The Law Commission

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WILDLIFE LAW: CONTROL OF INVASIVE NON-NATIVE SPECIES

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THE LAW COMMISSION

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

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WILDLIFE LAW:

CONTROL OF INVASIVE NON-NATIVE SPECIES

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To the Right Honourable Chris Grayling, MP, Lord Chancellor and Secretary of State for Justice

CHAPTER 1
INTRODUCTION

1.1 In July 2011, the Law Commission began a project on wildlife law. Its terms of reference are:

> To review the law on the protection, management, usage and welfare of wildlife in England and Wales, and to make recommendations for its simplification and modernisation.

1.2 We expect to publish our Final Report in autumn 2014. However, in November 2013, the Department for Environment, Food and Rural Affairs asked us to report earlier on one aspect of our review. This Report therefore relates solely to our Recommendations in relation to species control orders for the control of invasive non-native species. The Department wishes to consider whether this aspect of our final Recommendations would be suitable for early implementation.

1.3 A Provisional Proposal to adopt species control orders was included in our consultation paper, published on 14 August 2012.[1] Consultation ran from that date to 30 November 2012. The deadline was further extended to 21 December for some respondents. We received 488 consultation responses. We consider the responses in respect of species control orders in Chapter 2 of this Report.

Structure of this Report

1.4 The remainder of this Chapter considers the threat of invasive non-native animals, plants or fungi; relevant international provisions and some of the recent developments in the UK and the EU. A form of species control order has already been provided for in Scottish law. The next Chapter outlines the Scottish model and discusses our consultation paper and the responses we received. In the final Chapter we discuss the mechanics of a new order-making process for England and Wales, taking into account existing domestic legal preferences and constraints. These Chapters are accompanied by an Appendix containing the collated Recommendations made in this Report.

INVASIVE NON-NATIVE SPECIES

1.5 A species is generally considered to be “non-native” where it has been introduced by human agency outside its “natural range”. The term “natural range” refers to the natural past or present distribution of a species but for the direct intervention

of man.[2]

1.6 In line with the approach adopted under the Convention on Biological Diversity, non-native species have been described domestically as being invasive where their "introduction and/or spread threaten biological diversity or have other unforeseen impacts".[3]

1.7 Invasive non-native species are considered to be one of the main direct drivers of biodiversity loss across the globe.[4] An example of an introduced species having to be controlled in the UK is the American ruddy duck, which was threatening the already globally endangered white-headed duck with extinction through competition and hybridisation.

1.8 There are, of course, numerous species that are not native to a habitat, but which are not considered to be invasive. Such species either have little impact on the habitat into which they are introduced, or offer positive benefits to it. They include most crop plants and many farmed animals.[5]

1.9 However, all species which establish themselves in a new area carry the threat of causing harm, and the danger posed by a non-native species may not be immediately apparent. This has been the case with ornamental plants such as Japanese knotweed, which was introduced as an exotic ornamental plant over 100 years ago and is now estimated to cost the construction industry over £150 million a year.[6]

1.10 In Europe, around ten new non-native species establish themselves every year. There are approximately 1900 non-native species established in the wild in Great Britain, of which 109 plants (including a marine alga) and 173 animals are considered to have a negative ecological or human impact.[7] Although it is difficult to predict the extent of invasion, "the rate of spread of invasive non-native

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

2 Sixth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, 7 – 19 April 2002 – The Hague, Netherlands, Decision VI/23, ft 57. The Wildlife and Countryside Act 1981, ss 14 D and 14P (as amended by the Wildlife and Natural Environment (Scotland) Act 2011, s 16) adopts the term "native range", in turn defined as "the locality to which the animal or plant of that type is indigenous".

3 Sixth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, 7 – 19 April 2002 – The Hague, Netherlands, Decision VI/23, ft 57. Department for Environment, Food and Rural Affairs, *The Invasive Non-Native Species Framework Strategy for Great Britain* (2008) para 3.3.

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

5 F Williams and others*, The Economic Cost of Invasive Non-Native Species on Great Britain* (2010) p 11.

6 F Williams and others*, The Economic Cost of Invasive Non-Native Species on Great Britain* (2010) p 33.

7 H E Roy and others, *Non-native species in Great Britain: establishment, detection and reporting to inform effective decision making* (2012) pp 5-6.

species is often exponential".[8]

1.11 The annual cost of invasive non-native species to the economy is estimated at £1.3 billion in England and £125 million in Wales. These costs relate to control and eradication, structural damage to infrastructure, or loss of production due to the presence of an invasive non-native species. The biggest cost is to agriculture, estimated at over £910 million in England and Wales. The annual cost of damage caused and control measures necessitated by invasive non-native species is estimated at €12 billion across the EU.[9]

1.12 Because of the tendency of invasive non-native animals and plants to propagate rapidly, the scale and cost of control or eradication programmes directed at invasive non-native species can increase significantly if early eradication is not achieved. The refusal of particular landowners to take control or eradication measures, or to permit them to be taken, can frustrate early eradication programmes, enabling newly arrived invasive non-native species to become established.[10]

1.13 That, in turn, leads to increased costs of eradication or long-term control or containment, greater damage to biodiversity and the environment and greater cost to the economy. Moreover, the effectiveness of long-term control or containment measures against established invasive non-native species is similarly reduced, and their cost increased, if the measures taken leave pockets of land containing populations that can spread into neighbouring areas.

RELEVANT INTERNATIONAL OBLIGATIONS

1.14 Because invasive non-native species – or, as they are called in certain international instruments, invasive alien species – are a global problem, unilateral action is often insufficient to prevent unwanted introductions.[11]

1.15 The necessity of regulating the global spread of invasive non-native species has been recognised at the international level for more than 60 years. According to the Convention on Biological Diversity Secretariat, there have been more than 50 international agreements since the first major legally binding instrument in 1951.[12] Major international agreements ratified by the UK include the Council of Europe Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention) and the United Nations Convention on Biological Diversity.

1.16 The main objective of the Convention on Biological Diversity is to ensure the "conservation of biological diversity" and its "sustainable use". As regards

[8] M Hill and others, *Audit of Non-Native Species in England - English Nature Research Reports, Number 662* (2005); F Williams and others*, The Economic Cost of Invasive Non-Native Species on Great Britain* (2010) p 11.

[9] F Williams and others*, The Economic Cost of Invasive Non-Native Species on Great Britain* (2010) p 11; European Environment Agency "The impacts of invasive alien species in Europe" *Technical Report No 16/2012* (2012) p 7.

[10] Consultees instanced cases of such refusals. See paras 2.45 and 2.46 below.

[11] Bern Convention Standing Committee, *European Strategy on Invasive Alien Species* (2003) p 5.

[12] The International Plant Protection Convention 1951, ratified by both the UK and the EU, primarily regulates pests of plants that occur in international trade.

invasive non-native species, it requires that parties should, as far as possible and appropriate, "prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species".[13]

1.17 The Convention advocates a hierarchical approach to invasive non-native species: prevention, early eradication, containment and long term control. The approach suggests that

> Prevention is generally far more cost-effective and environmentally desirable than measures taken following introduction and establishment of an invasive alien species. Priority should be given to preventing the introduction of invasive alien species, between and within states. If an invasive alien species has been introduced, early detection and rapid action are crucial to prevent its establishment. The preferred response is often to eradicate the organisms as soon as possible … . In the event that eradication is not feasible or resources are not available for its eradication, containment … and long-term control measures … should be implemented.[14]

1.18 The Bern Convention requires that contracting parties must "strictly control the introduction of non-native species". This general obligation has been followed up by a number of international policy instruments, including the European Strategy on Invasive Alien Species – a pan-European strategy on invasive non-native species modelled on the Convention on Biological Diversity's guiding principles for the implementation of article 8(h)[15] – and a number of other species-specific recommendations issued by the Bern Convention Standing Committee.

1.19 The European Strategy on Invasive Alien Species stresses the importance of rapid implementation of eradication programmes and recommends that contracting parties should ensure that competent authorities are given sufficient powers to remove these alien species with a high potential to become invasive, including the power to issue emergency orders where urgent eradication is needed. Control programmes, on the other hand, should be based on a cost and benefit analysis, realistic priorities and appropriate monitoring; control methods "should be selected with regard to their efficiency, and selectivity, with due consideration of the undesirable effects they may cause".[16]

EU ACTION ON INVASIVE NON-NATIVE SPECIES

1.20 The EU is a contracting party to both the Convention on Biological Diversity and the Bern Convention, which require effective action against invasive non-native species, as set out above.

[13] Convention on Biological Diversity, arts 1 and 8(h). This provision is mentioned in the draft EU Invasive Alien Species Regulation, COM (2013) 620 fin, preamble, recital (4), which we consider in the next section.

[14] Sixth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, 7 – 19 April 2002 – The Hague, Netherlands, Decision VI/23, guiding principle 2.

[15] Bern Convention Standing Committee, *European Strategy on Invasive Alien Species* (2003); Sixth Ordinary Meeting of the conference of the Parties to the Convention on Biological Diversity, 7 – 19 April 2002 – The Hague, Netherlands, Decision VI/23.

[16] Bern Convention Standing Committee, *European Strategy on Invasive Alien Species* (2003) p 61.

1.21 EU law on the protection of species, such as the Wild Birds Directive and the Habitats Directive,[17] includes consequent requirements to manage the threat of invasive non-native species. The Wild Birds Directive requires that:

> Member States shall see that any introduction of species of bird which do not occur naturally in the wild state in the European territory of the Member States does not prejudice the local flora and fauna. In this connection they shall consult the Commission.[18]

1.22 Similarly, the Habitats Directive requires that:

> In implementing the provisions of this Directive, Member States shall ensure that the deliberate introduction into the wild of any species which is not native to their territory is regulated so as not to prejudice natural habitats within their natural range or the wild native fauna and flora and, if they consider it necessary, prohibit such introduction.[19]

1.23 Until now, however, specific EU legal measures for tackling the threat of invasive non-native species have been confined to the regulation of specific economic activities, such as the use of non-native and locally absent species in fish farming or the marketing and use of pesticides herbicides and plant protection products.[20]

1.24 Since 2008 the EU has been working towards a general strategy on invasive non-native species. In January 2008, the European Commission commissioned a comprehensive study to examine the impact of invasive non-native species in Europe and analyse the effectiveness of the existing law. It also considered the policy options for a future EU invasive non-native species strategy.[21]

1.25 In May 2011, the Commission, in a general environmental communication, announced that it would "fill policy gaps in combating [invasive non-native species] by developing a dedicated legislative instrument by 2012". In 2012, the European Commission consulted again on the possible need for a dedicated

[17] Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, Official Journal L 103, 25.04.1979 pp 1-18, subsequently consolidated as Directive 2009/147/EC of the European Parliament and of the Council on the conservation of wild birds, Official Journal L 20, 26.01.2010 pp. 7-25; Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, Official Journal L 206, 22.7.1992 p 7.

[18] Directive 2009/147/EC, art 11.

[19] Directive 92/43/EEC, art 22.

[20] Council Regulation (EC) No 708/2007 of 11 June 2007 concerning use of alien and locally absent species in aquaculture Official Journal L 168, 28.6.2007 p 1; Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products, Official Journal L 167, 27.6.2012 p 1; Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC, Official Journal L 309, 24.11.2009 p 1.

[21] European Commission - *Towards an EU strategy on invasive species* COM (2008) 789 fin. See also http://ec.europa.eu/environment/nature/invasivealien/ (last visited: 5 December 2013).

instrument.[22]

1.26 The Commission proposed a draft Regulation for the prevention and management of the introduction and spread of invasive alien species on 9 September 2013. The object of the proposed Regulation is to set out "rules to prevent, minimise and mitigate the adverse impacts of the introduction and spread, both intentional and unintentional, of invasive alien species on biodiversity and ecosystem services".[23]

1.27 The current draft Invasive Alien Species Regulation would impose obligations on member states regarding the early eradication of invasive alien species of "Union concern" specified in the Regulation. The draft Regulation provides that within 3 months of an early detection notified to the European Commission and member states, member states should apply measures which are "effective in achieving the complete and permanent removal of the population of the invasive alien species concerned, with due regard to human health and the environment, and ensuring that targeted animals are spared any avoidable pain, distress or suffering".[24]

1.28 Whilst the draft Invasive Alien Species Regulation has not completed its legislative stages, and it is hard to predict when or in what terms it may eventually be enacted, it shows that the importance of controlling invasive non-native species has been accepted within the EU.

RECENT DEVELOPMENTS IN THE UK

1.29 The Wildlife and Natural Environment (Scotland) Act 2011 made a number of significant amendments to the provisions on invasive non-native species in the Wildlife and Countryside Act 1981 in Scotland.

1.30 First, the 2011 Act amended section 14 of the Wildlife and Countryside Act 1981 as it applies in Scotland, so as to make it an offence to release an animal, or allow one to escape from captivity, to a place outside its native range or where the animal is of a type specified by the Scottish Ministers. It is also an offence to cause any animal outside the control of any person to be at a place outside its native range.[25] There is a similar offence in relation to plants grown in the wild.

1.31 The 2011 Act also introduced species control orders, a mechanism by which invasive species present on premises or land can be controlled with a view to preventing their spread into the wider environment.[26]

[22] European Commission, *Our life insurance, our natural capital: an EU biodiversity strategy to 2020* COM (2011) 244 fin p 15 (Action 16: Establish a dedicated instrument on invasive alien species). The later consultation documents are available at: http://ec.europa.eu/environment/consultations/invasive_aliens.htm (last visited: 16 December 2013).

[23] COM (2013) 620 fin; Draft IAS Regulation, art 1.

[24] Draft IAS Regulation, arts 15(1) and (2).

[25] Wildlife and Countryside Act 1981, ss 14(1) and (2).

[26] Wildlife and Countryside Act 1981, ss 14D to 14P.

1.32 The model adopted in Scotland comprises four basic stages:

(1) *Investigation*: the provisions allow the relevant body[27] to enter land or premises for the purpose of investigating whether a species outside its native range is present on the relevant land or premises;

(2) *Species control agreements* (made between the relevant body and the owner or occupier of land or premises on which invasive non-native species are present) provide for operations to be carried out to control or eradicate invasive non-native species;

(3) *Species control orders:* if a species control agreement is not agreed or not carried out, the relevant body can make a species control order, specifying operations to control or eradicate invasive non-native species to be carried out on the premises or land in question;

(4) If the species control order is not complied with, the relevant body can itself carry out the operations – or arrange for them to be carried out.

1.33 The first stage, investigation, can be dispensed with where not necessary; the second stage, species control agreements, can be dispensed with in an emergency. In an emergency, a species control order can be used to enable operations to be carried out by the regulator or persons designated by it.

1.34 As of late 2013, the species control procedure (which came into force in May 2012) had not yet resulted in a species control agreement or order, though we are aware of a species control agreement in the process of being negotiated.

CONCLUSION

1.35 It is clear that invasive non-native species pose a significant threat to both biodiversity and the economy. It is equally clear that it is important to seek to eradicate, or otherwise manage, invasive non-native species swiftly and effectively: proposed EU legislation and existing international obligations highlight the need for early eradication when preventive measures have failed. The recent legislative reforms in Scotland seek to provide mechanisms to assist early eradication, containment or control.

1.36 The species control order Recommendations set out in this Report seek to fill a gap in the current law of England and Wales: at present there is no mechanism to compel an owner or occupier of premises or land to control invasive non-native species or to take control measures without an owner or occupier's consent. Consultation has confirmed our views on the desirability of such a mechanism.[28]

[27] Wildlife and Countryside Act 1981, s 14P(6): the Scottish Ministers; Scottish Natural Heritage; the Scottish Environment Protection Agency; or the Forestry Commissioners.

[28] We summarise the responses to consultation on this topic at paras 2.32 to 2.54 below.

CHAPTER 2
CURRENT LAW AND RECOMMENDATION FOR REFORM

INTRODUCTION

2.1 This Chapter considers the current law in England and Wales and the recent legislative changes made in Scotland. We then consider our consultation proposals and the responses to them.

CURRENT LAW ON INVASIVE NON-NATIVE SPECIES IN ENGLAND AND WALES

2.2 The principal legal provisions are contained in the Wildlife and Countryside Act 1981, which makes it an offence in England and Wales to release, or allow to escape into the wild any animal which:

(1) is of a kind which is not ordinarily resident in and is not a regular visitor to Great Britain in a wild state; or

(2) is included in part 1 of schedule 9 to the Wildlife and Countryside Act 1981.[1]

2.3 It is an offence to plant or cause to grow in the wild any plant listed in part 2 of schedule 9 to the 1981 Act.[2] There is no wider prohibition of planting or causing to grow plants not ordinarily resident in Great Britain.

2.4 It is a defence to prove that all reasonable steps were taken and due diligence exercised in attempting to avoid the commission of one of the above offences. Activities otherwise prohibited can be permitted under a licence.[3]

2.5 The sale of species covered by the above provisions can be restricted by order.[4]

2.6 The legislation is enforced by wildlife inspectors authorised by the Secretary of State or Welsh Ministers.[5]

2.7 The Secretary of State has power to issue codes of practice in relation to any animal or plant to which the prohibitions above apply.[6] These are not legally binding, but can be taken into account by a court in proceedings in respect of offences under section 14 of the 1981 Act.

1 Wildlife and Countryside Act 1981, s 14(1). Part 1 of sch 9 to the Wildlife and Countryside Act 1981 includes monk parakeets and the grey squirrel.

2 Wildlife and Countryside Act 1981, s 14(1). Part 2 of sch 9 to the Wildlife and Countryside Act 1981 includes Japanese knotweed and the water primrose.

3 Wildlife and Countryside Act 1981, ss 14(3) and 16(4).

4 Wildlife and Countryside Act 1981, s 14ZA.

5 Wildlife and Countryside Act 1981, s 18A(1).

6 Wildlife and Countryside Act 1981, s 14ZB. See, by way of example, the Horticultural Code of Practice 2011, https://secure.fera.defra.gov.uk/nonnativespecies/index.cfm?pageid=299 (last visited: 4 December 2013).

2.8 There are other species-specific provisions covering invasive non-native species. The Import of Live Fish (England) Act 1980, for example, gives power to the Secretary of State or Welsh Ministers to prohibit the importation, the keeping or the release in any part of England and Wales, of live fish, or live fish eggs, "of a species which is not native to England and Wales" which might compete with, displace, prey on or harm the habitat of any freshwater fish, shellfish or salmon in England and Wales.[7]

2.9 The Conservation of Habitats and Species Regulations 2010 have created an offence of introducing a non-native species from a ship into any part of the territorial sea of England or Wales in which its introduction threatens wild native flora or fauna or natural habitats.[8]

2.10 The Destructive Imported Animals Act 1932 creates powers to control the importation and keeping of "destructive non-indigenous animals". While the 1932 Act deals primarily with muskrats, orders made under the Act relate to grey squirrels, non-indigenous rabbits, coypus and mink.[9]

2.11 Under the Plant Health Act 1967, the Minister and the Welsh Minsters, as the competent authorities, may make orders to prevent the introduction of pests into Great Britain.[10] The Minister and Welsh Ministers also have broad powers to control the spread of pests, by prohibiting their distribution or possession or ordering the destruction or treatment of any plant or other material infested with a pest.[11] Similarly, under animal health legislation, the Ministers or Welsh Ministers have broad powers to take measures to prevent the introduction into or spreading within Great Britain of pests or diseases affecting particular animals.[12]

2.12 Finally, there are domestic regulations, such as the Plant Protection Products Regulations 2011, that implement EU law and are consequently made under section 2(2) of the European Communities Act 1972. The 2011 Regulations prohibit the use, putting on the market or advertising of certain plant protection products. Further, they permit the Secretary of State or Welsh Ministers to issue a notice in writing restricting or prohibiting the sale or use of treated seeds.[13] The existing EU measures are limited in scope – focusing on a particular problem or economic sector (such as aquaculture).

7 Import of Live Fish (England and Wales) Act 1980, s 1(1). The Prohibition of Keeping or Release of Live Fish (Specified Species) Order 1998, SI No 1998/2409, art 2 (as amended) issued under s 1 of the Import of Live Fish (England and Wales) Act 1980, prohibits the keeping or release in England and Wales of a list of fish species specified in sch 1 to the Order.

8 SI 2010 No 490, reg 52.

9 Destructive Imported Animals Act 1932. See, as to orders: the Grey Squirrels (Prohibition of Importation and Keeping) Order 1937, SI 1937 No 478, the Mink Keeping (Prohibition) (England) Order 2004, SI 2004 No 100, or the Mink Keeping (Prohibition) (Wales) Order 2012, SI 2012 No 1427 (W 177).

10 Plant Health Act 1967, ss 1 and 2.

11 Plant Health Act 1967, s 3.

12 See, for example, the Animal Health Act 1981 or the Bees Act 1980.

2.13 However, there is currently no generally available power in England and Wales to require the control or eradication of invasive non-native species as such.

INVASIVE NON-NATIVE SPECIES CONTROL PROVISIONS IN SCOTLAND

2.14 Until the entry into force of the amendments made to the Wildlife and Countryside Act 1981 by the Wildlife and Natural Environment (Scotland) Act 2011, the position in Scotland was broadly similar to that in England and Wales: there were no general powers to require an owner or occupier to control or eradicate invasive non-native species present on land or premises.

2.15 Sections 14D to 14P of the Wildlife and Countryside Act 1981 were inserted by section 16 of the 2011 Act. These provided a new procedure for the management of invasive non-native animals, plants and fungi present on land or premises.

2.16 We shall consider the provisions introduced by the 2011 Act in greater detail in the next Chapter. Here, though, it is necessary to set out an overview in order to give context to our consultation provisional proposals, the consultation responses we received and the discussion of whether a similar procedure should be introduced in England and Wales.

2.17 The species control regime in Scotland allows for operations to control or eradicate an invasive animal, plant or fungus present on land or premises, excluding dwellings.[14] The procedure is built principally around two elements: *species control agreements* and *species control orders*.

2.18 A non-native animal or plant is defined for these purposes as an animal or plant (including any fungus) outside its native range, which is in turn defined as the locality to which it is indigenous.[15] An invasive animal or plant is one of a type which, if not under the control of any person, would be likely to have a significant adverse impact on:

(1) biodiversity;

(2) other environmental interests; or

(3) social or economic interests.[16]

2.19 Species control agreements may be entered into with the owner or occupier of the relevant land or premises by one of the relevant bodies: the Scottish Ministers, Scottish Natural Heritage, the Scottish Environment Protection Agency

[13] Plant Protection Products Regulations 2011, SI 2011 No 2131 (which implement Directive 1999/45/EC) reg 5 and regs 9 to19. See also the Aquatic Animal Health (England and Wales) Regulations 2009, SI 2009 No 463, and the Alien and Locally Absent Species in Aquaculture (England and Wales) Regulations 2011, SI 2011 No 2292.

[14] Wildlife and Countryside Act 1981, ss 14D(1)(a) and 14P(5). Wildlife and Countryside Act 1981, ss 14P(5)(a) and (b). Premises are defined as "including land (including lockfast places and other buildings), movable structures, vehicles, vessels, aircraft and other means of transport" but excluding dwellings.

[15] Wildlife and Countryside Act 1981, s 14P(2).

[16] Wildlife and Countryside Act 1981, s 14P(4).

and the Forestry Commissioners. Such an agreement should detail the measures to be taken to control or eradicate invasive plants or animals outwith their native range. There is no penalty for breach of a species control agreement, and such an agreement is not legally enforceable, but failure to enter into or comply with one may lead to a species control order being imposed.[17]

2.20 A species control order may be made where the body is satisfied as to the presence of an invasive non-native species on land or premises and one of the following applies:

(1) the offer of a species control agreement has been refused or the owner or occupier of the land or premises in question has otherwise failed to enter into an agreement;

(2) the owner or occupier of the land or premises cannot be identified following reasonable efforts on the part of the relevant body;

(3) it is an emergency; or

(4) the person who has entered into a species control agreement has failed to comply with the terms of that agreement.[18]

2.21 The legislative provisions thus make a species control agreement the default situation. This approach conforms to our view of the appropriate manner of regulatory intervention, with escalation only where a less intrusive measure has failed or is not practicable.

2.22 In most circumstances, the owner or occupier of the relevant land or premises must be notified of the making of an order.[19] A species control order must specify, amongst other matters, the operations which are to be carried out on the land or premises for the eradication or control of the invasive non-native species to which it relates; it may also specify operations which must not be carried out.[20]

2.23 It is an offence for a person, without reasonable excuse, to fail to carry out, in the manner required by a species control order, an operation which the person is required by the order to perform. It is also an offence to carry out an operation which is prohibited under the order.[21]

2.24 The Scottish model for species control orders also contains provisions for the enforcement of those orders. These apply where the relevant body considers:

(1) that any operation required to be carried out by a species control order has not been carried out within the period or by the date specified in it; or

[17] Wildlife and Countryside Act 1981, ss 14P(6) and 14D(4); Scottish Government, Non-native Species Code of Practice (2012), para 9.6.

[18] Wildlife and Countryside Act 1981, ss 14D(1) to (5) and s 14E.

[19] Wildlife and Countryside Act 1981, s 14G(1).

[20] Wildlife and Countryside Act 1981, ss 14F(1)(d) and (e).

[21] Wildlife and Countryside Act 1981, ss 14K(1) and (3).

(2) that any such operation has been carried out otherwise than in the manner required by the order.[22]

2.25 Where that is the case, the relevant body:

(1) may carry out the operation, or such further work as is necessary to ensure that it is carried out, in the manner required under the order;

(2) is not required to make any payment (and may recover any payments made) in pursuance of the species control order in relation to the operation in question; and

(3) may recover from the person whom the species control order required to carry out the operation any expenses reasonably incurred by it in doing so (less any payment which the relevant body was required to make towards the carrying out of the operation).[23]

2.26 Any owner or occupier of land or premises to which a species control order relates may appeal to a sheriff against the decision to make the order or the terms of the order.[24]

2.27 The operation of the species control process in Scotland is also dependent in part on powers of entry. A person authorised in writing by a relevant body may enter any land or premises, with the exception of dwellings, for any of the following purposes:

(1) to determine whether or not to offer to enter into a species control agreement with the owner or occupier of the premises;

(2) to determine whether or not to make or revoke a species control order;

(3) to post a notice offering a species control agreement where the owner or occupier is unknown or to serve notice on a known owner or occupier that a species control order is planned;

(4) to ascertain whether an offence, such as failing to comply with an obligation in a species control order, is being, or has been, committed in relation to an order made by the relevant body; or

(5) to carry out an operation or other work required by a species control order, where the owner or occupier is unknown or has failed to comply with the order.[25]

2.28 Force may be used to enter land or premises only if authorised by a warrant.[26]

[22] Wildlife and Countryside Act 1981, ss 14L(1)(a) and (b).

[23] Wildlife and Countryside Act 1981, ss 14L(1)(a), (b) and (c).

[24] Wildlife and Countryside Act 1981, s 14H(1).

[25] Wildlife and Countryside Act 1981, s 14M(1).

[26] Wildlife and Countryside Act 1981, s 14M(4).

2.29 Lastly, the Scottish regulatory framework provides the Scottish Ministers with a power to issue a code of practice to provide practical guidance on species control orders and species control agreements.[27] For the purposes of species control agreements and species control orders, a code of practice may, in particular, provide guidance on:

(1) which species of animal or plant are considered "invasive" for the purpose of species control agreements and species control orders;

(2) best practice on containing, capturing or killing animals or containing, uprooting or destroying plants outwith their native range;

(3) the making and content of species control agreements; and

(4) the making, content and enforcement of species control orders.[28]

2.30 Current guidance on species control orders includes, amongst other matters, general guiding principles to determine the allocation of the financial burden of carrying out the necessary control or eradication operations and guidance on the circumstances where compensation should be provided for damage caused to land or premises in the course of species control operations.[29]

2.31 After consultation with the relevant nature conservation body and other interested parties, any code of practice produced by the Scottish Ministers must be laid before, and approved by resolution of, the Scottish Parliament. Any revision of a code of practice must be laid before the Scottish Parliament and is subject to a negative resolution procedure. In general terms, non-compliance with a provision of a code of practice does not in itself give rise to any liability, but the provisions of the code may be taken into account by a court in the determination of any question related to the subject matter of the code. In any proceedings for a species control order offence, however, "failure to comply with a relevant provision of a code of practice may be relied upon as tending to establish liability" while "compliance with a relevant provision of a code of practice may be relied upon as tending to negative liability".[30]

CONSULTATION RESPONSES

2.32 In our consultation paper we highlighted that the sophisticated tools available in Scotland were not available in England and Wales.[31] We, therefore, made the following provisional proposals.

> **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.

[27] Wildlife and Countryside Act 1981, s 14C(1).

[28] Wildlife and Countryside Act 1981, s 14C(2).

[29] Scottish Government, Non-native Species Code of Practice (2012), paras 9.16 and 9.20.

[30] Wildlife and Countryside Act 1981, ss 14C(3) to (10).

[31] Wildlife Law (2012) Law Commission Consultation Paper No 206, paras 8.108 to 8.111.

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.

Provisional Proposal 8-1

2.33 Provisional Proposal 8-1 was the subject of campaigns from the Royal Society for the Protection of Birds (RSPB). Taking into account repeat responses generated by campaigns, we received 127 responses: 115 agreed with the Provisional Proposal; one disagreed; four gave conditional responses; and seven made general comments.[32]

2.34 Provisional Proposal 8-1 was overwhelmingly supported by consultees, who almost unanimously agreed that the current legislative framework is insufficient to tackle the problems with invasive non-native species effectively. Given the wide breadth of this Provisional Proposal, consultation responses covered a broad range of themes, only some of which are directly relevant to this Report.

2.35 Stakeholders in favour of a reform of the regulatory and enforcement tools focused primarily on two sets of problems: the limited enforceability of section 14 of the Wildlife and Countryside Act 1981 and the unavailability of adequate legal mechanisms to effectively counter the threat posed by invasive non-native species.

2.36 In relation to the unavailability of adequate legal tools, consultation responses focused primarily on two aspects: the absence of adequate measures to prevent the spread of invasive non-native species and the absence of adequate tools to carry out effective early eradication programmes.

2.37 As regards preventive measures, a number of conservation and animal welfare organisations, including Wildlife and Countryside Link and the Royal Society for the Prevention of Cruelty to Animals (RSPCA), pointed out that the Convention on Biological Diversity recognises prevention as the most desirable and cost-effective measure for invasive non-native species and that domestic legislation fails to incorporate this principle. They argued that the most effective preventive measure would be a ban on the importation of invasive non-native species, as an import ban would tackle the problem upstream. Certain consultees advocated more stringent rules on the possession of invasive non-native species. One consultee, for example, suggested that a mechanism should be put in place to enable the competent authority to prohibit the keeping by private individuals of potentially invasive species in private collections or as pets or to allow their keeping only under a licence.

2.38 In addition, a number of stakeholders, including the Countryside Council for Wales (now Natural Resources Wales) and the RSPB, highlighted the absence of effective tools to achieve the eradication or containment of invasive non-native species as a key driver for the reform of the existing regulatory framework. The Hampshire and Isle of Wight Wildlife Trust (New Forest Non-Native Plants

[32] If the repeat consultation responses from campaigning are counted as one, the number of consultation responses concerning Provisional Proposal 8-1 was 63: 51 agreed; one disagreed; four gave conditional responses; and seven made general comments.

Project) told us that the ability of a landowner to refuse to cooperate with an eradication programme and difficulties in tracing landowners have jeopardised the effectiveness of control programmes.

2.39 A number of consultees, including Scottish National Heritage, the Wildlife Trust, the Wildfowl and Wetlands Trust and the Woodland Trust, also highlighted the importance of having similar regulatory tools across Great Britain. In their view, this would ensure that efforts on one side of a border are not compromised by different provisions or enforcement tools on the other.

2.40 At the opposite end of the spectrum, certain stakeholders expressed concern that the introduction of new regulatory tools could have the potential to harm certain economic sectors, such as the horticultural industry. The National Farmers' Union (NFU) and NFU Cymru, for example, argued that restrictions on the introduction of certain species may prevent farmers and growers being able to react to market opportunities by growing new varieties of crops. As a result, any new ban should be accompanied by adequate transitional measures to ensure that sufficient time is given to commercial growers to exhaust their existing stocks.

2.41 Lastly, a number of consultees, including the National Gamekeepers' Organisation, the Woodland Trust and the International Fund for Animal Welfare, also expressed the view that it would be premature to reform the law before the expected EU instrument on invasive non-native species is finalised.

2.42 The Hawk Board submitted that the reform of the law in this area should lead to a stand alone legislative framework and should be subject to extensive separate consultation.

Provisional Proposal 8-7

2.43 Provisional Proposal 8-7 was the subject of campaigns from the RSPB. Taking into account repeat responses generated by campaigns, we received 125 responses: 105 agreed with the Provisional Proposal; eight disagreed; eight gave conditional responses; one was ambivalent; and three made general comments.[33]

2.44 Provisional Proposal 8-7 generally received strong support from consultees, including the Department of Environment, Food and Rural Affairs (Defra), although various concerns were expressed by a number of stakeholders.

2.45 The Ribble Rivers Trust (on behalf of the Lancashire Invasive Species Project), together with the Hampshire and Isle of Wight Wildlife Trust (New Forest Non-Native Plants Project) submitted that the proposed system would

> significantly improve the efficiency and efficacy of … control programmes. It would prevent the roadblocks to such programmes presented by being denied access to a crucial section of land.

[33] If the repeat consultation responses from campaigning are counted as one, the number of consultation responses concerning Provisional Proposal 8-7 was 61: 41 agreed; eight disagreed; eight gave conditional responses; one was ambivalent; and three made general comments.

2.46 The Hampshire and Isle of Wight Wildlife Trust confirmed that while voluntary cooperative approaches have been successful in the majority of the cases, they had experienced insurmountable difficulties where landowners refused to co-operate or could not be traced despite extensive research. The Ribble Rivers Trust highlighted two key features of the Scottish model that should be adopted:

> First … it allows for the judicious application of species control orders [as it] targets control work to where it is most needed and integrates with current control programs.
>
> Secondly, it allows for an escalation of response from species control agreements to control orders and emergency control orders. Species control agreements would allow the statutory body to work in cooperation with landowners and still make the most of the current infrastructure of voluntary organisations carrying out invasive species control. Where control agreements fail, control orders are available.

2.47 Natural England also fully agreed with the Provisional Proposal but argued that there should also be a clear provision to allow entry onto land or premises to investigate the presence of invasive plants and animals. The current wording of the Scottish provisions implies, in their view, that the presence of a species must be demonstrated beforehand.

2.48 A number of organisations, ranging from the Wildlife Trust and the National Anti-Snaring Campaign to the Country Land & Business Association (CLA), the NFU and NFU Cymru argued that adequate safeguards should be available to protect the interests of landowners.

2.49 The CLA argued for an appropriate system of checks and balances to protect landowners' interests. Similarly, the Wildlife Trusts and other individual respondents argued that there should be strong procedural safeguards and more clarity over the rights of an individual served with a species control order. International Wildlife Consultants Ltd made the general point that species control orders constitute an erosion of people's ownership rights and, consequently, they should provide for appropriate compensation.

2.50 The NFU and NFU Cymru considered that it would be highly problematic for control orders to impose obligations on landowners or occupiers to undertake action over something outside their control, or in circumstances in which the costs would be disproportionate to the impact of the operation. The NFU provided as an example the potential high costs of controlling a wind-borne invasive non-native species. CONFOR, an umbrella organisation representing the forestry sector, suggested that a clear distinction should be drawn between "unwillingness" and "inability" to comply with a species control order. Individuals should not be prosecuted for failing to carry out work they could not afford. In such cases the order should always be accompanied by provision of the necessary resources.

2.51 At the other end of the spectrum, the National Anti-Snaring Campaign (NASC), together with Animal Aid, suggested that the proposed provision "is oppressive to those who do not want harm to come to wildlife on their land". NASC suggested that "such a control order should only come where there is a 'serious' threat to public health or safety".

2.52 The Student Invasive Non-Native Group, whilst accepting that species control orders would be very useful in cases where cooperation with landowners has failed, also suggested a cautious approach: as instances of landowners failing to cooperate with eradication programmes are very rare, species control orders should only be used as a last resort. The RSPB argued that such orders should only be used as part of a strategic plan for the control, containment and/or eradication of the relevant invasive species.

2.53 Another issue brought up in consultation was the availability of public resources. The Canal and River Trust suggested that greater emphasis should be placed on prevention and that any control programme should be undertaken on the basis of a risk-based approach, ensuring that resources are targeted in the most efficient manner. Species control orders should only be considered for new occurrences where there is a realistic chance of preventing an invasive non-native species becoming established. The Countryside Council for Wales (now Natural Resources Wales) highlighted that "serious consideration should be given to the implications of the proposal and the potential resource implications on enforcement authorities".

2.54 Lastly, a number of welfare and conservation organisations, including the International Fund for Animal Welfare, the Woodland Trust and Wildlife and Countryside Link, argued that the statute should provide for the inclusion of animal welfare provisions in species control orders. The Amateur Entomologists' Society further suggested that the statute should also provide that operations under control orders should only be carried out by adequately trained people, regarding this as particularly important where pesticides or herbicides are involved. Best practice principles should be adhered to, particularly where there is a risk of contamination of watercourses.

RECOMMENDATION

2.55 In general, the introduction of the Scottish system for species control orders in England and Wales was strongly supported in consultation. However, there was a worry that species control orders could be used too widely or impose unnecessary burdens on those subject to them. On the basis of consultation, we consider that the creation of a species control regime for invasive non-native species would provide a highly desirable addition to the law of England and Wales. Such a process would facilitate the effective control of invasive non-native species, and thereby accord with domestic preferences and international obligations.

2.56 We, therefore, make the following recommendation.

Recommendation 1: We recommend that there should be a power to make species control orders to control invasive non-native species in England and Wales modelled broadly on the procedure introduced by the Wildlife and Natural Environment (Scotland) Act 2011.

2.57 We consider the details of the regime and ways in which the concerns of stakeholders can be addressed in Chapter 3.

CHAPTER 3
INVASIVE NON-NATIVE SPECIES CONTROL PROCEDURE

INTRODUCTION

3.1 This Chapter outlines the detail of the invasive species control procedure which we consider will assist in achieving the objective discussed in Chapter 1: dealing effectively and swiftly with threats posed by invasive non-native species. In line with consultation and Recommendation 1 set out earlier, we follow broadly the model adopted in Scotland by way of sections 14D to 14P of the Wildlife and Countryside Act 1981.

3.2 The model we recommend, based on the Scottish model outlined earlier,[1] comprises four stages:

(1) *Investigation*: the provisions allow the relevant body to enter land or premises for the purpose of investigating whether a species outside its natural range is present on the relevant land or premises;

(2) *Species control agreements*: agreements made between the relevant body and the owner or occupier of land or premises on which invasive non-native species are present, govern the carrying out of operations to control or eradicate the invasive non-native species present;

(3) *Species control orders*: if a species control agreement is not agreed or not carried out, the relevant body can make a species control order, specifying operations to control or eradicate invasive non-native species to be carried out on the land or premises in question; and

(4) *Enforcement*: if the species control order is not complied with, then the relevant body can carry out the operations itself, or arrange for them to be carried out.

3.3 As we explain later in this Chapter, the investigation stage can be dispensed with where it is not necessary. Species control agreements can be dispensed with in an emergency or in cases where, despite reasonable efforts, the relevant body was unable to identify the owner or occupier of the relevant land or premises.

3.4 We now consider:

(1) the appropriate order-making body;

(2) the persons to be subject to the species control agreement or order;

(3) the extent of species control powers;

(4) the principle of proportionality;

[1] See paras 1.29 to 1.34, and 2.14 to 2.31 above.

(5) species control agreements;

(6) species control orders;

(7) powers to revoke or modify a species control order;

(8) powers of entry onto land or premises;

(9) compensation;

(10) codes of practice;

(11) offences;

(12) appeals; and

(13) application to the Crown.

3.5 A complete list of our recommendations is set out in the Appendix.

THE APPROPRIATE ORDER-MAKING BODY

3.6 This is a key issue, given that the species control regime includes intrusive powers of entry onto land or into premises coupled with the power to carry out operations to control or eradicate invasive non-native species present there. In Scotland, the order-making body, the "relevant body", can be any of the following:

(1) the Scottish Ministers;

(2) Scottish Natural Heritage;

(3) the Scottish Environment Protection Agency; or

(4) the Forestry Commissioners.[2]

3.7 In England, the equivalent list would be:

(1) the Secretary of State;

(2) Natural England;

(3) the Environment Agency; and

(4) the Forestry Commissioners.

3.8 In Wales, the bodies would be:

(1) the Welsh Ministers; and

(2) Natural Resources Wales.

3.9 We explored whether the powers in our recommended species control regime should be reserved to the Secretary of State and the Welsh Ministers. We

[2] Wildlife and Countryside Act 1981, s 14P(6).

concluded that such an approach would be out of step with the rest of wildlife law. Natural England and Natural Resources Wales are the primary operational bodies delivering wildlife policy in England and Wales. The Environment Agency in England already has considerable powers for controlling other environmental matters, and the Forestry Commissioners are the primary public body regulating forestry operations, including felling licences, under the Forestry Act 1967. In Wales, the Environment Agency and Forestry Commissioners have been amalgamated with the Countryside Council for Wales to form Natural Resources Wales.

3.10 To reserve the power solely to the Secretary of State or the Welsh Ministers would potentially reduce the efficacy of the tool, separating the order-making power from those charged with the operational delivery of wildlife policy.

3.11 Whilst reserving the power in that way could, in theory, ensure policy co-ordination between operational agencies, we do not consider the risk of inconsistent approaches on the part of the various bodies to be great enough to justify imposing on them the additional bureaucratic hurdle of obtaining an order at national Government level.

3.12 We, therefore, make the following recommendation.

Recommendation 2: We recommend that the "relevant bodies" which can enter into species control agreements and make species control orders should be

In England –

(1) the Secretary of State;

(2) Natural England;

(3) the Environment Agency; and

(4) the Forestry Commissioners.

In Wales –

(1) the Welsh Ministers; and

(2) Natural Resources Wales.

PERSONS TO BE SUBJECT TO THE SPECIES CONTROL AGREEMENT OR ORDER

3.13 The Scottish legislation refers to owners and occupiers of land. English law provides for a variety of interests in land, some of which (such as hunting or fishing rights) may be held by people other than the person (typically the freeholder or a long leaseholder) who would be regarded in ordinary language as the "owner" of the land. We regard it as essential to the workability of our proposed system that a species control agreement or order should authorise both entry onto land or premises and the taking of control or eradication measures that could, in the absence of an agreement or order, amount to trespass to land

and/or a tortious interference with interests in land or in moveable property situated upon it.

3.14 We propose that the legislation should broadly follow the Scottish approach, tailored to English land law: a relevant body should have power to made a species control agreement with, or species control order against, the occupier of the relevant land or premises, the owner of the freehold interest in the land or a leaseholder in possession.[3]

3.15 While we expect that the relevant body would always use its best endeavours to include all the relevant parties in the negotiation of the agreement, relevant bodies should not be required to conduct detailed investigations into the complicated pattern of interests that may sometimes exist in pieces of land upon which invasive non-native species are present. It is likely that the relevant body's first point of contact would be with the occupier of the land or premises. As a matter of good administrative practice, the relevant body should ask that person what the nature of their interest in the land is and what other interests they know of. The relevant body should make contact with any others with interests whom they discover.

3.16 We have concluded that the legislation should provide that nothing done in accordance with a species control agreement should give rise to any liability of the relevant body to any person. If, for example, an occupier of land entered into a species control agreement authorising the relevant body to perform operations that interfered with the proprietary rights of a third party whose existence the relevant body had not discovered, the relevant body should be immune from any liability (such as liability in trespass) to that third party.

3.17 The other party to the species control agreement should not, however, be given immunity from any liability to the third party (such as for breach of a covenant in a lease) that resulted from authorising those operations. We see no reason of policy why the regime should enable the other party to the agreement to obtain immunity from their pre-existing legal obligations by virtue of a species control agreement voluntarily entered into by them. We would expect that person to have been asked to draw the body's attention to the existence of others (if any) with rights over the land. It would be open to them to decline to enter into an agreement if they feared that this would result in their being liable to a third party.

3.18 The legislation should, however, provide that nothing done in accordance with a species control order should be actionable by any person. This would confer immunity from suit pursuant to (for example) a covenant in a lease where a landlord or tenant was acting pursuant to an order.

3.19 Later in this Chapter, we set out our position on compensation; we consider that, whilst the circumstances in which compensation would be recoverable are very narrow, the right to compensation may in some cases extend to individuals other than those named in a species control agreement or order, such as those running a business on the basis of sporting rights in relation to the land. We recommend allowing for this by making the right to compensation a statutory one, rather than one depending on specific terms within a species control agreement or order.

[3] For convenience, we shall continue to use the term "owner or occupier" in this Report.

3.20 These Recommendations go some way towards protecting the position of third parties who are adversely affected by a species control agreement or order; they do not, however, exclude the possibility of injustice to such third parties where they are deprived of the opportunity to influence the terms of a species control agreement, to appeal against a species control order or to claim compensation because they learn of the existence of the agreement or order too late. We have already indicated that as a matter of good administrative practice relevant bodies should attempt to identify all those with interests in particular land or premises and, where appropriate, involve them in the species control agreement or order process. Guidance to this effect should be given in the code of practice that we recommend later in this Report.

Recommendation 3: We recommend that a relevant body should have power to make a species control agreement with, or species control order against, the occupier of the relevant land or premises, the owner of the freehold interest in the land or a leaseholder in possession (referred to in later Recommendations as the "owner or occupier").

Recommendation 4: We recommend that, subject to the provisions on compensation discussed below, the relevant body should not be liable to any person for anything done pursuant to a species control agreement or species control order.

Recommendation 5: We recommend that nothing done by a person in accordance with a species control order should be actionable by any person.

Recommendation 6: We recommend that the code of practice for species control orders should give guidance to the effect that relevant bodies should attempt to identify all those with interests in particular land or premises and, where appropriate, involve them in the species control agreement or order process.

THE EXTENT OF SPECIES CONTROL POWERS

3.21 In the consultation responses set out in the previous Chapter, concerns were raised about the extent of the power and its potential for imposing excessive or unnecessary burdens on individuals.

3.22 We acknowledge consultees' concerns: species control orders provide for interference with an individual's settled enjoyment of land or property where, for instance, an otherwise lawfully held animal or plant has to be given up for destruction, or the individual is required, in the public interest, to take steps they would not otherwise take.

3.23 In this and the following section, we consider two limits upon the extent to which the state can interfere with private interests under our proposed regime: the subject matter of species control agreements and orders, and the principle of proportionality. We also set out a requirement to give reasons for decisions taken.

3.24 In Scotland, the general prohibition on the release of non-native species in section 14 of the Wildlife and Countryside Act 1981 relates to the release of any

species outwith its native range. It is not necessary that the species be invasive, as defined in section 14D.

3.25 Species control orders or agreements, however, can only be made where the relevant body is satisfied of the presence of an "invasive" animal or plant outwith its native range on the relevant land or premises.[4] An invasive animal or plant is one of a type which, if not under the control of any person, would be likely to have a significant adverse impact on biodiversity or certain other interests.[5] The potential subject-matter of a species control order under the Scottish provisions is, therefore, narrower than that of the general prohibition of releasing non-native species under section 14 of the 1981 Act. This is a necessary restriction of the scope of the species control order procedure, which would otherwise extend (for example) to a significant proportion of garden plants and trees used in forestry.

3.26 Section 14 of the 1981 Act, as it applies in England and Wales, prohibits the release into the wild of animal species not "ordinarily resident" in or not a regular visitor to Great Britain, and animal or plant species listed in schedule 9 to that Act.[6] "Ordinary residence" can be made out when a species which is not native has established a self-sustaining population, such as is the case now in Great Britain with, for example, ring-necked parakeets or the American mink. These species are, however, both non-native and ecologically damaging in the British Isles. In this way, the definition still in use in England and Wales fails to catch certain harmful non-native species. This is to some extent remedied by the inclusion of such species in schedule 9 to the 1981 Act, to which the section 14 prohibition also applies.[7]

3.27 In the case of plants, the general prohibition of release is not accompanied by any attempt to define non-native plants; the prohibition only applies to plants listed in schedule 9 to the 1981 Act.

3.28 We have considerable concerns with the current definition in section 14 of the 1981 Act as it applies to England and Wales, especially the use of the term "ordinarily resident". However, the appropriate underlying definition is a reform question for the wider project. Any system of control of non-native species introduced in consequence of the present Report should, we consider, apply to the species to which section 14 applies in England and Wales.

3.29 We do not believe that the ambit of the order-making power could sensibly be restricted to species which are not "ordinarily resident" in Great Britain. To do so would mean that there would be no power to issue orders in relation to non-native species which have established a self-sustaining population in Great Britain.

3.30 We have also concluded that the power to make an order should be subject, as in Scotland, to the species being one which, if not controlled, may have significant adverse impacts on biodiversity, other environmental interests, or social or economic interests.

4 Wildlife and Countryside Act 1981, s 14D.

5 Wildlife and Countryside Act 1981, s 14P(4).

6 See paras 2.2 to 2.7 above.

3.31 We, therefore, make the following recommendation.

Recommendation 7: We recommend that a species control agreement or order should be capable of being made for the eradication or control of an animal or plant which is both

(1) invasive; and

(2) either

(a) an animal not ordinarily resident in or a regular visitor to Great Britain; or

(b) an animal or plant listed in schedule 9 to the Wildlife and Countryside Act 1981.

An invasive animal or plant is one of a type which, if not under the control of any person, would be likely to have a significant adverse impact on

(1) biodiversity;

(2) other environmental interests; or

(3) social or economic interests.

THE PRINCIPLE OF PROPORTIONALITY

3.32 There are legitimate concerns about the potential intrusiveness of the powers we recommend are created.[8] Whilst to a large extent they will apply to species whose presence is unwelcome to landowners (even if not sufficiently unwelcome for landowners to take steps against them of their own volition), they are also capable of applying to invasive non-native species kept as pets, as ornamental garden plants, in private collections of plants or animals, or even bred or propagated commercially. With relatively limited exceptions,[9] the possession of or trade in animals or plants belonging to invasive non-native species is not currently prohibited by law. Our recommendations pave the way for a regime under which the keeping of invasive non-native species in such circumstances can be prevented by the relevant bodies.

3.33 Article 1 of protocol 1 to the European Convention on Human Rights provides that:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

[7] Both ring-necked parakeets and the American mink are listed in sch 9 to the Wildlife and Countryside Act 1981.

[8] See paras 2.48 to 2.54 above.

[9] See paras 2.8 to 2.12 above.

> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.[10]

3.34 The Convention requires that any interference with a person's possessions must (a) be lawful and (b) pursue a legitimate aim in the general interest. In addition the means employed should be proportionate to the aim sought to be realised, so as to strike a "fair balance" between the general interest of the community and the individual's fundamental rights.[11]

3.35 We believe that the first two of those requirements would be satisfied in the case of species control orders.

3.36 The first requirement would be satisfied as the species control orders would be underpinned by law, with an appeal process which we examine later.

3.37 The second requirement would be satisfied as the species control procedure we are recommending has the purpose of addressing a serious threat to biodiversity and the UK economy. The history of the British Isles is replete not merely with instances of the intentional introduction of non-native species that have subsequently proved to be misguided,[12] but also of the escape of invasive non-native species from private collections, with serious environmental consequences.[13]

3.38 The third requirement, "fair balance", requires both the selection of the least onerous means of achieving the aim in view and that the outcome should be sufficiently worthwhile to justify the burden imposed.

3.39 We have concluded that consideration of the proportionality of any action should be a specific formal requirement of our proposed regime, so as to ensure that those exercising powers on behalf of the state comply with the state's obligations under the Convention, a duty to which the relevant bodies are likely in any event to be subject, pursuant to the Human Rights Act 1998.

3.40 There are already examples in current law of such a requirement being imposed in the context of intrusive powers. For instance, section 93 of the Police Act 1997, which provides for authorisations to interfere with property in order to conduct surveillance operations, requires that "the taking of the action is proportionate to

[10] European Convention on Human Rights, art 1 of protocol 1 is given effect in domestic law by s 1 of the Human Rights Act 1998.

[11] See *Broniowski v Poland* (2005) 40 EHRR 21 (App No 31443/96) at [147]; *Hutten-Czapska v Poland* (2007) 45 EHRR 4 (App No 35014/97) at [163]; *Sporrong and Lonnroth v Sweden* (1983) 5 EHRR 35 (App Nos 7151/75 and 7152/75) at [69] to [73]. Similarly, under art 8 of the European Convention on Human Rights a proportionality test is applied to determine whether a proposed interference with the right to privacy and family life is "necessary in a democratic society": there must be a pressing social need for action to advance a legitimate aim and the measures taken must be proportionate to that need.

[12] For instance, Japanese knotweed.

[13] Reeves' muntjac deer, arguably, emanated from Woburn Park. The Mammal Society, *Mammals of the British Isles* (4th ed 2008) p 567.

what the action seeks to achieve".[14] Similarly, the Intelligence Services Act 1994 requires the Secretary of State to be "satisfied that the taking of the action is proportionate to what the action seeks to achieve" before issuing a warrant allowing for entry or the interference with property or with wireless telegraphy.[15]

3.41 We have concluded that the decision-maker should be satisfied that the interference with the legitimate interests of a person affected by an order or agreement is proportionate to the outcome the action seeks to achieve. The requirement that an order be proportionate necessarily implies that each operation required to be undertaken, or prohibited, by the order must be proportionate. An operation will only be proportionate if it is the least intrusive method for achieving the necessary end.

Recommendation 8: We recommend that there should a formal requirement for the decision-maker to consider the proportionality of a proposed agreement or order, and to be satisfied that the taking of the action contemplated in the agreement or order is proportionate to what the action seeks to achieve.

3.42 Another matter potentially relevant to proportionality is the availability of compensation, a topic to which we devote a section later in this Chapter.

3.43 We consider that the requirement of proportionality should be accompanied by a formal obligation to give reasons for making species control orders. Such a provision would ensure transparency in the decision-making process. The procedure we are recommending is potentially intrusive and the reasons for using it should be communicated clearly to those subjected to an order.

3.44 We consider it appropriate that the obligation to give reasons should extend to explaining why a particular operation is to be carried out and, where appropriate, why another, less intrusive method has not been chosen. This should help to ensure that the nature and extent of the operations to be carried out are proportionate to the ultimate aim of the species control procedure.

3.45 We have concluded that the duty to give reasons need only apply to the making of orders. Agreements are negotiated settlements, and giving reasons for terms proposed by the relevant body would naturally be part of that process.

Recommendation 9: We recommend that there should be a formal requirement that the decision-maker give reasons for making a species control order and for the individual elements of an order, including why a particular operation is required or prohibited by the order.

3.46 Consultees suggested further requirements ensuring that those conducting operations were formally trained, and that animal welfare should be a specific consideration.

3.47 We expect that such considerations would be taken into account by a reasonable decision-maker as a matter of good administrative practice. The Animal Welfare Act 2006 would in any event apply to species control operations, as would

[14] Police Act 1997, s 93(2)(b).

specific measures in wildlife law prohibiting particular methods of killing, such as poisons or leg-hold traps. In addition, the Treaty on the Functioning of the European Union (as amended by the Lisbon Treaty) obliges member states to have regard to animal welfare when implementing any EU policy in relation to, among other things, agriculture and fisheries.[16] We do not, therefore, think it necessary to include further formal requirements within our recommended process.

SPECIES CONTROL AGREEMENTS

3.48 Species control agreements form a vital part of the procedure we are recommending. The rule should be that an agreement is normally sought before imposing a species control order on an owner or occupier. The agreement should not be legally enforceable against the owner or occupier but non-compliance should be capable of leading to the making of a species control order.

3.49 This outcome is achieved in Scotland by making the offer of an agreement a condition for a species control order, except in limited circumstances. Before a species control order can be made, one of the following must apply.

(1) The relevant body has offered to enter into an agreement (a "species control agreement") with the owner or occupier of the relevant land or premises to control or eradicate invasive animals or plants, 42 days have elapsed since that offer and the owner or occupier has failed to enter into that agreement.[17]

(2) The relevant body has failed to identify any owner or occupier of land or premises and, having made "reasonable efforts" to do so, has subsequently placed a notice at the land or premises stating its wish to enter into a species control agreement. The relevant body must allow 48 hours after the placing of the notice for an owner or occupier to come forward.[18]

(3) A species control agreement has not been properly performed.[19]

(4) The relevant body considers that a species control order is "urgently necessary".[20]

3.50 The legislation therefore makes a species control agreement the default situation. This approach conforms to our view of the appropriate manner of regulatory intervention, with escalation only where the least intrusive measures have failed or are not practicable in the circumstances.

[15] Intelligence Services Act 1994, s 5(2)(b).

[16] Treaty on the Functioning of the European Union, art 13.

[17] Wildlife and Countryside Act 1981, s 14D(2).

[18] Wildlife and Countryside Act 1981, ss 14D(4) to (6).

[19] Wildlife and Countryside Act 1981, s 14D(3).

[20] Wildlife and Countryside Act 1981, s 14E.

3.51 The Scottish provisions of the Wildlife and Countryside Act 1981 do not set any formal requirements as to the content of the agreement, nor are there any penalties for breach of such an agreement. We do not see any need for a penalty, the appropriate sanction being the making of a species control order, but consider that there should be some requirements as to content, with a view to ensuring that species control agreements state clearly the rights and obligations of the parties and to assist in a well-informed process of negotiating agreements.

3.52 We believe that the regulatory model should be that an offer of a species control agreement has the genuine aim of reaching an agreement, rather than being a non-negotiable ultimatum issued by a relevant body as a precursor to an order imposing exactly the same terms.

3.53 As any requirement to negotiate should not lead to the frustration of the regulatory process, we think that if an agreement is not concluded within a stipulated period from the day the relevant body first offered a species control agreement, the relevant body should be able to progress to the order-making stage. The right to appeal against orders, recommended below, ought to be a check on an over-hasty use of this power.

3.54 The Scottish legislation sets a period of 42 days for this purpose. No opinions were expressed in consultation on the desirability of any particular time period. We have concluded that the 42 day period is, on balance, correct, accepting that a case could be made for a longer or shorter period.

3.55 In order to avoid unnecessary delay to any operations being carried out, we do not think the regulatory body should be required to wait for the stipulated period to expire where there has been an unequivocal refusal to conclude any form of species control agreement (as opposed to difficulty in concluding an agreement).

3.56 Given the potential costs to the wider economy and the environment of the release of an invasive non-native species, and the possible need for an urgent response, the procedure must make provision for urgent action where necessary.

3.57 Similarly, the process should not be capable of frustration because the owner or occupier could not be identified after reasonable efforts had been made.

3.58 In these circumstances the legislation in Scotland requires a notice to be placed on the relevant land or premises. This is an eminently appropriate requirement, which we endorse. In Scotland the notice is required to be posted 48 hours before a species control order can be made. Again, we adopt that period for the purpose of our recommendations without ruling out the substitution of a different period.

3.59 Given that non-compliance with an agreement may lead to an order being made, we propose the introduction of a legal requirement that a species control agreement should state clearly the operations to be carried out, any operations prohibited and the timeframe for the conduct of any operations. We have also concluded that a code of practice issued by the Secretary of State or the Welsh Ministers, the making of which we discuss below, should provide any appropriate further guidance on the content of species control agreements, including the

allocation of the cost of carrying out control operations under the agreement.[21] The guidance should ensure that regulatory bodies take a consistent approach towards the negotiation of such agreements and that the negotiation of species control agreements is broadly in line with the principles underlying the contents of species control orders.

3.60 We, therefore, make the following recommendations.

Recommendation 10: We recommend that, before a species control order can be made, the relevant body should offer to conclude a species control agreement with the owner or occupier of land or premises on which there is an invasive non-native species that the relevant body wishes to control or eradicate, unless an exception applies.

The following should be the exceptions.

(1) The relevant body has failed to identify any owner or occupier of land or premises and, having made reasonable efforts to do so, has subsequently placed a notice at the land or premises stating to any owner or occupier that it wishes to enter into a species control agreement. Forty-eight hours have passed since the notice was placed and no owner or occupier has come forward.

(2) The relevant body considers that a species control order is urgently necessary.

Recommendation 11: We recommend that the legislation should enable the relevant body to make a species control order if, after 42 days have elapsed since the offer of a species control agreement, the relevant body and the owner or occupier of the relevant land or premises have failed to enter into a species control agreement.

Recommendation 12: We recommend that the legislation should allow the relevant body to make a species control order if, before 42 days have elapsed since that offer of a species control agreement, the owner and/or occupier have refused to conclude a species control agreement.

Recommendation 13: We recommend that there should be a legal requirement for a species control agreement to set out clearly the operations to be carried out, any operations not to be carried out and the timeframe for the carrying out of operations.

Recommendation 14: We recommend that a code of practice issued by the Secretary of State or the Welsh Ministers should provide appropriate guidance on the content of species control agreements, including the allocation of costs for the carrying out of control operations under the agreement.

[21] Codes of practice are further discussed at paras 3.166 to 3.175 below.

SPECIES CONTROL ORDERS

3.61 Although it is to be hoped that a species control agreement would lead of itself to a satisfactory outcome, the legal framework also needs to cater for the situation where a species control agreement has been entered into but the requirements of the agreement have not been complied with by the parties to the agreement. Species control agreements should not be legally enforceable, as to make them so would be to render them similar to an order, and the legislation should provide accordingly.

3.62 Where an owner or occupier does not comply with a species control agreement, it should be possible for the relevant body to impose a species control order in its place.[22] The scope of the species control order, in these circumstances, should be limited to the subject matter of the initial agreement.

3.63 Species control orders are the most formal and potentially intrusive part of the process, detailing operations to be carried out on the land or at the premises to control or eradicate invasive non-native species present, and specifying any operations not to be carried out. Failure to comply with a species control order should be an offence.[23] It should also be possible for the relevant body to carry out the operations required by the order itself (or by nominating someone else) where that is necessary to achieve the purpose of the order.[24]

3.64 The relevant body should also consider whether the imposition of an order is the least intrusive measure necessary to achieve the aim sought to be achieved. If, for instance, the terms of a species control agreement have proved to be unrealistic, the relevant body should consider the feasibility of renegotiating the agreement.

3.65 We, therefore, make the following recommendation.

Recommendation 15: We recommend that the relevant body should have the power to make a species control order where that body has entered into a species control agreement with the owner or occupier of land or premises to control or eradicate specific invasive non-native animals or plants and the owner or occupier has failed to comply with that agreement.

Content

3.66 The Scottish legislation requires that a species control order must describe the land or premises to which it relates, must be accompanied by a map delineating the land or premises,[25] and must specify the following:

(1) the date on which the order comes into effect and the period for which it is to have effect;[26]

(2) the invasive animal or invasive plant to which it relates;[27]

[22] In Scotland, this provision exists as s 14D(3) of the Wildlife and Countryside Act 1981.

[23] See paras 3.176 to 3.184 below.

[24] See paras 3.66 to 3.80 and 3.84 to 3.89 below.

[25] Wildlife and Countryside Act 1981, ss 14F(1)(a) and (b).

[26] Wildlife and Countryside Act 1981, s 14F(1)(f).

(3) the operations which are to be carried out on the land or at the premises for the eradication or control of the relevant invasive non-native species, including specifying the person who is to carry out the operations and detailing how and when those operations are to be carried out:[28] and

(4) any operations which must not be carried out on the land or at the premises.[29]

3.67 We recommend that species control orders issued in England and Wales should satisfy the same requirements as are listed in the previous paragraph. In particular, it is important that the order should enable the owner or occupier to know precisely what (if any) control or eradication operations are required to be performed by themselves or their contractors and/or precisely whose entry onto their land the order requires them to tolerate. This would not necessarily require the naming of particular members of staff of a regulatory body or its contractor.

3.68 In Scotland, species control orders may provide for payments by the body making the order to any person in respect of reasonable costs incurred by a person carrying out an operation under the order.[30] We recommend that this model should be followed.

3.69 Similarly, a species control order that is not an emergency order may require the owner or occupier to make payment in respect of reasonable costs incurred in relation to the carrying out of an operation under the order.[31]

3.70 Certain consultees expressed concern with this, arguing that it might lead to the recovery of costs disproportionate to the results that the operation sought to achieve.[32] It was also pointed out that the legislation should not lead to the prosecution of individuals because of their inability, rather than unwillingness, to carry out the order – such as inability to bear the costs involved.[33]

3.71 The legislative provision on the recovery of costs in Scotland is supplemented by a code of practice issued under section 14C of the Wildlife and Countryside Act 1981. The code currently states that:

> The intention is that costs will be recovered where it is fair and proportionate to do so, in accordance with the "polluter pays" principle. In others words, where it is clear that the person is responsible for the problem, for example if they have actively released the invasive animal or plant in question. There may also be other cases where it is fair to recoup costs, for example where the

[27] Wildlife and Countryside Act 1981, s 14F(1)(c).

[28] Wildlife and Countryside Act 1981, s 14F(1)(d).

[29] Wildlife and Countryside Act 1981, s 14F(1)(e).

[30] Wildlife and Countryside Act 1981, s 14F(2)(a)

[31] Wildlife and Countryside Act 1981, s 14F(2)(b).

[32] National Farmers' Union and NFU Cymru, see para 2.50 above.

[33] CONFOR: promoting forestry and wood, see para 2.50 above. Criminal offences for failing to comply with a species control orders are discussed at paras 3.176 to 3.184 below.

owner or occupier is considered to have caused the species to spread.[34]

3.72 Procedural safeguards are already provided in our recommended regime. First, in line with the Scottish model, the costs that the competent authority may charge a person will have to be "reasonable". Secondly, as set out above, the species control order as a whole will have to comply with an explicit "proportionality" test, so as to ensure that any interference with a person's property rights is proportionate to the legitimate aim the order seeks to achieve.

3.73 The code of practice requires an element of fault based on the "polluter pays" principle. We regard such liability as a form of no-fault liability justified by the polluting nature of the activity being undertaken. Given that invasion by non-native species may in different cases result from either activity or inaction, we do not find the analogy exact. In our view the touchstone should simply be fault.

3.74 The Scottish legislation on its face gives the relevant bodies an unrestricted power to impose the cost of operations on an owner or occupier, whether by requiring them to conduct operations without providing for reimbursement of the cost or by requiring them to make payments to another person in respect of the cost of operations carried out by that other.[35] The Code of Practice that we have quoted above indicates that it is not the practice in Scotland to make use of the power in that fashion.

3.75 We consider that the norm should be that the cost of operations is borne by the public purse rather than by the owners or occupiers of land on which invasive non-native species happen to be present. Accordingly, species control orders ought not generally to require owners or occupiers to incur significant costs by way of control operations without reimbursement or to pay the costs of control operations carried out by the relevant body or a third party.

3.76 There are, however, cases in which it is fair and appropriate to impose the cost of control operations on an owner or occupier. These include the situation contemplated in the paragraph that we have quoted from the Scottish Code of Practice. There are other situations in which it may be appropriate to require the owner or occupier to carry out operations at their own expense or to pay for their carrying out by others. These can broadly be described as cases in which irresponsible action or inaction on the part of the owner or occupier has created or compounded the problem that the control operation is intended to address.

3.77 Mere past failure to control an invasive non-native species that is present otherwise than as a result of the person's irresponsible conduct should not normally be sufficient to justify making an owner or occupier bear the cost of the operation. But it may be otherwise where an owner or occupier has brought the invasive non-native species onto the land or premises in question and either released it there or contained it inadequately, in circumstances where they knew or ought to have known of the risks involved and can be said to have taken insufficient care or otherwise to have behaved culpably. Such an owner or

[34] Scottish Government, *Code of practice on non-native species* (2012), para 9.20. http://www.scotland.gov.uk/Publications/2012/08/7367 (last visited: 9 December 2013).

[35] Wildlife and Countryside Act 1981, ss 14F(1) and (2).

occupier might reasonably be required to bear the cost of more adequate containment and/or of the control or eradication of specimens at large.

3.78 The Scottish legislation specifically confers power to impose the cost of operations on an owner or occupier who has failed to perform a species control order. We regard that power as appropriate and recommend accordingly below.[36] Whether use is made of the power in a particular case should depend on the circumstances surrounding the non-performance.

3.79 The Scottish model does not permit the recovery of costs in an emergency control order. Whilst it is true that the procedure for issuing an emergency species control order bypasses a number of important procedural guarantees, including the requirement to enter into negotiations with the owner or occupier to conclude a species control agreement, cases can be imagined where the need for urgent action results from the irresponsible holding of problematic species inadequately contained. Whilst such cases will be extremely rare, we do not find it appropriate to exclude the recovery of costs under an emergency species control order.

3.80 Unlike the position in Scotland, the above principles should in our view be enshrined in the legislation.

Recommendation 16: We recommend that –

(1) A species control order must describe the land or premises to which it relates, must be accompanied by a map delineating the relevant land or premises, and must specify the following:

(a) The date on which the order comes into effect and the period for which it is to have effect.

(b) The invasive animal or invasive plant to which it relates.

(c) The operations which are to be carried out on the land or at the premises for the eradication or control of the relevant invasive non-native species, how and when those operations are to be carried out.

(d) A specification of the person or persons that are to carry out the operations enabling the addressee of an order to understand the extent of their own obligations and/or to identify the persons that must be given access to the relevant land or premises.

(e) Any operations which must not be carried out on the land or at the premises.

(2) Any species control order should be capable of providing for payment by the body making the order to any person of reasonable costs incurred by a person carrying out an operation under the order.

[36] See paras 3.84 to 3.89 below.

(3) A species control order should be capable of requiring the owner or occupier to make a payment in respect of reasonable costs incurred in relation to the carrying out of an operation under the order.

(4) In determining whether to make provision for the payment or recoupment of costs, the body making the order should be under a statutory obligation to consider whether any culpably irresponsible action or inaction of the owner or occupier has created or compounded the problem that the control operation is intended to address. Mere past failure to control an invasive non-native species that is present otherwise than as a result of the person's conduct should not normally be sufficient to justify making an owner or occupier bear the cost of the operation.

Notice and entry into force

3.81 Under the Scottish model, the relevant body must give notice to the owner and (if different) the occupier of the land or premises to which the order relates.[37] Clearly, appropriate notice periods should be set. In the absence of any contrary view from consultees, we have adopted the notice periods used in Scotland. The Scottish legislation specifies that if the relevant body is not the Scottish Ministers, then they should also be notified. We propose to adopt the same approach.

3.82 The Scottish legislation provides that, unless the species control order specifies a later date, the order has effect as follows:

(1) in the case of an emergency species control order, from the date of giving notice; or

(2) in case of a standard species control order, from the expiry of the time limit for appealing the order (28 days from the giving of notice) or where an appeal is made, the withdrawal of the appeal or its final determination.[38]

3.83 This seems eminently sensible, and we, therefore, make the following recommendations.

Recommendation 17: We recommend that when an order is made, notice must be given to the owner, the occupier (if different) and any other person the relevant body has identified as having an interest in the land or premises to which the order relates. If the relevant body is not the Secretary of State or the Welsh Ministers, then either the Secretary of State or the Welsh Ministers should also be notified, as appropriate.

Recommendation 18: We recommend that a species control order should enter into force as follows:

(1) in the case of an emergency species control order, on the date of giving notice; or

[37] Wildlife and Countryside Act 1981, s 14G(1).

[38] Wildlife and Countryside Act 1981, s 14I.

(2) in any other case, from the expiry of the time limit for appeal against the order (28 days from the giving of notice) or where an appeal is brought, the withdrawal of the appeal or its final determination.

Carrying out of operations by the relevant body

3.84 The Scottish model for species control orders contains provisions for the enforcement of orders. These apply where the relevant body considers:

(1) that any operation required to be carried out by a species control order made by it has not been carried out within the period or by the date specified in it; or

(2) that any such operation has been carried out otherwise than in the manner required under the order.[39]

3.85 Where that is the case, the relevant body:

(1) may carry out the operation, or such further work as is necessary to ensure that it is carried out, in the manner required under the order;

(2) is not required to make any payment (and may recover any payments made) in pursuance of the species control order in relation to the operation in question; and

(3) may recover from the person whom the species control order required to carry out the operation any expenses reasonably incurred by it in doing so (less any payment which the relevant body was required to make towards the carrying out of the operation).[40]

3.86 These provisions enable the relevant body to carry out an operation required of the owner or occupier, where the latter has defaulted. The provisions also allow the relevant body to withhold any payment to the owner or occupier where the owner or occupier has failed to carry out operations required by the species control order, for which they would have been paid.

3.87 Finally, the provisions allow the relevant body to recover the costs of operations which should have been carried out by another but have not been carried out, with the result that the relevant body has carried out the operations itself (or made provision for them to be carried out by a third party – as permitted by the provisions considered above).

3.88 We regard these provisions as vital elements of the species control regime, and they were similarly regarded in consultation.

[39] Wildlife and Countryside Act 1981, ss 14L(1)(a) and (b).

[40] Wildlife and Countryside Act 1981, ss 14L(1)(a), (b) and (c).

3.89 We, therefore, make the following recommendation.

Recommendation 19: We recommend that where the relevant body considers

(1) that any operation required to be carried out under a species control order made by it has not been carried out within the period or by the date specified in it;

(2) that any such operation has been carried out otherwise than in the manner required under the order; or

the relevant body:

(1) may carry out the operation, or such further work as is necessary to ensure that it is carried out, in the manner required under the order;

(2) is not required to make any payment (and may recover any payments made) in pursuance of the species control order in relation to the operation in question; and

(3) may recover from the person whom the species control order required to carry out the operation any expenses reasonably incurred by it in doing so (less any payment which the relevant body was required to make towards the carrying out of the operation).

POWERS TO REVOKE OR MODIFY A SPECIES CONTROL ORDER

3.90 Under the Scottish model, the relevant body is provided with an explicit power to revoke a species control order by making another order to that effect.[41] Section 14J(3) clarifies that the revocation of a species control order does not prevent the relevant body subsequently making a species control order in relation to the same premises.

3.91 We have concluded that an explicit power to revoke a species control order should also be available in our proposed regime as there is no reason why a species control order should remain in force where the body considers it no longer necessary or appropriate.

3.92 We considered whether a power to amend provisions of a species control order through a simplified procedure should also be made available. We have concluded that such power would be potentially unfair. For example, under our proposed procedure, every species control order – except in an emergency – is subject to a 28 day period between the notification of the order and the coming into force of its provisions; this is in order to allow the addressees of the order to challenge its provisions.[42] To reduce the 28 day period in the case of amendments to an existing species control order would, in our view, unjustifiably reduce the procedural rights of the owners or occupiers subject to the order for mere administrative convenience.

[41] Wildlife and Countryside Act 1981, s 14J.

[42] See paras 3.81 to 3.83 above and paras 3.185 to 3.193 below.

3.93 Where the relevant body wishes to alter the provisions of a species control order, therefore, it should use its power to revoke the existing order and issue a new order, which would be subject to all procedural steps required for the making of a new order.

3.94 We, therefore, make the following recommendation.

Recommendation 20: We recommend that there should be an explicit power to revoke a species control order. The revocation of a species control order should not prevent the relevant body subsequently making a further species control order in relation to the same land or premises.

POWERS OF ENTRY ONTO LAND OR PREMISES

3.95 The process, as we set out in Chapter 2, relies considerably on powers of entry and coercion. The Scottish regulatory framework for species control orders allows the state to act in the place of an owner or occupier or use the threat of criminal liability to compel individuals to carry out required operations.

3.96 In England and Wales the entry onto private property by any person is a trespass unless consent is given or the entry is otherwise authorised by statute or the common law.[43] The use of force to enter onto land or into premises must also be explicitly authorised by statute or the common law, otherwise the entry may constitute an offence under sections 1 to 3 of the Criminal Damage Act 1971 or section 6 of the Criminal Law Act 1977 (violence for securing entry).

3.97 This is reinforced by article 8 (right to respect for the home and private and family life) and article 1 of protocol 1 (right to respect for property) of the European Convention on Human Rights, which are given effect in the law of England and Wales by section 1 of the Human Rights Act 1998. Article 8 provides that any measure interfering with the right to privacy and family life must be prescribed by law, must have a legitimate aim and must be necessary in a democratic society. A proportionality test is applied to the question whether the proposed interference is necessary in a democratic society: there must be a pressing social need for action to advance the legitimate aim and the measures taken should be proportionate to that need.

3.98 Depending on the scale of the interference with individual rights, certain powers of entry can only be exercised if a warrant is obtained. The requirement to seek a warrant ensures a further level of oversight in the balancing exercise between individual rights and public interest. It is current practice that a warrant is required where the power allows entry into private dwellings or allows the use of force to effect an entry. In the vast majority of cases, justices of the peace are the judicial authority entrusted with the power to issue a warrant. In exceptional cases, the power to issue a warrant is vested in a High Court judge or a circuit judge.[44]

3.99 Where powers of entry can be exercised without a warrant, other procedural guarantees are provided in most cases, such as the requirement to give advance

[43] *Entick v Carrington* (1765) 19 State Tr 1065.

[44] See, for example, the Police and Criminal Evidence Act 1984, s 9 and sch 1: access to "excluded" or "special procedure material" may only be made upon an application to a circuit judge.

notice of the exercise of the power. Entry by warrant is provided as a last resort, where entry on notice has failed or where in the specific circumstance the notification of the occupier would defeat the purpose of the proposed entry.

3.100 Under the Animal Health Act 1981, for example, an inspector is empowered to enter any premises[45] at any time for the purpose of ascertaining whether a power to slaughter an animal under the Act should be exercised or for the purpose of doing anything in pursuance of that power.[46] Reasonable force to effect an entry for those purposes, however, may only be exercised under a warrant issued by a justice of the peace. Before issuing a warrant, the justice of the peace has to be satisfied that the procedural requirements listed in section 62B of the Animal Health Act 1981 have been fulfilled. These include the giving of appropriate notice, unless this would defeat the object of entering the premises.[47]

3.101 Under the Plant Health (England) Order 2005, as amended, an inspector may enter premises at any reasonable time for the purpose of enforcing the provisions of the Order[48] or, upon reasonable notice, to destroy or treat listed plants or other relevant infected material.[49] This power, however, does not apply to private dwellings unless 24 hours' notice has been given to the occupier or a warrant has been granted. A justice's warrant also has to be sought for entering any premises if, for example, admission has been refused, the case is one of urgency, the premises are unoccupied or giving notice for admission would defeat the object of the entry.[50]

3.102 Following the enactment of the Protection of Freedoms Act 2012, a review of existing powers of entry has been undertaken. In parallel, the Home Office has created a "powers of entry gateway", which regulates the grant of new powers of entry. The test for granting a new power of entry requires the satisfaction of the following elements:

(1) necessity;

(2) proportionality; and

(3) safeguards.[51]

3.103 According to the gateway guidance, such powers should only be used where necessary, as opposed to routinely. The use of force or entry into private dwellings without the consent of the occupier should only be authorised under a warrant.[52] Prior notice of the use of a power of entry should be given, other than

[45] For the purposes of this section, "premises" includes "any land, building or other place" (Animal Health Act 1981, s 62A).

[46] Animal Health Act 1981, s 62A.

[47] Animal Health Act 1981, ss 62B(4) and (5).

[48] Plant Health (England) Order 2005 (SI 2005/2530), art 31.

[49] Plant Health (England) Order 2005 (SI 2005/2530), art 33.

[50] Plant Health (England) Order 2005 (SI 2005/2530), art 38. The use of reasonable force to enter the premises may only be authorised by warrant granted under art 38(2).

[51] Home Office, *Guidance on powers of entry gateway* (2012).

[52] Home Office, *Guidance on powers of entry gateway* (2012) p 6.

in an emergency, where there is serious risk of harm to public or animal health or where a notice would defeat the purpose of the inspection or visit. If following notice the owner or occupier refuses entry, a warrant should be obtained.[53]

3.104 The following are the powers of entry available in Scotland, which we would seek to recreate:

(1) a power of entry in order to determine whether a species control agreement should be offered**;**

(2) a power of entry in order to determine whether a species control order should be made**;**

(3) a power of entry in order to determine whether a species control order should be revoked;

(4) a power of entry in order to serve notices on occupiers or owners of the relevant land or premises, or to place a notice where the owner or occupier has not been identified;

(5) a power of entry to investigate possible breaches of a species control order;

(6) a power of entry to carry out operations where no owner or occupier could be identified following reasonable efforts by the relevant body;

(7) a power of entry allowing the relevant body to carry out operations in the case of failure to comply with a species control order.

3.105 We consider that a power of entry (in the last resort) for each of the above purposes is necessary to produce a workable means of countering, as is necessary in the general interest, the threat posed by invasive non-native species.

3.106 The reasons are more or less self-evident. Combating invasive non-native species involves detecting their presence; measures to counter them are appropriately taken pursuant to species control agreements, with control rules available in the last resort, in circumstances where a species control agreement is impracticable or in an emergency. At each stage the relevant bodies need to be able to inform themselves as to the position, something that can in many cases only be done by entering upon land or premises. A last resort power of entry for the purposes of control operations is essential in cases involving uncooperative or untraceable owners or occupiers.

3.107 The power of entry available in Scotland to carry out operations is conditional upon the operations specified by a species control order not having been carried out within a prescribed period or by a specified date.[54] This, in our view, is an inappropriate hurdle in the case of an emergency. There should be a specific provision allowing the relevant body or a third party engaged by it to carry out

[53] Home Office, *Guidance on powers of entry gateway* (2012) p 9.

[54] Wildlife and Countryside Act 1981, ss 14L and 14M(1)(e).

operations where those operations are required to be carried out by the relevant body or a third party in an emergency species control order.

3.108 We consider that our proposal to require a warrant for entry by force and where the order includes dwellings, discussed further below, limits the extent of the powers appropriately. The formal incorporation of a requirement to observe proportionality is designed to ensure compliance with the European Convention on Human Rights.

3.109 We consider in the next sub-sections the following specific issues:

(1) investigation;

(2) use of force and warrants;

(3) dwellings;

(4) accompanying persons and equipment;

(5) notice periods; and

(6) compensation and securing premises.

3.110 Finally, for this section, we set out our recommendations.

Specific issues

Investigation

3.111 In consultation, concern was raised that the Scottish legislation may require the presence of an invasive non-native species to be demonstrated, before land or premises could be accessed.[55] Without expressing any view on the construction of the Scottish provisions, we consider it desirable that the preconditions for exercising a power of entry should be spelled out clearly.

3.112 We would expect that those seeking to investigate would only do so where they have reason to believe that an invasive non-native species is present on the land or premises. Concerns were raised in consultation about the unjustified use of powers of entry. We consider it appropriate that our recommended procedure should prevent purely speculative intrusions onto land or premises.

3.113 We, therefore, consider that there should be a formal safeguard against potential over-use of powers of entry – though not one as restrictive as requiring the presence of a particular invasive non-native species to be established before entry.

3.114 We have come to the conclusion that a requirement for the relevant authority to have reasonable cause to believe that an invasive non-native species is present on the relevant land or premises is not overly onerous. It provides, in our view, a fair balance between private citizens' legitimate interests and the public interest in investigating the presence of an invasive non-native species for the purpose of

[55] Natural England, see para 2.47 above.

determining the appropriate control activities. The expression "reasonable grounds to believe" is already used in similar circumstances.

3.115 Under section 8 of the Police and Criminal Evidence Act 1984, for example, a justice of the peace may authorise a constable to enter and search premises only if satisfied that there "are reasonable grounds for believing" that an offence has been committed and, among other things, there is material on the premises which is likely to be of substantial value to the investigation.[56] The expression "reasonable grounds to believe" is also not unknown to wildlife law. Section 18D(1)(b) of the Wildlife and Countryside Act 1981, for example, allows a wildlife inspector to enter and inspect any premises where he or she has reasonable cause to believe that any birds included in schedule 4 are kept, for the purpose of ascertaining whether an offence under section 7 (unlawful keeping of such birds) is being, or has been, committed on those premises.

3.116 In Scotland there is also a provision allowing for entry onto land to ascertain whether a species control order is being breached. We recommend that the procedure in England and Wales should include a similar provision, in order to allow the delivery of the operations contained in the species control order to be monitored. We do not consider that a precondition of reasonable belief or suspicion should apply at this stage (it does not in Scotland). Where a case has reached the stage of an order being imposed, a power to monitor compliance seems uncontroversial. In a case where operations are being conducted by an owner or occupier pursuant to a species control agreement, provisions as to entry should be included in the agreement.

3.117 Where work is done pursuant to a species control order by the authority or a contractor engaged by it, the power of entry to perform the work ought to provide a sufficient opportunity for the authority to oversee it. There may be cases where grounds arise for suspecting that operations fulfilling the terms of the order have failed to control or eradicate the targeted species. However, we believe that those cases should be catered for by the power to investigate the suspected (in this case, continued) presence of the invasive non-native species.

Use of force and warrants

3.118 In the Scottish model, any use of force, including breaking a lock, requires a warrant issued by either a sheriff or a justice of the peace.[57] This accords with the approach of the law of England and Wales that we have described above, and with the wider requirements of human rights law on interference – as an additional legal safeguard is provided to protect individuals' rights before coercive action is taken.[58]

3.119 The Scottish model prescribes the following situations where a warrant, which can authorise reasonable force if necessary, can be issued:

(1) admission to the land or premises has been refused;

[56] Police and Criminal Evidence Act 1984, s 8(1).

[57] Wildlife and Countryside Act 1981, ss 14M(4) and 14N.

[58] See, for instance, *Sporrong and Lonnroth v Sweden* (1982) 5 EHRR 35.

(2) such refusal is reasonably apprehended;

(3) the land or premises are unoccupied;

(4) the occupier is temporarily absent from the land or premises;

(5) the giving of notice as set out above would defeat the object of the proposed entry; or

(6) the situation is one of urgency.[59]

3.120 Two of these concern us: the power of entry where the occupier is temporarily absent from the land or premises and the power of entry where refusal of entry is reasonably apprehended seem to meet a concern of administrative convenience, rather than strict necessity. Emergencies are covered by (6) above; except in an emergency, or where notice is not a practicable option, the normal procedure should be followed: notice should be served, and a warrant only sought following refusal by the occupier or owner.

3.121 We have considered the identity of the body issuing the warrant, and whether this should be the magistrates' court or another body, such as a tribunal – which we explored as the appropriate venue for appeals against civil sanctions and coercive orders in our consultation paper on wildlife law.[60] There is no established procedure, however, for tribunals issuing warrants, and the magistrates have long been established as having this jurisdiction. We consider that the magistrates' court remains the most appropriate body, and recommend accordingly.

3.122 In Scotland, where reasonable force is being used under a warrant, the person executing the warrant needs to be accompanied by a constable, and may not use force against an individual.[61] Such an approach accords with the practice in England and Wales. We, therefore, consider that there should be a provision making such a requirement in England and Wales.

Dwellings

3.123 In Scotland, the powers of entry onto land or premises in connection with species control orders extend to movable structures, vehicles, aircraft and other means of transport but exclude dwelling houses.[62]

3.124 On balance, we have concluded that under our proposed regulatory framework powers of entry should extend to private dwellings for the following reasons.

(1) Excluding access to private dwellings would also result in the exclusion of private gardens that can only be accessed through a dwelling house, including any buildings and structures in those gardens.

[59] Wildlife and Countryside Act 1981, ss 14N(1)(a) to (f).

[60] Wildlife Law (2012) Law Commission Consultation Paper No 206, paras 10.54 to 10.58.

[61] Wildlife and Countryside Act 1981, ss 14N(5)(a) and (b).

[62] Wildlife and Countryside Act 1981, s 14P.

(2) Excluding access to dwelling houses could also prevent the appropriate body from effectively responding to future threats. For example, the Asian hornet – a predator which may cause significant losses to bee colonies and other native species – has quickly spread in France and is expected to arrive in Great Britain in the near future. Asian hornets' nests are sometimes found in garages, sheds, under decking or, more rarely, in holes in walls or in the ground.[63]

3.125 Powers of entry into dwellings are not unusual in this area of law. Under the Plant Health (England) Order 2005,[64] for instance, an inspector may enter a private dwelling for the purpose of determining whether any "plant pest" is present there or, if he has reasonable grounds for suspecting the presence of any plant pest,[65] to destroy any of such pests or any material which may be carrying or be infected with a plant pest.[66] The power of entry into private dwellings can only be exercised if 24 hours' notice of the intended entry has been given to the occupier or the entry is in accordance with a warrant issued by a justice of the peace. A justice of the peace may authorise an inspector to enter the premises, if necessary by reasonable force, if admission has been refused or refusal is expected after notice has been served on the occupier, the giving of notice would defeat the object of the entry, the case is one of urgency or the premises are unoccupied.[67]

3.126 We accept that entry into private dwellings constitutes a significant invasion of privacy. We are persuaded, however, that the procedural guarantees provided in our proposed regime ensure that a fair balance will be struck between the public interest in the early eradication of invasive non-native species and citizens' rights to privacy and respect for their home.

3.127 Given the degree of invasion of privacy, the proportionality requirement recommended above[68] would mean that power to enter private dwellings could only be used in exceptional circumstances. In that regard, we further recommend, as an additional safeguard, that any access into private dwellings without the consent of the owner, whether or not by force, should only be lawful if expressly authorised in the warrant issued by a justice of the peace.

[63] See http://www.nonnativespecies.org/alerts/index.cfm?id=4 (last visited: 14 January 2014). While ss 1 and 2 of the Bees Act 1980 provide the Secretary of State with a broad power to issue orders for the control of any pest affecting bees in any premises (including dwellings), such broad power would not be available for any other equivalent future threat having a direct impact on a different protected animal.

[64] SI No 2005/2530 (as amended by the Plant Health (England) (Amendment) Order 2010/1510, art 5).

[65] A "plant pest" is defined as "a plant pest of a description specified in sch 1 or column 3 of sch 2; and (b) any plant pest not normally present in Great Britain and in respect of which there is, in the opinion of the inspector, an imminent danger of its spreading or being spread in Great Britain" (SI No 2005/2530, art 33(2)).

[66] SI No 2005/2530 (as amended), arts 31, 33 and 38.

[67] SI No 2005/2530 (as amended), art 38.

[68] See paras 3.32 to 3.47 above.

Accompanying persons and equipment

3.128 The model in Scotland provides that a person exercising a power of entry, whether under a warrant or not, may be accompanied by any other person, and may take machinery, other equipment or materials onto the land or premises for the purpose of assisting the person exercising the power of entry.[69]

3.129 We can see the need for this. Given that what we recommend is a power of entry upon land or premises without the consent of the owner or occupier, the scope of the power should be clearly defined in legislation. It is arguable that such a term could be implied, but it is normal drafting practice to ensure that the extent of a power of entry is made explicit rather than to rely on implication. [70]

Notice periods for powers of entry

3.130 Sections 14M(1) and (2) of the Wildlife and Countryside Act 1981 set out notice periods, as they exist in Scotland. The notice periods do not apply in relation to an emergency species control order.[71]

3.131 In consultation no view was expressed on these, and we have not seen any reason to differ from the model in Scotland. We consider that similar notice periods should apply in England and Wales. We have adopted the notice periods in the Scottish legislation in our recommendations below, but would not object to their being varied.

Compensation and securing land or premises

3.132 In Scotland, section 14O of the Wildlife and Countryside Act 1981 requires unoccupied land or premises to be secured afresh against unauthorised entry after the exercise of a power of entry; it also requires compensation for damage caused in exercising the power or resulting from a failure to leave the land or premises secure.

3.133 Such compensation should in our view be covered by the compensation scheme recommended below.[72] The duty to leave land or premises secured afresh against unauthorised entry is an important safeguard of private property that should be replicated in our proposed regime.

Recommendations

Recommendation 21: We recommend that there should be the following powers of entry:

(1) a power of entry in order to determine whether a species control agreement should be offered, where the relevant body has

[69] Wildlife and Countryside Act 1981, s 14O(1).

[70] For instance, s 2 of the Criminal Justice Act 2003 amended the Police and Criminal Evidence Act 1984 – by inserting ss 16(2A) and (2B) – to ensure that others could accompany a constable and participate rather than merely fulfil a clerical role (explanatory Note for the Criminal Justice Act 2003, para 10).

[71] Wildlife and Countryside Act 1981, s 14M(3).

[72] See paras 3.134 to 3.165 below.

reasonable grounds to believe that an invasive non-native species is present on land or premises;

(2) a power of entry in order to determine whether a species control order should be made where the relevant body has a reasonable suspicion of the presence of an invasive non-native species;

(3) a power of entry in order to determine whether a species control order should be revoked;

(4) a power of entry in order to serve notice on occupiers or owners of the relevant land or premises, or to place a notice where the owner or occupier has not been identified;

(5) a power of entry to investigate possible breaches of a species control order;

(6) a power of entry to carry out operations where no owner or occupier could be identified following reasonable efforts by the relevant body.

(7) a power of entry allowing the relevant body to carry out operations in the case of failure to comply with a species control order.

(8) a power of entry to carry out operations that are required to be carried out by the relevant body or a third party in an emergency species control order.

Recommendation 22: We recommend that a warrant authorising entry on to land or premises can be issued by a justice of the peace in the following situations, authorising force if necessary:

(1) admission to the land or premises has been refused;

(2) the land or premises are unoccupied;

(3) the giving of notice as set out above would defeat the object of the proposed entry; or

(4) the situation is one of urgency.

Recommendation 23: We recommend that where reasonable force is to be used under a warrant, the person exercising that warrant must be accompanied by a constable, and may not use force against an individual.

Recommendation 24: We recommend that powers of entry onto land or premises should extend to private dwellings, movable structures, vehicles, aircraft and other means of transport.

Recommendation 25: We recommend that any access into private dwellings without the consent of the owner should be expressly authorised in a warrant issued by a justice of the peace.

Recommendation 26: We recommend that there should be provision allowing for a person exercising a power of entry, whether under a warrant or not, to be accompanied by others, and to take machinery, other equipment or materials onto the land or premises for the purpose of assisting the person exercising the power of entry.

Recommendation 27: We recommend that where any person in the exercise of a power of entry authorised under our proposed framework enters any unoccupied land or premises, or land or premises from which the occupier is temporarily absent, he or she should leave them as effectively secured against unauthorised entry as they were before entry.

Recommendation 28: We recommend that the notice periods for the use of powers of entry should be as follows:

(1) where entry is in order to determine whether a species control agreement should be offered, at least 24 hours' notice of the intended entry has to be given;

(2) where entry is in order to determine whether a species control order should be made by the relevant body, at least 24 hours' notice of the intended entry has to be given;

(3) where entry is in order to determine whether a species control order should be revoked, at least 24 hours' notice of the intended entry has to be given;

(4) where entry is in order to serve notices on occupiers or owners of the relevant land or premises, or to place a notice where the owner or occupier has not been identified, no notice need be given;

(5) where entry is required to investigate possible breaches of a species control order, no notice needs to be given;

(6) where entry is required to carry out operations where no owner or occupier could be identified following reasonable efforts by the relevant body, at least 14 days' notice of the intended entry has to be given;

(7) where entry is required to allow the relevant body to carry out operations in the case of failure to comply with a species control order, at least 14 days' notice of the intended entry has to be given.

Recommendation 29: We recommend that the notice periods above should not apply in relation to an emergency species control order.

COMPENSATION

3.134 Species control orders may interfere with private property in a number of ways, including the following.

(1) The order may require the destruction or seizure of lawfully held assets, such as plants that are lawfully held and possibly traded in but are categorised as an invasive non-native species. It may also require the destruction of animals, such as certain species of invasive non-native

deer, over which a landowner or occupier or a third party has hunting rights.

(2) The order may result in incidental damage to or destruction of private property as a necessary side-effect of the required control activities.

(3) Force may be used to enter enclosed land or locked premises to investigate the presence of invasive species in the premises, to assess the occupier's compliance with an agreement or order, or to execute a species control order.

3.135 The right to peaceful enjoyment of property has long been recognised by the courts as a fundamental common law right,[73] giving protection against both arbitrary interference and unlawful deprivation of property.[74] At common law, it is an established principle that any unjustified direct physical intrusion onto another's land is a trespass.[75] As a result, a public official who enters land under a statutory power becomes a trespasser for the whole time spent on that land if the official abuses that authority, and is liable in damages. Similarly, any unjustified direct interference with goods in the possession of a person will constitute a trespass to goods.[76]

3.136 The common law rights to property are reinforced by article 1 of protocol 1 to the European Convention on Human Rights, which we have set out above,[77] and which is given effect in the law of England and Wales by section 1 of the Human Rights Act 1998.

Compensation for deprivation of property and other interferences

3.137 Given the constitutional importance of the right to peaceful enjoyment of property, where a statute empowers a public authority to deprive an individual of private property, it will generally provide for compensation. The absence of a provision for compensation provides an important, but not conclusive, indication that the power was not intended to authorise such interference.[78] Statutes authorising the expropriation of property rights are to be construed strictly in favour of the party whose property is to be interfered with.[79]

[73] See *Entick v Carrington* (1765) 95 ER 807, by Lord Camden CJ: "the great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole".

[74] *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180, 190; *Prest v Secretary of State for Wales* (1982) 81 LGR 193, 198.

[75] *Entick v Carrington* (1765) 95 ER 807.

[76] *Cinnamond v British Airports Authority* [1980] 1 WLR 582, at [588]; *Fouldes v Willoughby* (1841) 8 M & W 540, 549.

[77] See para 3.33 above.

[78] *Allen v Gulf Oil Refining Ltd* [1981] AC 1001 at 1016 (Lord Edmund-Davies).

[79] *Chilton v Telford Development Corporation* [1987] 1 WLR 872, CA.

3.138 Article 1 of protocol 1 to the European Convention on Human Rights has three elements:

(1) the principle of peaceful enjoyment of possessions;

(2) a rule on the deprivation of possessions;

(3) a recognition that the state can control of the of property in accordance with the general interest.[80]

3.139 Article 1 of protocol 1 does not explicitly provide for a right to compensation for interferences with the peaceful enjoyment of possessions, but compensation has been required in particular circumstances in the case law of the European Court of Human Rights.

3.140 The need for compensation for an interference with property rights depends, to an extent, on the type of interference in question. Where state interference with a person's possession amounts to a "deprivation" (by which we mean action that extinguishes the legal rights of the owner of a particular property) the Court has taken the position that:

> The taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 only under exceptional circumstances.[81]

3.141 In the context of state interferences with possessions not amounting to a "deprivation", the European Court of Human Rights has not recognised any implied right to compensation under article 1 of protocol 1.

3.142 There is, however, a case in which the deprivation of property without compensation has been found compatible with article 1 by the European Court of Human Rights. In *Handyside v United Kingdom*,[82] the forfeiture and destruction of a publication found to be obscene was held, despite amounting to a permanent deprivation, to be "authorised by the second paragraph of [article 1], interpreted in the light of the principle of law ... whereunder items whose use has been lawfully adjudged illicit and dangerous to the general interest are forfeited with a view to destruction". The principle of proportionality was not referred to. This reasoning, coupled with the reference to the second paragraph of article 1, suggests that the situation was viewed as having features akin to a control of use (which does not normally attract a right to compensation) as well as of deprivation. The judgment, together with the judgment of the Court of Justice of the EU, considered next, are indicative of a rule to the effect that the putting out of circulation of items "dangerous to the general interest" does not attract a right to compensation.

[80] See *Sporrong and Lonnroth v Sweden* (1982) 5 EHRR, 61.

[81] *Scordino v Italy (No 1)* (2006) 45 EHRR 207, at [95]; *Holy Monasteries v Greece* (1995) 20 EHRR 1, at [71]; *Lithgow v United Kingdom* (1986) 8 EHRR 329, at [71].

[82] Application 5493/72.

3.143 Under EU law, arguably our recommended species control regime has some affinities with the situation in Case C-20/00 *Booker Aquaculture*, where the Court of Justice of the EU ruled that measures taken to control fish diseases, involving the destruction of diseased fish, did not give rise to a right to compensation pursuant to the fundamental rights principles of EU law. Reiterating that the European Convention on Human Rights has "special significance" as a source of inspiration for fundamental rights in EU law, the Court of Justice asked whether the slaughter and destruction "constitute[d], in the absence of compensation for affected owners, a disproportionate and intolerable interference impairing the very substance of the right to property" and found that, in the circumstances, they did not.[83]

3.144 There are, however, precedents in the UK for compensation schemes where a previously legal activity has been made illegal. Section 7 of the Destructive Imported Animals Act 1932[84] requires compensation of the value of animals destroyed in consequence of an order under the Act prohibiting the keeping of muskrats or other destructive non-indigenous animals. Similarly, section 1 of the Fur Farming (Prohibition) Act 2000 made the keeping of animals for their fur illegal. As this would affect businesses that were until that point legal, the same Act provided for a compensation scheme which was required to "provide for the making of payments … in respect of income and non-income losses incurred by them as a result of ceasing … to carry on their businesses".[85]

3.145 Other statutes in England and Wales providing for the slaughter of wildlife or kept animals, with similar purposes to our recommended species control regime, give power to provide compensation, such as sections 34 (for slaughter not covered by specific provisions) or 36K (specifically for scrapie) of the Animal Health Act 1981. Recent large-scale state interventions to manage a threat to agriculture, human health or the wider environment, involving the destruction of livestock, have tended to be accompanied by arrangements for compensation: this has been the case in relation to BSE and the last major foot-and-mouth disease outbreak.

Discussion and recommendations

3.146 Compensation is not something to which human rights principles necessarily create a right. There is a balance to be struck between the public interest and individuals' right to their property.

3.147 In the following paragraphs, we discuss two categories of compensation:

(1) where an individual is deprived (either through removal or destruction) of an invasive non-native species otherwise lawfully held or present on land or premises (which we refer to as "compensation for invasive non-native species"); and

[83] Case C-20/00 *Booker Aquaculture Ltd (t/a Marine Harvest McConnell) v Scottish Ministers* [2003] ECR I-7446, at [65], [70] and [93].

[84] Referred to in para 2.10 above.

[85] Fur Farming (Prohibition) Act 2000, s 5(1).

(2) where an individual is deprived of property or where property is damaged in consequence of carrying out operations required by either a species control agreement or order (which we refer to as "compensation for incidental damage").

3.148 At the end of this section we outline our thinking on the setting up of a compensation scheme and the calculation of compensation.

Compensation for invasive non-native species

3.149 Most invasive non-native species are of no value to the owners or occupiers of land on which they are present, and their presence may well detract from the value or utility of land. Invasive animals or plants are generally a pest.

3.150 Moreover, in many cases the animals or plants to be controlled or eradicated will be "wild" (such as many non-native deer or wildfowl) and/or not present as a result of the wish of the owner or occupier (including invasive plants that have invaded land). No property right normally attaches to wild animals (except potentially a sporting right or similar allowing for the exploitation of a wild animal).

3.151 In some cases, however, invasive non-native species may currently be held for private use or traded lawfully in the course of a legitimate business. In such cases, we can see valid arguments in favour of providing compensation for losses incurred by the owner or beneficiary of the species controlled; this was the approach adopted in the Fur Farming (Prohibition) Act 2000.

3.152 There are, of course, counter-arguments. A requirement for the payment of compensation could operate as a disincentive for the relevant bodies to control species. The consequence of requiring compensation could be perverse: whilst inaction would avoid the immediate cost of providing compensation, the eventual costs of that inaction to society could be considerable. In Chapter 1, we set out the potential economic costs caused by some established non-native species such as Japanese knotweed.

3.153 As we set out above, there is no general legal rule in favour of compensation in all circumstances. However, compensation would be required in some cases by the European Convention on Human Rights. Consequently, there needs to be at the very least a *power* in the legal regime to provide compensation.

3.154 It is not in our view appropriate simply to leave entitlement to compensation to be determined case by case by application of the case-law of the European Court of Human Rights or the Court of Justice of the EU.

3.155 The open-textured nature of the principles enunciated by those courts leave many sets of circumstances in which it will be very difficult to predict whether particular species control measures engender a right to compensation. Consequently, leaving these matters to be governed by the Convention or EU law would be a recipe for uncertainty, avoidable litigation and/or for entitlements to compensation under the Convention being left unsatisfied owing to the uncertainties of litigation.

3.156 On balance, we think it just that compensation be paid for animals or plants taken from individuals, where the invasive animal or plant had a demonstrable market

value. We are conscious that our proposed species control regime involves giving the relevant bodies a power whose exercise is tantamount to prohibiting the possession of property that is lawfully held as a matter of the general law. Moreover, requiring compensation to be paid could act as an appropriate check on potential over-use of the new powers.

3.157 Compensation should, therefore, be provided for certain categories of demonstrable financial loss suffered as a result of action taken under a species control agreement or order. The categories of recoverable loss that we envisage would in our view cover those cases in which there might be a right to compensation under the European Convention but, we acknowledge, would extend compensation to cases where the Convention would probably not afford a right to it.

3.158 The potential beneficiaries of compensation should extend to others who suffer demonstrable financial loss as a result of a control measure, such as, conceivably, persons exploiting sporting rights.

3.159 The measure of compensation for specimens removed and/or destroyed should in our view be the market value of the specimens at the time of their removal or destruction.

3.160 In the, perhaps extreme, case of the closing down (or curtailment of the activities) of a business – such as one breeding or propagating invasive non-native animals or plants, or, conceivably, commercially exploiting such animals by hunting, shooting or fishing – compensation for the loss of the value of the business should also be provided, in a similar manner to the Fur Farming (Prohibition) Act 2000.

3.161 Compensation should not extend to sentimental value, whose ascertainment would be problematic. There would, obviously, be no compensation for specimens in which trade was illegal or specimens held unlawfully, for instance without an appropriate licence.

Compensation for incidental damage

3.162 We consider that compensation should also extend to some forms of what could be termed “incidental damage”. It is easily conceivable that the invasive species to be controlled has no value, but in order to control or eradicate it other property has to be damaged or destroyed. Examples could include an infested timber stock, where the control of the invasive non-native species carried by the timber requires the destruction of the whole stock, or more generally where property is damaged in order for persons or machinery to gain access to the invasive species being controlled.

3.163 Compensation should be calculated by reference to the condition that the land or property was in immediately before the operation was performed. It should not have the effect of compensating for the presence of the invasive non-native species.

Setting up the scheme

3.164 We consider that a duty to make arrangements for the payment of compensation in accordance with our recommendations above should be placed upon the Secretary of State and the Welsh Ministers. We recommend accordingly. Provisions for compensation would not need to be included in a species control agreement (though this should also be possible) or specified in an order, something that could easily delay the process of drafting agreements or orders and which would involve a requirement to identify in advance the individuals who might have a claim. Persons who considered themselves entitled to compensation under the scheme should be able to apply for it, within a relatively short time limit for doing so, and to appeal against a decision with which they were dissatisfied. We discuss appeals further below.

Recommendations

3.165 We, therefore, make the following recommendations.

Recommendation 30: We recommend that the Secretary of State and the Welsh Ministers should be required to make arrangements for the payment of compensation for losses resulting from a species control agreement or order.

Recommendation 31: We recommend that such a compensation scheme in respect of damage or destruction resulting from operations carried out under the order should be limited to:

(1) the marketable value of specimens lawfully held, where the specimens are shown to have been acquired by the claimant for a value or to have been bred or cultivated by the claimant from specimens acquired for a value;

(2) the market value of marketable specimens where the claimant shows that immediately before the order was made he had an intention to realise that value;

(3) where the order has caused the total or partial closure of a business, the value of the lost business; and

(4) costs reasonably incurred in making good incidental damage to land or premises or the value of any property incidentally destroyed.

Recommendation 32: We recommend that compensation should be calculated by reference to the condition that the land or property was in immediately before the operation was performed. It should not have the effect of compensating for the presence of the invasive non-native species.

Recommendation 33: We recommend that the compensation scheme should not provide compensation for sentimental value, for specimens in which trade was illegal or specimens held unlawfully, for instance without an appropriate licence.

CODES OF PRACTICE

3.166 As we explained in Chapter 2, the Scottish legislative model involves a code of practice issued under section 14C of the Wildlife and Countryside Act 1981. This provision sets out in detail the requirements for the code of practice, and the procedure for issuing it, including consultation and approval by the Scottish Parliament.

3.167 We consider that a code of practice is useful, partly to ensure coherence in the application of the species control process where there are multiple regulators and partly to explain further the operation of the procedure set up by the statutory provisions to those subject to it.

3.168 There should, therefore, be a similar statutory requirement to issue codes of practice in England and Wales.

3.169 The code or codes of practice we envisage should guide the decision-making of the relevant bodies and the Secretary of State and Welsh Ministers.

3.170 In this Chapter, we have highlighted areas where we consider further detail in a code of practice to be necessary. In particular these include the procedure for concluding a species control agreement and the steps that a relevant body should take to identify all those with a relevant interest in the particular land or premises before entering into a species control agreement or issuing a species control order. We have concluded that coverage of the above topics in the code of practice should be formally required.

3.171 Given that the function of our proposed codes of practice is to ensure policy coherence among the relevant bodies, the code should be issued by the Secretary of State or the Welsh Ministers, as appropriate; ideally, they would co-operate with the aim of drafting either a single code for both countries or separate codes which follow each other as closely as possible. There should be a duty to consult the bodies that will be empowered to make species control orders.

3.172 In Scotland, codes of practices issued under section 14C of the Wildlife and Countryside Act 1981 are subject to an affirmative resolution procedure before the Scottish Parliament. This is currently not a requirement under section 14ZB of the 1981 Act, which defines the procedure for issuing codes of practice on non-native species in England and Wales.[86] The Cabinet Office Guide to Making Legislation suggests that

> Departments should ensure that there is appropriate provision for Parliamentary procedure where the nature and importance of the subject matter of a code warrants it. In the case of evidential codes (where the failure to comply with a code can be taken as evidence of breach of legal duty) and codes to which authorities are to have regard, there is a presumption in favour of parliamentary procedure of

[86] See, for instance, the Horticultural Code of Practice 2011, available at: http://www.nonnativespecies.org/index.cfm?pageid=299 (last visited: 28 January 2014).

some kind; but this may not be appropriate for detailed technical documents.[87]

3.173 It does not seem to us that the codes we recommend need to be subject to an affirmative or negative resolution but they should be laid before Parliament and the Welsh Assembly.

3.174 In England and Wales, codes of practice issued under section 14ZB of the Wildlife and Countryside Act 1981 are admissible as evidence. The codes that we recommend should certainly be admissible in the First-tier Tribunal (which we do not consider to require a specific rule of evidence). We do not, however, envisage the codes of practice we are recommending dealing with criminal offences under the proposed regime or imposing requirements on individuals. We, therefore, do not recommend a specific rule as to their admissibility as evidence in any criminal proceedings.

3.175 We, therefore, make the following recommendations.

Recommendation 34: We recommend that the Secretary of State and the Welsh Ministers should be required to issue codes of practice concerning the application of the species control agreement and order regime.

Recommendation 35: We recommend that the Secretary of state and Welsh Ministers co-operate with a view to producing a single code of practice or closely aligned codes.

Recommendation 36: We recommend that the codes of practice should include provisions on the procedure for concluding a species control agreement and the allocation of costs.

Recommendation 37: We recommend that before issuing the codes of practice, the Secretary of State and the Welsh Ministers should consult the relevant bodies in their respective territories.

Recommendation 38: We recommend that codes of practice for species control orders should be laid before Parliament and the Welsh Assembly.

OFFENCES

3.176 Under the Scottish model, it is an offence for a person, without reasonable excuse, to fail to carry out, in the manner required by a species control order, an operation which the person is required by the order to carry out.[88]

3.177 It is also an offence to intentionally obstruct a person carrying out an operation required by a species control order.[89]

3.178 Finally, it is an offence, without reasonable excuse, to carry out, or cause or permit to be carried out, any excluded operation.[90]

[87] Cabinet Office, Guide to making Legislation (July 2013) p 303, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/210917/Guide_to_Making_Legislation_July_2013.pdf (last visited: 19 December 2013)

[88] Wildlife and Countryside Act 1981, s 14K(1).

[89] Wildlife and Countryside Act 1981, s 14K(2).

3.179 The offences in Scotland act as an incentive to comply with orders, and in the case of the obstruction offence an incentive to comply with a species control order without requiring resort to a warrant. We generally regard the above offences as appropriate and recommend their adoption. As currently drafted, however, the offence of intentional obstruction under section 14K(2) of the Wildlife and Countryside Act 1981 as it applies to Scotland is open-ended in the description of the class of persons whose intentional obstruction should be prohibited. We recommend that the obstruction offence should only be made out if it is established that the defendant intentionally obstructed a person who had been expressly authorised under the order to carry out the relevant operations.

3.180 In Scotland, the maximum penalty on summary conviction is 12 months' imprisonment or a £40,000 fine, or both. Upon conviction on indictment the maximum penalty is 2 years imprisonment, or a fine, or both.[91] These match the penalty for the release offence in section 14 of the Wildlife and Countryside Act 1981, as it exists in Scotland.[92]

3.181 We considered whether to adopt the same approach, tying the penalties in our proposed scheme to those available in England and Wales for releasing an invasive non-native species into the wider environment contrary to section 14 of the Wildlife and Countryside Act 1981. This would means that on summary conviction, the penalty would be imprisonment not exceeding 6 months, or a fine not exceeding the statutory maximum, or both; upon conviction on indictment it would be a term of imprisonment not exceeding 2 years, or a fine, or both.[93]

3.182 We are not persuaded that such offences need to be triable on indictment so as to attract higher maximum sentences of imprisonment. Offences of releasing an invasive non-native species into the wider environment have the potential to be far more serious than the offences we are recommending (unless accompanied, for example, by offences of violence which would attract separate maximum penalties). We consider that the appropriate sanction for these offences will generally be a fine, and that imprisonment for more than six months would be inappropriate. Therefore, we find it appropriate to recommend offences triable only summarily, but with maximum fines greater than the current statutory maximum. The appropriate maximum, we suggest, is £40,000 – as is the case in Scotland.

3.183 We note that magistrates' fining powers in England and Wales are subject to potential change. Section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 will, when it comes into force, remove the limit on fines on conviction by a magistrates' court for offences punishable by a fine of £5,000 or more, with the consequence that unlimited fines would be available in both the magistrates' court and Crown Court for an offence under section 14 of the Wildlife and Countryside Act 1981 and (if our recommendation is accepted) in the magistrates' court for offences relating to species control orders.

[90] Wildlife and Countryside Act 1981, s 14K(3).

[91] Wildlife and Countryside Act 1981, s 21(4ZA).

[92] Wildlife and Countryside Act 1981, s 21(4).

[93] Wildlife and Countryside Act 1981, s 21(4).

3.184 We, therefore, make the following recommendations.

Recommendation 39: We recommend that the following should be offences.

(1) It should be an offence for a person, without reasonable excuse, to fail to carry out, in the manner required by a species control order, an operation which the person is required to do by the order to carry out.

(2) It should be an offence to obstruct intentionally an authorised person carrying out an operation required by a species control order.

(3) It should be an offence, without reasonable excuse, to carry out, or cause or permit to be carried out, any excluded operation.

Recommendation 40: We recommend that the above offences should be triable summarily only.

Recommendation 41: We recommend that the penalty should be a term of imprisonment not exceeding 6 months, or a fine not exceeding £40,000.

APPEALS

3.185 In the Scottish model, any owner or occupier of land or premises to which a species control order relates can appeal to a sheriff against the decision to make the order or the terms of the order.[94] An appeal must be lodged not later than 28 days from the appellant being notified of the decision being appealed.[95]

3.186 In the case of emergency species control orders, their effect can be suspended pending the determination of the appeal.[96] There is no need for such a provision in relation to other species control orders since, where an appeal is lodged, the order does not enter into force until the withdrawal of the appeal or its final determination.[97]

3.187 The sheriff must determine the appeal on the merits, rather than as a review, and a decision of the sheriff is final except on a point of law.[98] The sheriff is empowered to do the following:

(1) affirm the order in question;

(2) direct the relevant body to amend the order in such manner as the sheriff may specify;

(3) direct the relevant body to revoke the order; or

(4) make such other order as the sheriff thinks fit.[99]

[94] Wildlife and Countryside Act 1981, s 14H(1).

[95] Wildlife and Countryside Act 1981, s 14H(2).

[96] Wildlife and Countryside Act 1981, s 14H(3).

[97] Wildlife and Countryside Act 1981, s 14I(b)(ii).

[98] Wildlife and Countryside Act 1981, ss 14H(4) and (5).

3.188 In our consultation paper on wildlife law, we provisionally proposed that the First-tier Tribunal (Environment) should hear appeals against orders – including civil sanctions and species control orders. The other options are the county court or the Administrative Court.

3.189 Our consultation paper favoured appeal to the First-tier Tribunal (Environment) in the case of appeals against orders such as those relating to invasive species. This would place appeals against such orders in the same forum as the provisionally proposed regime of civil sanctions for wildlife law, based on part 3 of the Regulatory Enforcement and Sanctions Act 2008.[100] The First-tier Tribunal (Environment) is already the designated appeal forum for some civil sanctions imposed by Natural England and the Marine Management Organisation.

3.190 We received 47 consultation responses in relation to our provisional proposal: 36 consultees agreed with our provisional proposal; 3 disagreed; and 8 were undecided or offered an alternative such as an ombudsman or a panel of experts. However, the consultation responses focused overwhelmingly on appeals against civil sanctions, rather than species control orders.

3.191 In Scotland, the sheriff has jurisdiction over appeals and shares with justices of the peace the power to issue warrants. We have recommended that in England and Wales warrants should be issued by magistrates. We adhere to our provisional proposal of a specialist forum to hear appeals. The reason for recommending that warrants be issued by magistrates is that there is an existing procedure for issuing warrants within the magistrates' court system.

3.192 Deciding on appropriate compensation levels has some affinities with the assessment of damages, in which the County Court in England and Wales is expert. However, it seems to us that it would not be sensible for appellate jurisdiction over compensation to be detached from other species control appeals. Therefore, we think that the appropriate appeal body in general is the First-tier Tribunal (Environment).

3.193 We, therefore, make the following recommendations.

Recommendation 42: We recommend that appeals against species control orders and decisions on compensation should be to the First-tier Tribunal (Environment).

Recommendation 43: We recommend that the First-tier Tribunal (Environment) should be empowered to do the following

(1) affirm the order in question;

(2) direct the relevant body to amend the order in such manner as the Tribunal may specify;

(3) direct the relevant body to revoke the order;

[99] Wildlife and Countryside Act 1981, s 14H(4).

[100] Wildlife Law (2012) Law Commission Consultation Paper No 206, Provisional Proposals 10-1 and 9-1 to 9-3.

(4) make or vary an award of compensation; or

(5) make such other order as the Tribunal thinks fit.

APPLICATION TO THE CROWN

3.194 In England and Wales, the Crown is not bound by statute unless the contrary is clearly intended.[101]

3.195 Section 66A of the Wildlife and Countryside Act 1981, as it applies in England and Wales, explicitly provides that Part 1 of the Act, which includes the existing legislation on invasive non-native species, binds the Crown except Her Majesty in her private capacity. The Crown is also bound by any order or regulation made under Part 1, although the powers of entry and investigation conferred by sections 18A to 19XA are not exercisable in relation to premises occupied by the Crown. Although no contravention any provision of Part 1 can make the Crown criminally liable, the High Court may, on the application of any person appearing to the Court to have an interest, declare unlawful an act or omission of the Crown which constitutes such a contravention.

3.196 Section 66B of the Wildlife and Countryside Act 1981 as it applies to Scotland contains similar provisions, but provides that species control orders and powers of entry connected to species control orders should only be exercisable in relation to Crown land[102] with the consent of the "appropriate authority".[103] The "appropriate authority", broadly speaking, corresponds to the appointed administrator of the relevant portion of Crown land.

3.197 We consider that restricting the application of species control orders and the powers of entry in connection with species control orders in line with the Scottish model would significantly weaken our proposed regulatory framework. [104]

3.198 We accept that because of the extent of the Crown possessions, the Crown Estate and certain Government departments may often be required to control invasive species on Crown land. In that regard, the Crown is in no different position to any other landowner, in owing a duty to co-operate in the control of invasive non-native species.

3.199 We consider, therefore, that our proposed regime should extend to the Crown in the same way as other provisions in Part 1 of the Wildlife and Countryside Act 1981. It will be for the Government to determine whether special arrangements

[101] D Greenberg, *Craies on Legislation* (8th ed 2004) p 429.

[102] Wildlife and Countryside Act 1981, s 66B(6) provides that "Crown land" includes any interest in land that belongs to Her Majesty in right of the Crown, Her Majesty in right of Her private estates, belongs to an office-holder in the Scottish Administration or is held in trust for Her Majesty by such an office-holder for the purposes of the Scottish Administration, or belongs to a government department or is held in trust for Her Majesty for the purposes of a government department.

[103] Wildlife and Countryside Act 1981, ss 66B(4) to (9).

[104] In the United Kingdom, the Crown Estate owns 145,000 hectares of rural land, around half of the UK's foreshore, 850 aquaculture sites and a large number of residential, commercial and industrial properties. See http://www.thecrownestate.co.uk/estates-map/ (last visited: 14 January 2014). Significant other land would also be excluded, such as that owned by Government departments, including the considerable holdings of the Ministry of Defence.

may be needed to ensure that species control orders and powers of entry associated with them are exercised in line with the security imperatives of defence infrastructure, military premises or any other Crown property to which access is restricted in the interest of national security.

3.200 We, therefore, make the following recommendations.

Recommendation 44: We recommend that species control orders, and any power of entry authorised in connection with a species control order, shall be capable of being imposed in relation to the Crown, except Her Majesty in her private capacity.

Recommendation 45: We recommend, in line with section 66A(2) of the Wildlife and Countryside Act 1981, that no contravention by the Crown of any provision of a species control order should make the Crown criminally liable. The High Court may, however, on the application of any person appearing to the Court to have an interest, declare unlawful an act or omission of the Crown which constitutes such a contravention.

(*Signed)* DAVID LLOYD JONES, *Chairman*
ELIZABETH COOKE
DAVID HERTZELL
DAVID ORMEROD
NICHOLAS PAINES

ELAINE LORIMER, *Chief Executive*
31 January 2014

APPENDIX A
RECOMMENDATIONS

Recommendation 1: We recommend that there should be a power to make species control orders to control invasive non-native species in England and Wales modelled broadly on the procedure introduced by the Wildlife and Natural Environment (Scotland) Act 2011.

Recommendation 2: We recommend that the "relevant bodies" which can enter into species control agreements and make species control orders should be

In England –

(1) the Secretary of State;

(2) Natural England;

(3) the Environment Agency; and

(4) the Forestry Commissioners.

In Wales –

(1) the Welsh Ministers; and

(2) Natural Resources Wales.

Recommendation 3: We recommend that a relevant body should have power to make a species control agreement with, or species control order against, the occupier of the relevant land or premises, the owner of the freehold interest in the land or a leaseholder in possession (referred to in later Recommendations as the "owner or occupier").

Recommendation 4: We recommend that, subject to the provisions on compensation discussed below, the relevant body should not be liable to any person for anything done pursuant to a species control agreement or species control order.

Recommendation 5: We recommend that nothing done by a person in accordance with a species control order should be actionable by any person.

Recommendation 6: We recommend that the code of practice for species control orders should give guidance to the effect that relevant bodies should attempt to identify all those with interests in particular land or premises and, where appropriate, involve them in the species control agreement or order process.

Recommendation 7: We recommend that a species control agreement or order should be capable of being made for the eradication or control of an animal or plant which is both

(1) invasive; and

(2) either

(a) an animal not ordinarily resident in or a regular visitor to Great Britain; or

(b) an animal or plant listed in schedule 9 to the Wildlife and Countryside Act 1981.

An invasive animal or plant is one of a type which, if not under the control of any person, would be likely to have a significant adverse impact on

(1) biodiversity;

(2) other environmental interests; or

(3) social or economic interests.

Recommendation 8: We recommend that there should a formal requirement for the decision-maker to consider the proportionality of a proposed agreement or order, and to be satisfied that the taking of the action contemplated in the agreement or order is proportionate to what the action seeks to achieve.

Recommendation 9: We recommend that there should be a formal requirement that the decision-maker give reasons for making a species control order and for the individual elements of an order, including why a particular operation is required or prohibited by the order.

Recommendation 10: We recommend that, before a species control order can be made, the relevant body should offer to conclude a species control agreement with the owner or occupier of land or premises on which there is an invasive non-native species that the relevant body wishes to control or eradicate, unless an exception applies.

The following should be the exceptions.

(1) The relevant body has failed to identify any owner or occupier of land or premises and, having made reasonable efforts to do so, has subsequently placed a notice at the land or premises stating to any owner or occupier that it wishes to enter into a species control agreement. Forty-eight hours have passed since the notice was placed and no owner or occupier has come forward.

(2) The relevant body considers that a species control order is urgently necessary.

Recommendation 11: We recommend that the legislation should enable the relevant body to make a species control order if, after 42 days have elapsed since the offer of a species control agreement, the relevant body and the owner or occupier of the relevant land or premises have failed to enter into a species control agreement.

Recommendation 12: We recommend that the legislation should allow the relevant body to make a species control order if, before 42 days have elapsed since that offer of a species control agreement, the owner and/or occupier have refused to conclude a species control agreement.

Recommendation 13: We recommend that there should be a legal requirement for a species control agreement to set out clearly the operations to be carried out, any operations not to be carried out and the timeframe for the carrying out of operations.

Recommendation 14: We recommend that a code of practice issued by the Secretary of State or the Welsh Ministers should provide appropriate guidance on the content of species control agreements, including the allocation of costs for the carrying out of control operations under the agreement.

Recommendation 15: We recommend that the relevant body should have the power to make a species control order where that body has entered into a species control agreement with the owner or occupier of land or premises to control or eradicate specific invasive non-native animals or plants and the owner or occupier has failed to comply with that agreement.

Recommendation 16: We recommend that –

(1) A species control order must describe the land or premises to which it relates, must be accompanied by a map delineating the relevant land or premises, and must specify the following:

(a) The date on which the order comes into effect and the period for which it is to have effect.

(b) The invasive animal or invasive plant to which it relates.

(c) The operations which are to be carried out on the land or at the premises for the eradication or control of the relevant invasive non-native species, how and when those operations are to be carried out.

(d) A specification of the person or persons that are to carry out the operations enabling the addressee of an order to understand the extent of their own obligations and/or to identify the persons that must be given access to the relevant land or premises.

(e) Any operations which must not be carried out on the land or at the premises.

(2) Any species control order should be capable of providing for payment by the body making the order to any person of reasonable costs incurred by a person carrying out an operation under the order.

(3) A species control order should be capable of requiring the owner or occupier to make a payment in respect of reasonable costs incurred in relation to the carrying out of an operation under the order.

(4) In determining whether to make provision for the payment or recoupment of costs, the body making the order should be under a statutory obligation to consider whether any culpably irresponsible action or inaction of the owner or occupier has created or compounded the problem that the control operation is intended to address. Mere past failure to control an invasive non-native species that is present otherwise

than as a result of the person's conduct should not normally be sufficient to justify making an owner or occupier bear the cost of the operation.

Recommendation 17: We recommend that when an order is made, notice must be given to the owner, the occupier (if different) and any other person the relevant body has identified as having an interest in the land or premises to which the order relates. If the relevant body is not the Secretary of State or the Welsh Ministers, then either the Secretary of State or the Welsh Ministers should also be notified, as appropriate.

Recommendation 18: We recommend that a species control order should enter into force as follows:

(1) in the case of an emergency species control order, on the date of giving notice; or

(2) in any other case, from the expiry of the time limit for appeal against the order (28 days from the giving of notice) or where an appeal is brought, the withdrawal of the appeal or its final determination.

Recommendation 19: We recommend that where the relevant body considers

(1) that any operation required to be carried out under a species control order made by it has not been carried out within the period or by the date specified in it;

(2) that any such operation has been carried out otherwise than in the manner required under the order; or

the relevant body:

(1) may carry out the operation, or such further work as is necessary to ensure that it is carried out, in the manner required under the order;

(2) is not required to make any payment (and may recover any payments made) in pursuance of the species control order in relation to the operation in question; and

(3) may recover from the person whom the species control order required to carry out the operation any expenses reasonably incurred by it in doing so (less any payment which the relevant body was required to make towards the carrying out of the operation).

Recommendation 20: We recommend that there should be an explicit power to revoke a species control order. The revocation of a species control order should not prevent the relevant body subsequently making a further species control order in relation.

Recommendation 21: We recommend that there should be the following powers of entry:

(1) a power of entry in order to determine whether a species control agreement should be offered, where the relevant body has reasonable

grounds to believe that an invasive non-native species is present on land or premises;

(2) a power of entry in order to determine whether a species control order should be made where the relevant body has a reasonable suspicion of the presence of an invasive non-native species;

(3) a power of entry in order to determine whether a species control order should be revoked;

(4) a power of entry in order to serve notice on occupiers or owners of the relevant land or premises, or to place a notice where the owner or occupier has not been identified;

(5) a power of entry to investigate possible breaches of a species control order;

(6) a power of entry to carry out operations where no owner or occupier could be identified following reasonable efforts by the relevant body.

(7) a power of entry allowing the relevant body to carry out operations in the case of failure to comply with a species control order.

(8) a power of entry to carry out operations that are required to be carried out by the relevant body or a third party in an emergency species control order.

Recommendation 22: We recommend that a warrant authorising entry on to land or premises can be issued by a justice of the peace in the following situations, authorising force if necessary:

(1) admission to the land or premises has been refused;

(2) the land or premises are unoccupied;

(3) the giving of notice as set out above would defeat the object of the proposed entry; or

(4) the situation is one of urgency.

Recommendation 23: We recommend that where reasonable force is to be used under a warrant, the person exercising that warrant must be accompanied by a constable, and may not use force against an individual.

Recommendation 24: We recommend that powers of entry onto land or premises should extend to private dwellings, movable structures, vehicles, aircraft and other means of transport.

Recommendation 25: We recommend that any access into private dwellings without the consent of the owner should be expressly authorised in a warrant issued by a justice of the peace.

Recommendation 26: We recommend that there should be provision allowing for a person exercising a power of entry, whether under a warrant or not, to be

accompanied by others, and to take machinery, other equipment or materials onto the land or premises for the purpose of assisting the person exercising the power of entry.

Recommendation 27: We recommend that where any person in the exercise of a power of entry authorised under our proposed framework enters any unoccupied land or premises, or land or premises from which the occupier is temporarily absent, he or she should leave them as effectively secured against unauthorised entry as they were before entry.

Recommendation 28: We recommend that the notice periods for the use of powers of entry should be as follows:

(1) where entry is in order to determine whether a species control agreement should be offered, at least 24 hours' notice of the intended entry has to be given;

(2) where entry is in order to determine whether a species control order should be made by the relevant body, at least 24 hours' notice of the intended entry has to be given;

(3) where entry is in order to determine whether a species control order should be revoked, at least 24 hours' notice of the intended entry has to be given;

(4) where entry is in order to serve notices on occupiers or owners of the relevant land or premises, or to place a notice where the owner or occupier has not been identified, no notice need be given;

(5) where entry is required to investigate possible breaches of a species control order, no notice needs to be given;

(6) where entry is required to carry out operations where no owner or occupier could be identified following reasonable efforts by the relevant body, at least 14 days' notice of the intended entry has to be given;

(7) where entry is required to allow the relevant body to carry out operations in the case of failure to comply with a species control order, at least 14 days' notice of the intended entry has to be given.

Recommendation 29: We recommend that the notice periods above should not apply in relation to an emergency species control order.

Recommendation 30: We recommend that the Secretary of State and the Welsh Ministers should be required to make arrangements for the payment of compensation for losses resulting from a species control agreement or order.

Recommendation 31: We recommend that such a compensation scheme in respect of damage or destruction resulting from operations carried out under the order should be limited to:

(1) the marketable value of specimens lawfully held, where the specimens are shown to have been acquired by the claimant for a value or to have been bred or cultivated by the claimant from specimens acquired for a value;

(2) the market value of marketable specimens where the claimant shows that immediately before the order was made he had an intention to realise that value;

(3) where the order has caused the total or partial closure of a business, the value of the lost business; and

(4) costs reasonably incurred in making good incidental damage to land or premises or the value of any property incidentally destroyed.

Recommendation 32: We recommend that compensation should be calculated by reference to the condition that the land or property was in immediately before the operation was performed. It should not have the effect of compensating for the presence of the invasive non-native species.

Recommendation 33: We recommend that the compensation scheme should not provide compensation for sentimental value, for specimens in which trade was illegal or specimens held unlawfully, for instance without an appropriate licence.

Recommendation 34: We recommend that the Secretary of State and the Welsh Ministers should be required to issue codes of practice concerning the application of the species control agreement and order regime.

Recommendation 35: We recommend that the Secretary of state and Welsh Ministers co-operate with a view to producing a single code of practice or closely aligned codes.

Recommendation 36: We recommend that the codes of practice should include provisions on the procedure for concluding a species control agreement and the allocation of costs.

Recommendation 37: We recommend that before issuing the codes of practice, the Secretary of State and the Welsh Ministers should consult the relevant bodies in their respective territories.

Recommendation 38: We recommend that codes of practice for species control orders should be laid before Parliament and the Welsh Assembly.

Recommendation 39: We recommend that the following should be offences.

(1) It should be an offence for a person, without reasonable excuse, to fail to carry out, in the manner required by a species control order, an operation which the person is required to do by the order to carry out.

(2) It should be an offence to obstruct intentionally an authorised person carrying out an operation required by a species control order.

(3) It should be an offence, without reasonable excuse, to carry out, or cause or permit to be carried out, any excluded operation.

Recommendation 40: We recommend that the above offences should be triable summarily only.

Recommendation 41: We recommend that the penalty should be a term of imprisonment not exceeding 6 months, or a fine not exceeding £40,000.

Recommendation 42: We recommend that appeals against species control orders and decisions on compensation should be to the First-tier Tribunal (Environment).

Recommendation 43: We recommend that the First-tier Tribunal (Environment) should be empowered to do the following

(1) affirm the order in question;

(2) direct the relevant body to amend the order in such manner as the Tribunal may specify;

(3) direct the relevant body to revoke the order;

(4) make or vary an award of compensation; or

(5) make such other order as the Tribunal thinks fit.

Recommendation 44: We recommend that species control orders, and any power of entry authorised in connection with a species control order, shall be capable of being imposed in relation to the Crown, except Her Majesty in her private capacity.

Recommendation 45: We recommend, in line with section 66A(2) of the Wildlife and Countryside Act 1981, that no contravention by the Crown of any provision of a species control order should make the Crown criminally liable. The High Court may, however, on the application of any person appearing to the Court to have an interest, declare unlawful an act or omission of the Crown which constitutes such a contravention.