EXPLANATORY MEMORANDUM TO

THE WILDLIFE AND COUNTRYSIDE ACT 1981 (ENGLAND AND WALES) (AMENDMENT) REGULATIONS 2016

2016 No. 127

1. Introduction

1.1 This explanatory memorandum has been prepared by Defra and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument amends section 1 of the Wildlife and Countryside Act 1981 ('the 1981 Act') and in particular, the provision that establishes the offence of being in possession or control of a wild bird's egg (or any part of an egg). The instrument broadens the statutory defence to that offence, so that a person will not be guilty if they can show the egg was taken before the offence came into force (this reinstates the legal position before 2004, when the exemption was narrowed so that wild birds and their eggs were treated the same)..

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 The recent history of the legislation put in place to protect wild birds begins with the Protection of Birds Act 1954 (as amended in 1964 and 1967). 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.

4.2 In 1979, the European Economic Community[1] adopted Council Directive 79/409/EEC[2] on the conservation of wild birds ('the Wild Birds Directive'). 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.

4.3 To transpose the Directive in Great Britain, the Wildlife and Countryside Act 1981was enacted. This repealed the Protection of Birds Acts 1954 to 1967. Part 1 of

[1] Now the European Union.
[2] Council Directive 79/409/EEC has now been codified by Directive 2009/147/EC.

the 1981 Act deals with wildlife and Part 1, section 1, sets out the main offences in respect of wild birds.

4.4 This instrument amends section 1 of the 1981 Act, and in particular the provision that establishes the offence of being in possession or control of a wild bird egg[3]. Section 1(2)(b) of the 1981 Act makes it an offence to possess or have in one's control, the egg of a wild bird or any part of such an egg, unless a statutory exemption applies or a valid licence is held.

4.5 When the 1981 Act was enacted, the statutory exemption/defence included that the egg had not been taken from the wild in contravention of Part 1 of the 1981, which meant that a person would not be guilty of the possession offence in section 1(2)(b) if they could show the egg was taken before that section came into force, namely 28 September 1982[4].

4.6 On 14 July 2004 the Wildlife and Countryside Act (England and Wales) (Amendment) Regulations 2004 (SI 2004/1487) ('the 2004 Regulations') came into force. Regulation 3(d) of the 2004 Regulations inserted a new subsection (3A) into section 1 of the 1981 Act. This amendment specified what constituted lawful killing, taking, possession or control of wild birds or their eggs.

4.7 The new section 1(3A) included that where someone possessed a wild bird's egg (or part of an egg) they had committed an offence unless they could show (amongst other things) 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 exemption, as it 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, made the possession of any wild bird egg which a person could not show was taken before 1954 illegal (unless an exception within the legislation applied or a licence permitted the possession).

4.8 The effect of the change introduced by the 2004 Regulations was not subject to full public consultation. The amendments brought about by this instrument follow a public consultation and review of the policy. The instrument also amends the definition of the 'Wild Birds Directive' in the 1981 Act following that Directive being consolidated.

5. Extent and Territorial Application

5.1 The extent of this instrument is England and Wales.

5.2 The territorial application of this instrument is England and Wales.

6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary of State, Environment, Food and Rural Affairs has made the following statement regarding Human Rights:

[3] For the purpose of the 1981 Act a wild bird is defined as "a bird of a species which is ordinarily resident in or is a visitor to the European Territory of any EU member State in a wild state, but does not include poultry, or, except in ss.5 and 16, any game bird" (s. 27).

[4] Section 1 of the 1981 Act came into force on 28 September 1982, by virtue of article 2 the Wildlife and Countryside Act 1981 (Commencement No. 5) Order 1982 (S.I. 1982/1217 (c. 39)).

"In my view the provisions of the Wildlife and Countryside Act 1981 (England and Wales) (Amendment) Regulations 2016 are compatible with the Convention rights."

7. Policy background

What is being done and why

7.1 The 1981 Act is a key instrument in the implementation of the obligations set out in the Wild Birds Directive. Section 1 of the 1981 Act makes it an offence to possess or have in one's control the egg of a wild bird or any part of such an egg[5].

7.2 The primary purpose in making the 2004 Regulations was to amend the definition of 'wild bird' in the 1981 Act to fully comply with the Wild Birds Directive[6]. The 2004 Regulations also revised the legislative exceptions to the offence of being in possession of a wild bird egg. The regulation removed the statutory exception to the egg possession offence, namely, if the person could show the egg was taken before Part 1 of the 1981 Act came into force (commonly known as the 'Pre-1981 Defence' although Part 1 did not come into force until 28th September 1982).

7.3 The 2004 Regulations narrowed the defence so that if a person in possession of a wild bird egg (that did not come within another exception or hold a relevant licence for that possession) could not show the egg in their possession had been taken from the wild before the Protection of Birds Act 1954 (which became known as the pre-1954 exception) came into force they would have committed the offence.

7.4 In 2011 an application was made to Judicially Review the 2004 Regulations as Defra had not consulted fully on the effect the regulations would have on the possession of wild bird eggs offence. To this end Defra accepted that the 2004 Regulations were made unlawfully to the limited extent that they removed the Pre-1981 Defence without full prior public consultation.

7.5 This instrument reinstates the Pre-1981 Defence in respect of the possession of wild bird eggs offence following full public consultation as discussed below.

Consolidation

7.6 None.

8. Consultation outcome

8.1 Defra and the Welsh Government carried out a public consultation to determine whether the amendments introduced by the 2004 Regulations, i.e. the Pre-1954 exception to the eggs possession offence should be maintained or the 'Pre–1981 Defence' should be reinstated.

8.2 The consultation concluded that 74% of the respondents favoured the reinstatement of the Pre-1981 Defence.

8.3 Defra and the Welsh Government carefully considered the responses and agreed the Pre-1981 Defence should be reinstated as this is a proportionate response to what is now a declining activity and a falling number of prosecutions.

[5] It should be noted that game birds and the eggs of game birds are not covered by this regulation.

[6] The definition was extended (subject to certain exceptions for poultry and game birds) to cover any bird of a species which is ordinarily resident in or a visitor to the European territory of any member State. When enacted the definition only covered birds of a kind ordinarily resident or a visitor in Great Britain.

8.4 It was concluded that there is no significant benefit to wildlife conservation in maintaining the pre-1954 exception; the pre-1981 defence complies with the requirements of the Wild Birds Directive but avoids 'gold-plating' in line with current UK Government policy.

8.5 Defra will inform the relevant enforcement authorities of the changes to the legislation as a result of this instrument. A full Government consultation response has been published ahead of this instrument being laid in Parliament (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/494610/wild-bird-egg-consult-sum-resp.pdf).

9. Guidance

9.1 The Secretary of State is not intending to issue guidance in respect of these regulations.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

12.1 Defra and the Welsh Government will monitor the measures introduced by this instrument by keeping under review the level and nature of prosecutions in respect of wild bird eggs under the 1981 Act. This will be done through liaison with the Police representative organisations and the Crown Prosecution Service, in particular.

13. Contact

13.1 Paul Ballinger at Defra Tel: 02080266843 or e-mail: paul.ballinger@defra.gsi.gov.uk can answer any queries regarding the instrument.