

**Explanatory Memorandum to the Wildlife and Countryside Act 1981
(England and Wales) (Amendment) Regulations 2016**

This Explanatory Memorandum has been prepared by the Economy, Skills and Natural Resources Department and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Wildlife and Countryside Act 1981 (England and Wales) (Amendment) Regulations 2016.

Carl Sargeant
Minister for Natural Resources
5 February 2016

1. Description

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 an egg of a wild bird (or any part of such an egg). More specifically, it amends the statutory exemption to that offence, so that a person will not be guilty if they can show the egg (or any part) was in the possession or control of any person before Part I of the 1981 Act came into force. This reinstates the legal position before amendments made in 2004, when the exemption was inadvertently narrowed.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

This instrument is being made on a composite basis with the Secretary of State for DEFRA and amends earlier England and Wales legislation. The 1981 Act transposes Directive 2009/147/EC on the conservation of wild birds (the Wild Birds Directive) into law in England and Wales and it is desirable to have a common England-Wales regulatory regime covering transposition. The policy in Wales on this specific matter is identical to that in England and as such the textual amendment is identical if 'Wales only' and 'England only' statutory instruments were pursued. Maintaining a consistent approach in Wales with England is considered beneficial for those individuals and organisations wishing to possess wild bird eggs and the relevant law enforcement agencies. It is considered that a composite instrument also removes the potential for confusion that having two separate statutory instruments producing the same legal effect may cause.

This instrument is subject to the negative resolution procedure in the National Assembly for Wales and in the UK Parliament. This is deemed the appropriate procedure because the subject-matter of the instrument is of relatively minor detail in the overall legislative scheme and is technical in nature. This instrument does not impose duties, burdens or create any criminal offences. Rather, it provides for a benefit by expanding the statutory exemptions under section 1(3) of the 1981 Act, and as such, is considered appropriate for the negative procedure.

As this instrument will be subject to both the National Assembly for Wales and UK Parliamentary scrutiny, it is not considered reasonably practicable for this instrument to be made or laid bilingually. The instrument is not amending earlier bi-lingual legislation.

3. Legislative background

The taking of wild bird eggs is governed by the Wild Birds Directive. It requires Member States to establish a system to protect wild birds, and their eggs. It is transposed into domestic law via Part 1 of the 1981 Act.

The National Assembly for Wales was designated under section 2(2) of the European Communities Act 1972 in relation to measures relating to the

conservation of natural habitats and of wild fauna and flora. This designation now vests in the Welsh Ministers by virtue of section 162 of, and paragraph 30 of schedule 11 to, the Government of Wales Act 2006.

Paragraph 2(2) of Schedule 2 to the European Communities Act 1972 provides for a choice between the affirmative and negative procedure when exercising the power under section 2(2) of that Act. The negative procedure is considered appropriate for reasons outlined above.

4. Purpose & intended effect of the legislation

The overarching purpose of this instrument is to ensure a proportionate regime in Wales in relation to the possession of wild birds' eggs in a manner that continues to meet the requirements of the Wild Birds Directive.

Specifically, this instrument provides that possession or control of an egg of any wild bird, or any part of it, taken in contravention of certain legislation (namely the Protection of Birds Acts 1954 to 1967) prior to Part 1 of the 1981 Act coming into force, is no longer an offence under section 1(2)(b) of the 1981 Act.

When the 1981 Act was enacted, section 1(2)(b) made possession of a wild bird egg, or any part of such an egg, illegal, unless a statutory exemption applied. The statutory exemptions included that the egg had not been taken from the wild in contravention of Part 1 of the 1981 Act or orders made under it. This meant a person was not guilty of possession under section 1(2)(b) if they could show the egg was taken before that section came into force (namely 28 September 1982) even though it may have been taken in contravention of earlier legislation such as the Protection of Birds Acts 1954-1967. This commonly became known as the 'Pre-1981 Defence'.

Amendments made in 2004, by SI 2004/1487 ('the 2004 Regulations') and made applicable in Wales by SI 204/1733 had the effect of narrowing the statutory exemptions to the offence of possessing an egg of a wild bird, or any part of it. Following the amendments, a person in possession of an egg of a wild bird, or any part of it, committed an offence unless they could show (amongst other things) that there had been no contravention of the Protection of Birds Acts 1954-1967. Therefore, possession of any egg, or any part of it, which a person could not show was taken before 1954 became illegal (unless an exception within the legislation applied or a licence under section 16 of the 1981 Act permitted the possession).

The effect of the change introduced by the 2004 Regulations, in that they removed the Pre-1981 Defence in relation to the possession of an egg of a wild bird, was not subject to full public consultation. It has been accepted that, to this limited extent, the 2004 Regulations were made unlawfully insofar as they removed the Pre-1981 Defence without full prior public consultation.

The amendments brought about by this instrument follow a public consultation and review of the policy. The majority of those who responded concluded that the Pre-1981 Defence should be reinstated.

The effect of the amendments made by this instrument is therefore to revert to the position prior to the 2004 amendments, i.e. to reinstate the Pre-1981 Defence such that possession of an egg of a wild bird, or part of such an egg, is not an offence under section 1(2)(b) of the 1981 Act if the person charged can show it was taken (i.e. a person was in possession of it) before Part 1 of the 1981 Act came into force.

By reinstating the Pre-1981 Defence the uncertainty for those possessing eggs of wild birds, or any part of such eggs, collected after 1954 such as museums, scientific research organisations and private collectors is removed. This should prevent historical collections with scientific value from being destroyed. It allows museums and similar institutions to continue to possess and use such eggs for research purposes without fear or prosecution and removes unnecessary burdens on these institutions in obtaining licences to possess such eggs under section 16 of the 1981 Act.

This instrument also amends section 27 of the 1981 Act by updating the definition of the Wild Birds Directive which was consolidated in 2009.

This instrument will affect anyone wishing to possess or control any egg of a wild bird, or any part of such an egg in Wales. It ensures a consistent legal framework across Wales and England concerning the possession or control of any egg of a wild bird, or any part of such an egg.

5. Consultation

A joint England and Wales public consultation was held titled “establishing the grounds for an offence of the possession of wild bird eggs”. The consultation was launched on 14 October 2014 and was open for views until 9 December 2014.

The consultation set out two options:-

- **Option 1. Maintain the Pre-1954 exception in respect of wild bird egg possession.** This would mean possession of eggs would be illegal unless;
 - they were held under a licence issued under section 16(1) of the 1981 Act,
 - a legislative exemption applies, or
 - it could be shown by the person in possession that they were taken from the wild before 1954.
- **Option 2. Reinstating the Pre-1981 Defence in respect of wild bird egg possession.** Re-instating the Pre-1981 Defence, would mean possession of eggs would be illegal unless;

- they were held under a licence issued under section 16(1) of the 1981 Act,
- a legislative exemption applies, or
- it could be shown by the person in possession that they were taken from the wild before Part 1 of the 1981 Act came into force (28 September 1982).

There were 34 responses to the consultation. The consultation asked respondents to confirm whether their response applied to England (29%), Wales (12%) or England and Wales (56%). Nearly three quarters of respondents to the consultation supported option 2; to re-instate the original offence (the Pre-1981 Defence). Of the 4 respondents specifying they were responding in relation to Wales, 3 preferred option 2 and 1 preferred option 1 (to maintain the pre-1954 defence).

A summary of consultation responses has been published on gov.uk, with a link from the Welsh Government consultation webpages ahead of this instrument being laid in the National Assembly for Wales.

<http://gov.wales/consultations/environmentandcountryside/possession-of-wild-bird-eggs-establishing-grounds-for-an-offence/?status=closed&lang=en>).

All respondents have been notified of the publication of the summary document and outcome.

6. Regulatory Impact Assessment (RIA)

Having considered the Welsh Ministers' code of practice, a Regulatory Impact Assessment has not been prepared for these Regulations. No impact on the private, public or voluntary sectors is foreseen separate to that already covered by the substantive provisions of the 1981 Act.