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Eich Cyf:/Your ref:

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Mr Alun Ffred Jones AM  
Chair of the Proposed Environment Protection  
And Waste Management LCO Committee  
National Assembly for Wales  
Cardiff Bay  
CF99 1NA

Dear Mr Jones AM

As requested by the LCO2 committee I am forwarding for information a document outlining 33 suggestions as to how legislation relating to biodiversity can in the view of the Police service be improved.

Eleven suggestions relate to changes in regulations that could at present be introduced by the Welsh Assembly Government (3, 5, 7, 14, 17, 19, 22, 24, 25, 31) whilst another could already be introduced under the authority of the primary legislation. (9)

Ten other suggestions can only be introduced if the Welsh Assembly Government obtain legislative competency. If such competency is gained some of the suggestions could be introduced without substantial resource implications but with substantial impact (2, 6, 8, 10, 16, 18, 20, 21, 26, 27,). The other twelve suggestions could be implemented but with greater resource implications (1, 4, 11, 12, 13, 15, 23, 28, 29, 30, 32 and 33).

**1. Sections 1, 9 and 13 of the Wildlife and Countryside Act 1981. - Recklessness.**

To extend the nature of all offences under these sections so that all birds, animals and plants are protected against reckless as well as intentional behaviour. There are many incidents where wildlife is persecuted but prosecutions cannot be taken because of the difficulties in evidencing intent.

**2. Sections 1, 9 and 13 of the Wildlife and Countryside Act 1981. – Offence for a statutory authority to fail to pay regard to biodiversity.**

**3. Regulations 39 and 43 of the Conservation (Natural Habitats & c) Regulations 1994 as amended by the Conservation (Natural Habitats & c) (Amendment) Regulations 2007. - Offence for a statutory authority to fail to pay regard to biodiversity**

Time and again instances occur throughout the UK where insufficient regard is paid to biodiversity resulting in loss or damage to protected places. Much of the loss or damage could be avoided if public bodies were required to fully consider the impacts on biodiversity of licences and permissions granted by them. Legislation could be extended so that public bodies commit a criminal offence if a negative impact on protected species occurs as a consequence of operations being carried under statutory licence or permission. Such measures would I believe have substantial impact on the planning and highways departments of local authorities in particular.

**4. Section 9 and 13 of the Wildlife and Countryside Act 1981. – Codes of practice.**

**5. Regulations 39 and 43 of the Conservation (Natural Habitats & c) Regulations 1994 as amended by the Conservation (Natural Habitats & c) (Amendment) Regulations 2007. – Codes of practice.**

Protected species, ever increasingly are becoming subjected to intensive levels of study and public curiosity. The need for the production of codes of practice is becoming ever more apparent and should be produced by the Countryside Council for Wales. The legislation should require the production of codes relating to wildlife watching as is the case for Cetaceans in Scotland. It should be made clear that a breach of the code is evidence of the species being disturbed.

**6. Section 1, 9, 13 and 28, of the Wildlife and Countryside Act 1981. - Stop notices.**

**7. Regulations 39 of the Conservation (Natural Habitats & c) Regulations 1994 as amended by the Conservation (Natural Habitats & c) (Amendment) Regulations 2007. – Stop notices.**

Part 2 of the act used to contain provision for the Secretary of State to issue stop notices preventing certain activities from taking place on sites of special scientific interest. Such provisions were removed by the Countryside and Rights of Way Act but are missed by the Countryside Council for Wales who would I understand welcome reintroduction. A similar power to prevent activities that might result in the damage or destruction of protected places could also be added.

**8. Section 14 Wildlife and Countryside Act 1981. – Defining “in the wild”.**

Invasive non –native species have been identified as a substantial threat to our native biodiversity. Section 14 (1) relating to the release of non-native animals appears to be working effectively. On the other hand section 14(2) is widely considered to be un-enforceable. The section relates to the planting of certain species in the wild or causing certain species to grow in the wild. No definition of “the wild” has been provided and almost 30 years on from when the legislation was introduced the courts have not had opportunity to give their view. Given that all land in Wales is owned it is not at all clear what was intended. As a consequence little enforcement activity in relation to non native invasive species is undertaken. Clarity as to what is intended is

essential. An ability to effectively enforce the legislation might allow issues such as the spread of Japanese Knotweed in some parts of the country to be tackled. .

#### **9. Section 16. Wildlife and Countryside Act 1981. - General licences.**

At present a number of general licences issued by the Welsh Assembly Government permit in certain circumstances the killing of what are red listed birds in Wales namely Starling and House Sparrow. Licences in England have for some years not included these species. It is difficult to understand how in Wales these species remain subject of general licences given the duty to have regard to and enhance biodiversity. It is noted that at the time species were removed from the General Licences in England a decision was also made to add the Canada goose to the list of species covered by such licences. I have no reason to argue that the same step should be taken in Wales.

#### **10. Section 16. Wildlife and Countryside Act 1981. - Breaching of conditions of licence.**

The recent amendments to the Conservation (Natural Habitats & c) Regulations 1994 recognised in regulation 46A the need for a specific offence of failing to comply with the conditions of a licence issued under them. As a consequence it no longer has to be demonstrated that offences under regulation 39 have been committed. A similar offence is needed within the Wildlife and Countryside Act. Without such an offence developers can breach the conditions of their licences but are unlikely to face sanction as harm or disturbance cannot in itself be evidenced nor can damage to their protected places.

#### **11. Section 28 of the Wildlife and Countryside Act 1981. - Third parties carrying out operations likely to damage the special interest of a site of special scientific interest.**

To create a new offence of any person knowingly carrying out an operation likely to damage the special interest of a protected site similar to the existing offence applying to owners and occupiers. The Countryside and Rights of Way Act created an offence of third party damage to sites of special interest that required evidence of damage to the designating feature and knowledge of the status of the site. Recently the Natural Environment and Rural Communities Act created a new offence of third party damage where although guilty knowledge is not required damage to the designating feature of the site still has to be proved. This causes difficulty if for instance motor cyclist's drive over fragile heath over a period of time. It is unlikely that evidence would be available to demonstrate that any one offender caused damage to the designating feature as the damage arises from cumulative behaviour. An offence of carrying out operations would resolve these difficulties and place third parties in the same position as owners and occupiers, knowledge not only of the protected nature of the site but also of the damaging operation would have to be evidenced.

#### **12. Section 28 of the Wildlife and Countryside Act 1981. - Designation of land as being a site of special scientific interest that does not contain designating features.**

To introduce provisions allowing the designation of land as a site of special scientific interest if designating features are absent but there is a likelihood of operations being carried out on that land, affecting such features located elsewhere. (Buffer zones).

An example of where such provisions could be utilised is that of the freshwater pearl mussel where the designated sites are the river channels. However the water quality in the river is determined by activity that occurs outside the site of special scientific interest and at present there are many instances where those activities are not subject of control. In order to influence the quality of the water, restrictions would have to be imposed across a much wider area, perhaps throughout the catchments.

**13. Sections 1, 9 and 13 of the Wildlife and Countryside Act 1981. - Restoration orders to reinstate or replace protected places.**

**14. Regulations 39 and 43 of the Conservation (Natural Habitats & c) Regulations 1994 as amended by the Conservation (Natural Habitats & c) (Amendment) Regulations 2007. - Restoration orders to reinstate or replace protected places.**

**15. Section 3, Protection of Badgers Act 1992. - Restoration orders to reinstate or replace protected places.**

To mirror the provisions in Part 2, Section 31 of the Act permitting restoration orders to be made where the protected places of protected species have been damaged or destroyed. At present the “offender pays” principal can apply where damage is caused to protected places but not where offences relating to species are being heard.

**16. Section 51, Wildlife and Countryside Act 1981. - Power of entry to establish whether or not protected species are present.**

**17. Conservation (Natural Habitats & c) Regulations 1994. - Power of entry to establish whether or not protected species are present.**

To create a power enabling authorised persons to enter land for the purposes of establishing whether or not protected species are present. It is often not possible to evidence offences against protected species simply because their presence has not previously been noted. On occasion this is due to landowners refusing to allow surveys aimed at establishing whether protected species might be present. With such a power on receipt of information to the effect that protected species may be at a specified location their presence can be confirmed and suitable advice provided in order to prevent offences being committed.

Landowners knowing that the statutory authorities are aware of the presence of protected species will be less likely to commit offences. Should they choose to do so the fact that the presence of protected species can be evidenced would be of significant assistance to investigators and prosecutors.

Intelligence is now emerging from various parts of the United Kingdom to the effect that a small number of consultants may submit survey results suggesting that protected species are not present when in fact they are. Such false surveys may save developers considerable amounts of money and at present the SNCO's have no power to enter property to carry out their own surveys to challenge initial results.

It is suggested that this power should be provided to persons so authorised by the Countryside Council for Wales.

**18. Section 51 Wildlife and Countryside Act 1981 - Power of entry to monitor protected species.**

**19. Conservation (Natural Habitats & c) Regulations 1994 - Power of entry to monitor protected species.**

This is not the same power as outlined above and relates to a power of entry to enter land to monitor the status of protected species. Such a power could be utilised for example where it is known that Hen Harriers are nesting or attempting to nest on moor land where the landowner is not sympathetic to their presence. Whilst there may be concern that the nest has been damaged, generally this will be insufficient for existing powers of entry to be utilised because a reasonable suspicion of an offence having been committed cannot be formed. A specific power of entry would allow for such a nest to be checked to establish its status and determine whether criminal offences may have been committed.

It is rather bizarre that at present where such nests are located on open access land they can be monitored by anybody with an interest in doing so recreationally. However if such monitoring is being done on behalf of a statutory authority it is no longer recreational and cannot be done under the provisions of the Countryside and Rights of Way Act 2000. This leaves a situation where members of the public are entitled to enter land to establish the status of protected species but the authorities charged with the conservation of the species and those responsible for law enforcement cannot.

It is suggested that such a power of entry should be exercised by those authorised by the Countryside Council for Wales.

**20. Section 63, Wildlife and Countryside Act 1991. - Rerouting and closure of public rights of way.**

It is suggested that the Act could be amended to allow for the diversion or closure of Public Rights of Way in the interests of nature conservation. A footpath passes within 100 metres or so of Wales's only breeding pair of Osprey. The act at present contains no provisions allowing for the closure or diversion of the footpath in order to prevent the birds being disturbed whilst nesting.

**21. Wildlife and Countryside Act 1981. - To create a consolidated act.**

**22. Conservation (Natural Habitats & c) Regulations 1994 – To create consolidated regulations.**

There are a large number of amendments that have been made to the Wildlife and Countryside Act and as a consequence it is suggested that only those who deal with the subject on a day to day basis fully understand the present position. A consolidated act will undoubtedly result in enforcers being more confident when addressing wildlife crime and will allow all other sectors to gain greater understanding of the legislation. The same measure should be taken in relation to the Conservation (Natural Habitats & c) Regulations 1994 so as to include not only the recent amendments but also the Offshore Marine Conservation (Natural Habitats & c) Regulations 2007.

### **23. Wildlife and Countryside Act 1981 - Repeal.**

To repeal all other legislation protecting wildlife including the Protection of Badgers Act 1992 and the various Game Laws to produce one comprehensive and effective piece of conservation legislation.

### **24. Regulation 39 (b) Conservation (Natural Habitats & c) regulations 1994 as amended by the Conservation (Natural Habitats & c) (Amendment) Regulations 2007. - Disturbance of European protected Species.**

For many years I have been voicing the opinion that our conservation legislation has not served to protect many of our European Protected Species against disturbance. Of particular concern has been the levels of disturbance caused to cetaceans around the Welsh coast in particular disturbance arising from recreational interaction with these animals. The difficulty with enforcing the legislation has always been one of trying to evidence that disturbance had in fact occurred. The way forward until recently seemed to be through statutory codes of practice.

It appears that the recent amendments to the regulations have in reality decreased the protection offered to cetaceans. At present we have not been formally advised as to what a significant group of animals might be but it seems that evidencing disturbance has been made even more difficult. It has been suggested that the amendments to the regulations were driven by other government departments and that the amendments still fail to meet the demands of Europe. That is a matter for government but there are I believe good grounds for arguing that the disturbance offence provides inadequate protection to cetaceans around our coasts.

The value of tourism to the Welsh economy has been recognised by the Welsh Assembly Government and there is evidence to suggest that in recent times the concept of marine safaris has been recognised with a number of operators now in existence. Likewise there is clear evidence that numbers of recreational marine craft operating off the Welsh coast are increasing, not least because their use has been prohibited on some freshwater lakes. Taken together it seems highly likely that the number of contacts between marine species and humans will lead to increased pressure on the animals some of which do need access to inshore areas for feeding and breeding.

Whilst tourism does bring enormous benefits to the Welsh economy it is vitally important that our approaches are sustainable. It does seem at present that increased human use of the marine environment will impact on marine animals and as such there is a need for effective legislation that can be used to sanction those who act irresponsibly. That is now not the case.

It is noted that the offence of disturbance in the Offshore Marine Conservation (Natural Habitats & c) Regulations 2007 is very similar. I am not at present able to argue that this offence should be amended in the same manner because at present the Police have no evidence of any such offences having been committed off shore.

### **25. Conservation (Natural Habitats & c) Regulations 1994. – Third party damage.**

To create a third party offence of causing damage to European protected sites. At present third party offences apply to sites of special scientific interest where generally

the seaward border is one of the low tide marks. The offshore regulations create an offence of third party damage to offshore European protected sites leaving sites lying in onshore waters below the lowest low water mark unprotected against damaging activities because such areas are not designated as sites of special scientific interest.

#### **26. Conservation of Seals Act 1970. - Definition of terms.**

A very recent case in Scotland has highlighted difficulties with this act in that the term “vicinity of nets” is not further defined leading to a judgement that the shooting of a seal a mile away from the nearest net can be considered to be in the vicinity. In Wales a small number of firearms licences have been granted allowing the shooting of seals in lawful circumstances. Given that Grey seals are a designating feature of some sites of special scientific interest the terms used in this legislation should be clarified.

#### **27. Conservation of Seals Act 1970. - Disturbance**

Increasingly the Police are receiving reports of seals being disturbed either by watercraft approaching too closely to hauling out spots or by walkers visiting beaches used by the animals at pupping times. Offences relating to third parties on sites of special scientific interest may be considered but are difficult to evidence. A specific offence of disturbing seals using their breeding and resting places could be created. Alternatively the offence could be created by adding seals to schedule 5 of the Wildlife and Countryside Act for the purposes of the disturbance offence contained in section 9.

#### **28. Part III Countryside and Rights of Way Act 2000. - Excluded activities.**

The right of access to open country does not extend to activities specified in schedules to the act. Those who carry out excluded activities can be excluded from using the land for a period of 72 hours but are simply civil trespassers whilst carrying out excluded activities or if they return to the land during the 72 hour period of exclusion. It is suggested those who knowingly carry out excluded activities could be guilty of a criminal offence as should those who return to land less than 72 hours after being excluded.

#### **29. Customs and Excise Management Act 1979.**

New provisions to be introduced to allow for specimens of endangered species to be returned to the wild prior to proceedings being completed where it is in the interest of the specimens for this to be done.

#### **30. Dangerous Wild Animals Act 1976.**

In 2004 the Police submitted a response to Defra’s consultation on the review of this act. In particular we suggested that powers should be provided to Police officers and that Police access to registers was needed. Defra’s review appears not to be progressing but these suggestions could be addressed in Wales.

#### **31. Environmental Protection (Restriction on use of lead Shot) (Wales) Regulations 2002. - Prohibition on possession of lead shot at certain times.**

It is known that the use of lead shot on wetlands has a significant impact on swans, dabbling ducks and waders. There has never been a prosecution in Wales under these regulations and I suggest there is never likely to be one. Health and safety considerations prevent the attendance at many locations where lead shot may be being used illegally. Even if it can be shown who has shot at a listed species forensic

examination would have to be undertaken to establish that the shot was indeed lead. If it is the wish of the Welsh Assembly Government that the use of lead shot when shooting certain species or at specified locations should cease, then possession of lead shot at that time should also be prohibited.

**32. Section 40, Natural Environment and Rural Communities Bill. – Requirement to report on section 40 duty.**

Section 40 requires all public bodies to have regard to biodiversity in all they do. There is no requirement to report on how such responsibilities have been discharged. The act could be amended to require such reports from all public bodies.

**33. Section 32 Regulation of Investigatory Powers Act 2000. – Serious crime.**

This section defines serious crime. In certain circumstances wildlife and environmental crime should be considered as being serious allowing for covert surveillance. A suggestion would be that criminal offences likely to affect the conservation status of Biodiversity Action Plan Species and habitats at a local level should be considered as serious crime.

Yours sincerely



**Richard Brunstrom**  
**Chief Constable/Prif Gwnstabl**