



# AMATEUR ENTOMOLOGISTS' SOCIETY



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Registered Charity No. 267430

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Dear Sir or Madam,

## **Wildlife Law**

The Amateur Entomologists' Society (AES), established in 1935, is the UK's leading organisation for amateur entomology, as far as membership is concerned. In 1991 the Society published the world's first comprehensive handbook on insect conservation and has been producing a conservation journal alongside its other periodicals since 1969.

The AES is concerned with invertebrates and therefore has a remit to respond to consultations that concern all aspects of law that are relevant to these taxa. We believe that the conservation of invertebrates depends mainly on the protection of habitats and ecosystems, whether on a local or landscape scale or in marine areas. We therefore believe that any review of wildlife law should take account both of site-based and species-based provisions but we are aware that the present consultation is concerned primarily with the latter.

The need to review all highly relevant law – not merely species-based law – applies not only to protected species but also to invasive non-native species. For example, there is little use in prohibiting the deliberate importation or possession of an invasive species if it is far more likely to be introduced into the UK as a consequence of being harboured in goods imported

under an inadequate regulatory regime. And yet, the European Commission's review of law relating to such species has been conducted in isolation from any review of the EU directives that favour free trade in such high-risk goods.

Despite our concern that the current review does not cover all aspects of law relating to invasive non-native species, we welcome the opportunity to comment on aspects of law that concern the importation and possession of such species. These organisms pose a significant threat to our native invertebrates and their habitats, especially since they include causal agents of serious disease in tree species that provide many such habitats.

Whilst invasive non-native species are a threat to native invertebrates, we are concerned that an unduly strict approach might lead to the prohibition of imports of species that pose no significant risk and that are of immense value for the education of young people. Certain stick insect species, for example, are admired as 'pets' and allow for familiarisation with insect biology. The care of stick insects and certain other invertebrates helps encourage young people to be the entomologists, ecologists and conservationists of the future. In an era when 'nature deficit disorder' is increasingly apparent in children, the care of living invertebrates, whilst being no replacement for outdoors activities and contact with UK nature, does help in mitigation.

The AES would like to thank the Law Commission for consultation on wildlife law reform. We agree with the conclusion that the current law is confusing and complicated and that there is inconsistency across various statutes. Since, however, many aspects of the law have been drafted with vertebrate animals mainly in mind, it is essential that any rationalisation of the law takes full account of the wide range of biological and ecological characteristics of invertebrates and of the methods that are necessary for their study. Our comments on the Wildlife Reform Consultation Paper are listed below in respect of (1) protected and (2) invasive non-native species.

## **PROTECTION OF SPECIES**

We firmly believe that species protection legislation should be risk-based, so that the law is applied only to species that are demonstrably at significant risk from activities specifically identified as potentially harmful. Guidance on the principles of risk-based species protection law is set out in a document<sup>1</sup> published by Invertebrate Link (JCCBI), the "umbrella" group of organisations involved in invertebrate conservation in the UK. We fully endorse that document, a copy of which we are sending by e-mail, together with the present submission.

In our opinion, the current procedures for selecting invertebrates for protection in the UK are broadly in keeping with the risk-based approach that we advocate and that is set out in the attached InvLink document. Provided that prohibition of collecting applies only to the very small proportion of invertebrate species that warrant such protection, a wide range of studies can be pursued without much fear of inappropriate restrictions. This relative freedom is in our view essential if we are to have any hope of recruiting future generations of invertebrate enthusiasts, whose work is essential in conservation.

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<sup>1</sup> "Statement on the appropriate role of legislation in controlling activities likely to harm specified taxa of terrestrial and freshwater invertebrates, with particular reference to taking and killing" (*British Journal of Entomology & Natural History* (2008) 21: 202-204)

**PROVISIONAL PROPOSAL 5-4:** statutory factors to be taken into account by decision makers

***Agree:***

We think, in particular, that planning authorities should be required to take account of invertebrate biodiversity in their decisions. This should include a full evaluation of biodiversity in a given area; not just the presence or absence of protected species.

**PROVISIONAL PROPOSAL 5-5:** formal listing of factors to be considered by public bodies

***Agree:***

Formal listing should help to ensure that all factors are considered as a matter of course

**QUESTION 5-6:** suitability of the list of factors to be taken into consideration

***Agree, with reservation:***

We welcome the inclusion of preservation and conservation of biodiversity but we think that guidelines are needed in order to ensure that invertebrates – not only protected species – are not neglected.

**PROVISIONAL PROPOSAL 5-7:** organisation of wildlife law by reference to individual species or groups of species

***Strongly agree:***

We think that the risks posed to different taxa are so varied that there is an essential need to retain differential measures for their protection. Please see our comment on Question 7-1, which seems consistent with this differential approach.

**PROVISIONAL PROPOSAL 6-5:** to use the term “intentionally or recklessly” to transpose the term “deliberately” in the Wild Birds and Habitats Directives.

***Agree, with reservation:***

We accept the need to use terms consistently but we are concerned that “recklessly” can be interpreted unfairly, in cases where there is no ill intent. We suggest that appropriate guidelines should be made available to prevent such problems.

**PROVISIONAL PROPOSAL 5-9:** requirement to review all listing of species periodically.

***Agree, with reservation:***

We agree entirely that, owing to changes in the conservation status of species (or in knowledge), a periodic review is essential. We think strongly, however, that there should also be provision to amend the listing of certain species where there is a pressing need not to wait until the next formal review.

**PROVISIONAL PROPOSAL 5-10:** requirement for the Secretary of State to explain reasons for rejecting advice from Statutory Agencies regarding review of species lists

***Agree***

**PROVISIONAL PROPOSAL 5-11:** five year proposed maximum interval between reviews of species lists

***Agree:***

A five-year maximum interval seems to provide a reasonable balance between the need for amendment and the work required for a review.

**QUESTION 5-13:** appropriate regulatory technique for the management of listed species

***Agree:***

Taking account of the varied risks affecting endangered invertebrates, we see an essential need to be specific in defining which activities are sufficiently harmful to be prohibited for a particular species. We agree also that appropriate exceptions should be permitted, together with specified defences and facilities for licensing.

**QUESTION 5-14:** undesirability of statutory defining of individual, class or general licences

***Agree (that this is undesirable):***

We agree that the Statutory Agencies should be enabled to exercise discretion in issuing general licences. This should facilitate fieldwork that might otherwise require a specific licence.

**PROVISIONAL PROPOSAL 5-15:** two-year maximum duration of a licence for the killing of member of a species

***Agree:***

**Provisional Proposal 5-16:** ten-year duration of other licences

***Disagree:***

There are certain activities (e.g. involving specimens that were lawfully collected before the date of scheduling) for which a licence might be required, and yet where there is no harm in making the licence permanent. In such cases, the expiry of licences would be a cause of unnecessary anxiety, burden and bureaucracy.

**QUESTION 6-7:** no need to define or to qualify the term “disturbance” when transposing the requirements of the Wild Birds and Habitats Directive?

***Agree:***

We agree that there is no need further to define or to qualify disturbance, given the existing definition in the Conservation of Habitats and Species Regulations 2010 (as stated in para. 6.52 of the Paper). This definition is sufficient for invertebrates and we would disagree with any re-definition that could criminalise the activities of naturalists who might, for example approach a protected invertebrate for photography without causing any harm.

**PROVISIONAL PROPOSAL 6-8:** unification and simplification of various anti-disturbance provisions in different statutes

***Agree, with reservation:***

We recognise the need to unify and simplify these provisions but it is essential that any unified revision takes due account of the wide range of our invertebrate fauna, for which a “place of shelter” can be difficult to define.

**QUESTION 6-10:** gold plating of Habitats Directive provisions to protect European Protected Species (except the pool frog and the lesser whirlpool ram’s horn snail)?

***Agree:***

The protection afforded by the Wildlife and Countryside Act 1981 does not unduly exceed the requirements of the Habitats Directive. On the contrary, we see cause for concern about certain onerous requirements regarding invertebrates listed in Annex IV of the latter, with particular regard to licensing for the possession of specimens.

**PROVISIONAL PROPOSAL 6-11:** removal of the defence of action being the “incidental result of a lawful operation and could not reasonably have been avoided”

***Disagree:***

Much as we recognise the apparent conflict between the EU Habitats Directive and defence currently provided in the Wildlife & Countryside Act 1981 Section 4(2)(c), we think it is a matter of justice not to criminalise actions that could “not reasonably have been avoided”. We do not, however, object to the criminalisation of “otherwise lawful actions” that **could** have been reasonably avoided. Moreover, we are very concerned about activities (e.g. in connection with site development) that are very damaging to invertebrates and to their habitats and yet go unpunished even where they could reasonably have been avoided. There is a need to resolve this matter of conflicting terms, so as to ensure justice while also protecting scheduled species and habitats. Perhaps the matter could be taken to the EU for discussion; perhaps in the context of linguistic translation.

**QUESTION 7-1:** ways in which species protected only under domestic law should be protected

***Strongly disagree, pending clarification:***

We are extremely unhappy with all the options (a, b, and c), to the extent that they seem to presume that it should be a criminal offence to take, kill or injure any legally protected invertebrate.

Question 7-1 appears to be seriously inconsistent with the current provisions of Schedule 5 of the Wildlife and Countryside Act 1981, under which, for example, certain invertebrates are protected only from destruction of a place of shelter [Section 9(4)(a)] or from sale / offering for sale [(Section 9(5)]. We strongly support the selective implementation of different parts of S.9, which enables the scheduling of species that merit certain forms of protection but not others.

Much as we would strongly disagree with the criminalisation of taking or killing any scheduled invertebrate, we realise that Qu. 7-1 is probably intended mainly to ask whether the terms “intentional” and/or “reckless” should be used in order to define the intent of the action. To this extent, we have some concern about the use of “reckless”, since it could conceivably be invoked against those engaged in field studies involving the unintentional capture of a fully protected species. If, however, suitable safeguards (e.g. through guidance on enforcement) could be established, we would favour the enhanced protection that could be conferred by the use of “reckless”.

**QUESTION 7-2:** inclusion of offering for sale, exposing for sale, and advertising to the public as offences

***Agree:***

We think that these activities are tantamount to actual sale and should therefore be prohibited where sale is listed as a specifically prohibited activity for a given invertebrate species. We understand, however, that “offering for sale” of certain invertebrates on Schedule 5 of the Wildlife and Countryside Act 1981 is already covered by Section 9(5)(a) and (b) of the Act.

**Question 7-9:** rationalisation of purely domestic licensing, using the conditions contained in the Berne Convention

***Agree in principle:***

We think that the current licensing arrangements for scheduled invertebrate are confusing and onerous. A great burden is placed upon us in our role as facilitators of activities involving the exhibiting and trade of living and dead specimens, which have great educational value but require us to adopt a ‘policing’ role in order to prevent potentially unlawful activities. We would therefore welcome simpler and less onerous conditions but we do not know whether adoption of the terms of the Berne Convention would make matters better or worse.

**PROVISIONAL PROPOSAL 7-11: and QUESTION 7-12:** the “reverse” burden of proof

***Disagree in relation to invertebrates:***

These two items in the Paper refer specifically to birds and badgers respectively but we wish to point out that the reverse burden of proof appears also to apply to invertebrates, according to Section 9(3)(a) of the Wildlife & Countryside Act 1981, which requires an accused person to prove that the item concerned was obtained otherwise than “in contravention of the relevant provisions”.

It is beyond our remit to comment on fundamental issues of justice that are raised by the reverse burden of proof but we are aware that some of our members have understandable concerns that they could be wrongfully accused and convicted on the grounds of being deemed “guilty until proven innocent”. Such a situation could arise, for example, where someone inherits an old collection containing protected species that were taken before the date of scheduling. Thus, whilst we accept that deserved convictions could be hindered by a need for the prosecution to prove guilt, we are very concerned that the study of invertebrates is negatively affected by the existence of the reverse burden of proof.

**INVASIVE NON-NATIVE SPECIES**

**QUESTION 8-1:** the case for reform of the regulatory and enforcement tools

***Agree, with reservations:***

We see a case for reform but only with respect to high-risk activities, by which invasive non-native species can be incidentally introduced with imported goods, especially plants, soil and wooden packing materials. The risk is demonstrated by recent examples, including the introduction of the causal agents of very serious tree diseases such as ash dieback and of insects such as the “Asian longhorn beetle”. The deliberate introduction of certain vertebrate animals and of plants for horticulture has also led to several major problems. In contrast,

the deliberate introduction of invertebrates (e.g. for the pet trade) has not resulted in significant problems within the UK, perhaps because many of the species concerned are tropical and hence very unlikely to become established in the wild in the UK.

The importation and possession of invertebrates as pets or as objects of study should in our opinion be regarded generally as too low-risk to warrant additional legislation. We agree with the existing prohibition of the release of alien animals into the wild and of the unlicensed importation or possession of certain scheduled invertebrate species.

**PROVISIONAL PROPOSAL 8-2: emergency listing of invasive non-native species**

***Agree:***

The emergency listing of invasive non-native species would be a positive step in dealing with them. Prevention of incursions is seen as preferential to taking measures of control or elimination once invasive non-native species have reached our shores, at which stage there could be serious environmental consequences and severe financial burdens on landowners and the state.

**QUESTION 8-3: time limit for emergency listing**

***Agree, with reservations:***

We prefer that a 1-year limit should be the initial default but that there should be provision to renew the period for a further year (subject to a further review at the end of the 2nd year) if the data required for a long-term decision have not yet been assessed adequately.

**PROVISIONAL PROPOSAL 8.4: power to order notification of invasive non-native species**

***Agree:***

Increased familiarity with invasive non-native species would lead to better monitoring and control. It would also aid the implementation of early warning systems, while encouraging stakeholders to follow existing processes of control.

**PROVISIONAL PROPOSAL 8.5: defence of reasonable excuse for failure to notify**

***Agree:***

Provision for a reasonable excuse would help to ensure fair treatment of stakeholders, provided that it does not weaken the effectiveness of legislation.

**PROVISIONAL PROPOSAL 8-6: availability of licences**



**Agree:**

We agree that the full range of licences should be available, so as to enable research, education and other valuable activities to be conducted.

**PROVISIONAL PROPOSAL 8.7: species control orders**

**Agree:**

This proposal appears effective but there is a need to harmonise any such new legislation with existing provisions that, for example, require site owners to destroy plants affected by notifiable diseases. There is the proviso that control orders are undertaken by adequately trained people. This is especially important where pesticides and/or herbicides are involved. Best practice principles should be adhered to, especially where there is risk of contamination of watercourses.

*General comment*

The life cycles of some invertebrates are comparatively short and it is imperative that biology and ecology are taken into consideration in the control of many invasive non-native species. The inclusion of measures to limit costs to stakeholders can lead in the long term to disproportionate costs over wider geographical areas. Any appeals processes introduced should consider this need for urgent action. Appeals that take months to prepare are therefore hazardous to the environment.

**PARA. 8.117: possible new offence of selling an invasive non-native species**

**Agree, with reservations:**

It seems reasonable to prohibit the sale of a species that, according to appropriate risk-based criteria is scheduled such that it could not be lawfully imported into the UK or kept without a licence. We would, however, disagree with any proposal to prohibit the sales of species that are not thus scheduled.

**SANCTIONS AND COMPLIANCE**

**QUESTION 9-4: Sufficiency of current sanctions for wildlife crime**

**Uncertain:**

We think that the question is somewhat loaded, since it does not ask whether the sanction might be more than sufficient (i.e. excessive). We would agree with greater sanctions in instances where major harm is done to a critically important population of a protected invertebrate. On the other hand, there could be instances where the unlawful taking or killing of a specimen causes no significant harm and yet could carry a relatively severe

penalty. If a crime has been committed, punishment is of course appropriate but the degree of punishment should be proportionate to the harm that is actually done.

In this context and with reference to Questions 9-7 and 9-8, we welcome the analysis presented in para. 9.113 of the Paper, in which a contrast is drawn between the killing of specimens of a numerous species (with reference to birds) and the killing of the “last breeding pair of a seriously” endangered species.

Yours sincerely

Dr. David Lonsdale

AES Conservation Secretary