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A Manifesto for Wildlife Law Reform: Assessing the Law Commission's Proposals for Wildlife Law reform

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In August 2012, the Law Commission published its proposals on wildlife law reform for the UK. Its aim is to review all UK wildlife law simplifying the legislative wildlife protection regime, whilst at the same time addressing much of the inconsistency and confusion considered to exist within UK wildlife law.¹

Few would argue with this overall goal. For several years, investigators, NGOs and wildlife protection activists have voiced concerns about the perceived inadequacy of the UK regime.² The species-specific nature of much UK wildlife law means that a patchwork of different legislation affording different levels of protection to different species exists.³ NGOs have also highlighted inadequacies in individual legislation such that legislation intended to protect wildlife often fails to do so and ambiguous or inadequate wording actually allows animal killing or fails to provide adequate protection for effective animal welfare.⁴ Such confusion also causes problems in the investigation of

wildlife crime with investigators and prosecutors needing to understand a complex range of legislation, powers of arrest and sanctions.

The Commission's proposals seek to resolve these problems in part by providing for a single integrated Wildlife Management Bill, consistent with EU law and harmonising various UK wildlife provisions. This article assesses the Commission's proposals against the key problems of wildlife law identified by NGOs and in previous research.

The Current Legislative Regime and International Obligations

Historically UK wildlife law has been 'associated with socio-economic structures' largely dominated by wildlife's value as either economic or social resource.⁵ Wildlife protection law operates in part as conservation or wildlife management legislation according to wildlife's property or economic value, rather than purely as

species protection or criminal law. As a result of a variety of legislative interventions, the UK wildlife law regime consists of a vast, fragmented range of statutes and subordinate legislation used to protect wildlife, or more accurately, allow for management of wildlife and to prosecute offences once committed. Within the UK's complex wildlife protection regime, species specific legislation such as the *Deer Act 1991* and *Protection of Badgers Act 1992* combine with general protective legislation such as the *Wildlife & Countryside Act 1981* and the *Wild Mammals (Protection) Act 1996*. However, legislation has also been

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¹ Law Commission (2012) *Wildlife Law: A Consultation Paper*, London: Law Commission.

² See for example Wilson, S. Anderson, L. and Knight, A. (2007) *The Conservation of Seals Act 1970: The Case for Review*, Scotland: Seal Forum, and Nurse, A. (2003) *The Nature of Wildlife and Conservation Crime in the UK and its Public Response*, Working Paper No 9, Birmingham: University of Central England Birmingham, Faculty of Law and Social Sciences.

³ Ibid.

⁴ Ibid. See also: E.C.M. Parsons, J. Clark, J. Wharam and M.P. Simmonds 2010 The Conservation of British Cetaceans: A Review of the Threats and Protection Afforded to Whales, Dolphins, and Porpoises in UK Waters, Part 1 *Journal of International Wildlife Law & Policy*, 13:1–62, 2010 and Parsons, E. C. M. , Clark, J. and Simmonds, M. P.2010 The Conservation of British Cetaceans: A Review of the Threats and

Protection Afforded to Whales, Dolphins, and Porpoises in UK Waters, Part 2, *Journal of International Wildlife Law & Policy*, 13: 2, 99 — 175.

⁵ Law Commission (2012) *Wildlife Law: A Consultation Paper*, London: Law Commission.



enacted to implement international and European wildlife protection legislation. For example, the wild bird provisions of the *Wildlife and Countryside Act 1981* were intended to implement the 1979 *EC Directive on Wild Birds*⁶ and give protection to all forms of native wild birds (with certain exceptions for pest control and agricultural purposes).

In addition to this, wildlife offences can also be caught by other forms of legislation aimed at regulating commercial activities or creating offences in relation to other activities (e.g. the *Customs and Excise Management Act 1979* which regulates the import and export of prohibited items, including wildlife). It is also important to note that devolved legislation sometimes provides for different protection. For example, the *Wildlife and Natural Environment (Scotland) Act 2011* provides for the offence of ‘vicarious liability’⁷ which is not yet replicated in other wildlife legislation. A distinction should also be made between wildlife crimes and poaching offences involving species of game birds or animals specially bred for game shooting⁸ although the Law Commission’s approach to wildlife law incorporates poaching and game species.

In principle, the Commission’s approach is one of directly transposing EU law into UK law to develop a consistent approach to wildlife protection. Throughout its

consultation document the Commission makes clear that its role is not to increase levels of protection for wildlife.⁹ The Commission identifies that international agreements such as the Bern Convention, the Ramsar Convention, the Convention on the International Trade in Endangered Species (CITES) and the UN’s Aarhus Convention ‘set benchmarks for national action while protecting a certain level of national autonomy’.¹⁰ EU law, binding on the UK, places a higher obligation on domestic legislation than broader international agreements and thus the Commission’s approach is generally one of using the exact terminology of EU legislation consistent with the current Government’s policy of copying out EU obligations.

However within the Commission’s approach there is scope to enhance animal protection where domestic law already allows for this and provides an opportunity to go beyond the basics of EU law. NGOs have raised concerns that an unintended potential consequence of the Commission’s proposals is an increased ability to exploit wildlife through; a relaxation of the regulatory regime, increased use of general licences, and the resultant reduction in scrutiny of ‘authorised’ animal killing. The Commission’s approach, which utilises general orders and open general licences to cover classes of operation rather than requiring individual licence

applications for animal control or management operations may be administratively attractive, but risks creating a legislative regime that fails to consider existing wildlife crime problems. Any new legislative regime urgently needs to address current inadequacies to be effective.

Perceived Problems with Wildlife Law

UK wildlife law is a fringe area of policing whose public policy response was significantly influenced by NGOs.¹¹ The Commission argues that there is no need to invent a new and untested regime if a suitable one already exists. However considerable research evidence indicates that the existing regime does not work in its implementation rather than in its basic legislative provisions and that practical enforcement problems are endemic to the UK’s wildlife law system. For example, as far back as May 2002 the University of Wolverhampton published a report on *Crime and Punishment in the Wildlife Trade* which concluded that:

The attitude of the UK’s legal system towards the ever-increasing illegal wildlife trade is inconsistent. It does not adequately reflect the nature and impact of the crimes, and it is erratic

⁶ Directive 79/409/EEC now codified as Directive 2009/147/EC of the European Parliament and of the Council of 30 November 1979 on the conservation of wild birds.

⁷ *Wildlife and Natural Environment (Scotland) Act 2011*, Section 18.

⁸ Game species are subject to a different legislative regime arguably based on consideration of animals as property. For a discussion of game laws see Munche (2008) *Gentlemen and Poachers: The English Game Laws 1671-1831*, Cambridge: Cambridge University

Press, and Parkes and Thornley (1991) *Fair Game: The Law of Country Sports and the Protection of Wildlife*, London: Pelham Books.

⁹ See for example Law Commission (2012) *Wildlife Law: A Consultation Paper*, London: Law Commission, para. 1.24, para.7.39.

¹⁰ Law Commission (2012) *Wildlife Law: A Consultation Paper*, London: Law Commission, para 2.98.

¹¹ See for example: Nurse, A (2012), *Repainting the Thin Green Line: The Enforcement of UK Wildlife Law*,

Internet Journal of Criminology, October 2012, Ankers, N.K. (1993), *Policing and Environmentalism: A descriptive analysis of the influence of increased public concern for the environment upon the United Kingdom Police Service, focusing upon the role and development of Police Wildlife Liaison Officers*, Manchester: University of Manchester, and Kirkwood, G. (1994), *The Enforcement of Wildlife Protection Legislation: A Study of the Police Wildlife Liaison Officers’ Network*, Leicester: De Montfort University.

Crucial to any new regime is a coherent approach to the subject of wildlife criminality and the abuse of animals

*in its response. The result is that the courts perceive wildlife crime as low priority, even though it is on the increase.*¹²

Although the Wolverhampton report focused solely on wildlife trade, its conclusions on the inadequacies and inconsistency in the way that legislation is enforced have been echoed by successive writers and NGOs in looking at other aspects of wildlife crime.¹³ The picture that emerges of wildlife crime through the available literature is that of legislation inadequate to the task of wildlife protection, subject to an equally inconsistent enforcement regime (albeit one where individual police officers contribute significant amounts of time and effort within their own area) and one that fails to address the specific nature of wildlife offending. While there is no doubt that there is an inconsistency in

wildlife legislation, the ad-hoc development of wildlife policing and policy creates with it a risk that no matter what the legislative regime; the enforcement of wildlife legislation may itself be inconsistent and inadequate even if the Commission achieves coherence in sentencing and wildlife protection provisions.

Crucial to any new regime is a coherent approach to the subject of wildlife criminality and the abuse of animals. A further University of Wolverhampton report published in June 2002 concluded that organised crime had become ‘increasingly involved in the most lucrative parts of the illegal trade’¹⁴ and subsequent research investigating different types of offenders involved in wildlife law violations identified that rather than all wildlife offenders being rational-thinking profit-driven individuals, wildlife crime is a complex varied phenomenon involving a range of offenders with different motivations and offending characteristics.¹⁵ Thus while the Commission acknowledges that fines can easily be internalised by high-profiteering businesses, there is considerable and consistent research evidence that wildlife crime is not only growing in scale but has links with other crimes (e.g. organised crime, illegal trafficking and illegal gambling) and represents

a distinct form of criminality. While it can involve offenders who are clearly motivated by profit (particularly with respect to trade in endangered species which can sell for thousands of pounds) and involves criminal actors involved in other forms of crime^{16 17} it also involves individuals motivated by a desire to inflict harm on animals, those subsumed into a subculture that positively promotes animal killing, and those involved in countryside businesses for whom non-compliance with wildlife law has become an economic necessity.¹⁸

The problems of wildlife law can, thus broadly be identified as general problems of enforcement and enforcement resources¹⁹ ambiguous wording and inconsistency of protection between species,²⁰ and weak or ineffectual sentencing provisions when the specific nature

wildlife crime is a complex varied phenomenon involving a range of offenders with different motivations

¹²Lowther, J, Cook, D and Roberts, M. (2002), *Crime and Punishment in the Wildlife Trade*, Wolverhampton: WWF/TRAFFIC/Regional Research Institute (University of Wolverhampton).

¹³Nurse (2003) *The Nature of Wildlife and Conservation Crime in the UK and its Public Response, Working Paper No 9*, Birmingham: University of Central England Birmingham, Faculty of Law and Social Sciences and Wellsmith, M. (2011) ‘Wildlife Crime: The Problems of Enforcement’, *European Journal on Criminal Policy and Research*, 17/2: 125-148.

¹⁴Cook, D, Roberts, M. and Lowther, J. (2002), *The International Wildlife Trade and Organised Crime: A Review of the evidence and the role of the UK*, Wolverhampton: Regional Research Institute (University of Wolverhampton).

¹⁵Nurse, A. (2011) ‘Policing wildlife: Perspectives on criminality in wildlife crime’, *Papers from the British*

Criminology Conference, Volume 11, 2011, pp. 38-53 and South, N. and Wyatt, T. (2011) ‘Comparing Illicit Trades in Wildlife and Drugs: An Exploratory Study’, (2011) *Deviant Behavior*, 32: 538-561, 2011.

¹⁶Cook, D, Roberts, M. and Lowther, J. (2002), *The International Wildlife Trade and Organised Crime: A Review of the evidence and the role of the UK*, Wolverhampton: Regional Research Institute (University of Wolverhampton).

¹⁷See for example; Linzey (ed.) (2008) *The Link Between Animal Abuse and Human Violence*, Eastbourne: Sussex Academic Press, and Hutton, J.S. (1981), *Animal Abuse as a diagnostic approach in Social work*: Paper presented at the International Conference on the Human/companion Animal Bond, Philadelphia, PA.

¹⁸Nurse, A. (2011) ‘Policing wildlife: Perspectives on criminality in wildlife crime’, *Papers from the British*

Criminology Conference, Volume 11, 2011, pp. 38-53 and South, N. and Wyatt, T. (2011) ‘Comparing Illicit Trades in Wildlife and Drugs: An Exploratory Study’, (2011) *Deviant Behavior*, 32: 538-561, 2011.

¹⁹Wellsmith, M. (2011) ‘Wildlife Crime: The Problems of Enforcement’, *European Journal on Criminal Policy and Research*, 17/2: 125-148.

²⁰Wilson, S, Anderson, L. and Knight, A. (2007) *The Conservation of Seals Act 1970: The Case for Review*, Scotland: Seal Forum and Nurse, A. (2003) *The Nature of Wildlife and Conservation Crime in the UK and its Public Response, Working Paper No 9*, Birmingham: University of Central England.

of wildlife criminality is taken into account.²¹ While it is not the Commission's remit to improve wildlife protection and it clearly acknowledges this within its proposals, within its chosen approach there is scope to address several of these problems.

A Manifesto for Wildlife Law

In principle at least, UK wildlife law is broadly adequate to its purpose as conservation or species management legislation, albeit a high level of legal expertise is often required even at the investigative stage and there is little provision in UK wildlife law and its enforcement response for crime prevention. In principle the Commission's proposals, which build on the improvements provided for by the *Countryside and Rights of Way Act 2000* (CRoW) and the *Wildlife and Natural Environment (Scotland) Act 2011* will at least provide for a single piece of legislation. However in an enforcement system that is largely voluntary, lacks resources and relies too heavily on the NGO sector, the Commission's proposals will ideally address the following issues.

- i. Review all wildlife law to ensure consistency in penalties, police powers and specification of offences.
- ii. Consider consolidation of wildlife law into themes to suit purpose and produce 'super' wildlife legislation across the following themes: *Conservation and Habitat Protection, Environment and Biodiversity, Wildlife Protection and Management, Countryside and Recreation*. This can be achieved through its single bill

approach with each theme forming a section of the new bill. It should adopt existing good practice from UK legislation but strengthen it through consolidating good practice that achieves effective protection and sustainability according to its theme.

- iii. Review all legislation to close loopholes or ambiguous wording. For example in the *Conservation of Seals Act 1970* seals could be killed 'in the vicinity' of fishing gear.²² There is no definition of 'in the vicinity' in the Act and the Seals Forum has reported that there is also confusion over what constitutes nets or fishing gear.²³ Such loopholes allow the killing of wildlife that are otherwise protected and should be removed across UK wildlife laws.
- iv. Harmonise references to wilfully or intentionally in wildlife law with appropriate wording that not only reflects the requirements of EU law but also allows investigators to proceed with cases where an offence has clearly been committed, without also having to prove the wildlife knowledge or intentions towards wildlife of the offender. Thus a definition that incorporates both accidental and deliberate disturbance and harm to wildlife and addresses the failure of an offender to modify their action when it should have been obvious that there would be consequences should be consistently applied across all wildlife legislation.
- v. Introduce an outright ban on snares and other indiscriminate forms of killing wildlife by

²¹Nurse, A. (2009) 'Dealing with Animal Abusers' in Linzey, A. (ed) *The Link between Animal Abuse and Human Violence*, Eastbourne: Sussex Academic Press.

²²Section 9(1)(c) of the Act.

²³S. Wilson, L. Anderson and A. Knight (2007) *The Conservation of Seals Act 1970: The Case for Review*, Scotland: Seal Forum.

²⁴For discussion of the failures of self-regulation see Ogus, A.I. (1995) 'Rethinking Self-Regulation', *Oxford Journal of Legal Studies*. 1995; 15: 97-108.

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- conducting a comprehensive review of prohibited forms of killing wildlife and specifying additional ones accordingly.
- vi. Ensure that wildlife crime is a Home Office/Ministry of Justice mainstream policing issue rather than DEFRA/NGO environmental one and allocate resources accordingly. While this may be outside the scope of the Commission's proposals *per se*, in their implementation there is a need for wildlife crime to be seen as part of an overall criminal profile and mainstream criminal activity, and policed, prosecuted, and sentenced accordingly.
- vii. Make specific provision for crime prevention in wildlife legislation and in the revised enforcement regime.
- viii. Strengthen/expand the registration scheme for wildlife so that all British birds of prey kept in captivity are required to be registered and are subject to an inspection and enforcement regime.
- ix. Use statutory rather than voluntary codes e.g. the *Hunting Act 2004 Code* for use of dogs. While it is outside the scope of this article to discuss the topic in detail, voluntary codes are rarely effective as they rely on the goodwill and compliance intent of those involved in the regulated activity while persistent offenders rarely comply with regulations and such codes.²⁴

- x. Introduce ‘cause and permit’ provisions into all wildlife protection legislation to make it an offence for employers to encourage or pressure staff into committing wildlife offences.

The Commission’s proposals address some of these issues, proposing for example to use the term ‘intentionally or recklessly’ to transpose the EU law term ‘deliberately’ into UK law as a means of dealing with deliberate actions. The Commission also clarifies that this includes the concept of subjective recklessness for both circumstances and consequences.²⁵ The Commission also raises consultation questions concerning, for example, whether there should be a legal requirement for reporting of all members of a species killed or taken and also whether there should be a wildlife offence that extends liability to an employer or someone who exercises control over an individual. Thus within the scope of the Commission’s proposals there remains opportunity for wildlife protection to be strengthened by not

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offenders could engage in repeat offending before any use of criminal sanctions is considered or begins to bite
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only improving the coherence of legislation but also its enforcement regime. However, further concerns occur on this aspect of the proposals.

A New Enforcement Regime

The Commission’s enforcement approach is based on a mixture of criminal and civil sanctions suggesting that ‘criminalising regulatory transgressions may not always be the appropriate way of ensuring beneficial outcomes. It may be better to provide the non-compliant individual or organisation with advice or guidance.’²⁶ This is consistent with the Coalition Government’s approach of generally reducing business’ regulatory burden, with a belief in risk-based regulation in accordance with the Hampton Principles²⁷ and which suggests that UK regimes for achieving compliance with business regulations through regulatory inspections and enforcement are generally complex and ineffective. The Commission identifies that the government’s approach is generally that regulation should only be resorted to where ‘satisfactory outcomes cannot be achieved by alternative, self-regulatory, or non-regulatory approaches.’²⁸

However while the risk-based, prosecution-as-last-resort regulatory

approach is consistent with government policy and its approach to ‘light touch’ regulation there are potential flaws with this approach, not least the possibility that offenders could engage in repeat offending before any use of criminal sanctions is considered or begins to bite. Given academic and policy research on the nature of criminality in wildlife law violations the advice and guidance/decriminalisation approach proposed by the consultation also raises concerns. Academic research on the use of civil sanctions as an approach to consumer problems conducted on behalf of the Department for Business Enterprise and Regulatory Reform (BERR) noted both a lack of willingness on the part of enforcers to use civil sanctions and the increased resources required for this approach to be effective where criminality was an inherent problem that needed to be addressed.²⁹ In addition, while the Commission refers to the US Environmental Protection Agency’s (EPA) use of administrative penalties, these have often been ineffective as a solution to wildlife crime and environmental non-compliance, resulting in US NGOs challenging the ineffectiveness of EPA enforcement activity which has persistently failed to address problems and allowed ongoing non-compliance. Thus while civil sanctions may be attractive politically as a way of seeming to decriminalise legitimate business activity they are often ineffective in dealing with environmental/wildlife criminality. While the consultation

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²⁵European Commission, *Guidance on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007).

²⁶Law Commission (2012) *Wildlife Law: A Consultation paper*, London, Law Commission. P.53.

²⁷Hampton, P. (2005) *Reducing administrative burdens: effective inspection and enforcement*, London: HM Treasury.

²⁸Law Commission (2012) *Wildlife Law: A Consultation paper*, London, Law Commission. P.55.

²⁹Peysner, J. and Nurse, A. (2008) *Representative Actions and Restorative Justice: A report for the Department for Business Enterprise and Regulatory Reform*, Lincoln: University of Lincoln Law School.

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suggests that the current regime is too reliant on criminalisation, a different view emerges from research evidence suggesting instead that a weak enforcement regime allows a wider range of criminality and transfer of criminality from mainstream crime into wildlife crime.

Preliminary Conclusions

The Commission's proposals take a pragmatic approach to wildlife law reform by directly transposing EU law wherever possible with potential for clarifying ambiguities in legislation and closing legislative loopholes that should be welcomed. But the proposals would also appear to allow wider scope for killing of wildlife without the need for the individual circumstances of that killing to be justified and risk relaxing the existing regime for monitoring the 'lawful' killing of wildlife. Transparency is an important factor in wildlife use, management or control and reducing transparency in animal killing operations by allowing for a class based approach which provides for decision makers to allow animal killing under specified circumstances but rationalises these by providing for general categories across legislation is a matter of concern.

As with most legislative proposals the devil is in the detail and while there are concerns about any approach that seemingly reduces the criminal justice response to wildlife offending, the Commission allows for consultation responders to comment on a wide range of issues which have scope to considerably influence the shape of the eventual legislative proposals. Its proposals need careful scrutiny and a detailed, measured response but the Commission might just have allowed an opportunity for a significant number of wildlife law problems to be addressed.