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Reforming Wildlife Law: Proposals by the Law Commission for England and Wales

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Abstract

This article examines critically the review commenced in 2012 by the Law Commission for England and Wales into wildlife law. The article considers four interlinked elements of the process. First, it outlines the underlying subject matter and regulatory aims of wildlife law. It then describes the scope of the Law Commission's Wildlife Law Project, identifying some of the key problem areas it sought to address and referencing the public consultation process conducted in the latter part of 2012. Next the article summarises the Law Commission's view for a new wildlife law regime. The fourth element explores the current and potential roles of criminalising and non-criminalising sanctions. With a continued focus on the underlying subject matter and regulatory aims, discussion centres on the greater use of non-criminalising civil sanctions in wildlife law. The article supports the Law Commission's argument that the creation of a civil sanctions regime is not tantamount to decriminalisation in its true sense but simply widens the available regulatory enforcement options.

Keywords

Wildlife; environment; civil sanction; decriminalisation; law reform.

Introduction

For some time, there has been a recognised need to rationalise the law that governs the management of wildlife in England and Wales, and particularly laws which apply to wild birds and other protected species. In part this is because the numbers of successful prosecutions for breaches of the current law are thought to represent only a small proportion of reported and anecdotal criminal activities. Furthermore, existing law has been criticised for a number of other reasons including the criminalising of offenders who are successfully prosecuted for what might be a relatively minor breach of one of multiple project consent conditions.

Accordingly, in 2012 the Law Commission prepared proposals for revised wildlife laws and wildlife sanctions that were subsequently subjected to and informed by comments from the public, including individuals, organisations and institutions. This review is known as the Wildlife Law Project and the background, concerns, consultation and, finally, the Interim Report published by the Law Commission in 2013 are the focus of this article. The interlinked elements are presented within four sections: subject matter of wildlife law; themes in wildlife law and

statutory factors; the Law Commission and the Wildlife Law Project; and sanctions. The following discussion is centred round the pros and cons of non-criminalising civil sanctions. The intent of the article is to raise awareness of the issues involved and promote discussion about the preferred regulatory regime that should be implemented for the protection of wildlife in England and Wales. The new laws had not been promulgated at time of publication.

Subject matter of wildlife law

Wildlife law for England and Wales, as currently composed, is contained in a variety of Acts and regulations going back to 1828. However, the principal legislation is contained in the Wildlife and Countryside Act 1981 and the Conservation of Habitats and Species Regulations 2010, as well as the Deer Act 1991, the Protection of Badgers Act 1992 and the Conservation of Seals Act 1970. The imperatives of wildlife law include responding to the dramatic decline in numbers for many species. In the 2013 report, *State of Nature* (Royal Society for the Protection of Birds et al. 2013), 60 per cent of the 3,148 reported species showed decline over the last 50 years; 31 per cent of those declined s.² Particularly worrying is the decline in numbers of farmland birds.

To take a particular example, research has shown that there are significantly fewer hen harriers – a bird of prey that breeds throughout the northern parts of the northern hemisphere – in England and Wales than there would be if there had not been illegal persecution (Fielding 2011). Numbers for some other species of birds of prey, such as peregrine falcons, are also below expected levels given natural propagation rates. Moreover, there has been a rise in serious crime associated with wildlife such as poaching which can take the form of large-scale organised crime.

Regulated community and regulatory activity

There is little common agreement as to what constitutes human-wildlife interaction. Affected communities and contexts range from small farmers to large developments and industrial operations. Wildlife can be affected by, for instance, the activities of navy submariners, large vessels utilising UK waters and ports, aircraft operating out of airports, and individuals who are influenced by dramas portraying country life such as *The Archers*.³ More importantly, the range of illegal deviant activity is large. As the National Wildlife Crime Unit (2013) point out in their recent submission to the Sentencing Council, wildlife crime ranges from small-scale activities to serious organised crime carried out within sophisticated operations.

Criminal activity statistics

Available statistics help to illustrate difficulties in interpreting the magnitude of criminal activity levels based on the small number of cases prosecuted in the courts. In 2011, only 58 people were proceeded against under the Protection of Badgers Act 1992, up from 48 in 2010 (House of Commons 2013). In 2009, the most recent date of which figures could be sourced, as few as 57 people were proceeded against under the Hunting Act 2004 (House of Commons 2010). Specific statistics for the bulk of wildlife crime, however, are not available, partly because the Wildlife and Countryside Act 1981 covers a wide variety of different types of offences, including non-species-specific ones. Nevertheless, the Royal Society for the Protection of Birds (RSPB) states that in 2011 there were 34 prosecutions in England and Wales relating to birds; in 2010 there were 38 (RSPB 2010). The 34 prosecutions are significantly fewer than the number of reports of bird crime: 298 in England and Wales in 2011. There could be many reasons for this, such as over reporting, and it is obviously not a given that a report should lead to a prosecution.

There are no overall crime figures for species protected as a result of the EU Habitats Directive,⁴ although the Bat Conservation Trust reported no prosecutions for either 2010 or 2011. The

National Wildlife Crime Unit (NWCU) recorded 58 wildlife crime cases being heard by courts in England and Wales in 2011. For 2012 59 cases were recorded.

There are three interlinked reasons for the low numbers of prosecutions. First, given the way that protection works (for instance, all wild birds in the EU are protected) and the resources available, the police have established priorities in the types of cases they pursue (such as those compliant with the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES), and also cases involving badgers, bats, raptors and poaching). Second, detecting actions against priority species is frequently challenging, due to geographic remoteness and poor access. Third, even where an action against a protected species is detected/reported, these are difficult to prosecute, in part because the cost of any prosecution has to be weighed against other matters competing for scarce legal resources.

Prosecution of criminal activity, though, is only one element of the regulated world of wildlife law. Licensing activities which permit the killing or removal of wildlife are also important. In 2011, 24 General Licences were issued by Natural England (the wildlife regulatory authority for England). These permit members of the public, within certain limitations, to conduct activities otherwise prohibited under the Wildlife and Countryside Act. In the same year, ten Class Licences were issued, which allowed certain groups to conduct otherwise illegal acts upon wildlife: for example, one licence allowed all those operating airfields to kill or take wild birds for air safety reasons. There are also Institutional Licences issued to particular institutions and organisations, allowing them to perform designated responsibilities and functions. In 2011, 18 such licences were issued, including to the Ministry of Defence and the Environment Agency, and to Natural England itself. From April to December 2011 – unfortunately there is no dataset for January to March 2011 – 3251 Scientific Licences (mostly for surveying) were issued by Natural England. In the same year, 1703 Individual Licences concerning wild birds were issued, allowing for a range of activities, from taking for the purposes of taxidermy to the preservation of air safety.

There is, though, little investigation into deviation from the conditions of licences granted and little funding to make this possible. Anecdotal evidence suggests widespread deviation, particularly with respect to reporting conditions. What is clear is that a significant range of human-wildlife interaction comes within the scope of licenced activity. Additionally, pheasant shooting, an activity affecting large numbers of birds, requires no shooter's licence. Some 35 million pheasants are estimated to be bred for sport each year (Game and Wildlife Conservation Trust et al. 2006). The governing legislation, the Game Act 1831, does not distinguish between raised pheasants and those truly wild.

Themes in wildlife law

Another reason there has been a call for a review of existing legislation relating to wildlife is that there is no homogenous purpose or theme to the laws which currently apply. Instead a variety of aims and roles, some of which are conflicting, make application of laws problematic. Nevertheless, four themes can be identified: control, exploitation, welfare and conservation.

In the first instance, the law provides the framework within which wildlife can be controlled so that it does not interfere unduly with the conduct of human activity. Second, the law allows for the exploitation of wildlife as a valuable natural asset (Reid 2009). Third, the law protects individual animals from harm beyond a permitted level. Finally, the law seeks to conserve wildlife as part of our common natural heritage. A brief description of the characteristics of each of these four themes follows.

Control of wildlife has long been a feature of wildlife law and is almost certainly the earliest purpose of wildlife laws. Acts have required the control of rabbits, vermin or certain birds since medieval times (Reid 2009). The species to be controlled have, however, changed over time: badgers were once required to be killed, and a carcass would fetch a high price (see Fitzgerald forthcoming 2014). The theme has continued into modern legislation. Wildlife is managed to permit the building of a road, the development and operation of an airport, or to protect the raising of game stock. The modern practice, though, is that, rather than mandatory control by killing, the law now allows for discretionary freedom from prohibitions on killing or taking. An exception concerning rabbits is in section 2 of the Pests Act 1954.

Wildlife law creates rights to **exploit** animals present on an owner or occupier's land. The law then excludes others from being able to interfere with those rights, traditionally through the creation of crimes such as poaching. The Game Act 1831 is an ongoing example of this.

In the UK, legislative rules which address animal **welfare** considerations can be seen as descending from the nineteenth century movements that led to the foundation of such institutions as the Society for the Prevention of Cruelty to Animals in 1824 and The League against Cruel Sports, founded in 1924. Although potentially linked to conservation considerations, welfare is concerned with protecting an individual animal from harm rather than the survival of a species' population. Consequently, it is not possible to mitigate the prohibited harm, or to offset it against the wellbeing of another individual.

Environmental conservation can be construed as applying to animals regarded as being in the common ownership of (or held in trust by) humanity. Initially, the conservation movement in the UK focused on the safeguarding of particular species, or groups of species, deemed worthy of protection. The first domestic statute is probably the Wild Bird Protection Act 1872. Conservation is now more about the protection of biodiversity. This ties the conservation of individual species to the development of research into the functioning of ecosystems and the need to mitigate some of the effects that climate change is having on our natural heritage (Bowman et al. 2010). The current conservation regime for England and Wales is primarily located in the Wildlife and Countryside Act 1981 and the Conservation of Habitats and Species Regulations 2010.

The Law Commission and the Wildlife Law Project

I now turn to the role of the Law Commission in the UK and outline how it became involved in the review of wildlife law. In so doing, limitations in the scope of the project are identified and some problems that replacement legislation would seek to overcome are outlined. The public consultation process which took place in the latter half of 2012 and types of respondents are also summarised.

The Law Commission was established in the UK as an independent agency in 1965 to keep the law under review, with a view to its systematic development and reform, including in particular:

- the codification of such law;
- the elimination of anomalies;
- the repeal of obsolete and unnecessary enactments;
- the reduction of the number of separate enactments; and
- generally, the simplification and modernisation of the law (Law Commissions Act 1965).

The Wildlife Law Project

The Wildlife Law Project was proposed by the Department for Environment, Food and Rural Affairs (Defra) as part of the Law Commission's 11th programme of law reform which was

launched in July 2011. In consultation with Defra, there was agreement to exclude consideration of habitats protection legislation and the Hunting Act 2004 from the scope of the review; also excluded were alterations to the level of protection afforded particular species, unless such were required as a matter of European Union (EU) law.

Problems with existing wildlife law

The Wildlife Law Project sought to address certain perceived problems with existing law, including the following:

- breaches of EU law;
- unnecessary confusion and complication, with inconsistent provisions over a number of statutes;
- use of inappropriate language; and
- lack of flexibility.

Each of these problem areas is expanded upon below.

Problems with breaches of EU law: The general offence under the law of England and Wales, in relating to wild birds is to ‘intentionally’ kill or take wild birds. The applicable word in the EU Wild Birds Directive is ‘deliberate’. Ruling on the Habitats Directive through *Commission v Spain*, on an identical provision to that in article 5 of the Wild Birds Directive, the European Court of Justice held that:

For the condition as to ‘deliberate’ action ... to be met, it must be proven that the author of the act intended the capture or killing of a specimen belonging to a protected animal species or, at the very least, accepted the possibility of such capture or killing. (European Court of Justice 2006)

This clearly goes beyond mere intention and consequently the use of ‘intention’ to define the mental element in section 1 of the Wildlife and Countryside Act 1981 is illegal.

The hunting of game is covered by the Game Acts, particularly the Game Act 1831. Hunting is permitted under the Wild Birds Directive subject to certain conditions, including ‘wise use’ and ‘ecologically balanced control’. These are not a feature of the current law. So, the Game Act 1831 breaches EU law.

Problems with interpretation and inconsistent provisions: This problem area is partly the result of the manner in which wildlife law has been enacted, and the underlying policies reflected in the Acts. For instance, the introduction and content of the Wildlife and Countryside Act 1981 were driven by the Wild Birds Directive. However, the Act also reflected earlier domestic legislation, such as the Protection of Birds Act 1954. Many of the species-specific Acts, such as the Conservation of Seals Act 1970 and the Protection of Badgers Act 1992, were driven by concerns focused on those particular animals. Several Acts are the result of private Member’s Bills, and may not have been drafted with a view to fitting with other domestic legislation.⁵

One of the adverse outcomes of current wildlife law has been the duplication of provisions. Certain species are dealt with by more than one statute or other legislative provision. For example, the Pipistrelle bat is a European Protected Species within the Habitats Directive. Consequently, taking and killing these bats and the destruction of their resting places are prohibited (Conservation of Habitats and Species Regulations 2010). Their shelters are also protected by the Wildlife and Countryside Act 1981, ss 9(4)-9(5). Certain methods of taking or

killing Pipistrelle bats are prohibited under the Habitats Regulations 2010, reg 43 and many of the same methods are also prohibited under the Wildlife and Countryside Act 1981, s 11, sch 6.

A certain level of complexity is, in part, an inevitable consequence of the breadth of wildlife law. 'Wildlife' is a complicated subject and the law concerning it needs to apply in a range of different situations and reflect a range of (potentially competing) interests; these are explored below. In other cases, however, there would appear to be little obvious rationale, and repetitions and inconsistencies should therefore be removed.

Problems with inappropriate language: Use of inappropriate language within and between statutes is best explained by way of example. For instance, the Wildlife and Countryside Act 1981 protects species that have established self-sustaining wild populations, such that they could be regarded as 'ordinarily resident' irrespective of how they came to establish the population. In the Wild Birds Directive, the term 'ordinarily resident' can be transposed to mean 'naturally occurring'. Thus the current position in law means that certain species which are regarded as invasive non-native species by virtue of their inclusion in schedule 9 to the Wildlife and Countryside Act 1981 are also protected under section 1 of that same Act due to their assumed ordinarily resident status. An example is the ring-necked parakeet.

Problems with lack of flexibility: The sort of flexibility now required of regulatory regimes is not present in important areas of wildlife law. This is due, in part, to the age and intention of the legislation in question. There are no powers to prohibit outright certain methods of wildlife control for domestic reasons, although there is power to prohibit methods in order to comply with international obligations (Wildlife and Countryside Act, s 11(4), 1981). There are no powers to impose new close seasons – that is, periods of the year when hunting is not permitted – or vary those imposed on different types of game. Primary legislation would be needed to achieve these outcomes. Regulations could be used under section 2(2) of the European Communities act 1972, but only if that is to implement an EU obligation.

The consultation process

The *Wildlife Law* consultation paper (Law Commission 2012) was published on 14 August 2012, and public consultation ran for three and a half months, to 30 November 2012. This paper set out detailed proposals for replacing the existing law, currently located in disparate statutes which neither accord with each other nor – except occasionally – with the UK's external obligations, both within the EU and in other international jurisdictions.

During the consultation period, the Law Commission organised events where all stakeholders including members of the public, interest groups, and those with economic investments involving wildlife were encouraged to provide feedback on the consultation paper. Responses received were from:

- organisations, which included charities, trade associations and other interest groups, companies, government agencies, local authorities, enforcement authorities and Defra;
- campaigns such as ones led by the RSPB and another by the Wildlife News blog; and
- interested individuals, including academics, enforcement authorities, lawyers, environmental consultants and other practitioners, and individuals with a personal interest in the outcome of the project (for example, falconers, pigeon fanciers, landowners, gamekeepers).

The Wildlife Law Project was informed by these responses offered during consultation. Subsequently the Law Commission published a document containing interim recommendations and issues. This was to advise and form the basis for pending new legislation.

Law Commission's Interim Statement

The Law Commission's *Wildlife Law Interim Statement* was published in October 2013. This set out the Commission's views on the basic structure for the new wildlife regulatory regime and was composed of the following recommendations and elements:

- There should be a single wildlife law statute
- Certain species need to be protected from defined activities, such as killing or taking. These species should be listed in the statute. Species not listed would not be protected. Therefore, it should be an offence to kill a wild bird or a European Protected Species, unless holding a licence or relying on a specific defence.
- There needs to be a power to prevent the killing and taking of particular species during close seasons, which would allow close seasons to be applied to animals which do not currently have one.
- Certain methods need to be prohibited when taking particular protected species. For instance, it should be an offence to use a net when taking a wild bird, unless a licence specifically permitting the use of a net for the taking of wild birds has been issued.
- The listing of the species covered by wildlife law, the duration of close seasons, and the prohibited methods of killing or collecting need to be capable of amendment through a common power.
- There should be regular reviews of the effectiveness of the law.
- The hunting of wild birds should be within a framework that ensures 'wise use' and complies with article 7 of the Wild Birds Directive.
- The regime should make use of civil sanctions as an alternative to prosecuting the underlying criminal offence, based on the regime contained in Part 3 of the Regulatory Enforcement and Sanctions Act 2008.
- The regime needs to make provision for offences to be triable and the appropriate level of fines and custodial sentences needs to be set.
- There needs to be an appeals process against civil sanctions and compulsive orders made under the Act.

Sanctions

The report presented the creation of civil sanctions within a new regulatory regime as not tantamount to decriminalisation in its true sense but, instead, simply a widening of the available regulatory enforcement options. This is an area that has generated considerable interest in the public sphere. It is important, therefore, to offer some explanations of the range of sanction types being considered. Accordingly, this section describes the different facets of criminalising and non-criminalising sanctions and how and when they are, or may be, applied. Some are currently available as a means of punishing transgressors and others may be included or revised under a replacement wildlife law regime for England and Wales.

Current criminalising sanctions

The law, even one as confusing as wildlife law, needs to be enforceable. Thus making provision for enforcement is key to any regulatory regime. The current regime essentially criminalises certain activities that interfere with wildlife, then either provides limited defences to prevent such illegal activities occurring or offers the possibility of licensing and thus legitimising the otherwise criminal activity.

Criminalising some activities as the sole method of control within the law provides essentially a binary result: a person or organisation is either law-abiding or criminal, with the stigma that comes with labelling as the latter. Therefore, criminalising regulatory transgressions may not always be the appropriate way of ensuring beneficial outcomes. Other ways may also achieve

the desired regulatory ends. It may be better, for instance, to provide the non-compliant individual or organisation with advice or guidance. However, the subject matter is complicated, and whatever the regulatory regime, certain levels of inherent complexity will remain.

If criminal activities are successfully prosecuted in that a guilty verdict is obtained, the sentences available within the law may not be effective enough to control certain serious transgressions. For instance, the maximum fines that could be imposed may be of a size that could be easily internalised by high profit-earning businesses, and some of the actors subject to wildlife law and that may potentially breach it are large businesses (Hampton 2005; Macrory 2006). On that basis, the use of other economic tools, such as preventing those committing serious transgressions from continuing to operate in a particular type of business (until they can provide assurances that their future behaviour will accord with wildlife law) may have merit.

Currently, most wildlife offences are summarily triable in a Magistrate's court, with maximum penalties of either six months' imprisonment or a fine of up to £5,000, or both (Wildlife and Countryside Act, s 21(1) 1981).⁶ Poaching offences under the Game Act, s 3, 1831 have the lowest penalties of £200. By way of comparison, the maximum fine on summary conviction for disposing of waste without a licence is £50,000 (Environmental Protection Act 1990, s 33).

There are certain areas where any activity against nominated forms of wildlife is prohibited and, rightfully, criminalised. This includes illegal hunting prohibited by the Hunting Act 2004, badger baiting prohibited under the Protection of Badgers Act 1992, and the unlicensed taking of protected wild birds from the wild for the purpose of illegal trade. However, in other instances, such deviances may form a small part of a much larger and essentially legally operating activity. So, a developer killing more birds than permitted under a licence or failing to put in sufficient mitigation as required by a licence may be failing to meet the requirements of one comparatively minor part of a large (possibly compliant) activity. Accordingly, Law Commission's recommendation in its review of wildlife law was that the regulatory regime should take into account different penalty scenarios to solely criminalisation: specifically, civil and administrative sanctions of one form or another.

Arguments for hardening criminal sanction penalties

There are two interlinked arguments that have been put forward against current level of criminal sanctions:

- they are an insufficient deterrent and can be easily internalised by offenders; and
- they are disproportionately lenient compared to other, non-wildlife, environmental offences.

If one accepts these arguments, then there are two ways in which the sanction penalties could be made more onerous to offenders. First, the level of fines could be raised but the trial could remain in Magistrates' Courts. Second, the offences could be made triable 'either way', meaning that cases can, alternatively, be heard in the Crown Court.

The first of these has obvious advantages in relation to simplicity and keeping the costs of trials down. This will become the position when Section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 comes into force, removing the limit on fines on conviction by a Magistrate's Court for offences currently punishable by fines of £5,000 or more. Consequently, unlimited fines would be available in the Magistrates' Courts. However, there is a significant amount of wildlife crime committed by organised criminal enterprises. This is the sort of activity that it is appropriate to sentence in the Crown Court rather than in the Magistrates' Courts, as it is not just a matter of determining the amount of fines but also of

custodial sentencing. Hence, the Law Commission favours making most of the core wildlife offences triable 'either way'.

There may, though, be negative impacts due to the costs of trial: Crown Court trials are significantly more expensive than those in a Magistrate's Court. Arguably, the additional costs are offset by the level of sanctions available in a Crown Court, and the additional negative publicity that such a trial would engender to the detriment of the offender.

Non-criminalising sanctions

Criminalising sanctions, though, are only part of the regulatory picture. There is also a significant role for civil and administrative sanctions in wildlife law. These types of sanctions as an alternative to prosecution were presented in the Law Commission's Interim Report. This is not to say that these methods are necessarily the best way to achieve regulatory aims. However, this review of the regulatory regime needed to address law reform in terms of effective enforcement. Moreover, other elements which required consideration, such as funding particular programmes which have as their objective securing the conservation or control of species, are not really a function of law reform.

The two elements of non-criminalising sanctions discussed here are:

- civil sanctions modelled on those contained in Part 3 of the Regulatory Enforcement and Sanctions Act 2008; and
- administrative sanctions that can be used as a result of adopting a new regulatory framework.

Administrative sanctions

Administrative sanctions do not impose a direct sanction on a person such as a fine or a custodial sentence: they merely make it harder for someone to do that which is permitted. So, at the moment there are clauses in General Licences⁷ which state that a person convicted of a wildlife crime cannot rely on the General Licence. Therefore, they have to gain an individual licence to do what others, the normally law abiding, can do without such a burden.

This regime could be extended to the permitted hunting of wild birds. So, rather than being covered by the Game Act of 1831, pheasant shoots and similar will be covered by General Licences which accords better with the provisions of Article 7 of the Wild Birds Directive. However, one can only use the envisaged General Licence if free of wildlife convictions or transgressions. This means that someone who had had a civil sanction issued against them would be prohibited permission. This approach appears to be one way to sanction regulatory transgressors appropriately.

Civil sanctions

By far the more complex of these alternative non-criminalising sanctions in terms of variety and interpretation are the civil sanctions. The remainder of this section, therefore, outlines potential types and ways of penalising offenders of wildlife law using non-criminalising civil sanctions.

Four types of civil sanctions are available under the Regulatory Enforcement and Sanctions Act 2008. These are fixed monetary penalties, discretionary requirements, stop notices, and enforcement undertakings. Where regulators are given the power to issue civil sanctions, they must issue guidance, including the circumstances in which they are likely to – and in which they will – use civil sanctions (The Regulatory Enforcement and Sanctions Act 2008, ss 63 to 64). These different types of sanctions are worth setting out in a little detail.

Firstly, a **fixed monetary penalty** creates a requirement on an individual to pay the regulator a prescribed amount if the regulator is satisfied beyond reasonable doubt that the relevant offence has been committed. It is available for relevant offences punishable on summary conviction by a fine, whether or not a term of imprisonment is also an option. The fixed monetary penalty cannot exceed the maximum fine available summarily (The Regulatory Enforcement and Sanctions Act 2008, s 39).

The second alternative type of civil sanction, the provisions for **discretionary requirements**, allow a regulator to impose one or more of the following on an individual if they are satisfied beyond reasonable doubt that they have committed a relevant offence:

- to pay a monetary penalty to a regulator of such amount as the regulator may determine;
- to take such steps as a regulator may specify, within such period as it may specify, to secure that the offence does not continue or recur; or
- to take such steps as a regulator may specify, within such period as it may specify, to secure that the position is, so far as possible, restored to what it would have been if the offence had not been committed (The Regulatory Enforcement and Sanctions Act 2008, ss 42(1)-(3)).

The first of these is referred to as a 'variable monetary penalty'; a requirement falling into either the second or third categories is referred to as a 'non-monetary discretionary requirement' (The Regulatory Enforcement and Sanctions Act 2008, 42(4)).

Next, the provisions for **stop notices** allow a regulator to prohibit an individual from carrying on an activity specified in the notice until the individual has taken certain steps specified in the notice (The Regulatory Enforcement and Sanctions Act 2008, 46(2)).

A stop notice can only be issued where:

- the activity of an individual is causing, or there is a significant risk that it will cause, serious harm to certain matters, which include the environment, and involve the commission of a relevant offence (The Regulatory Enforcement and Sanctions Act 2008, ss 46(3), (4) and (6)), or
- an individual is likely to carry out an activity that will cause, or will present a significant risk of causing, serious harm to certain matters, which include the environment, and involve the commission of a relevant offence (Regulatory Enforcement and Sanctions Act 2008, ss 46(3), (5) and (6)).

The final alternative to be considered here is **enforcement undertakings**. These work in a slightly different way to the other civil sanctions. The provisions allow the regulator to accept an undertaking from an individual to take such action as is specified in the undertaking where the regulator has reasonable grounds to suspect that the individual has committed a relevant offence (Regulatory Enforcement and Sanctions Act 2008, ss 50(1) and (2)). Enforcement undertakings are used widely by the Environment Agency in other areas of environmental law.

Discussing civil sanctions

There are, of course, concerns about civil sanctions. Particularly, some argue that they do not provide the same form of rigour and protection that comes with a criminal trial. Criticism tends to focus on the fact that the issuer of the civil sanction is the regulatory agency; in wildlife law that would mean Natural England, the Marine Management Organisation or Natural Resources Wales. However, there are safeguards in the model offered by Part 3 of the Regulatory

Enforcement and Sanctions Act 2008. The Act requires an appropriate appeals mechanism for challenging decisions of the regulator on the basis that the decision was wrong in law, unreasonable or based on an error of fact. Under that Act, such appeals can only be made to the First-tier Tribunal or another tribunal created under an enactment (Regulatory Enforcement and Sanctions Act 2008, s 54(1)). This would be the First-tier Tribunal (Environment), which was established to handle appeals against civil sanctions issued by the Environment Agency. Moreover, there are benefits to a regulator issuing sanctions, and then appeals going to a dedicated tribunal, which come from the expertise that those organisations will have in what are frequently complicated matters. Of course, where one is talking about digging for badgers, then this is the sort of activity that Magistrates' Courts, or possibly Crown Courts, are designed for. These Courts are not appropriate for assessing whether a wind farm is indirectly killing too many birds.

Current government policy with regards to these types of sanctions warrants examination. In November 2012, the Department for Business, Innovation and Skills announced a general Government policy on the use of civil sanctions which needs to be addressed:

... powers to impose Fixed Monetary Penalties, Variable Monetary Penalties and Restoration Notices will, as a general rule, only be granted where their use is restricted to undertakings with more than 250 employees; and powers to impose Enforcement Undertakings, Stop Notices and Compliance Notices may be granted without restriction as to the size of undertaking against whom they might be used. (Fallon, 2012)

This policy, especially the limitation on imposing fines on enterprises with fewer than 250 employees (Small to Medium Enterprises or SMEs) has been severely criticised by some, including UK Environmental Law Association and Professor Richard Macrory.

In general, those responding to the consultation on the wildlife law project favoured the creation of a comprehensive scheme for civil sanctions, accepting that the Law Commission's provisional proposals would form a useful enforcement mechanism within a balanced regulatory regime. Several consultees, including high-profile conservation and welfare organisations, opposed the adoption of civil sanctions. In particular, the Royal Society for the Prevention of Cruelty to Animals (RSPCA), the Royal Society for the Protection of Birds (RSPB) and the League Against Cruel Sports raised concerns which essentially equated the creation of a regime for civil sanctions with a lessening of sanctions, a reduction in the powers of police and the possibility of creating confusion between the regime for civil sanctions and criminal prosecution. As previously noted, the Law Commission (2013) contended in its *Interim Statement* that civil sanctions should be put in place for wildlife offences. It argued that the use of civil sanctions would allow the wildlife regulatory regime to be flexible and proportionate and was perhaps a better way for a regulatory regime to achieve its regulatory ends (in this case, protecting wildlife) in the least intrusive manner.

Adherence to current Government policy would mean that the vast majority of actors within the regulated community (they are individuals or businesses with fewer than 250 employees) would be outside the regime for civil sanctions. However, this would not mean that they were outside regulation. All persons would still be subject to the criminal law, as required by EU Directives. Consequently, the effect of adhering strictly to current Government policy would be that the binary criminal regime would apply to small businesses; whilst large businesses would benefit from a modern regulatory regime. This was probably not the outcome that the Government intended. More importantly, the reality of wildlife enforcement should be taken into account here, which is that wildlife police budgets are being cut and that wildlife is not a priority for the Crown Prosecution Service.

The creation of a mechanism for civil sanctions does not necessarily represent a lessening in sanctions. Having civil sanctions has no affect whatsoever on the existence of the underlying offence. In fact, the regime that could be used as a model in the Regulatory Enforcement and Sanctions Act 2008 relies on the existence of an underlying offence. It is, therefore, additional to, as opposed to a replacement for, criminal sanctions. The creation of a civil sanctions regime would allow gaps to be filled in the current regime where the commission of an existing offence is not investigated, or if investigated (possibly by a conservation organisation) it is not prosecuted.

Including the possibility of civil sanctions fits better within the regulatory landscape. A significant proportion of regulations that affects wildlife activities is through the licensing regime. And the regulation appropriate to those covered by a permissive set of licences is not necessarily the same as that appropriate to those conducting a wholly prohibited activity such as illegal hunting or badger baiting. For example, the breach of a licence condition offence is not one that lends itself to police investigation (as they would not naturally know of the licences issued, though Natural England would). Nor would it come to court in many cases because a more the appropriate enforcement mechanism may be remediation or a requirement to cease the activity until alternatives are agreed with the regulator. Consequently, it is important to have a range of enforcement tools available, so as to allow for different options and different actors, including the regulators, to take steps to ensure the proper functioning of the regulatory framework. In order, though, to implement such a regime, importantly dialogue needs to be maintained between the regulatory agencies, the police and the Crown Prosecution Service in order to ensure that the whole enforcement regime functions effectively and transparently.

Summation

If there are conclusions to be drawn from an article such as this – one that seeks to promote discussion about the preferred regulatory regime that should be implemented for the protection of wildlife in England and Wales – then I suggest it should be twofold. Wildlife law occupies a complicated regulatory space, owing partly to the subject matter – wildlife – and diverse range of activity and individuals that can affect it. Given the nature of the regulatory space and its occupants, the broadest range of regulatory responses should be available, including both criminal and civil sanctions. Many individuals, organisations and institutions will be waiting and watching with interest to see which of the Law Commission’s recommendations, informed by public opinion though the consultation process, will make their way into the revised regulatory framework.

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² State of Nature was the result of collaboration between 25 UK Conservation and research organisations, including RSPB, Wildlife Trusts, Wildfowl and Wetlands Trust, Buglife and Plantlife.

³ *The Archers* is a long running BBC Radio 4 radio programme portraying issues in a fictitious village (Ambridge) in rural England.

⁴ The EU Habitats Directive, along with the Wild Birds Directive, is one of the core pieces of EU environmental law.

⁵ An example would be the Wild Mammals (Protection) Act 1996.

⁶ Level 5 is set in the Criminal Justice Act 1982, s 37(2).

⁷ These are licences issued by Natural England that allow individuals to conduct otherwise prohibited activity without applying for an individual licence (so, they do not name individuals). General Licences are used presently for low risk activity.

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