Wildlife and Countryside LINK

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Response to the Law Commission Consultation on Wildlife Law
November 2012

Wildlife and Countryside Link (Link) brings together 39 voluntary organisations concerned with the conservation and protection of wildlife and the countryside. Our members practise and advocate environmentally sensitive land management, and encourage respect for and enjoyment of natural landscapes and features, the historic and marine environment and biodiversity. Taken together our members have the support of over 8 million people in the UK and manage over 750,000 hectares of land.

This response is supported by the following 17 members of Link plus Wales Environment Link.

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1. Introduction

Link welcomes the Law Commission's project to reform the legal regime for wildlife management and we are pleased to respond to the consultation paper outlining the key recommendations and questions arising from the project. Our response is set out within this document and is based on the knowledge and understanding of this area gained by our members through their detailed and practical engagement with the EU Birds and Habitats Directives and domestic legislation, their knowledge of the needs of biodiversity in England and Wales and their experiences in working with enforcement authorities in the investigation and prosecution of wildlife crime.

We have a vision for the reform of wildlife legislation in England and Wales that not only consolidates and clarifies the existing protection, but also better represents the love of the British people for wildlife, contributes more to achieving the UKs international commitments to halt biodiversity loss, and achieves improved animal welfare. Achieving sustainable wildlife populations and preventing mistreatment of animals will go beyond the scope of this consolidation and clarification exercise, but we hope that these ambitions provide, in Section 2, a useful context within which to interpret our response.

Sections 3 – 8 set out our detailed consideration of the questions and recommendations contained within the various chapters of the consultation paper. In all cases we have provided a rationale for our conclusions and where relevant, have cited examples and illustrations from case law or practical situations.

There are a number of areas where there is not yet a sufficient level of detail in proposals for us to understand how the measure will operate in practice, or where a complex interaction of clauses must be carefully charted out to avoid undermining the protection and functioning of the legislation. We have identified these in our response and would welcome further engagement and consultation from the Law Commission on these areas.

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2. Link's ambitions for Wildlife Law Reform

We support a fully integrated statutory approach
Link believes that the proposed consolidation and review of wildlife law presents clear opportunities for codifying and strengthening the protection of wildlife in England and Wales. While we maintain and re-emphasise the benefits of addressing species and habitat protection in one statute, we welcome the attempt to consolidate the protection of species – ideally as a precursor to a fully integrated statutory approach.

This must provide an effective legislative framework for species conservation
We are concerned that the Review also has the potential to shift the basis upon which centuries of legislation has evolved away from conservation, enhancement and welfare to an approach based on anthropogenic management and use. In our view, this would seriously undermine the fundamental principles on which biodiversity protection has evolved in the UK and could result in long-term and, in some cases, irreversible negative impacts on wildlife and the environment.

We are currently failing to halt the loss of biodiversity, despite a moral imperative and a global convention: improved wildlife legislation is an essential part of remedying the current failure to achieve a sustainable life on Earth.

The new Wildlife Act should:-

1. **Provide greater clarity - a wildlife statute that is easier to understand and thereby results in better compliance, enforcement and review.** This review should ensure a sensible consolidation that incorporates all species and habitat lists and related specific measures. However, it should also lay the foundations for the consolidation/improvement of legislation on site/habitat protection, ecosystem connectivity, ecosystem restoration, and animal welfare at a future date.
2. **Reflect the aims of the Convention on Biological Diversity** - be clearly aligned with the sustainable conservation status of species and ensure that decision makers must have this purpose in mind when making decisions in relation to this Act and more generally.
3. **Incorporate animal welfare aims** - so that improved welfare is achieved without significantly compromising the achievement of the conservation purposes.
4. **Not compromise the existing protection provided to any species**.
5. **Strengthen measures for preventing and controlling Invasive Non-Native Species,** including:-
    a. a "white list" approach, where the activity (e.g. import) is banned for all species other than those on the "white list"
    b. adoption of the whole Scottish model from the WANE Act (2011)
    c. incorporating improvements to animal welfare provisions
    d. a better mechanism to ban sales
    e. powers for emergency listing and improved powers for enforcement
    f. more action around prevention
6. **Strengthen sanctions and sentencing provisions and remove loopholes**.

7. **Improve monitoring and reporting of wildlife populations (article 7), hunting and licensed control**

3. Chapter 1: Scope of the review

Question 1-1: Do consultees think that the marine extent of the project should be limited to territorial waters?

No, we support a marine extent for the project out to 200 nautical miles (nm), for the following reasons:

- It would be simpler and clearer if the Act covered all relevant (English and/or Welsh) areas subject to UK jurisdiction. Creating several geographically separate pieces of legislation would result in additional complication and bureaucratic burdens.
- Animals do not take arbitrary boundaries into account and with many marine and bird species being migratory it is important that we offer protection throughout UK waters (i.e. onshore, inshore and offshore), particularly as we have obligations to protect migratory and mobile species and marine organisms to 200nm through the Bonn Convention on Migratory Species.
- A marine extent of 200nm will ensure that commitments made by the UK under AEWA and ASCOBANS (CMS) of cetaceans in the North Sea are supported.
- The Habitats and Birds Directives are not restricted to territorial waters. In Commission v. United Kingdom C-6/04, [1] the Court of Justice of the European Union (CJEU) stated "*Member states have an obligation to comply with Community law in the fields where they exercise sovereign powers and that the Directive therefore applies beyond territorial waters*" Sovereign power in Britain goes out to 200nm and should therefore be protected.
- Extending to 200nm would cover the Offshore Marine Conservation Regulations limits and would protect the species in SACs which extend beyond the 12nm limit (there are currently 15).
- The NERC act goes out to 200nm and relates to all Crown decision makers.
- The development of marine plans and licensing of managing marine resources and use occurs out to 200nm. It would be inconsistent if the wildlife management legislation did not match the extent.

[1] http://ec.europa.eu/environment/nature/info/pubs/docs/others/ecj_rulings_en.pdf

4. Chapter 5: The New Framework for Wildlife Regulation

Provisional Proposal 5-1: We provisionally propose that there should be a single wildlife statute dealing with species-specific provisions for wildlife conservation, protection, exploitation and control.

We support the proposal to introduce a single wildlife statute dealing with species specific provisions for wildlife conservation, protection, exploitation and control.

Making the law simpler and easier to understand should bring clear benefits particularly in terms of better compliance, enforcement and review.

However, we are concerned that the consolidation exercise contains considerable risk of reducing protection levels through the introduction of a lowest common denominator approach. It is imperative that the greatest of care is taken to ensure that, as a minimum, existing levels of protection are retained and that the implementation of the Habitats and Birds Directives are in no way compromised.

There is some legislation currently omitted from the review that we believe should be consolidated into the unifying statute. Most obviously the Weeds Act 1959, Ragwort Act 2003 and Section 40 to 42 of the NERC Act 2006 all contain provisions relating to the conservation or control of wild species. The Lead Shot Regulations for England and Wales are another obvious omission and a missed opportunity to improve enforcement of existing regulations. The incorporation of these provisions into the single statute would assist with the consolidation aim of this review.

We acknowledge that the scope of this review has been confined to the consideration of statutes that relate to species and has not therefore included statutes that relate to habitat protection and site designation. Whist we acknowledge the reasons for this and have accordingly confined our comments to issues within the scope, habitats and species are intrinsically linked and as such it would be preferable for any new statute to consider them concurrently – as has been done within the Habitats Directive. We therefore hope that this review lays the foundation for future consolidation and improvement of legislation in a manner that ensures an integrated approach to habitats and species management and protection.

In the meantime, we believe that the biodiversity elements of the NERC Act should be consolidated as part of this review. The NERC Act is a composite Act that primarily amends other pieces of legislation, and also contains the Biodiversity Duty and the establishment of Natural England. The NERC Act is likely to become even more eroded next time Natural England is reorganised. If the NERC Act lists were omitted this would be anomalous. All other conservation lists in our jurisdiction would be in the new statute. It damages the claim that this is a comprehensive species management statute if such a significant part of species management considerations are excluded. On the other hand including the NERC habitat lists does not require any significant additional 'habitat' legislation to be consolidated. Including these lists would also allow them to benefit from the general provisions of the consolidated Act relating to reviewing lists and enforcing the legislation.

Including the Section 41 and 42 lists of the NERC Act and Regulation 48 of the Conservation of Habitats and Species Regulations 2010, which covers surveillance of the status of habitats, within this Act would not disturb any additional legislation. All locality focused and site designation conservation legislation such as the Hedgerow Regulations 1997, Town and Country Planning (Trees) Regulations 1999 and sections of the Conservation Regulations 2010 and WCA 1981 relating to Natura 2000 sites and SSSIs would still fall clearly outside the scope of the review.

In undertaking this consolidation exercise it is important to be mindful of legislation that remains unconsolidated and where there are currently gaps in the legislation. We believe that once this review has been progressed, consideration should be given in the near future to consolidating and improving legislation on site protection and ecosystem restoration/connectivity and on wild and domestic animal welfare.

Finally, we seek clarification from the Law Commission regarding whether the sections of current legislation to be consolidated in this proposed statute, but which are not mentioned in the review, will be automatically integrated in the new statute or will be lost in repeal. We would be opposed to the latter as there are important sections of the current legislation, not currently mentioned in the review, which we believe need to be retained. For example "*the power to issue a protection order suspending the shooting of wildfowl and waders in cold weather*". .

Provisional Proposal 5-2: We provisionally propose that our proposed single statute should not include the general welfare offences in the Animal Welfare Act 2006 and the Wild Mammals (Protection) Act 1996.

We agree that the proposed single statue should not include the general welfare offences in the Animal Welfare Act 2006 and the Wild Mammals (Protection) Act 1996 as long as the consolidation process will not lead to animal welfare offences being lost for any animal currently protected. The Wild Mammals (Protection) Act 1996 should remain intact until consolidated into a Wild and Domestic Animal Welfare Act.

Provisional Proposal 5-3: We provisionally propose that the provisions in the Wild Mammals (Protection) Act 1996 be incorporated into the Animal Welfare Act 2006.

We agree that there are potential benefits from the incorporation of the Wild Mammals (Protection) Act 1996 into the Animal Welfare Act 2006. This should not be a simple consolidation exercise. The protection of wild animals should not be confined to mammals, but should extend to the same taxonomic definition of animal as used in the Animal Welfare Act 2006.

Provisional Proposal 5-4: We provisionally propose that the new regulatory regime should contain a series of statutory factors to be taken into account by decision makers taking decisions within that regulatory regime.

We agree that there may be potential benefits from the inclusion of a list of statutory factors to be taken into account by decision makers. However, we are not convinced that a strong case for the benefit of doing this has been made and we cannot, therefore, endorse this

proposal at this stage. The precise wording that is used in the legislation has the potential to undermine existing levels of legal protection enjoyed by species; make little practical difference; or provide much needed clarity regarding the purpose of the legislation and the outcomes that should be sought by decision makers.

If the factors were included without any direction or guiding context, then there must be no risk of mistaking a list of factors to be considered for a list of factors to be balanced.

At present the proposal seems to be that the factors would only extend to the decision makers within the regulatory regime, but we question whether the duty to consider factors should be extended to other relevant public bodies such as the Police, CPS and Local Authorities when they are making decisions that will affect species listed in this Act and the regulatory regime.

Provisional Proposal 5-5: We provisionally propose that the factors listed in paragraph 5.49 above should be formally listed, to be taken into account by public bodies in all decisions within our provisionally proposed wildlife regime.

Wildlife law should be clearly and explicitly about the conservation and protection of wildlife. Other factors may be secondary considerations. Our view is that the factors to be considered should not be simply listed. If they are set out in a simplistic way and there is no strong clarity as to how their application will be approached in relation to the different levels of wildlife protection this may lead to greater confusion regarding the purpose of protective measures than currently exists. It is important that the consolidation of several pieces of legislation created by Parliament for a variety of clear purposes does not result in a slush of measures with no clear reason for their existence or application.

The legislation should establish an approach to applying the factors to be considered that has a firm basis in the relevant international conventions, particularly the Convention on Biological Diversity. In particular, it is very important that how the factors should be addressed in relation to the Birds Directive and Habitats Directive should be explicit. For example, the Birds Directive is clear that economic considerations should not be regarded as an automatic derogation from some of the provisions of the Directive yet para 5.44 of the consultation suggests that economic considerations should be taken into account generally. It is also the case that licences can only be issued under Article 9 of the Birds Directive and 16 of the Habitats Directive for very specific purposes. If licensing decisions were instead made against the proposed set of statutory factors listed in para 5.49 we believe these decisions could well be subject to legal challenge.

We believe that the consolidated Act should reflect the necessity and importance of animal welfare and we are content that the need for economic activity is recognised. However, this must be done in such a way that the outcomes of the decision will not compromise “the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources”. Decisions must contribute to the sustainable conservation status of relevant species and/or habitats and that it should be clear that for European species and habitats this should equate to the Favourable Conservation Status of those features.

In addition we believe that the Biodiversity Duty should be consolidated into the resulting Act and extended to cover other bodies, not just public authorities. This would remove the current anomaly that companies that do not undertake public duties do not have to exercise their functions, having regard to the purpose of conserving biodiversity, while companies that undertake public duties always have to do so. This creates a competition inequality that should be resolved by extending the duty to other organisations. We also support bring the Duty up to the same standard as the Scottish Duty i.e. to 'further' biodiversity conservation c.f. Nature Conservation (Scotland) Act 2004 and to report on the duty c.f. Wildlife and Natural Environment Act 2011.

If the Biodiversity Duty is not consolidated into this statute then we believe this will create confusion and a loss of purpose.

We acknowledge that this clear purpose for the legislation and compliance with the aims of our international commitments could be delivered either through a framework setting out how factors should be considered or could be delivered elsewhere, i.e. separately from the list of factors to be considered. We believe that further consultation should be invited on this point.

Question 5-6: Do consultees think that the list of factors we suggest is appropriate? Do consultees think that there are other factors which we have not included that should be?

Should appropriate wording be proposed and the issues highlighted in our answers to 5-4 and 5-5 resolved, then we would strongly support the inclusion of 'conservation of the species or habitat about which the decision is concerned', 'conservation of biodiversity, and 'animal welfare' on any list of statutory factors to be considered.

Because of the nature of decisions that will be taken in the context of this legislation we see benefit is expanding 'economic implications' to 'economic implications, including implications for ecosystem services'.

There are two additional factors that should be considered by decision makers – Sustainable Development and the antecedents of the applicant.

'Sustainable Development' is a factor in the NERC Act 2006 (in relation to the Natural England remit), in the Localism Act 2011 (in relation to Local Authorities), the National Planning Policy Framework (in relation to the planning system) and in Wales it is likely to be enshrined in a Sustainable Development Act that would apply to all public bodies. Sustainable Development is not simply an amalgamation of the proposed factors. Sustainable Development concerns a wider environmental aspect and is about understanding how the factors inter-play to achieve a beneficial outcome.

When an application for a licence is submitted, some consideration should be given to the person seeking the licence. For instance if a convicted egg collector applies for a photography licence the regulator should be able to consider the past and potential behaviour of the individual and the full range of consequences that may arise from the decision – we would suggest adding 'the antecedents of the applicant'.

Provisional Proposal 5-7: We provisionally propose that wildlife law continue to be organised by reference to individual species or groups of species, so as to allow different provisions to be applied to individual species or groups of species.

We agree with this approach (provided that the current levels of protection demanded by European legislation for certain species and groups of species (e.g. European Protected Species, birds) continue to be observed). We believe that simple presentation of the protection levels afforded to each species by means of a table or tables would be much simpler to understand and apply. We would encourage the Law Commission to consider dissolving higher-level taxonomic restrictions to the application of different measures so that any measure would in theory be available to any species (albeit there may be some practical limitations to this approach), in particular disturbance measures should be available to plants.

The NERC Act Section 41 and 42 listed species should be included in this approach.

For clarity, we would also like confirmation that the formal/legal/statutory definition of the term "wildlife" is explicitly understood to include wild plants and fungi and to know where this confirmation is subsequently to be located/referenced for the avoidance of doubt and to aid interpretation.

Provisional Proposal 5-8: We provisionally propose that the new regime for wildlife uses section 26 of the Wildlife and Countryside Act 1981 as the model for its order-making procedures.

We agree with this proposal.

Provisional Proposal 5-9: We provisionally propose that there should be a requirement to review all listing of species periodically.

We agree with this proposal.

Provisional Proposal 5-10: We provisionally propose that where the Secretary of State decides not to follow advice made by a regulator (such as Natural England) on updating a list there should be a duty on the Secretary of State to explain why the advice is not being followed.

We agree with this proposal, but believe that it should go one step further and impose a duty on the Secretary of State or Welsh Ministers to show that the species is currently at sustainable conservation status or, if not, to set out a plan to achieve the sustainable conservation status of the species affected by the decision. We believe this would assist in the delivery of commitments under the Convention on Biological Diversity and the UNECE Convention on Access to Environmental Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus convention).

Provisional Proposal 5-11: We provisionally propose that five years should be maintained as the maximum period between reviews of the listing of species within the regulatory regime.

We agree that maximum periods should be set, but we are not convinced that five years will be the appropriate maximum period between reviews for all the measures. There is a risk of overload with the scale of the task if undertaken simultaneously, resulting in an unsatisfactory process. In addition the need to apply different types of measures changes over time at different rates. For instance, the species protection currently provided by NERC Act Section 41 and 42 listing and closed seasons would only need to be reviewed every 10 years, whereas which species should be subject to measures to prevent invasive species probably needs to be reviewed at least every second year. We therefore propose that the menu of measures available for species are grouped and reviews of logically related sections of measures are undertaken on a staggered basis. It may also be that emergency powers to apply certain measures to a species will be needed. It will therefore be important to retain the ability to make *ad hoc* revisions. We believe there should be further consultation on review timescales.

Provisional Proposal 5-12: We provisionally propose that the regulatory regime should have a general power allowing close seasons to be placed on any animal, and to allow for the amendment of close seasons by order.

We can see the potential benefits of this approach, but unless there is clarity on the species to which it applies and how factors will be applied we are concerned that close seasons could be amended to the detriment of biodiversity conservation.

The amendment of closed seasons should be based on sound monitoring of population levels, breeding data and bag data. In general the closed season should constitute the "breeding season to end of rearing".

Question 5-13: Do consultees think that the appropriate regulatory technique for the management of listed species is to prohibit certain activity, permit certain exceptions, provide specified defenses and allow for the licensing of prohibited activity?

Yes.

Question 5-14: Do consultees think that it is undesirable to define in statute individual, class or general licences.

We recommend that the circumstances under which individual, class or general licences are used and relied on should be clear. This would be best achieved through a guidance document produced by the Secretary of State or Welsh Ministers that would set out the criteria for determining when a certain approach was appropriate and should clarify how general licences meet the licensing test that there is 'no satisfactory solution'. The production of the guidance document and its use should be clearly underpinned by the wording of the legislation.

We would like to highlight that while some WCL members are accepting of general licences, some members are not convinced that in their current form general licences are a justified or appropriate part of the licensing framework. We believe the priority for the Law Commission should be to draft the legislation to ensure that **all** licences issued under the new statute affecting species protected by European law comply with the derogation requirements of the

Birds and Habitats Directives. If general licences were clearly Directive compliant then some of the concerns may recede. We would welcome further discussion with the Law Commission on this point.

Provisional Proposal 5-15: We provisionally propose that the maximum length of a licence provision permitting the killing of member of a species, including licensing a particular method, should be standardised at two years for all species that require licensing.

There has been extensive discussion on this issue between Link members and this is not an area where we have been able to identify a unified response to this proposal. Link members are agreed that the limit should be a maximum, not a standard, and no one wants the length to be greater than two years. However, there are two main additional and alternative views:-

5. Opposition to this proposal and a strong view that licences for killing should be restricted to a maximum of one year but should have, where appropriate, monitoring provisions that are enforceable over a longer period of time or

- Agreement with the proposal because annual licencing may be unrealistic for resource reasons. However all licences should be conditional on annual reporting to ensure that impacts on populations are reported in time to influence any renewal of a licence.

There is a consensus that the licence must minimise the risk of un-checked damaging impacts on a species population or unnecessary welfare impacts and that both the duration of the licence period and the monitoring conditions it contains, will be of major importance in this regard. However, we do not have an agreed view as to whether the proposal above is satisfactory in that regard.

As such, we would be grateful for further discussion with the Law Commission on this issue.

Provisional Proposal 5-16: We provisionally propose that there should be formal limits of ten years for all other licences provisions.

We believe this should be a maximum not a standard. Ten years would be too long for most disturbance licences (planning permission only lasts 5 years). Link members agree that activities involving disturbance or taking licences should have a maximum of no more than 5 years, indeed a number of Link members believe that a maximum of 2 years would be more appropriate.. The licence for the specified activity should be time limited but where appropriate the licence should include monitoring provisions that are enforceable over a longer period of time.

With regard to the possession of biological material we think that every effort should be made to limit the burden of administration on museums and other legitimate establishments. The example set by Class Licence WML - CL01[1] should be followed for all relevant species.

[1] http://www.naturalengland.org.uk/Images/wml-cl01_tcm6-24173.pdf

Provisional Proposal 5-17: We provisionally propose that there should be a general offence of breaching a licence condition.

We agree with this proposal, provided there is clear guidance to prosecutors to ensure that where a breach of the licence also gives rise to a primary offence, the defendant would face charges on both counts. The practice of end of licence reporting could, for licences over 2 years, result in an inability to prosecute offences. This could be resolved by extending the time limits for allowing prosecutions for these offences.

We also consider that there are cases where the two year period as an extension from the standard 6 months limitation period for offences triable summarily is insufficient. The statutory agencies only monitor the conservation status of SACs and SPAs on a six year cycle and only report on the status of Habitats Directive species every six years. This means that offences can sometimes be detected only years after they have occurred – a poignant example is the Freshwater pearl mussel in Scotland where a population was destroyed by unauthorised channel maintenance but this was not identified until years later[2].

The extension of the two year deadline for certain offences should be considered.

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http://www.thetraveleditor.com/article/5381/Feature_Article_Conservation_Appalling_Damage_to_Scotland_s_Pearl_Mussel_Sites.html

5. Chapter 6: Species Protected Under EU Law

Provisional Proposal 6-1: We provisionally propose that the definition for "wild bird" in Article 1 of the Wild Birds Directive (birds of a species naturally occurring in the wild state in the European territory of EU member states) be adopted in transposing the Directive's requirements.

In principle, Link supports this proposal as it recognises that domestic law would reflect more closely the aspirations of the Wild Birds Directive if the definition of "wild bird" in Article 1 was transposed. However, our support is qualified; we are mindful that a number of species not native to the EU but currently afforded protection under the Wildlife and Countryside Act 1981 (by being 'ordinarily resident') would no longer be considered "wild birds" and would therefore lose their protected status. The consultation paper fails both to outline the implications of this new definition for these species (e.g. ring-necked parakeet, mandarin duck, common pheasant) and to clarify the legal status of these species within the new domestic framework. Though we strongly support a robust approach towards addressing the threats posed by non-native species (see comments on Chapter 8), we believe action – if justified – must be taken strategically and through means and methods which minimise suffering. We believe provision must be made within the new framework to ensure that species falling outwith the definition of "wild bird" are protected from inappropriate action.

Furthermore, the Law Commission must clarify the legal status of vagrant birds originating from outside the EU (e.g. North American passerines blown off course on migration). As such individuals occur through natural means (i.e. without human intervention); we believe they warrant full legal protection.

It is important that the definition of "wild bird" includes any offspring of birds taken illegally from the wild. The definition of "wild animal" should be similarly clarified to ensure that captive bred animals from wild caught parents cannot be kept or traded as if captive bred.

Question 6-2: Do consultees think that the general exclusion of poultry from the definition of "wild bird" should be retained?

Yes, under the condition that the definition within the Wildlife and Countryside Act is adopted i.e. "domestic fowl, geese, ducks, guineafowl, pigeons, quail and turkeys", therefore wild species of these birds should be included under the "wild bird" definition.

Question 6-3: Do consultees think it necessary to deem game birds "wild birds"?

We think it would be appropriate to deem **native** game birds "wild birds". This will not undermine hunting interests – hunting these species is consistent with the Wild Birds Directive – but it will better enable the UK to fulfil its obligations under that Directive. At present, these species are reliant on the antiquated 'Game Acts' for their protection, but these Acts were created in the 18th and 19th centuries for purposes quite separate to conservation.

As stated previously, an anomaly arises when considering common pheasant; this species is not "naturally occurring in the wild state in the European territory" but is released on a large scale for lowland game shooting. We believe the new regime must distinguish between

native game birds and those that are reared and released for sporting purposes (currently common pheasant and red-legged partridge). Given the proposed approach to species organisation in Chapter 5, we do not see that making this distinction would be unduly complicated. We also reject the notion that this would be 'disadvantageous to the shooting industry' and question the basis for this claim.

Question 6-4: Do consultees think that the exclusion of captive bred birds in EU law is best transposed by solely transposing the provisions of the Wild Birds Directive, or by express reference to the exclusion?

We believe that the current situation with regards to captive bred birds is adequate and that there should be no express reference to the exclusion, as this will leave special cases of captive birds less protected especially in the borderline cases where their definition is key. We believe that there are situations where an express reference to the exclusion would be detrimental to the protection of some birds, which should be protected.

We would like to see express reference that birds from legal re-introductions or repopulation schemes are classed as wild birds.

Provisional Proposal 6-5: We provisionally propose using the term "intentionally or recklessly" to transpose the term "deliberately" in the Wild Birds and Habitats Directives.

We support this proposal, despite the fact that the inclusion of the term 'reckless' may create some difficulties for some otherwise lawful operations that could not reasonably avoid occasional reckless killing or injuring (See below).

The term "intentionally or recklessly" is an accurate transposition of the term "deliberately" in the Wild Birds and Habitats Directives, as established in European case law (see 6.7, below), and would be understood within English and Welsh law. It is routine within Scottish wildlife legislation to use the term "intentionally or recklessly" and would be a welcome simplification if this was also the case in England and Wales. Without the "reckless" provision, the law provides too great a scope to argue that, whilst the offence was committed by the accused, the action was not intended or deliberate.

The provision of intention alone as an offence does nothing to discourage or prevent irresponsible and negligent actions, which whilst they may not be intended, can nonetheless have serious consequences for wildlife.

Hence it is vitally important in many areas of wildlife crime for "recklessly" to be included as an offence in relation to all killing, taking, injuring, disturbance and damage or obstruction to places offences in the Act. Currently prosecutions can fail because of the difficulty in providing sufficient evidence to prove intention. One example is the illegal poisoning of birds of prey, which is currently very difficult to prosecute under section 5 of the WCA. The Environmental Audit Committee review of wildlife crime acknowledged this difficulty and the resultant lack of deterrent, therefore the inclusion of recklessness, would assist in helping to tackle this very important issue.

It should be noted that the inclusion of reckless does create some difficulties for some otherwise lawful operations that could not reasonably avoid occasional reckless killing or

injuring – for instance the incidental effects of driving cars, operating wind turbines or managing the habitat of the species. To be workable the law needs to ensure that legitimate and responsible users of the countryside, and those making genuine and reasonable efforts to minimise risk are not punished for accidents and unforeseen consequences of otherwise lawful activities. To this end we suggest that s4(2A) of the WCA as currently active in Scotland is adopted or amended so that reckless offences do not occur when the outcome was a) incidental, b) could not have been foreseen or reasonable precautions were taken, and c) reported by the person promptly. See also response to Proposal 6-11.

However, it is important to note that this defence could not be made available in the case of any offences relating to species listed on the Nature Directives.

Question 6-6: Do consultees think that badgers protected under the Protection of Badgers Act 1992 or those protected currently by section 9(1) of the Wildlife and Countryside Act 1981 (from damage, destruction or the obstruction of access to a shelter or place of protection, or the disturbance of an animal whilst using such a shelter or place of protection) should be protected from intentional and reckless behaviour

Yes, badgers should be protected from intentional and reckless behaviour.

The Badgers Act 1991 [subsequently consolidated into the Protection of Badgers Act 1992] made provision for the protection of badger setts. This included the offence of interfering with a badger sett by doing a number of specified things 'intending to do any of those things or being reckless as to whether his actions will have any of those consequences, he shall be guilty of an offence.'

The legislation was introduced as a Private Members Bill and was extensively debated in Parliament in a process that sought to improve protection for badgers without compromising other lawful activities. During the consideration of the Bill the original proposal for a strict liability offence was accepted as being too widely drawn and there was substantive debate about 'recklessness' including the test enunciated by Lord Diplock in *R v Lawrence* in 1981.

The legislation was introduced, in part, to seek to overcome the difficulties experienced in taking prosecutions - for example, by suspects claiming that they were after foxes - but also evidence of activities such as the bulldozing of occupied setts by builders, farmers and landowners. The previous difficulties were acknowledged, for instance, in the Home Office news release (25 July 1991) welcoming new protection for badgers when, Angela Rumbold MP, then Minister of State, said "The new Badgers Act will enhance the protection afforded to badgers under existing legislation. No longer can badger diggers claim when challenged that they were looking for foxes..."

She also recognised that badgers "... are uniquely at risk from persecution by badger diggers and baiters, which is why they need special laws to protect them."

The experience of prosecutors such as the RSPCA is that proving 'intention' alone is evidentially very difficult and that therefore removing the 'reckless' element of the offence would, in effect, turn the legislative clock back over twenty years and reopen loopholes in the law for those wishing to persecute badgers. The situation has not changed from when this

Act was passed; therefore there is still a need for the current level of protection to be maintained.

Question 6-7: Do consultees think that the term "disturbance" does not need to be defined or qualified within the provisionally proposed legal regime, when transposing the requirements of the Wild Birds and Habitats Directives?

Link members have enjoyed a detailed debate on this issue and we note diverging views. However, our prevailing view is that it would not be practicable, or necessarily helpful, to define disturbance within the proposed legal regime, particularly if that definition were to be based on current UK jurisprudence. Our reasoning is set out below.

Article 12 of the Habitats Directive requires Member States to take requisite measures to establish a system of strict protection for species listed in Annex IV(a) in their natural range, prohibiting "*deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration*".

The European Court (CJEU) has given 'deliberate' a very broad construction, to the effect that it is not a defence that the disturbance of a species was the unintended result of the pursuit of other purposes. For example, the use of noisy explosives in order to construct an underwater gas pipeline was held to amount to the deliberate disturbance of cetaceans in *Commission v Ireland*[3]. The point was directly in issue in *Commission v Spain*[4], in which the Court held that the test was whether 'the author of the act intended … or, at the very least, accepted the possibility' of the capture of otters. The position is therefore that conscious advertence to the risk of the prohibited activity is required, akin to 'recklessness' in English criminal law.

However, the European Court has not yet been asked to examine the definition of 'disturbance'. This was the central issue in *R (Morge) v Hampshire County Council*[5]), however, the Supreme Court's decision not to seek a preliminary ruling from the CJEU has led to a somewhat mixed bag in terms of legal principles for the UK. Firstly (and helpfully), *Morge* established that disturbance can occur at all stages of the life-cycle of a species (the use of the word 'particularly' in Article 12(1)(b) indicating that there can be disturbance outside 'the period of breeding, rearing, hibernation and migration'), and that disturbance can be indirect[6].

However, the judgment is also authority for the proposition that although the effect need not be 'significant' to constitute a 'disturbance', an activity must have a 'sufficient negative impact on the species' as a whole, because in contradistinction to sub-article 12(1)(a), sub-article 12(1)(b) was drafted to refer to 'species' rather than 'specimens'[7]. Put simply, disturbing one bat is not enough – a number of individuals must be negatively affected to constitute disturbance in this context. This point has been criticised as a departure from the

3 Case C-183/05 Opinion of Advocate General Léger at paragraphs 60 to 61 and judgment of the Court at paragraph 36

4 Case C-221/04, paragraphs 70 to 74

5 [2009] EWHC 2940 (Admin), [2010] Env. L.R. 26; [2010] EWCA Civ 608, [2010] P.T.S.R. 1882; [2011] UKSC 2, [2011] 1 W.L.R. 268

6 In *Commission v Greece* (Case C-103/00 at paragraph 34), the CJEU held that 'deliberate disturbance' of the sea turtle *Caretta caretta* was said to arise from noise pollution from the use of mopeds on the beach

7 [2011] UKSC 2 at [19] *per* Lord Brown

preventive principle of EU environmental law[8] and is noted by Link members as unhelpful in practice. In the case of cetaceans, for example, it is virtually impossible to prove disturbance at a population level.

Notwithstanding the above, the Supreme Court recognised that what was needed was 'an assessment of the nature and extent of the negative impact of the activity in question upon the species and, ultimately, a judgment as to whether that is sufficient to constitute a 'disturbance' of the species'[9]. Lord Brown commended passages in EU Guidance suggesting a species by species approach and, within each species, a case by case approach, requiring competent authorities to reflect carefully on the level of disturbance to be considered harmful, taking into account the specific characteristics of the species concerned and the situation. In particular, the Supreme Court envisaged the question to be a matter of fact requiring professional judgment by competent authorities, requiring in-depth knowledge of the characteristics and conservation status of a species. The Supreme Court also listed some 'considerations' to be borne in mind, including:

- The rarity and conservation status of the species in question;
- The impact of the disturbance on the local population of a particular protected species;
- Whether the species is declining, or increasing, in numbers;
- Whether the disturbance is likely to impair the ability of the species to survive, to breed or reproduce, or to rear or nurture their young, or … hibernate or migrate; or affect significantly the local distribution or abundance of the species to which they belong'.

Such questions are integral to the question of disturbance and are, in our view, most effectively addressed through the provision of appropriate guidance. For example, Link members have pointed out that, in the context of species, there are different forms of disturbance. Disturbance to cetaceans from field research (i.e. through photo-identification licenses) where the goal is furthering the conservation of the study animals would not typically cause the same level of disturbance as an industrial activity (where impact is incidental, but often higher, long-term and often due to multiple sources). Furthermore, the cumulative impacts of different types of development in one specific area may lead to unacceptable levels of disturbance. Such cumulative impacts need to be taken into account when attempting to define disturbance or describe illustrative factors. Similarly, WWT advocates that relevant factors should extend beyond the social, ethological, physiological and psychological to include the disturbance of a population social structure, an animal's natural communications or navigation processes, an animal's reproductive potential as well as disturbance of nesting, feeding and resting grounds, etc.

To conclude, Link suggests that while it would not be practicable to define disturbance in the proposed legal regime, there is an argument that the Act should provide for a duty on the statutory nature conservation agencies to provide guidance on the definition of disturbance on a species by species/ case by case basis. Such guidance should include the

[8] (2011) *After Morge, where are we now? The meaning of 'disturbance' in the Habitats Directive*. Paper given by Charles George QC and David Graham (Francis Taylor Building) to a conference on 'The Habitats Directive: A Developer's Obstacle Course'

[9] [2011] UKSC 2 at [19]

considerations set out above and views should be invited as to which other factors may be relevant. However, we would urge the Law Commission not to follow the reasoning in *Morge* that a number of specimens must be negatively affected to constitute disturbance on the basis that this does not accord with the preventive principle of EU environmental law.

It should also be noted that the implementation and enforcement of the Wildlife and Countryside Act 1981 and the issuing of licences for specified purposes has always operated on the basis that causing disturbance to an individual animal without a licence is an offence. We would therefore be concerned that adopting a strictly *Morge* based approach to defining disturbance could reduce the level of protection currently enjoyed by species listed on the 1981 Act. We are also not convinced that the CJEU, if asked to rule on this point, would adopt the view in *Morge* that a number of specimens must be negatively affected. To follow that approach may, therefore, require a change in the law in the future.

Provisional Proposal 6-8: We provisionally propose that the disturbance provisions contained in sections 1(1)(aa), 1(1)(b), 1(5), 9(4) and 9(4A) of the Wildlife and Countryside Act 1981, regulation 41(1)(b) of the Conservation of Habitats and Species Regulations 2010 and section 3(1) of the Protection of Badgers Act 1992 can be brought together and simplified.

If the proposals were to bring the Acts together and so as to afford the highest level of protection currently afforded in these Acts then we would support this. However, as already stated S.9 (4) of the Wildlife and Countryside Act 1981 is weaker than S.3 (1) of the Protection of Badgers Act 1992 and badgers are still in need of additional protection from persecution. The Wildlife and Countryside Act did not offer this and it was the reason the Protection of Badgers Act was introduced. We would therefore not support any simplification that would result in a weakening of the protection currently offered by the Protection of Badgers Act. It would have to be clear that any consolidated wording would need to fully encompass all the offences under the Protection of Badgers Act.

There are currently discrepancies between the Conservation Regulations 2010 and the Wildlife and Countryside Act in relation to the protection extended to the places and structures that are essential for the survival of the species in question. The Wildlife and Countryside Act protects the 'structure or place used for shelter or protection' while the Conservation Regulations protect the 'breeding site or resting place'. We suggest that this should be addressed by the consolidated wording ensuring that obstruction of, damage to and disturbance of any site, structure or place used by the animal for essential activities or life cycle stages is an offence, as is disturbing the animal while in such a feature or causing the animal to be disturbed. A similar offence should also be available for plants.

We believe further consultation should be invited on the details of this proposal.

Question 6-9: Do consultees think that the badger would be adequately protected from disturbance, and its sett protected if covered only by the disturbance provision?

No. In our view the assumptions made by the Commission in paragraph 6.58 are incorrect.

The consultation paper presents an argument that if a sett is occupied and a dog is caused to enter it, an offence would 'surely be made out' under section 9(4)(b) - disturb the badger in its resting place - of the Wildlife and Countryside Act, and that an offence under (4)(a) –

damage to the sett - is also likely. Both may have occurred, but as the offence would then have been committed underground the evidence is likely to be hard to procure.

The offence of 'causing a dog to enter a sett' is well used by RSPCA and police in prosecution cases. In many cases the outcome regarding the badger is not determined. The option of charges such as this is of practical importance. It may be argued in defence that the dog entered and came out but did not damage or destroy the sett. Currently, the offence of 'causing a dog to enter a badger sett' is more straightforward evidentially. The prosecution does not have to prove that damage had occurred or that badgers were disturbed - points which, in practice, may be difficult.

In their guidance as to what constitutes 'disturbance' to a badger occupying a badger sett, Natural England comments that '*disturbance is therefore something less than what might otherwise be considered damage to a sett'.* [10]

It also comments that '*the offence of disturbing a badger whilst it is occupying a sett has given rise to considerable debate over the years. The issue presents problems, not only in determining what might constitute disturbance, but also in proving that any badger had actually been disturbed*.'

This interpretation accords with our view that 'causing a dog to enter a badger sett' is not simply a repeat provision of the offences of 'damaging a badger sett' or 'disturbance' of a badger and that relying solely on the disturbance offence would reduce the offences and pose evidential problems.

Question 6-10: Do consultees think that the protection afforded European Protected Species (except the pool frog and the lesser whirlpool ram's horn snail) under section 9(4)(c) of the Wildlife and Countryside Act 1981 does not amount to "gold-plating" the requirements of the Habitats Directive?

We agree that the protection afforded European Protected Species under this section of the Wildlife and Countryside Act does not amount to "gold plating" of the Habitats Directive as it is included in what the Directive intends by "deterioration of a resting place". By "obstructing access" this causes "deterioration of a resting place" as the species is unable to use the resting place, which is the purpose behind the provision. We believe that "obstructing access" should be included within the new statute, thus making it clear that deterioration of a resting place includes obstructing access.

Provisional Proposal 6-11: We provisionally propose the removal of the defence of action being the "incidental result of a lawful operation and could not reasonably have been avoided" located currently in section 4(2)(c) of the Wildlife and Countryside Act 1981.

We believe that there would be risks associated with removing this defence completely - see our response to Proposal 6-5.

Therefore we suggest adopting an approach similar to that taken in Scotland through the Nature Conservation (Scotland) Act 2004 to tighten up this defence so that it can be less

[10] http://www.naturalengland.org.uk/Images/WMLG16_tcm6-11814.pdf

easily mis-used. The amendments made to the Wildlife and Countryside Act in the Nature Conservation (Scotland) Act 2004 are:

1. Section 4 (exceptions to offences against wild birds etc.) is amended as follows.
2. In subsection (2), in paragraph (c), for the words from "if" to the end substitute "(an unlawful act if he shows that each of the conditions specified in subsection (2A) was satisfied in relation to the carrying out of the unlawful act."
3. After that subsection insert—

"(2A) those conditions are—

(a) that the unlawful act was the incidental result of a lawful operation or other activity;

(b) that the person who carried out the lawful operation or other activity—

(i) took reasonable precautions for the purpose of avoiding carrying out the unlawful act; or

(ii) did not foresee, and could not reasonably have foreseen, that the unlawful act would be an incidental result of the carrying out of the lawful operation or other activity; and

(c)that the person who carried out the unlawful act took, immediately upon the consequence of that act becoming apparent to the person, such steps as were reasonably practicable in the circumstances to minimise the damage or disturbance to the wild bird, nest or, as the case may be, egg in relation to which the unlawful act was carried out."

We also ask for consideration to be given to the amendment of the commonly known dwelling house defence located in section 10(2) of the Act.

The amendment to section 10(2) that we seek would be simply to tighten the conditions when the defence might be utilized so that a person who seeks the advice of a statutory nature conservation organization is obliged to give them time in which to respond. Further if the defence is then to be relied upon the advice that has been obtained should have been implemented.

Note, this will apply only to those species not covered by the Nature Directives.

Provisional Proposal 6-12: We provisionally propose that there should be a general defence of acting in pursuance of an order for the destruction of wildlife for the control of an infection other than rabies, made under either section 21 or entry onto land for that purpose under section 22 of the Animal Health Act 1981

We are not convinced that this issue would be more appropriately dealt with through the creation of a defence rather than licencing. The creation of a defence where a more controlled and monitored licence is currently required appears to be a reduction in protection levels. We would like to see a clearer justification for taking a defence rather than licenced based approach.

In any case, we would like to see express reference that this only refers to infected animals and must include welfare provisions that these actions are carried out humanely and that the defence does not cover welfare related offences. This statement should also include reference to abiding by the sections 21 and 22 of the Animal Health Act 1981.

The risks posed, for example, by bird flu and other animal health diseases are the reason this is allowed up to now. This is a valid reason and should continue. If there is a pandemic where wild animals are dying from disease with potential negative impacts on humans and other wildlife, a defence or licence would both allow further spread of a disease to be controlled through destroying diseased animals.

We find this proposal confusing and we are concerned about the implications for European Protected Species. Para 6.81 suggests that the introduction of this defence would obviate the requirement to obtain a licence regarding the killing of EPS (because an order granted under conditions in s.21 AHA 1981 would fulfill the conditions for granting a licence under the Conservation Regulations 2010). It is also stated that it would fulfill the conditions for granting a licence under the Protection of Badgers Act 1992. We have the following concerns:

In relation to the 2010 Regulations, we can see that the "imperative reasons" and "satisfactory alternatives" tests of reg 53 of the 2010 Regulations may be covered by the AHA 1981. However, it is unclear how the "maintenance of the population at a favourable conservation status" test under reg 53 is met by the AHA 1981. Therefore, we do not see how the full requirements of Article 16 Habitats Directive can be met without either maintaining the requirement for a licence or through modification of the AHA 1981 so as to impose this further consideration when considering an order;

The Law Commission makes no comment as to whether an order under s22 AHA 1981 would fulfil the conditions for granting an EPS / Badgers Act licence (it only comments on s21 AHA 1981). This needs to be considered.

Since Badger Act licences are not driven by European law we have less concern about AHA 1981 orders being issued without the need also for a licence, and would be more content for the proposed defence to apply to badgers.

With regard to wild birds, we agree that the AHA 1981 order process is likely to have the effect of satisfying the "no other satisfactory solution" test under Art 9 Wild Birds Directive and so we would accept the defence as applying to wild birds as it does at present under s4(1)(b) WCA 1981.

Provisional Proposal 6-13: We provisionally propose that Article 7 of Wild Bird Directive be transposed into the law of England and Wales.

This proposal has also led to debate within Link, and we note several views. We would thus welcome more discussion with the Law Commission on this point, and the implications of the proposal.

One view, is that the proposal is to be supported (with caveats). This is based on a concern that the Game Acts do not fulfil Art.7 requirements in relation to native gamebirds (black grouse, red grouse, grey partridge, ptarmigan). These species are subject to the requirements of the Birds Directive and hunting them is consistent with the Directive, but the Game Acts do not ensure wise use and are therefore are not compliant with it. Provided “wise use” is ensured, and a reporting requirement is introduced (as described in response to 6-15), then some members are likely to support the transposition of Art. 7.

An alternative view is that the provisions of the Directive are already sufficiently transposed into domestic legislation. Directly transposing Article 7 risks reducing the level of protection given to species in the longer term as it allows hunting purely for sport. This is not a reason present in domestic legislation, where there must be other reasons for hunting (pest control, protection of property, food etc.).

Provisional Proposal 6-14: We provisionally propose that the transposition be accompanied by the establishment of species specific close seasons.

As above, there is not an agreed view within Link as to whether Article 7 should be transposed. However, there is support for the establishment of species-specific close seasons. However, the term "close season" must be carefully defined within the law to cover the breeding season through to the end of rearing. Without this there is a risk that close seasons by order may be inadequate to protect the species of concern. See response to 5-12.

Provisional Proposal 6-15: We provisionally propose that the transposition be accompanied by codes of practice explaining "wise use".

Despite our response to Proposal 6-13, Link welcomes the Law Commission's intention to create tools within the statute to ensure that "wise use" occurs, and acknowledges that codes of practice may be beneficial in this instance. However, we require more detail on the proposed scope and content of these codes of practice, noting that the European Commission has issued guidance on the principle of wise use.[11] This guidance notes that the principle of wise use includes consideration of population impact, habitat use, game management, conservation status of huntable species, and education, training and awareness. We would expect codes of practice on wise use in England and Wales to reflect these concepts as a minimum.

However, we do not believe that codes of practice alone will be sufficient to underpin a rigorous system of quarry management. Assessment of hunting bags is critical to achieving wise use, and is recommended by the European Commission. As a result we believe that a legal requirement to report on numbers killed is essential (see response to Proposal 6-19). There is a view within Link that this should form part of a system for regulation of game shooting.

Provisional Proposal 6-16: We provisionally propose that breach of the codes of practice would mean that the defendant would have to show how they had complied with "wise use", otherwise the underlying offence of taking or killing a wild bird would have been committed.

We support Proposal 6-16 in principle. However, we question how it would operate in the absence of a reporting requirement, particularly if the breach relates to population impact or conservation status of the huntable species in question.

As described above, we require further information on the proposed scope and content of the codes of practice, and believe that "wise use" can only be achieved fully if there is a

[11] European Commission (2008) *Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds "The Birds Directive"*

requirement to report on all members of a species killed or taken (see response to 6.19). Without a sound system of quarry management and reporting, it would be very difficult for a defendant to demonstrate how they did or did not comply with the principle of wise use, and almost impossible to enforce these codes of practice. Therefore, although we agree with the option of proposal 6-16 to reverse the burden of proof if the codes of practice are breached, this is unlikely to be realised as the proposals stand.

We would like to see the full range of civil and criminal sanctions be applied to this offence, dependent on the scale of the offence committed. However, we do believe that the civil sanction of stop notices is extremely relevant here. If enforced, these are potentially the most dissuasive - removing the right to hunt from the individual guilty of an offence against taking or killing a wild bird (see further discussion in chapter 9).

Provisional Proposal 6-17: We provisionally propose that such codes of practice be issued by either the Secretary of State or Welsh Ministers

Considering responses to proposals 6-15 and 6-16 we agree. The duty to monitor the activity and record “wise use” should also rest with the Secretary of State or Welsh Ministers.

Provisional Proposal 6-18: We provisionally propose that the term “judicious use of certain birds in small numbers” be one of the licensing purposes.

It is not clear how this would be applied to licensing procedures. We are not sure whether it refers to a species specific individual licence which would then determine what the “small number” limit would be - and then require a reporting and monitoring regime or a general licence allowing a list of birds to be shot with no reporting requirement. The latter would not be acceptable as without a reporting requirement there is no chance of enforcing the number shot and this could potentially result in many more birds being killed.

We would advocate the more restrictive approach in current domestic legislation. Opening up the legislation to encompass “judicious use” without there being an exhaustive definition, allows for too much flexibility especially if considering the principles previously mentioned in chapter 3 on an equal plane. There is no definition of judicious use, or of certain birds or small numbers. There are certain birds where killing a small number would cause serious problems to local populations and without the law to restrict this, the decision-makers would have no restriction to prohibit or sanction an action which can be defended by such a term. It is not gold plating per se as it is simply defining judicious use as the UK sees it.

We would not support inclusion of a new licensing ground of "judicious use" without this term being carefully and exhaustively defined in the proposed legislation. Any other approach would risk abuse of the term and unlawful licensing. The Law Commission needs to state its proposed definition of the term, and clarify the types of activity this would and would not permit. We note that the European Commission’s guidance on sustainable hunting discusses this term. We note also that the addition of "judicious use” was considered, and subsequently dismissed, during the development of the Wildlife and Natural Environment Bill in Scotland. The proposed amendment was to insert into Section 16 of the Wildlife and Countryside Act: 'for the purpose of the other judicious use of such birds as the Scottish Ministers may, by order, specify'. The Minister rejected the amendment, saying:

'*I put on the table what I suspect is really behind the amendments. The intended effect of amendment 103 would be to allow a derogation from the Birds Directive to control some wild predator species for the purpose of maintaining a shootable surplus of other wild birds. The purpose of such a derogation would be to prevent damage to property, but there is already a derogation for that purpose. It is clear from the Directive and supporting guidance from the European Commission that it does not cover shooting rights. Our initial analysis is therefore that to grant such a derogation would raise a high risk of legal challenge*.'

We argue strongly against the inclusion of this provision.

Question 6-19: Do consultees think that it is not necessary to require the reporting of all members of a species taken or killed as a matter of law for our provisionally proposed regime?

We do not agree, for a number of reasons. A reporting requirement is crucial, for species killed both under the derogation mechanism and through hunting. In terms of the former, we do not see how the Government can meet its obligation under Article 9.3 of the Birds Directive without a reporting requirement (and we do not agree that the absence of legal action by the European Commission on this front thus far, is a wise or justifiable reason not to do so!).

We reject the assertions made within the consultation paper that transposition of Article 7 'reduces the risk of returns being required for huntable species'. Collecting statistics on the number of individuals harvested for each quarry species is fundamentally important to any system purporting to ensure wise use. This is recommended by the European Commission in its guidance for sustainable hunting, which states:

'…*there is a need for sound, scientifically based monitoring mechanisms to ensure that any use is maintained at levels which can be sustained by the wild populations without adversely affecting the species' role in the ecosystem or the ecosystem itself. This should include information on bag statistics*…' (Paragraph 2.4.16)

We think it is necessary to require reporting of all hunting of quarry species as a matter of law in order to ensure wise use. We would be looking for a requirement to report game taken (game bags) annually at the very least. This is necessary to generate an evidence base sufficient to enable Government to meet its obligations under Articles 7.1 and 7.4 of the Birds Directive. This should not constitute an additional burden on shooting businesses, which traditionally record such information for their own uses. It is the norm in many other countries – we are almost unique in Europe and North America in having no form of, or potential for, the mandatory reporting of game bags. How the proposed lack of disclosure/recording will help to regulate hunting is not clear. Target bag sizes would need to be set annually in order for any viable adaptive harvest management system to work.

Sustainable development is a core responsibility of the Welsh Government (One Wales, One Planet); the UK government is also mainstreaming sustainability to a core strategic approach and reporting of game taken must be required in order to monitor and ensure that hunting is sustainable.

Also as stated in the consultation paper, the Habitats Directive requires reporting on all activity conducted under derogations. Therefore, the suggestion that it is not necessary to transpose this into national legislation does not represent/pose a reasonable argument.

6. Chapter 7: Regulation of Species Protected Solely by Domestic Legislation

Question 7-1: In which of the following ways, (1), (2) or (3), do consultees think that domestically protected species not protected from taking, killing or injuring as a matter of EU law should be protected?

(1) All domestically protected species not protected as a matter of EU law should be protected from being intentionally and recklessly taken, killed or injured.

(2) Badgers and seals should be protected from being intentionally and recklessly killed, taken and injured; all other domestically protected species not protected as a matter of EU law should be protected from being intentionally taken, killed or injured. It would be possible subsequently to move species between the two groups by order.

(3) All domestically protected species not protected as a matter of EU law should be protected from being intentionally taken, killed or injured.

We understand "protected from being intentionally and recklessly taken, killed or injured " to mean "protected from being intentionally taken, killed or injured and protected from being recklessly taken, killed or injured". We prefer option 1, since this will give more protection to wildlife and would facilitate enforcement. We discard option 2 because we do not believe there is justification for granting different protection to different wild animals and plants, which all need to be protected from intentional taking/killing/injuring, but also from reckless behaviour that leads to their capture, injury or death, even if that behaviour was not intentional.

We believe that domestically protected species should be protected from intentional or reckless harming behaviour, because these species have been protected domestically for reasons which still exist. The same degree of protection for certain wild animal and plant species within England and Wales is still needed. Just because a species is not protected under EU law does not mean it should have a lower level of protection. An intentional offence is very difficult to prosecute and species need protecting against offenders who can argue against an intentional offence through recklessness (whether or not this is true). In addition, species need protection from negligence and thoughtless behaviour as much as they do against intentional harm.

See also our responses to Proposals 6-5 and 6-11.

Question 7-2: Do consultees think that the offences of selling certain wild animals, plants and fish, should include the offences of offering for sale, exposing for sale, and advertising to the public?

We do. Such behaviours already show the intent to commit the offence, and whether the sale actually occurs depends not only on the accused (the seller) but also on the buyer. For example, despite the fact that selling introduced non-native North American Ruddy Ducks without a licence is illegal (under section 6(1) of the Wildlife and Countryside Act), birds were still being offered for sale by a Northamptonshire bird dealer in June 2011. It is therefore necessary to close this loophole and make offering for sale, exposing for sale and advertising to the public an offence.

Provisional Proposal 7-3: We provisionally propose that there should be a power to amend the species covered by the crime of poaching.

We support this, as long as the species already protected remain protected. The value of different species for landowners or poachers may vary in time (due to their rarity, new commercial exploitations, etc.), so the provisions should be able to adapt to these variations

Question 7-4: Do consultees think that the offence of poaching concerns matters beyond simply the control of species?

We do. For example, landowners may simply like to use their land as a "sanctuary" for particular species hunted in their area, purely on animal welfare grounds; they can also consider the advantage of having wildlife on their land for tourism related reasons, if nature walks or similar events are a feature they offer to holiday makers. We are aware that poaching can lead to threats, violence and intimidation of landowners and therefore it has serious public order ramifications beyond the control of the species.

Question 7-5: Do consultees think that the offence of poaching should require proof of acting without the landowner's consent in relation to the animal rather than proof of trespass?

We do. Whether a poacher has trespassed or not is immaterial if he/she managed to kill an animal without permission that belongs to a landowner. Therefore, the key element is the "landowner consent".

Provisional Proposal 7-6: We provisionally propose that a reformed offence of "poaching" should be defined by reference to whether the person was searching for or in pursuit of specified species of animals present on another's land, with the intention of taking, killing or injuring them, without the landowner or occupier's consent, or lawful excuse, to do so.

We agree. We believe that the emphasis on the "intention" and the fact that searching for the animal already may constitute an offence, makes this definition complete.

Provisional Proposal 7-7: We provisionally propose that it should remain an offence to attempt the offences in the new provisionally proposed regime.

We agree. We believe that the attempt of the offence already shows the intent to break the law, and therefore it should be punished.

Provisional Proposal 7-8: We provisionally propose to consolidate the common exceptions to prohibited acts set out in existing wildlife legislation.

We agree that the common exemption of "tending the animals" or "mercy killing" should be consolidated, but the exemption of "incidental result of a lawful operation" could only be consolidated as an exception if qualified with "unless the behaviour that caused the incident was reckless" and if the issues raised in our responses to Proposals 6-5 and 6-11 are also consolidated. This would match the current provisions of the Animal Welfare Act 2006 for similar situations.

Note, this exemption applies only to those species not covered by the Habitats and Birds Directives.

Question 7-9: Do consultees think that purely domestic licensing conditions should be rationalised using the conditions contained in the Bern Convention?

No. We consider that the current domestic licensing conditions reflect more accurately the circumstances involving wildlife issues in the UK, and the will of Parliament (which has not considered some of the exemptions used in the Bern Convention on the grounds that they would risk conservation and animal welfare) should be respected. We believe that exemptions based on terms such as "judicious exploitation" or "education" would open the door to new legal loopholes, or re-open others that have been already closed in the Courts.

Provisional Proposal 7-10: We provisionally propose that both individuals and classes of persons be able to benefit from a badger licence.

We disagree with this proposal. We do not believe that Badger licences should be given to classes of persons. Badgers are a special case due to the level of persecution that they have been and remain exposed to and their secretive habits. The use of class licences may be particularly open to abuse. Parliament passed the Protection of Badgers Act because of issues such as illegal badger baiting and the systematic killing of badgers. Giving "class" licences to groups of people who could perceive they would benefit from persecuting badgers would lead to the opposite effect intended by Parliament, and those that still wish to kill badgers could easily arrange to be included in whatever class may be licensed. The carefully crafted protection of this species should not be downgraded for the sake of consistency of approach.

Provisional Proposal 7-11: We provisionally propose that the current burden of proof on a person accused of being in possession of wild birds or birds' egg should be retained.

As the recent RSPB bird crime report 2011 indicates, bird crime is still a big problem; recently an offender was prosecuted in October 2012 of taking over 650 eggs. The hen harrier currently teeters on the brink of extinction driven there through wildlife crime and habitat loss, this review is a chance to tackle this problem and make legislation stronger, not weaken it, which is what would result if the burden of proof were not retained.

In 2011 the RSPB In 2011 received the following reports:

- 202 reports of shooting and destruction of birds of prey
- 100 reports of poisoning and the use of poisoned baits
- 30 egg collecting incidents. There were three confirmed and six probable nest robberies of eggs and chicks of Schedule 1 species
- 26 reports of illegal taking, possession or sale of birds of prey
- 69 reports of illegal taking, possession or sale of wild birds other than birds of prey, predominantly finches.

Therefore, we strongly support this proposal. The alternative would be unacceptable and would significantly compromise the protection of wild birds in England and Wales. 'Strict

liability' offences form an extremely important part of the armoury available to fight against bird crime. Detecting offences of illegally killing and taking birds and eggs is usually extremely difficult. Offences often take place in remote and private places by individuals taking care to ensure their actions are not seen. Consequently, there have been relatively few convictions for offences of individuals being 'caught in the act' for these types of offences under the WCA.

Consequently, possession offences are an extremely important component of the WCA and provide a deterrent to many offences relating to the killing and taking of protected specimens. We are not aware of the courts expressing a view that there is any unfairness at the nature of strict liability provisions under the WCA.

We have no doubt that strict liability offences, particularly in relation to the possession of protected wildlife, are logical, sensible and fair. The prosecution is required to prove beyond reasonable doubt that an individual is in possession of a specimen and that it is one that is covered by the legislation and is thereby guilty of the relevant offence. However a range of statutory defences are then available under the WCA and a defendant is entitled if he or she wishes to show, only on a balance of probabilities, that one of these defences apply. An example would be showing that, probably (more likely than not), a bird or egg was killed or taken lawfully. Examples of the standards of evidence that have met this requirement are the production of genuine documentary evidence that cross referenced with serial numbers ('set marks') inscribed on a collection of wild birds.

Question 7-12: Do consultees think that, as under the present law, a person charged with digging for badgers should have to prove, on the balance of probabilities, that he or she was not digging for badgers?

Yes, we do. It would be very difficult to successfully prosecute an illegal badger digger if the current burden of proof is reversed. The alternative would then be for the prosecution to prove on the higher burden of proof of "beyond reasonable doubt" that he/she was digging for badgers.

7. Chapter 8: Invasive Non-native Species

We would be grateful for evidence from consultees and their views on this area and the quantification of the costs and benefits anticipated.

Invasive Non-Native Species (INNS) are one of three major negative effects on biodiversity. Therefore, tackling INNS will contribute to reaching the UKs Biodiversity 2020 targets.

INNS can negatively impact the ability of plants and animals to carry out functions necessary for their survival (e.g. feed, predate, fight disease and so on). They also contribute to increased erosion, increased flood risk and the need to physically remove plants so that water can be extracted for domestic supply. When areas become monocultures of INNS, their recreational value decreases and thus associated recreational activities such as fishing are severely hindered. These impacts result in a decreased income from visitors, which are an important income for many Link members.

Many Link members currently spend thousands of pounds a year and many hours of staff time managing Invasive Non Native Invasive Species (INNS)[12]. Much of this would be saved if there was tighter regulation of these species. In addition, there is money spent on tackling INNS through agri-environment schemes that could be used for other activities if the scale of the INNS problem was less. However, the benefits of tackling INNS undoubtedly outweigh the costs involved.

General comments

Whilst we welcome the proposals, it is not entirely clear why this review proposes to adopt only some of the Wildlife and Natural Environment (WANE) Act (Scotland) 2011 invasive non-native species regulations and not all of them. We believe that in order to be completely complementary, the treatment of prohibited or safe species should be aligned. This would also be desirable in light of the probability that the upcoming EU Directive on Invasive species may adopt a black, white or grey listing approach and our current legislation only allows for, in effect, a black listing approach through an order to ban from sale.

We are therefore keen that this review advocates a complementary ability to produce a "white list" of species that are deemed safe.

This chapter seems to pay too much attention to one end of the pipe that is dealing with an existing or emerging problem - i.e. the killing or destroying of animals and plants - rather than other end of the pipe which includes the trade in and keeping of various species, and preventing invasive species establishing themselves in the first place. There is a need for this proposed legislation to enable more action to be taken on the first element of the CBD principles i.e. **prevention**. For example we believe that a provision to allow a ban at point of import would provide a greater defence against INNS establishing themselves in the UK.

[12] It has been estimated that INNS cost the UK economy £1.7 billion annually (Williams et al, 2010. The Economic Cost of Invasive Non-native Species to the British Economy. Downloaded from http://www.cabi.org/uploads/projectsdb/documents/6534/Economic%20Costs%20of%20INNS%20to%20the%20British%20Economy%20-%20Final%20Report%20v3.pdf)

The WANE Act (Scotland) 2011 included a provision relating to the prohibition on possessing specified invasive animals and plants[13]. We would like to see this provision included in the Law Commission's recommendations, with individual licences applied where necessary.

The consultation paper makes brief mention of the current ability to ban certain species from sale by order. In paragraph 8.21 it states "Section 14ZA (of the WCA) allows for the restriction, by order, of the sale of invasive non-native species and section 14ZB allows for the issuing of codes of practice. One code has been issued since the provision was introduced in 2006" whereas in paragraph 8.113 under "Selling invasive non-native species" it states "At present, the law in England and Wales only prohibits the release or escape of invasive non-native species". It is not currently clear whether it is the intention to carry through the current ability to ban from sale by order into the new proposed framework. We therefore want to see this statement clarified with reference to the restriction by order. We would also like to see specific copy out of the current Wildlife and Countryside Act legislation section 14ZA and 14A to allow for an order to ban sale. As the EC and the Convention on Biodiversity regards prevention as a top priority, then it is remiss to leave this out from the new legislation and would in effect constitute a change in the law and a reduction in protection. A ban on sale and/or keeping would most effectively remove the most harmful invasive non-native species from potentially finding their way into the wild.

We would also like to see the Introduction of statutory backing, such as Species Control Orders, for specific bodies to enable them to take reasonable action to control, contain or eradicate invasive species outside of their native range, including on privately owned land where landowners are not taking adequate action to prevent their spread.

Question 8-1: Do consultees think that that there is a sufficient case for the reform of the regulatory and enforcement tools available for the delivery of Government policy.

Yes. Invasive non-native species are one of the three top causes of biodiversity loss globally together with habitat loss and climate change. Any strengthening of the regulation and enforcement tools available would help combat the spread of INNS in England and Wales and would lead to an improvement in reaching our biodiversity targets and makes economic sense. Strengthening of the regulation and enforcement tools would also help achieve likely obligations from the proposed EU invasive non-native species Directive which would need transposing into UK law. It also makes sense to harmonise regulation across (at least) the land-linked countries that make up the UK, since invasive non-native species do not respect country boundaries.

Provisional Proposal 8-2: We provisionally propose that there should be a mechanism allowing for the emergency listing of invasive non-native species.

We agree with this proposal. Emergency listing will allow us to better and more cost effectively tackle outbreaks of INNS when they are first discovered, and therefore quickly establish responsibilities and appropriate responses to deal with them. The cost of eradicating INNS increases exponentially with time[14]. Therefore the ability to put in place

[13] http://www.legislation.gov.uk/asp/2011/6/section/14/enacted

[14] The Economic Cost of Invasive Non-Native Species on Great Britain (2010) Williams, F. *et al*. CABI Downloaded 25/10/2012 http://www.invasivespeciesscotland.org.uk/filelibrary/the_economic_cost_of_invasive_non-native_species_to_great_britain_-_final_report[1].pdf

measures to eradicate them as soon as possible via official emergency listing, substantially reduces costs and resources required to eradicate INNS. We also recommend that this ability for emergency listing also covers the ability to emergency ban from sale, for the same reasons as the Law Commission propose the emergency listing to tackle a problem in its early stages is much more economically efficient.

Question 8-3: Do consultees think that such emergency listing should be limited to one year?

No. It should be possible for this period to be longer with reassessment after a year. It is not suitable to place a time limit on emergency listing due to the unknown details of each invasive non-native species, and what might be required to eradicate it. There needs to be some flexibility associated with emergency listing in order to adequately deal with the size of the problem, how viral the species is and putting in place measures to prevent re-contamination. With an appropriate assessment, if the problem has been dealt with the emergency listing can be removed. If there is still a problem, this allows for continued work to occur. This is especially the case as it may take longer than a year to be placed on schedule 9.

For example, the killer shrimp *Dikerogammarus villosus* was first discovered in 2010. Programmes to control the population of killer shrimp are still on-going and a new population was discovered in March 2012 even after continuous work to control the spread. The ability to tackle these invasive non-native species quickly is paramount to our success in controlling and eradicating them. As can be seen from this example, emergency listing of just a year would not be adequate in some critical situations.

Provisional Proposal 8-4: We provisionally propose that the Secretary of State and Welsh Ministers should be able to issue an order requiring specified individuals (whether by type of person or individual identity) to notify the competent authority of the presence of specified invasive non-native species.

We agree with this proposal. In some instances it will be critical for land-owners to come forward with information about the presence of species, in order to effectively tackle all sources of the species.

Provisional Proposal 8-5: We provisionally propose that there should be a defence of "reasonable excuse" for failing to comply with the requirement.

It depends on what "reasonable excuse" refers to. Guidance would be required as to what would be appropriate for "reasonable excuse" and there would need to be consultation on this guidance.

Provisional Proposal 8-6: We provisionally propose that the full range of licences can be issued for activity prohibited in our scheme for invasive non-native species

We believe that there is a case where individual licences would be applicable (in specific cases and only with corresponding guidance on good practice and under conditions that this code of practice is adhered to (see BIAZA voluntary code of practice)). Licences would need to include certain conditions, especially around steps taken to prevent escape/release into the wild and adequate monitoring and we believe that risk assessments are necessary before licences are issued.

We feel this would be useful in the following instances: transport/exchange of INNS for scientific/research/education purposes; to further the understanding of a species; to increase awareness; and develop effective methods of prevention/eradication. However, we believe that licences should not be permitted for public entertainment, gardening, keeping of pets, etc.

However, we would not agree that general or class licences would be suitable unless the licence could specify the conditions and codes of practice as mentioned for the individual licence. The consultation paper states that it "may be desirable in certain circumstances to issue general licences". We would need to be shown real examples of these circumstances, in order to be convinced that general licences would be appropriate.

We believe that risk assessments are necessary before licences are issued.

We would welcome further consultation on this proposal.

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.

We agree. This again helps make the control of INNS more effective and we would like to see more animal welfare provisions included.

8. Chapter 9: Civil sanctions

Chapter 9 discusses whether the full range of civil sanctions under the Regulatory Enforcement and Sanctions (RES) Act 2008 should be available for the wildlife offences contained in the reforms set out in chapters 5 to 8 of the Consultation Paper.

Before commenting on the specific proposals set out in the Consultation Paper, we wish to make a number of general comments about the principles underlying effective enforcement mechanisms for wildlife law:

- There must be an **appropriate balance** between the use of criminal and civil sanctions. The extension of civil sanctions to wildlife offences set out in chapters 5 to 9 of the Consultation Paper must not undermine the application of criminal sanctions when they are a more effective and proportionate response to the offence being committed. In short – civil sanctions must act as an addition to the range of tools available to the regulatory bodies, not simply as a way of de-criminalising illegal activity;

- **Transparency and clarity** are central to the application of civil sanctions. For there to be public confidence in the system, individuals and NGOs should be able to understand the basis upon which decisions about their use are made. Subject to the application of the Environment Information Regulations 2004, civil society should enjoy full access to information upon which decisions are made and there should be appropriate opportunities for public engagement in accordance with the UNECE Aarhus Convention.

Provisional Proposal 9-1: We provisionally propose that part 3 of the Regulatory Enforcement and Sanctions Act 2008 should be used as the model for a new regime of civil sanctions for wildlife law.

Provisional Proposal 9-2: We provisionally propose that the full range of civil sanctions (so far as is practicable) should be available for the wildlife offences contained in the reforms set out in Chapters 5 to 8 of this Consultation Paper.

Criminal Sanctions – general remarks

We would highlight that the criminal penalties indicated in the Consultation Paper extend beyond those indicated in the discussion of the "current regime"[15]. For example, there are powers to: (i) confiscate equipment used in committing the offence(s); (ii) confiscate a dog used in badger offences; and (iii) disqualify an owner from keeping dogs. However, a criminal sanction does not necessarily trigger an immediate recourse to court. It could entail advice, an informal warning, or an adult caution - thus within the "criminal sanctions" regime there are a range of tools that can be pursued. If the case does go to court then the Magistrates have a number of options available to them as to the nature of the penalty imposed will depend on the circumstances of each case. Thus, there is more variety within the criminal sanctions route than the Consultation Document implies.

[15] See Para 9.85 and seq

The criminal sanctions route also enables immediate action to be taken in relation to, for example, finches that are found trapped. They can be seized and removed from the person, promptly ensuring their welfare. This would not be possible under the civil sanctions route.

There is a potential risk of creating an "uneven playing field" with regard to the treatment of offences. For example, if an individual is reported to the Police or the RSPCA for illegally taking wild birds then the criminal sanctions route is likely to be applied (note that the RSPCA cannot use civil sanctions). If that same offence was reported to Natural England and they applied the civil sanctions regime, that same offence could have a very different outcome.

Finally, in criminal cases, there is the potential to recover at least some of the costs incurred in undertaking a prosecution. This will not apply with civil sanctions. Our understanding is that some regulatory bodies are reluctant to apply FMPs because of the high costs involved – which cannot be recouped in the process.

Notwithstanding the above, we agree that Part 3 of the RES Act 2008 provides a suitable model for a new regime of civil sanctions for wildlife law and we support the availability of the full range of civil sanctions (so far as is practicable) for the wildlife offences contained in the reforms set out in chapters 5 to 8 of the consultation paper.

We recognise that civil sanctions have a number of potential advantages, in that: (i) they are relatively quick to apply and can therefore stop illegal activity promptly; (ii) they can remove financial gain on the part of the offender; (iii) they embed the "polluter pays" principle; (iv) they can bring about the restoration and improvement of damaged environments; and (v) they may be a more proportionate response to the offence being committed (i.e. they do not criminalise unnecessarily). However, we have a number of comments we would wish the Law Commission to take into account in recommending the extension of civil sanctions to the offences set out in chapters 5 to 8 of the Consultation Paper.

(i) Clarity and transparency as to the use of civil sanctions

We believe that the effectiveness of civil sanctions depends on the full range of mechanisms available to the regulators actually being used. We are concerned to note, for example, that of the options available to the Environment Agency[16] only two appear to be in general use. Since 2008, the Agency has negotiated 109 Enforcement Undertakings (of which 59 have been formally accepted) and only 6 Fixed Monetary Penalties for abstraction offences[17]. As far as we are aware, none of the other mechanisms have been used at all. There may be plausible reasons for this. For example, there is specific provision for compensation in relation to Stop Notices (for loss suffered as a result of service of the notice) which may mean that the Agency is reluctant to use it unless in extreme circumstances. However, aside from that, there appears to be an almost total reliance on one particular mechanism as opposed to the full range of options available. Accordingly, we would wish to see improved clarity on the part of the regulators as to why particular mechanisms have been pursued. Ideally, civil society should be invited to comment on the appropriateness of the proposed sanction before they are pursued.

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15 Including Fixed Monetary Penalties, Stop Notices, Enforcement Undertakings, Variable Monetary Penalties, Compliance Notices and Restoration Notices

17 Figures given by the EA at a conference held by UCL on The New System of Environmental Enforcement and Sanctions: From Principle into Practice, 8th November 2012

(ii) Clarity as to the roles and responsibilities of regulators and partner organisations

A recent report on Wildlife Crime by the Environmental Audit Committee[18] highlighted a difference in approach regarding the use of civil powers by Natural England compared to other agencies such as the Environment Agency. The Committee recommended the Government research the impact of how Natural England is exercising its current civil powers and consider the different approaches to enforcement adopted by Natural England and the Environment Agency in its on-going review of those two agencies. We therefore submit that there is a need to clarify the roles and responsibilities of the regulators and the organisations with whom they work to ensure effective and consistent levels of environmental protection.

Currently, the main body responsible for enforcing wildlife laws related to protected species is the Police. Natural England is responsible for taking enforcement action where a licence or permit that has been issued by Natural England has been breached. A breach may be identified through Natural England's programme of targeted compliance visits and telephone calls or through a report from a third party. So Natural England's current use of their enforcement powers is limited. We therefore believe that clarity as to the existing use of such powers is a necessary prerequisite before extending the offences to which those powers might be applied.

We note that there has been an attempt to provide some clarity over roles and responsibilities through a Memorandum of Understanding (MoU) between Natural England, Countryside Council for Wales, Association of Chief Police Officers and the Crown Prosecution Service[19]. The MoU States, for example: "*The Police are responsible for the prevention and investigation of species offences. Natural England and the Countryside Council for Wales have a duty to assist and advise the Police investigating such offences*" and "*In cases where a licence has been issued to permit certain activity under UK wildlife legislation and licence conditions have been breached, Natural England and the Countryside Council for Wales will investigate and take enforcement action, although the assistance of the police may be required*."

We urge the government and regulators to ensure that the division of responsibilities is as clear as possible in any revised MoU or subsequent guidance (see later).

Finally, we have one or two further concerns about extending Natural England's powers in this way. Firstly, we are concerned that NE does not have the resources to apply, monitor and enforce civil sanctions outside the fairly limited areas they currently apply them. Secondly, we are also somewhat concerned about NE's use of language in this context. For example, in the same report, the Environmental Audit Committee[20] considered Natural England's choice of language unusual in describing as "customers" those who perpetrate environmental crime.

(iii) The balance between criminal and civil sanctions

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18 See sections on civil enforcement (paras 79-82) at http://www.publications.parliament.uk/pa/cm201213/cmselect/cmenvaud/140/140.pdf

19 See http://www.naturalengland.org.uk/Images/nemou2008_tcm6-9402.pdf

20 See sections on civil enforcement (paras 79-82) at http://www.publications.parliament.uk/pa/cm201213/cmselect/cmenvaud/140/140.pdf

As stated previously, we would be concerned if civil sanctions for wildlife offences were used as a substitute for criminal sanctions where those represent a more effective and proportionate response to the offence being committed. In this respect it is important to reinforce that while Member States may rely on both criminal and civil measures, they are ultimately obliged to achieve ***effective*** protection of the environment (see Article 5 of Environmental Crime Directive[21], which states that "*Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 and 4 are punishable by effective, proportionate and dissuasive criminal penalties*" (own emphasis added). Thus, Member States cannot allow the application of civil sanctions to undermine the overall system of environmental protection.

We submit one case-study by way of example. The Department for Business Innovation and Skills (DBIS) describes fixed monetary penalty notices as "*fines for relatively low amounts that are intended to be used in respect of low level, minor instances of regulatory non-compliance*". However, there is an argument that on this basis FMPs are not suitable for offences against animal welfare or various wildlife offences.

(iv) The appropriate burden of proof

We would reinforce the need to apply the burden of proof in criminal cases (beyond reasonable doubt) to civil sanctions in relation to wildlife law. We note that proposals being introduced by the Scottish Executive and SEPA will apply the civil burden of proof (on the balance of probabilities) on the basis that this protects the right of the accused. However, at least in relation to fixed monetary penalties and discretionary requirements, the Regulatory Enforcement and Sanctions Act 2008 requires the regulator to be satisfied beyond reasonable doubt that the person has committed the relevant offence[22].

(v) The appropriate forum in which appeals are heard

We would recommend that the appropriate forum for such appeals to be heard is the First Tier (Environment) Tribunal and not, as may be contemplated, the Planning Inspectorate with the ultimate decision-maker being the Secretary of State. This is necessary in order to ensure compliance with Article 6(1) of the European Convention on Human Rights (ECHR), which requires that: "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*". See also the case of *Öztűrk v Germany*[23], in which the prosecution and punishment of minor offences on administrative authorities is not inconsistent with Article 6 of the ECHR provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantee of Article 6(1).

Provisional Proposal 9-3: We provisionally propose that the relevant regulator, currently Natural England and the relevant body in Wales (either the Countryside Council for Wales or the proposed new Natural Resources Wales), issues guidance as to how they will use their civil sanctions.

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21 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law

22 Ss. 39(2) and 42(2)

23 (1984) 6 EHRR 409

If it is decided to extend the full range of civil sanctions (so far as is practicable) to the wildlife offences contained in the reforms set out in chapters 5 to 8 of the consultation paper, we support the provisional proposal to require the relevant regulators to issue guidance as to how their powers will be applied for the reasons outlined above (i.e. clarification as to roles and responsibilities of regulators and their partners and transparency as to the sanction(s) being pursued on a case by case basis).

Question 9-4: Do consultees think that that the current sanctions for wildlife crime are sufficient?

No, we do not agree that the system as a whole is sufficient. Our particular concerns include:

(i) Some of the sanctions regarding poaching are inadequate (as is acknowledged by the Consultation Document);

(ii) A maximum of 6 months imprisonment or a level 5 fine is not enough to dis-incentivise offenders. As mentioned below (Provisional Proposal 9-5) this would be the totality of the penalty imposed for killing the last hen harrier in England. This is not proportionate to the crime committed. These crimes are also not proportionate to other sanctions on other offences as the Law Commission highlights, such as pollution and fly tipping and examples that the EAC mention in their report on Wildlife Crime such as trade in endangered species. We believe this is not simply a matter of confusion but a lack of enforcement and ability for those issuing sanctions to have the flexibility to apply a sanction appropriate to the offence;

(iii) Current criminal sanctions are not being applied properly by the courts. We note that the Environmental Audit Committee made a useful recommendation in this regard: 61. "*It is currently impossible definitively to answer the question whether the available penalties for wildlife crime offences are fit for purpose because of inconsistent sentencing by judges and magistrates, a factor which was repeatedly highlighted by our witnesses. It was argued that this inconsistency is due to the lack of any sentencing guidelines for the judiciary and of specific training for magistrates. It is impossible to assess whether sentences are fit for purpose until they are imposed consistently in line with appropriate sentencing guidelines. We recommend that the Government reviews whether the available penalties provide sufficient deterrent effect and work with the Sentencing Council and the Magistrates' Association to introduce sentencing guidelines for the judiciary and training for magistrates in relation to wildlife crime offences*."

Provisional Proposal 9-5: We provisionally propose that offences for wildlife, excluding those for invasive non-native species and poaching, should have their sanctions harmonised at 6 months or a level 5 fine (or both) on summary conviction.

Provisional Proposal 9-6: We provisionally propose that the poaching offences for wildlife should have their sanctions harmonised at four months or a level 4 fine (or both) on summary conviction.

We also disagree with both of these proposals as they conflict with the Law Commission's objectives to make the law more flexible. We do not believe there should be a limit on the criminal sanction applied, especially if there is no multiple offence requirement (see question

9-7). With no sanction limit it can be left to the Magistrates' Court to apply an appropriate sanction for the crime committed. Sanctions should be applied at a level which acts as a disincentive to the crime and relates to both the rarity of the species in question and the number of individuals taken. It has been shown that the introduction of prison sentences for egg-collecting has dis-incentivised the offence to a certain degree[24]. We believe that the existence of an unlimited fine would further dis-incentivise the offence. Also, having the offence tri-able both ways would allow the larger cases to be heard in the Crown Court rather than the Magistrates Court. Thus, the maximum limit applicable in the Magistrates' Court would not act as a constraint.

Currently shooting the last hen harrier in England would result in a maximum penalty of six months in jail, which does not in our view proportionately reflect the crime committed. The EAC report on Wildlife Crime highlighted the disparity in the system as follows: "*a conviction for unlawfully killing a peregrine falcon under the Wildlife and Countryside Act 1981 would attract a maximum penalty of six months' imprisonment and/or a fine of up to £5,000, whereas a conviction for unlawfully trading a peregrine falcon internationally would result in a maximum penalty under COTES of five years' imprisonment and/or an unlimited fine*". The six month limit therefore conflicts with another of the Law Commission's objectives to align the provisionally proposed regime with other, non-EU, international treaties.

As the RSPB Bird Crime report 2011[25] indicates, there is still a high level of bird crime being carried out - a large amount of which remains un-penalised. We believe the Law Commission review provides an opportunity to address this situation and further dis-incentivise bird crime by removing the six month/level 5 fine limit on summary convictions. We do not believe this would result in additional bureaucracy or resources - but would, in fact, decrease red tape and regulation.

If there are limits placed on sanctions, we see no logical reason why poaching offences shouldn't also be level 5. Otherwise it immediately implies that they are less serious offences. Also, the consultation is silent on how statutes such as the Pests Act 1954 would be treated in the new regime. The penalties under that Act are currently level 3.

Question 9-7: Do consultees think that the provisions that mean that the fine for a single offence should be multiplied by the number of instances of that offence (such as killing a number of individual birds) should be kept?

Question 9-8: Do consultees think that the provisions for such offences should be extended to cover all species?

While we acknowledge that aggregating single offences can lead to an absurd result in non-wildlife crime situations, we would reinforce the importance of the court being able to use its discretion to address the seriousness and scale of the crime being committed. It is currently for the court to decide, based on the evidence and circumstances, of the seriousness of a crime. Someone found trapping scores of finches may be involved in serious and on-going commercial trade in such birds - and inflict a good deal of suffering in the process. In this situation, it must be correct that the court has the discretion to award multiple penalties if that is the most effective and proportionate approach to penalising the offence.

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[24] See EAC report on Wildlife Crime, paragraph 32

[25] See http://www.rspb.org.uk/Images/Birdcrime_2011_edit_tcm9-324819.pdf

As a general point in this context, we would reinforce the importance of ensuring that there is appropriate guidance to support the judiciary in sentencing wildlife crime. The only guidance currently available for Magistrates is a booklet called "*Costing the Earth*[26]" (published by the Magistrates' Association). We see significant benefits in updating this guidance and extending it to the Crown Courts.

We have some confusion as to the precise meaning of question 9-8, however, our instinctive feeling is that extending the provision to all species would improve coherence and consistency.

Question 9-9: Do consultees think that there should be a wildlife offence extending liability to a principal, such that an employer or someone exercising control over an individual could be liable to the same extent as the individual committing the underlying wildlife offence?

We strongly support this proposal and note endorsement by the Environmental Audit Committee[27] in its recent report on Wildlife Crime as follows: "*We recommend that the Government evaluates the effect of the introduction of an offence of vicarious liability in relation to raptor persecution in Scotland and considers introducing a similar offence in England and Wales in that light. We expect the Government to report to us, or otherwise publish, the results of that review within the next 12 months*".

We believe that there may also be a case for extending the offence beyond the individual to include 'advisor' within the meaning of 'an employer or someone exercising control over an individual'.

Finally, paragraph 9.12 of the Consultation Paper refers to three specific ways of facilitating the achievement of the aims of the regulatory regime: (i) civil sanctions; (ii) criminal sanctions; and (iii) mechanisms to ensure transparency and consistency in implementing enforcement as a whole, over the wildlife area. We note the Law Commission is silent on the third element and how it is envisaged this will be achieved. One option towards this might be to adopt the element recently introduced in Scotland - namely the requirement on Ministers to produce an annual report on wildlife crime[28].

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[26] Second edition (2009). See http://www.magistrates-association-temp.org.uk/dox/Costing%20the%20Earth%20for%20MA%20with%20cover.pdf

[27] See EAC Report, paragraphs 37-44

[28] See http://www.legislation.gov.uk/asp/2011/6/section/20/enacted

9. Chapter 10: Appeals and Challenges against Regulatory Decisions

This chapter considers whether there should be new provision for appeals and challenges against decisions made by regulatory bodies in the context of wildlife law, in which three potential types of appeal or challenge are possible:

- An appeal against, or challenge to, a decision granting (or not granting) a licence, or the conditions contained in a licence;
- An appeal against, or challenge to, an order made by a regulator requiring an individual or a company to do something; and/or
- An appeal against, or challenge to, a civil sanction imposed on an individual or company for breaching the requirements of the regulatory regime provisionally proposed in Chapter 9 of the review.

There is currently no formal appeal against species licensing decisions by Natural England, whether they concern individual, class or general licenses. Species licensing decisions can, however, be subject to legal challenge by way of judicial review.

The Review identifies three options: (i) to retain the existing system without alteration; (ii) an applicant only appeal process; or (iii) a more general appeals process covering applicants and third parties (where the latter have a sufficient interest).

The Review outlines the appeals process in comparable regimes. There is no formal mechanism for the appeal of decisions taken in respect of Marine Management Organisation (MMO) wildlife licences – as above, they can presently only be challenged by way of Judicial Review. In contrast, an applicant is able to appeal against a decision taken by the MMO in relation to a marine licence by submitting a notice to the Secretary of State.

In the planning sphere it is possible for an applicant (but not a third party) to appeal planning decisions (or the conditions attached to them) to the Planning Inspectorate on the merits or on a point of law, or both. The decision of the Planning Inspectorate cannot normally be challenged except by way of statutory appeal to the High Court, however, the possibility of such an appeal (albeit only on an error of law) extends beyond the applicant to include “a person aggrieved”.

The position with regard to Nationally Significant Infrastructure Projects (NSIPs) is different again. Developers wishing to construct a NSIP must apply to the Planning Inspectorate to obtain development consent. The Planning Inspectorate prepares a report on the application to the relevant Secretary of State. Once the Secretary of State’s decision has been made, it can only be challenged by way of Judicial Review.

The Review also notes that a formal appeals mechanism already exists in respect of challenges to prescriptive orders and civil sanctions imposed by Natural England and the MMO. Appeals are directed to the newly established First-tier Tribunal (Environment) and can be on the merits or on a point of law.

It is interesting to note there is no uniform approach to the appeals mechanism - and, as such, no parity of treatment relating to appellants or third parties in environmental matters. Moreover, not only is the present situation complex, it is evolving. It is not, therefore, simply a question of bringing appeals on species licensing into conformity with other regimes.

The Review makes explicit reference to the importance of the third pillar of the Aarhus Convention[29] to this debate - and the role of the Aarhus Convention Compliance Committee in ensuring the compliance of contracting Parties. It confirms that the Compliance Committee remains critical of the UK's system of Judicial Review – principally due to non-compliance with Article 9(4) of the Convention and the requirement that relevant review procedures shall be 'f*air, equitable, timely and not prohibitively expensive*[30]'.

The Review confirms that the Ministry of Justice is currently consulting on cross-undertakings in damages in environmental judicial review claims and is working to make rules regarding Protective Costs Orders (PCOs)[31]. The Law Commission may wish to note that Members of the Legal Strategy Group have responded to the consultation on cross-undertakings in damages and the most recent Ministry of Justice proposals regarding PCOs[32]. Essentially, our view is that while the MoJ's most recent proposals in relation to PCOs offer one or two improvements in current practice, they will not bring the UK into compliance with Article 9(4) of the Convention.

Provisional Proposal 10-1: We provisionally propose that the appropriate appeals forum for appeals against Species Control Orders and civil sanctions under our new regime is the First-tier Tribunal (Environment)?

It is somewhat difficult to comment on the suitability of this proposal given that the First-tier Tribunal (Environment) has, as yet, only heard one case. However, we agree with the view that the Environmental Tribunal is *likely* to provide a better forum for such appeals than the High Court[33]. Firstly, the composition of the Tribunal, comprising one judge and two lay members with some environmental background or knowledge, offers an opportunity to develop and apply dedicated legal and factual judicial expertise in this area of environmental law. Secondly, the tribunal system is relatively inexpensive – thus providing a cost-effective and proportionate means of redress (and avoiding present concerns about the high costs of pursuing Judicial Review in the High Court). Thirdly, it is quick – contrasting markedly with the significant delays presently experienced in the High Court with regard to Judicial Review applications. These characteristics would all help to ensure compliance with Article 9(4) of the Aarhus Convention, which states that:

> "4. *In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be* ***fair, equitable, timely and not prohibitively expensive****. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible."* (own emphasis added)

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29 UNECE Convention on Access to Environmental Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

30 See Case 2008/33, in which Client Earth and the UK Coalition for Access to Justice for the Environment (comprising WWF-UK, the RSPB, Friends of the Earth, Greenpeace, the Environmental Law Foundation and Capacity Global) are communicant and *amicus* respectively.

31 Paragraph 10.53

32 See attached CAJE response to Ministry of Justice consultation on cross-undertakings in damages in environmental judicial claims dated 23rd February 2011 and CAJE submission to the Aarhus Convention Compliance Committee critiquing the most recent proposals on PCOs dated 19th September 2012

33 Paragraph 10.55

Appeals Concerning Wildlife Licences

Question 10-2: Do consultees think that it is unnecessary to create a new appeals process for wildlife licences (option 1)?

The Review does not present a compelling case for the introduction of an appeals process for wildlife licences. It acknowledges that a recent review of the implementation of the Habitats and Wild Birds Directives conducted by Defra noted that few licence applications are refused outright[34] - in fact, Natural England reports that some 96% of licence applications are eventually granted with or without conditions. Defra also reports, in the same review, there it is unaware of any Judicial Reviews having been made against a decision[35] - and that the absence of a right of appeal in this context is in line with most wildlife legislation in England. The Review also confirms no consistent approach with regard to appeals within the environmental planning and regulatory regimes (as noted above). As such, the introduction of such an appeal would still not 'level the playing field' in access to environmental justice terms.

Notwithstanding the above, we recognise that the introduction of such an appeal may be necessary in order to ensure compliance with Article 6 of the European Convention on Human Rights (ECHR) – subject to the safeguard below.

Question 10-3: If consultees think that there should be a dedicated appeals process for wildlife licences, should it be restricted to the initial applicant for the wildlife licence (option 2), or be open additionally to the public with a 'sufficient interest' (option 3)?

If the Law Commission were to conclude there was a compelling argument for the introduction of such an appeal, it is our view that the UK's ratification of the UNECE Aarhus Convention, combined with recent rulings of the Court of Justice of the European Union (CJEU) in Case C-240/09 *Lesoochranarske zoskupenie VLK v Ministerstvo Zivotneho prostredia slovenskej republiky*[36] ('the Slovak Brown Bear case'), requires the UK to give the fullest possible effect to Article 9(3) of the Aarhus Convention:

"*3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."*

The Review acknowledges that giving the fullest effect to Article 9(3) would mean that the general public (with sufficient interest) should not be excluded from the appeals process[37]. However, while it acknowledges that '*both sides of the question remain arguable'*, it appears to support restricting the possible appellants to the applicant on the basis that third party

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34 Paragraph 10.71

35 Albeit noting that it is not possible to know whether this is a result of satisfaction with the outcome of the decision or whether the potential expense and length of a Judicial Review process acts as a deterrent

36 See http://curia.europa.eu/juris/document/document.jsf?text=&docid=80235&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3015712

37 Paragraph 10.83

challenges could lead to delays in the planning process, create unnecessary burdens and is out of step for other processes (such as planning in general)[38].

We believe this argument is flawed in both principle and practice. Whilst the UK has generally adopted an extensive approach to standing (although we would argue that has not been the case in Scotland, in which the requirement to demonstrate 'title and interest to sue' has, until very recently, been problematic), other EU Member States and the CJEU demonstrate a variable approach to standing[39]. In this respect, the Aarhus Convention, Regulation (EC) No 1367/2006 (applying the provisions of the Convention to Community institutions and bodies) and the case-law of the Aarhus Convention Compliance Committee are, collectively, having a significant effect on this issue in contracting Parties across the territory of the UNECE region.

For example, in Communication ACCC/C/2005/11, the Compliance Committee found that if Belgium did not relax its approach to standing (it had effectively blocked most, if not all, environmental organizations from access to justice with respect to town planning permits and area plans, as provided for in the Walloon region) it would fail to comply with article 9, paragraphs 2 to 4, of the Convention[40]. The Compliance Committee similarly concluded, after examining Cases T-91/07 *WWF-UK Ltd v Council* and C-355/08 *WWF-UK Ltd v. Council*, that if the CJEU did not relax its approach to standing it would also be in non-compliance with Article 9(2) of the Convention[41]. There are many more examples of non-compliance with Article 9(2) of the Convention which have been examined by the Compliance Committee and which are resulting in widespread improvements to standing across the UNECE[42]. It would therefore be perverse for the UK, at this time, to introduce such an appeal but adopt a restrictive approach to who could bring it. Furthermore, granting a right of appeal to third parties who can show sufficient interest provides consistency with the claimant's requirement to show "sufficient interest in the matter to which the application relates" that currently applies (and is given liberal interpretation) in Judicial Review[43].

As to the practical arguments raised in the Review, we do not find them convincing. Assuming such cases were to be heard in the Environmental Tribunal, there would be no delay as there are simply no cases waiting to be heard. Cases could therefore be heard swiftly and efficiently, thus reducing any delay to the absolute minimum. As for 'unnecessary burdens', we assume this refers to the cost of responding to appeals brought by third parties. If this really is a genuine concern, and we wonder whether there is any evidence to show that there would be a significant number of cases, we suggest that it may be appropriate to consider introducing a form of permission 'filter', as is the case in Judicial Review. This would weed out any appeals which were deemed to be frivolous, vexatious or with poor

38 Paragraphs 10.86-10.87

39 The requirement to show 'direct and individual concern' under Article 230 of the Treaty has been interpreted very strictly by the CJEU for some 50 years – see, for example, Case 25/62 *Plaumann & Co v Commission* [1963] ECR 95 and Case T-585/93 *Stichting Greenpeace Council and others v Commission* [1995] ECR II-2205:EC] and Case C-321/95 *P.Stichting Greenpeace Council (Greenpeace International) and others v Commission* [1998] ECR I-1651

40 See http://www.unece.org/fileadmin/DAM/env/documents/2006/pp/ece.mp.pp.c.1.2006.4.add.2.e.pdf

41 See http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-32/ece.mp.pp.c.1.2011.4.add.1_as_submitted.pdf

42 See A.Andrusevych, T.Alge, C.Clemens (eds), *Case Law of the Aarhus Convention Compliance Committee (2004-2008),* (RACSE, Lviv 2008) available at: http://www.rac.org.ua/en/activities/publications/cc-case-law/

43 Section 31(3) Supreme Court Act 1981

prospects of success. The possibility of doing this in relation to statutory appeals (also to address the possibility of an increased number of unmeritorious cases being brought) was suggested in the Update Report of the Working Group on Access to Environmental Justice[44].

Finally, the Review proposes that the introduction of a third party right of appeal is out of step with other similar processes, such as that for planning in general[45]. However, it can be seen from the summary of procedures in the Review itself that there is no consistent approach to appeals in planning or other regulatory regimes. Furthermore, there is a precedent in that 'a person aggrieved' can appeal (albeit only on an error of law) a decision of the Planning Inspectorate to the High Court by way of statutory appeal.

Thus, to conclude, Link believes that if there were to be a dedicated appeals process for wildlife licences, it should be open additionally to the public with a 'sufficient interest' (option 3).

Question 10-4: Do consultees think that the appeal process should be available for all types of wildlife licence (general, class and individual)?

Link has a divergence of views on this issue. One view is that if a dedicated appeals process is introduced it should be available for all types of wildlife licence. Another is that there is not a strong enough case for the existence of class or general licences to replace individual licences and, therefore, the appeals process should only be available for individual licences.

Question 10-5: Do consultees think that it would be more appropriate for appeals concerning wildlife licences to go to the Planning Inspectorate or the First-tier Tribunal (Environment)?

We believe that it would be appropriate for appeals concerning wildlife licences to be heard in the First-tier Tribunal (Environment) for the reasons stated above, namely that the Tribunal could provide a dedicated forum in which cases could be heard in a timely and cost-effective manner, thus ensuring compliance with Article 9(4) of the Aarhus Convention.

Wildlife and Countryside Link

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[44] Ensuring access to environmental justice in England and Wales – Update Report (August 2010). Available at: http://www.wwf.org.uk/wwf_articles.cfm?unewsid=4228

[45] Paragraph 10.87