

# Consultation on the possession of wild bird eggs: Establishing the grounds for an offence.

## Appendices

### 1. Legislative background

The recent history of the legislation put in place to protect our wild birds begins with the Protection of Birds Act 1954 (as amended in 1964 and 1967) (“the 1954-1967 Acts”). This made it an offence to take or destroy an egg of any wild bird, and to sell, offer for sale or to have in possession for sale an egg of a wild bird (except under licence). The 1954-1967 Acts did not, however, make it an offence to possess a wild bird egg, or a part of an egg.

In 1979, the European Economic Community<sup>1</sup> adopted Council Directive 79/409/EEC<sup>2</sup> on the conservation of wild birds. It applies to all species of birds naturally occurring in the wild in the territory of the Member States and encompasses protection for “birds, their eggs, nests and habitats”. The Directive requires Member States to establish a system to protect wild birds, and in Article 5 to prohibit the taking of wild birds eggs and keeping them “even if empty”. Member States were required to implement the Directive by 2 April 1981.

To transpose (to implement) the Directive in Great Britain, the Wildlife and Countryside Act 1981 was enacted. This repealed the Protection of Birds Acts 1954 to 1967. Part 1 of the 1981 Act deals with wildlife and Part 1, section 1, sets out the main offences in respect of wild birds. The 1981 Act introduced a new offence (in section 1(2)(b)) of possessing or being in control of the egg of a wild bird, subject to certain exceptions. The 1981 Act also defined a wild bird as “a bird of any kind which is ordinarily resident in or is a visitor to Great Britain in a wild state, but not including poultry, or, except in ss.5 and 16, any game bird”. Part 1 of the 1981 Act came into force on 28 September 1982. It became an offence to possess a wild bird’s egg collected after that date if no statutory exemption applied and no licence was held creating what is commonly referred to as the Pre-1981 Defence. You could possess a wild bird egg if it could be shown that it was taken before 28 September 1982. In 2000, the Countryside and Rights of Way Act introduced custodial sentences for egg possession offences under the 1981 Act to deter

---

<sup>1</sup> Now known as the European Union

<sup>2</sup> Council Directive 79/409/EEC has now been codified by Directive 2009/147/EC

unlawful egg collectors. However, this is not directly relevant to the issue at hand, and changes to the applicable penalties are not proposed under this consultation.

On 14 July 2004, the 2004 Regulations came into force. The Regulations amended the definition of a ‘wild bird’ in the 1981 Act. The principal reason for the 2004 Regulations was to bring the definition of ‘wild bird’ used in the 1981 Act in line with that found in the EU Wild Birds Directive – i.e. a definition that encompassed “any bird of a species which is ordinarily resident in or is a visitor to any member State of the European territory of any member State”. The 1981 Act had only referred to a wild bird as being “...ordinarily resident in or is a visitor to Great Britain in a wild state...” Regulation 3(d) of the 2004 Regulations also inserted a new subsection (3A) into section 1 of the 1981 Act. This specified what constituted lawful killing, taking, possession or control of wild birds or their eggs.

A part of the effect of regulation 3(d), and therefore a part of the effect of new section 1(3A) in the 1981 Act, was to remove the Pre-1981 Defence in respect of possession of a wild bird egg. Section 1(3A) of the 1981 Act stated that where someone possessed a wild bird’s egg they had committed an offence unless they could show that there had been no contravention of the 1981 Act and the egg was not taken in contravention of the Protection of Birds 1954-1967 Acts. This narrowed the defence but meant eggs and birds were treated in the same way for the first time (previously contravention of the 1954-1967 Acts had only applied to birds, not their eggs). The amendment, therefore, removed the “Pre-1981 Defence”, making the possession of any egg collected after 1954 illegal, unless an exception within the legislation or a licence permitted the possession. A table showing the drafting changes made by the 2004 Regulations to the 1981 Act is available below.

**Table showing the drafting changes made by the 2004 Regulations**

WCA 1981, s.1(2) and (3) – pre S.I. 2004/1487	WCA 1981, s.1(2) and (3) – post S.I. 2004/1487
(2) Subject to the provisions of this Part, if any person has in his possession or control— (a) any live or dead wild bird or any part of, or anything derived from, such a bird; or (b) an egg of a wild bird or any part of such an egg, he shall be guilty of an offence.	(2) Subject to the provisions of this Part, if any person has in his possession or control— (a) any live or dead wild bird or any part of, or anything derived from, such a bird; or (b) an egg of a wild bird or any part of such an egg, he shall be guilty of an offence.
(3) A person shall not be guilty of an offence under subsection (2) if he shows that— (a) the bird or egg had not	(3) A person shall not be guilty of an offence under subsection (2) if he shows that— (a) the bird or egg had not

<p>been killed or taken, or had been killed or taken otherwise than in contravention of the relevant provisions ; or</p> <p>(b) the bird, egg or other thing in his possession or control had been sold (whether to him or any other person) otherwise than in contravention of those provisions; and in this subsection ‘the relevant provisions’ means the provisions of this Part and of orders made under it and, in the case of a bird or other thing falling within subsection (2) (a), the provisions of the Protection of Birds Acts 1954 to 1967 and of orders made under those Acts.</p>	<p>been killed or taken, or had been <b>lawfully</b> killed or taken <b>[deleted]</b> ; or</p> <p>(b) the bird, egg or other thing in his possession or control had been <b>lawfully</b> sold (whether to him or any other person) <b>[deleted]</b>.</p> <p><b>(3A) In subsection (3) “lawfully” means without any contravention of—</b></p> <p><b>(a) this Part and orders made under it,</b></p> <p><b>(b) the Protection of Birds Acts 1954 to 1967 and orders made under those Acts,</b></p> <p><b>(c) any other legislation which implements [the Wild Birds Directive] and extends to any part of the United Kingdom, to any area designated in accordance with section 1(7) of the Continental Shelf Act 1964, or to any area to which British fishery limits extend in accordance with section 1 of the Fishery Limits Act 1976, and</b></p> <p><b>(d) the provisions of the law of any member State (other than the United Kingdom) implementing the Wild Birds Directive.</b></p>
--	---

## 2. Ministry of Justice statistics

### Defendants proceeded against at magistrates' court, found guilty and sentenced at all courts for offences under S.1 of the Wildlife and Countryside Act 1981, England and Wales 2002-2012 (1)(2)(3)

Offence	Outcome	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Protection of nests and eggs of wild birds	Proceeded against	10	17	18	16	22	4	6	5	3	2	10
	Found Guilty	7	7	8	9	11	3	4	5	2	1	6
	Sentenced	7	7	8	9	11	3	4	5	2	1	6
	Immediate custody	1	1	-	2	1	-	-	-	-	-	-
	Suspended sentence	-	-	1	-	-	-	-	1	-	-	1
	Community sentence	3	1	1	1	2	-	3	1	-	-	2
	Fine	2	3	1	5	3	3	1	2	-	-	3
	Absolute discharge	-	-	-	-	1	-	-	-	-	-	-
	Conditional discharge	1	2	3	1	4	-	-	1	2	1	-
	Otherwise dealt with	-	-	2	-	-	-	-	-	-	-	-
	Average fine amount		£250.00	£1,266.67	£60.00	£985.00	£153.33	£866.67	£20.00	£150.00	£0.00	£0.00
Average custodial sentence length (months) <sup>(4)</sup>		3.7	3.0	-	2.7	4.0	-	-	-	-	-	-

"-" nil

(1) The figures given in the table on court proceedings relate to persons for whom these offences were the principal offences for which they were dealt with. When a defendant has been found guilty of two or more offences it is the offence for which the heaviest penalty is imposed. Where the same disposal is imposed for two or more offences, the offence selected is the offence for which the statutory maximum penalty is the most severe.

(2) Every effort is made to ensure that the figures presented are accurate and complete. However, it is important to note that these data have been extracted from large administrative data systems generated by the courts and police forces. As a consequence, care should be taken to ensure data collection processes and their inevitable limitations are taken into account when those data are used.

(3) Excludes data for Cardiff magistrates' court for April, July and August 2008.

(4) Excludes life and indeterminate sentences.

Source: Justice Statistics Analytical Services - Ministry of Justice. Ref: 341-14

### 3. Letter sent to stakeholders in 2012

Zone 1/14  
Temple Quay House  
2 The Square  
Temple Quay  
Bristol  
BS1 6EB

**Telephone:** 0117 372 3567

**Web:** [www.defra.gov.uk](http://www.defra.gov.uk)



**Your ref:**

**Our ref:**

**Date:** 29<sup>th</sup> Feb 2012

Dear

**Re: Wildlife and Countryside Act 1981 (Amendment) Regulations 2004**

As you may be aware, there has been a recent court case challenging certain provisions contained within the Wildlife and Countryside Act 1981 (England and Wales) (Amendment) Regulations 2004 ("the 2004 Regulations", SI 2004/1487), which amended the Wildlife and Countryside Act 1981 ("the 1981 Act").

Defra has accepted that a small part of the 2004 Regulations was made unlawfully due to a failure to consult fairly on the effect of one proposed amendment, as outlined below. Under section 1(2)(b) of the 1981 Act it is an offence to possess a wild bird egg. There are exceptions and defences to this offence. Before the 2004 Regulations were made, where a person could show that a wild bird egg in their possession had been taken before the 1981 Act came into force, that person could rely on the exception to the offence. Put another way, they would have had a defence ("the Pre-1981 Defence").

The 2004 Regulations revised the format of the exceptions provisions. Regulation 3(d) of those Regulations inserted a new subsection (3A) into section 1 of the 1981 Act. A part of the effect of regulation 3(d) (and a part of the effect of new section 1(3A)(b) of the 1981 Act) was to remove the Pre-1981 Defence in respect of possession of a wild bird egg. Defra has accepted that the consultation on the proposed 2004 Regulations did not mention the removal of the Pre-1981 Defence in respect of wild bird eggs. Defra has also accepted that 2004 Regulations were made unlawfully insofar as they removed, without consultation, the Pre-1981 Defence in respect of wild bird eggs.

As Defra has accepted that the 2004 Regulations were made unlawfully to the extent described above, Defra needs to take steps to remedy the situation by amending the offending provisions of the legislation. To this end Defra is currently considering the policy options, moving forwards. It is very important in reviewing the options that we consider stakeholder views, together with the current evidence available to inform our policy direction. Later Defra intends to undertake a full public consultation.



The 1981 Act is a key instrument in implementing the EU Wild Birds Directive. Our overarching objective in looking at suitable remedies for the above is to meet the requirements in the Directive to protect all wild birds and that must include protection from taking and keeping of their eggs. We consider that there are two options available:

1. amend the legislation so that section 1(3A)(b) of the 1981 Act reads as it does now (this is likely to involve a proposal to re-make the provisions as they stand now, but with full consultation on the effect of this proposal)
2. amend the legislation so that section 1(3A)(b) of the 1981 Act has the same effect in relation to the offence of possession of wild birds eggs as its predecessor provisions had in 1981 (this may involve the insertion of wording at the beginning of section 1(3A)(b) to limit this provision so that it applies in the case of a bird or thing falling within section 1(2)(a) of the 1981 Act).

Stakeholders may well be able to suggest other options.

Moving forwards, we will need to consider whether, as a matter of policy Option 2 suffices or whether it is necessary to limit the defence for possession of wild bird eggs (Option 1). We would like to take preliminary views from stakeholders about current evidence on the use and efficacy of:

- (a) the limitation of the defence, and
- (b) any non-statutory measures which might be useful tools to contribute to the objective of protecting wild bird eggs from being taken or kept.

Having considered the evidence, policy officials can put proposals to Ministers to decide on a preferred way forward, prior to the public consultation being issued.

I would be very interested in discussing any views you may have on the options outlined above and whether you have any alternative suggestions to put forward. If you would be interested in discussing the matter I would be grateful if you could contact me on the above number. If you would prefer to send us written comments please send these to the email below.

I am attaching annex A which shows the relevant changes the 2004 Regulations made to the text of the 1981 Act and the current text of the 1981 Act as amended in 2007 for your information.

Yours sincerely

Helen Heat  
Birds Policy Team  
Biodiversity Programme  
(Enc 1)  
**Direct line:** 0117 372 3567  
**Mobile:**

## 4. Pre-consultation stakeholder views table 2012

Consultee	In support of Option 1	In support of Option 2
1	<ul style="list-style-type: none"> <li>- The 2004 Regulation closed the loophole which allowed egg collectors to use the Pre-1981 Defence, which was often used falsely.</li> </ul>	
2	<ul style="list-style-type: none"> <li>- The Wildlife and Countryside Act 1981 created a loophole as it treated eggs differently to birds; this was closed by the 2004 Regulation</li> <li>- Using the Pre-1981 Defence is the commonest defence to unlawful possession</li> <li>- Fraudulent data has been produced in some cases to support a Pre-1981 Defence</li> <li>- The 2004 Regulation targeted active collectors, making it difficult for them to claim their eggs had been taken prior to 1954</li> <li>- The legal process allows sufficient discretion to be exercised where people inherit eggs but do not actively collect, through police advice or caution</li> <li>- The statutory defence is on a 'balance of probabilities' which is not onerous</li> </ul>	
3	<ul style="list-style-type: none"> <li>- Reinstating the 2004 Regulation would provide greater clarification and simplification that would benefit surveyors, as nest recorders can be distinguished from those illegally</li> </ul>	

	egg collecting	
4		- Hold evidence that at least two data-rich egg collections have been destroyed by private owners as a result of the 2004 Regulations
5	[This response provided the same points in support of Option 1 as consultee 2]	