



UK Environmental Law Association's response to the Law Commission's consultation paper No 206 on wildlife law.

UK Environmental Law Association (UKELA)

UKELA is the UK's foremost membership organisation working to improve understanding and awareness of environmental law, and to make the law work for a better environment.

This submission is made by the UKELA Nature Conservation Working Group which is one of a number of working groups which have been in existence for many years. It meets on a regular basis to discuss issues relating to the legal framework for wildlife protection.

Membership of the group is open to anyone within UKELA and, as one would expect, it comprises those with a particular interest in wildlife protection. It draws upon lawyers in private practice, public and administration, academic institutions and NGOs. This means that it is able to comment from both a theoretical and practical point of view. The Group has links with the Partnership Against Wildlife Crime, and so it is able to understand matters of enforcement of wildlife law in practice

Introduction

UKELA has long advised that wildlife legislation is in need of review, simplification and consolidation and welcomes the Law Commission's consultation paper and strongly endorses the majority of the proposals made.

However, it is regrettable that the review only considers species protection and does not take the opportunity to also address habitat protection. It is questionable whether amending the provisions for species protection can be effective without doing so. In the event of legislation being progressed solely addressing the species provisions then there will be an imbalance and inconsistency in the law. It therefore appears to us logically that both species and habitat protection legislation be amended and consolidated at the same time.

UK Environmental Law Association: making the law work for a better environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: One Wood Street, London, EC2V 7WS www.ukela.org

President: Rt. Hon. Lord Justice Carnwath C.V.O.



Responses to the proposals and questions

Rather than responding to each individual proposal we will address only those that we do not support, or where a question is asked, or where clarification is sought.

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

No. The provisions should be extended to UK waters beyond the 12 mile territorial limit to ensure clear and consistent application and to reflect the EU Birds and Habitats Directives.

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.

The suggested use of statutory factors is inconsistent with the requirements of the Birds and Habitats Directives. The text indicates that the suggested factors would be applied in any decision of certain decision makers, as listed in Paragraph 5.26. For decisions made pursuant to the Directives this would be unlawful. It is clear from the Birds Directive that economic considerations as mentioned in Article 2 should not be regarded as an autonomous derogation from later provisions in the Directive (this is acknowledged at Paragraph 2.46). Yet paragraph 5.44 suggests that economic considerations should be taken into account generally. Furthermore, derogations are only permitted by the Directives under very specific circumstances as carefully prescribed in the Directives. Therefore to the extent that the Law Commission seeks to retain a list of "statutory factors" within any new legislation, the drafting would have to carefully carve out the application of those factors to any decision in implementation of the Directives' requirements. We think that such "carve out drafting" will be complex and lead to confusion over when and where the factors would be relevant. Furthermore our view is that in many decisions where economic or social factors may be relevant (for example the decision to prosecute) there are existing mechanisms through which these factors may be taken into account (for example Natural England's Enforcement Policy; CPS guidance as to when prosecution is in the public interest).

In any event the legislation needs to make clear that the primary purpose of the provisions is to protect wildlife. Other factors may inform decisions but should not

UK Environmental Law Association: making the law work for a better environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: One Wood Street, London, EC2V 7WS www.ukela.org

President: Rt. Hon. Lord Justice Carnwath C.V.O.



override the overall objective of species protection. It would appear under what is being proposed that the factors will have equal weight as wildlife which we would reject.

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.

We believe this is inconsistent with the Birds and Habitats Directives. See our answer to 5-4 above.

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?

See 5-4 above. We have concerns regarding the list of factors, the weight afforded to social and economic factors and context of its use in decision making.

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

We would question the legality of general or class licences where the regulator seeks to discharge legally required licensing tests through the imposition of conditions on the licensee. For example under s16(1A)(a) WCA the licensing authority is required to make a judgement, based on evidence before it, that the s16(1A)(a) no satisfactory alternative test is met at the time it grants a licence. It is therefore in our view unlawful for the licensing authority to seek to discharge that duty through the use of a condition which instead makes the potential licensee responsible for making that judgement. It is not a valid argument that compliance is nevertheless achieved because such a licensee may be prosecuted if he or she makes that judgment incorrectly. The Court of Justice in *Commission v France* (383/09) has made clear that in relation to Art 12 Habitats Directive the Art 12 system of strict protection requires "coherent and coordinated measures of a preventative nature" (para 19-21), indicating that the criminal law, which bites only retrospectively, is inadequate. We would suggest in the light of this case that reliance on criminal law enforcement as a means of securing the "no satisfactory alternative" test is inadequate.

UK Environmental Law Association: making the law work for a better environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: One Wood Street, London, EC2V 7WS www.ukela.org

President: Rt. Hon. Lord Justice Carnwath C.V.O.



If class and general licences are to be retained it must be made clear that the licensing authority must itself be satisfied that the licencing tests are met before they issue the licence.

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.

We would prefer 1 year, conditional on the ability to review and revoke in exceptional circumstances for example a severe winter.

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

This seems too long a period. We would prefer 5 years.

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

We support the proposal to introduce a breach of licence condition. This is long overdue.

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

Yes, this should be the case for native game birds.

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?

By solely transposing the provisions of the Wild Birds Directive.

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 do not support this proposal. "Deliberate" acts do not in our view equate to "reckless" acts. Recklessness under the leading case of RvG is a wider concept. In view of caselaw from the European Court and from the Supreme Court on the

UK Environmental Law Association: making the law work for a better environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: One Wood Street, London, EC2V 7WS www.ukela.org

President: Rt. Hon. Lord Justice Carnwath C.V.O.



meaning of "deliberate" we believe that the only sensible option is to retain the EU law term "deliberate" in the new legislation and to leave it undefined or to adopt the definition given by the Supreme Court in *Morge v Hampshire County Council* [2011] UKSC 2. Any attempt to pigeonhole it into existing English law concepts is unsatisfactory.

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.

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?

It is not appropriate to define "disturbance" for the purpose of the Birds Directive within the new regime. In general defining "disturbance" is extremely difficult, as the concept affects different species (and even individuals of the same species) in different ways. In our experience, the challenge in prosecuting disturbance offences is not in defining disturbance but in showing that it was caused by the defendant.

However, as per the case law (*Morge v Hampshire County Council* [2011 UKSC 2] in relation to the Article 12(1)(b) Habitats Directive prohibition) the new law should be clear that disturbance of European Protected Species under the Habitats Directive is given a particular meaning directed at disturbance of the species (rather than individuals) and "particularly during the period of breeding, rearing, hibernation and migration" .

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.

We believe that reg 41(1)(b) should remain self-standing since this is an offence directed at disturbance of the species, rather than at individual animals (see the

UK Environmental Law Association: making the law work for a better environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: One Wood Street, London, EC2V 7WS www.ukela.org

President: Rt. Hon. Lord Justice Carnwath C.V.O.



Supreme Court judgment in *Morge*) and this is a distinction which it is important to maintain.

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?

Disagree

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?

Agreed this does not amount to the over used term 'gold plating'.

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 support the removal of the "incidental result of a lawful operation and could not reasonably have been avoided" defence located currently in section 4(2)(c) of the Wildlife and Countryside Act 1981

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

We oppose this addition. We cannot see any situation where its inclusion will benefit biodiversity conservation. Alternatively the Law Commission needs to state its proposed definition of the term, and clarify the types of activity this would and would not permit as it would need to be very restrictively defined.

If the decision is made to introduce this term in England and Wales, a reporting requirement here, as in other areas of licensing, will be essential.

UK Environmental Law Association: making the law work for a better environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: One Wood Street, London, EC2V 7WS www.ukela.org

President: Rt. Hon. Lord Justice Carnwath C.V.O.



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 would prefer a full reporting requirement.

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?

Option (1) preferred

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?

Agreed

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

Yes definitely. This is long overdue.

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 agree

CHAPTER 8: INVASIVE NON-NATIVE SPECIES

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

Yes we support, with the option of renewal

UK Environmental Law Association: making the law work for a better environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: One Wood Street, London, EC2V 7WS www.ukela.org

President: Rt. Hon. Lord Justice Carnwath C.V.O.



CHAPTER 9: SANCTIONS AND COMPLIANCE

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

No. Of particular concern is the current maximum fine which can be awarded for offences to be tried in the Magistrates' Court under the WCA. This is just £5000, which, particularly for a crime committed by a body corporate, is wholly inadequate

in its value as a deterrent. This is completely out of line with penalties provided for under other recent environmental legislation. For example, penalties provided under the Environmental Permitting (England and Wales) Regulations 2010, for offences such as failing to comply with an environmental permit condition, can reach fines of up to £50,000 and/or up to 12 months in prison in the Magistrates Court, and unlimited fines and/or up to 5 years in prison in the Crown Court. This needs wholesale revision.

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.

We agree with harmonisation but not at the low level (level 5) suggested. There must be greater penalties.

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?

Agreed

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

Agreed

UK Environmental Law Association: making the law work for a better environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: One Wood Street, London, EC2V 7WS www.ukela.org

President: Rt. Hon. Lord Justice Carnwath C.V.O.



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?

Agreed

CHAPTER 10: APPEALS AND CHALLENGES AGAINST REGULATORY DECISIONS

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

Yes

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)?

Option 3 is preferred

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

Yes we agreed

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

We prefer the first tier tribunal.

UK Environmental Law Association: making the law work for a better environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: One Wood Street, London, EC2V 7WS www.ukela.org

President: Rt. Hon. Lord Justice Carnwath C.V.O.