the Police. You will need to determine which body initiated the investigation. Unless the investigation is clearly and substantially a police matter UKBA should be consulted before any prosecution arising from such a joint operation is accepted by the CPS. UKBA will also be able to advise if any prosecution by them under the Customs and Excise Management Act is likely. If such is the case, consideration should be given as to whether

the entire prosecution should be handled by that agency. See also Relations with other Prosecutions Agencies.

## Powers of Search, Seizure and Forfeiture

These are to be found at Articles 9, 10 and 11 of COTES.

## Inquiries under the Proceeds of Crime Act

A Serious Crime Prevention Order can be applied for under the Proceeds of Crime Act. The purpose of the order is to prevent reoffending and any breach could result in an immediate prison sentence.

### National Wildlife Crime Unit (NWCU)

The NWCU is a police led, stand-alone, multi-agency unit with a UK wide remit for wildlife crime. The NWCU gathers intelligence on national wildlife crime and provides analytical and investigative support to the police and the UK Border Agency. The NWCU is the conduit between all agencies, domestically and internationally, that have a legal obligation and an interest in dealing with wildlife crime.

Queries: NWCU

Old Livingston Police Station

Almondvale South

Livingston

West Lothian

EH54 6PX

Tel: 01506 833 722

Fax: 01506 443 447

## Cautioning Guidelines and the Public Interest

Guidance on cautioning policy in general is contained in Home Office Circular 16/2008. The Crime and Disorder Act 1998 introduced the final warning scheme for young offenders aged 10 to 17 and guidance is provided in Home Office Circular 14/2006. The principles, which underlie

those procedures, apply equally to wildlife crime offences.

Some factors, such as the views of, and effect upon, the victim and public interest considerations, require modification to fit the circumstances of conservation offences.

The Department of Environment, Transport and Regions (DETR), now DEFRA with assistance from CPS Policy Directorate, produced a booklet entitled "Wildlife Crime: Cautioning Offenders" which provides guidelines for the cautioning of wildlife offences. Copies of the booklet have been distributed to every CPS Area.

## Public interest considerations

In the context of wildlife crime 'public interest considerations' should be taken as including the following:

- The biodiversity status of the species involved;
- The potential danger to the public, companion animals or livestock
- The level of public outrage; and
- The extent of (or potential for) suffering caused to any bird or animal involved.

'Views, or effect upon, the victim' must be modified where the only identifiable 'victim' is the wildlife concerned.

The purpose of the relevant legislation is to protect and conserve creatures and habitats that belong to all and these offences are concerned with abuse of the national heritage and environment.

It will therefore be relevant to consult a wildlife expert in order to gauge the full impact of the offence. However the 'conservationist' view is not conclusive and the public interest must prevail in determining the appropriate course of action.

A decision not to prosecute a wildlife conservation offence will require positive justification. In reaching a decision whether or not to prosecute

consideration must be given to such aggravating or mitigating factors as may exist.

## Aggravating factors

These include:

- Adverse impact on a individual specimen or species locally, nationally or internationally;
- Public outrage;
- An element of additional suffering;
- Organised activity and/or evidence of advanced planning;
- Commercial basis (either for personal gain or as part of employment);
- The offence involves one or more species benefiting from special protection;
- Conduct of the offender after detection has contributed to either the concealment of specimens or the causation of further harm to either the specimen(s) or to the species;
- Multiple offences or large number of specimens involved.

## Mitigating factors

These include:

- Accused played a minor part and/or was acting on an employer's instructions;
- Minimal loss, or negligible damage;
- Age of offender;
- Conduct of the offender after detection leads to the recovery of live specimens or a reduction in the harm caused to the specimen(s) or species;
- Offender acted under the direct instructions of his or her employer;
- Single offence and small number of specimens involved.

In addition, attention must be paid to the specific circumstances of the offence under consideration.

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# Memorandum of Understanding

## Natural England

In 2008, the CPS signed up to a Memorandum of Understanding (MOU) on the prevention, investigation and enforcement of wildlife crime with Natural England, Countryside Council for Wales and Association of Chief Police Officers (ACPO). This is due to be revised in November 2011.

The aim of the MOU is to create a stronger working relationship between the named organisations by providing:

- effective communication, including the exchange of information where appropriate;
- a clear understanding of their respective roles, responsibilities, procedures of the organisations and any legal constraints under which they work; and
- the sharing of knowledge and working practices by way of guidance and training.

## English Heritage

The CPS signed an MOU on Heritage Crime with English Heritage and ACPO on 11 February 2011.

Heritage Crime is any crime or behaviour that harms the value of England's heritage assets to this and future generations. The assets include Scheduled Monuments; Conservation Areas; Grade 1 and 2 listed buildings; World Heritage Sites; Protected marine Wreck Sites and Military Remains; and other sites of archaeological interest.

The MOU is in direct response to the perceived threat to heritage sites and buildings. It is a coordinated approach to working closer together in the investigation and prosecution of these type of crimes.

The aim of the MOU is similar to that with Natural England (see above).

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