

REPORT OF THE GROUP MANAGER PLANNING**LAW COMMISSION CONSULTATION – WILDLIFE LAW****Purpose of the Report**

1. To set out the County Council's response to a Law Commission consultation on the reform of wildlife law.

Information and Advice

2. The Law Commission is the statutory independent body created by the Law Commissions Act 1965 to keep the law under review and to recommend reform where it is needed. The aim of the Commission is to ensure that the law is fair; modern; simple; and as cost-effective as possible.
3. As part of its work, the Law Commission is currently consulting on proposals to simplify the existing complex framework relating to wildlife, placing wildlife law into a single statute. Documents relating to the consultation are available on the Law Commission's website at <http://lawcommission.justice.gov.uk/consultations/wildlife.htm>.
4. Given its origins and subsequent development, there is no homogenous purpose or theme to wildlife law. It has varying, and sometimes conflicting, aims and roles. However, the Law Commission suggests that four principal strands have emerged over time:
 - a) wildlife law provides the framework within which wildlife can be controlled, so that it does not interfere unduly with the conduct of human activity, such as development.
 - b) the law allows for the exploitation of wildlife as a valuable natural asset.
 - c) the law seeks to conserve wildlife as part of our common natural heritage.
 - d) the law protects individual animals from harm above a permitted level (animal welfare).
5. The proposals to rationalise wildlife law relate to species-specific provisions allowing for the conservation, control, protection and exploitation of wildlife within England and Wales, covering species-specific protection afforded to wild birds and other animals under part 1 of the Wildlife and Countryside Act 1981; the species protection provisions of the Conservation of Habitats and Species Regulations 2010; and Acts covering individual and limited groups of species (such as seals and badgers).

6. The project does not seek to vary the levels of protection afforded to particular species, and excludes legislative provisions for habitats. In addition, it does not relate to the Hunting Act 2004.
7. The full consultation paper extends to 192 pages, and is detailed and complex in nature. The provisional proposals that the Law Commission is seeking specific comments on, along with a small number of specific questions, are provided in Appendix 1, with the County Council's proposed responses.

Other Options Considered

8. Not applicable.

Reason/s for Recommendation/s

9. To allow the County Council to provide a considered response to the Law Commission consultation on the reform of wildlife law.

Statutory and Policy Implications

10. This report has been compiled after consideration of implications in respect of finance, equal opportunities, human resources, crime and disorder, human rights, the safeguarding of children, sustainability and the environment and those using the service and where such implications are material they are described below. Appropriate consultation has been undertaken and advice sought on these issues as required.

RECOMMENDATION/S

- 1) That Committee approve the comments made in Appendix 1 of this paper to form the basis of the County Council's response to the Law Commissions consultation on the reform of wildlife law.

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Constitutional Comments

11. Culture Committee has authority to approve the recommendation set out in this report. (NAB 07.11.12).

Financial Comments

12. The contents of this report are duly noted; there are no financial implications arising. (DJK 07.11.12).

Background Papers

None

Electoral Division(s) and Member(s) Affected

All

Appendix 1 - List of provisional proposals and consultation questions and proposed responses from Nottinghamshire County Council

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

No comment. Not considered to be relevant to Nottinghamshire County Council.

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.

This proposal is supported, for the reasons put forward in paragraph 5.20 of the consultation document. The current regime is complex and difficult to navigate even for those familiar with the current legislative landscape. Bringing together existing legislation into a single statute will provide a more consistent, straightforward and user-friendly statute.

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.

This proposal is supported, for the reasons put forward in paragraph 5.22 of the consultation document. To include those provisions would add to confusion and separate unnecessarily the welfare regime for all animals into wild and domesticated.

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.

This proposal is supported, for the reasons put forward in paragraph 5.25 of the consultation document. This will further simplify the existing legislation.

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.

This proposal is supported, for the reasons put forward in paragraph 5.34 of the consultation document. The use of statutory factors will improve transparency, and show that specific factors need to be addressed, and in many cases balanced, in coming to a particular decision.

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.

This proposal is supported, as it will provide clarity on what the relevant factors are.

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?

The list is considered to be appropriate. No other factors appear to be relevant.

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.

This proposal is supported. This approach is considered to be that which is most appropriate and user-friendly.

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

This proposal is supported, for the reasons put forward in paragraph 5.59 of the consultation document.

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

This proposal is supported. This approach allows flexibility, given that the status of a particular species can change over time. Currently, listings are reviewed every five years (see Provisional Proposal 5-11).

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.

This proposal is supported. This will improve transparency.

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.

This proposal is supported. The status of a particular species can change over time, sometimes rapidly, and for this reason, five years should be considered a maximum.

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.

This proposal is supported. This will allow close seasons to be imposed in response to particular concerns about the conservation of the species in question.

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 defences and allow for the licensing of prohibited activity?

Yes. This will continue the current regulatory regime.

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

Yes. Defining the circumstances in which different types of licences could be used would remove flexibility from the regulatory regime.

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.

This proposal is supported. This is the current situation for most species, excluding badger, and standardisation at two years will therefore correct this anomaly.

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

This proposal is supported. A limitation on the length of licences allows for unforeseen variations in populations size or species distribution.

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

This proposal is supported. Currently, the approach to dealing with offences of breaching licence conditions is inconsistent between legislation.

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.

This proposal is questioned. The definition of a wild bird as given in Article 1 of the Wild Bird Directive is those species “naturally occurring in the wild state”, i.e. which are indigenous to the relevant territory. This will exclude those introduced species which have established self-sustaining wild populations in this country, such as Little Owl and Mandarin Duck, but which have no impact on native wildlife and are a valued component of our avifauna. However, it is recognised that such a definition would allow for the inclusion of invasive non-native species such as Monk Parakeet.

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

No. Poultry cannot reasonably be defined as ‘wild birds’ given that they are domesticated, and reference to them seems unnecessary.

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

This is not straightforward. Some game birds are indigenous species (i.e. “naturally occurring in the wild state”), such as Grey Partridge and Red Grouse, whilst others are introduced species such as Pheasant and Red-legged Partridge. Furthermore, some populations of indigenous gamebirds are captive-reared and released specifically for shooting, such Grey Partridge, so it can be questioned whether these constitute ‘wild birds’. The suggestion that Pheasant should be treated as if it were an indigenous gamebird (and hence as a ‘wild bird’) seems at odds with the proposal 6-1 that other introduced birds should not be considered ‘wild 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?

Express reference to the exclusion should be made. However, clarification should be provided in relation to captive bred birds that have been released as part of a sanctioned reintroduction scheme.

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.

This proposal is supported, for the reasons put forward in paragraph 6.43 of the consultation document. Using the term ‘deliberate’ without further clarification could lead to the ordinary English meaning being used, which would not go as far as relevant Court of Justice case law. Using the term ‘intentionally or recklessly’ would be clearer for user.

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. To do so would align that level of protection provided to those species afforded heightened protection under domestic legislation as those protected under the Habitats Directive as transposed.

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?

Yes. The term ‘disturbance’ is capable of being understood through its plain and ordinary meaning.

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.

This proposal is supported. This will simplify the current disturbance provisions.

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?

Yes, for the reasons put forward in paragraph 6.58 of the consultation document. It is considered that ‘disturbance’ would be sufficiently covered.

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?

Yes, for the reasons put forward in paragraph 6.60 of the consultation document, as the 1981 Act does not in fact appear to go further than the requirements of the Habitats Directive, given the level of protection the Directive intends to afford (“strict”).

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.

This proposal is questioned. It is unclear how this proposal sits with lawful operations such as farming where a crop is cut during the summer and ground nesting birds are killed as an incidental result.

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.

This proposal is supported, as it will reduce administrative burdens.

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 is supported, for the reasons put forward in paragraphs 6.87-6.89 of the consultation document.

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

This proposal is supported, as it seems appropriate to set close seasons that are relevant to individual species.

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

This proposal is supported, for the reasons put forward in paragraphs 6.90-6.91 of the consultation document, as these appear the most appropriate regulatory tool.

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.

This proposal is supported, for the reasons put forward in paragraphs 6.91-6.92 of the consultation document.

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

This proposal is supported, as it seems appropriate for the Secretary of State should issue such codes of practice, after consultation with relevant stakeholders.

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

This proposal is supported, for the reasons put forward in paragraphs 6.105-6.106 of the consultation document, as this purpose is allowed for in the Birds Directive.

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?

Yes. To do so would introduce something that is not currently required by EU law.

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.

Each alternative has its merits. On balance, option 2, which would continue the existing protection regime, is probably most appropriate.

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?

Yes, as these can reasonably be seen as part of the selling process.

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

This proposal is supported, as it recognises that markets for certain species may change in the future and this may lead to the poaching of new species.

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

Yes, as it relates to a wrongdoing committed against the particular rights of a landowner.

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?

Yes, for the reasons put forward in paragraph 7.30 of the consultation document. The act of poaching can occur in instances where there has been no act of trespass.

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.

This proposal is supported, as it appears to provide a valid definition of what the act of poaching constitutes.

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

This proposal is supported, as it will continue the existing regime.

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

This proposal is supported, as it will continue the existing regime.

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

Yes, as to do so will rationalise existing licensing regimes, and it appears would not affect the protection currently afforded to species.

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

This proposal is supported, as it will improve 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' eggs should be retained.

This proposal is supported, for the reasons put forward in paragraphs 7.61 and 7.62 of the consultation document. This will continue the existing regime.

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, retention of the reverse burden of proof in this instance is considered appropriate.

Provisional Proposal 8-1: We provisionally propose that there is a sufficient case for the reform of the regulatory and enforcement tools available for the delivery of Government policy.

This proposal is supported, for the reasons put forward in paragraphs 8.65-8.67 of the consultation document. That is, there is currently no provision for access to land to carry out control measures to combat invasive non-native species, that there are no emergency provisions currently available, and that there is no requirement to make notification in relation to the presence of a particular invasive non-native species.

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

This proposal is supported, as it will allow a rapid response to emerging issues.

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

Yes, if one year is a sufficient length of time to allow the normal listing process to take place within.

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.

This proposal is supported, as it will contribute to the early detection and eradication of invasive non-native species.

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

This proposal is supported.

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.

This proposal is supported, for the reasons put forward in paragraph 8.106 of the consultation document. Licensing forms a key part of the regulatory regime.

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.

This proposal is supported, as it will help facilitate the management and control of invasive non-native species.

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.

This proposal is supported, for the reasons put forward in paragraph 9.67 of the consultation document.

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.

This proposal is supported, as it will allow the regime to be flexible.

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 single Welsh Environmental Agency), issues guidance as to how they will use their civil sanctions.

This proposal is supported.

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

It is suggested that the level of current sanctions could be increased, to bring it in line with sanctions available in relation to other offences such as depositing waste without a licence or polluting a controlled water. There are certainly arguments for doing so given the importance of the issue and on the basis that it would increase the deterrent against undertaking wildlife crimes in the first place.

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.

This proposal is supported, as it will improve consistency and contributes to the recognition of the serious threat posed by the introduction of invasive non-native species.

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.

This proposal is supported, as it will harmonise between the sanction in the Deer Act 1991 (level 4 fine) and that in the Game Act 1831 (level 1 fine).

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?

On balance, it is considered that these provisions should be kept, as it provides a clear way of showing that multiple infractions warrant more severe penalties.

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

If retained, then yes, as this will improve consistency of approach.

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?

On balance, the introduction of such an offence is supported, as it will ensure the responsibility of those who direct a regulatory transgression.

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)?

This proposal is supported, as it will use a new mechanism considered most appropriate by government and there seems no point in reforming this process.

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

No. Whilst there are arguments for and against creating a new appeals process, on balance, it is considered that the current licensing process is an iterative one, with regulators and developers/other licence applicants working together through an ongoing process. In addition, the introduction of an appeals process would be expensive.

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)?

N/A

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

It would appear appropriate, if an appeals system were adopted, that it should apply to all types of wildlife licence.

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)?

There are arguments for and against both. On balance, the First-tier Tribunal (Environment) appears most appropriate, so as to avoid the Planning Inspectorate becoming overburdened.