UK Environmental Law Association – written evidence (NER0053)

Evidence of the United Kingdom Environmental Law Association Nature Conservation Working Party

1. The UK Environmental Law Association aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA’s members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.

2. UKELA prepares advice on proposals of governments and regulators covering a range of environmental law topics, with the help of its specialist working parties. This response has been prepared by the Association’s nature conservation working Party (“NCWP”).

3. The UKELA NCWP has awarded a bursary to Joanna Smallwood of the Sussex University Law School. She is currently in the second year of an ESRC funded socio-legal PhD at Sussex University. The title of her PhD is: “The Convention on Biological Diversity’s objectives include conservation of biological diversity at a global level but has it become another victim of extinction as a result of its text and strategic plan?” The NCWP acknowledges the substantial input from Joanna Smallwood in the compilation of this submission.

Rural Advocacy and the Commission for Rural Communities

2. Are sufficient measures being taken to ensure that policies are rural proofed at national and local levels? Who is taking the lead on policy for rural areas – and who should take the lead on such matters?

4. One aspect of rural proofing and ensuring adequate advocacy for rural interests is biodiversity governance.

5. In Wales, the system of local biodiversity action plan (LBAP) officers is key with regard to implementation of the enhanced s61 Biodiversity duty as well as other legal biodiversity obligations including those arising from international law. LBAP officers act as a point of contact to all stakeholders and facilitate better information and coordination between different stakeholders to aid the implementation of biodiversity policies. They provide a means by which biodiversity obligations arising from national, European and international levels are considered and applied to the local level according to the local circumstances. They look at the problems of implementation and the barriers faced and feed back to the Welsh government on direct experiences for the policy makers.

6. Each Welsh county has a differing emphasis on the LBAP officer. Some counties have 3 day a week positions (such as Pembrokeshire). This allows for quite a good system to aid implementation of biodiversity policies. Other counties have only a 1 day a week position and this is considered to be inadequate resourcing.

1. Section 6 of the Environment (Wales) Act 2016
7. Where LBAP officers are poorly supported there is less of a distinction between delivery by an LBAP implementation officer and sole delivery by the local authority. Leaving the local authorities to deal with implementation of biodiversity policies amongst the plethora of other issues they have to deal with risks biodiversity duties and obligations being side-lined.

8. The role of the LBAP officer seems crucial to deliver effective ‘rural proofing’ of biodiversity policies at the local level. They provide information and advice to, and co-ordinate differing positions of, stakeholders. They act as a point of contact to make practical advice regarding implementation of obligations arising from different levels of biodiversity governance and feed into local action on implementation. They also provide feedback to the Welsh government on what is and is not working in relation to policies.

9. LBAP officers in Wales also meet together through a forum known as Biodiversity for Cymru (B4C) and they discuss policies, how to implement them and test new policies.

10. The overarching structures co-ordinating the LBAP officers have been BAP Partnerships for the 4 countries. However, the structure of biodiversity governance within the 4 countries is changing. In England the BAP Partnership has been dissolved. In Wales the BAP Partnership still exists but the amount of funding for county LBAP officers varies. In Scotland the BAP Partnership has been dissolved and is being replaced by a new biodiversity co-ordination group. BAP partnerships (or their successors) need to be well supported to deliver effective implementation of biodiversity duties at the local level. Unless these systems are in place then it removes the ability to ‘rural proof’ policies and to deliver action at the local and national level in relation to biodiversity policies.

11. The Committee is referred to the following conclusion:

“24. The lack of resources to enable local authorities to fulfil their own statutory duties and responsibilities, in terms of conservation, preservation, planning and in tackling wildlife crime reflects at best a woeful ignorance on the part of those in charge and, at worst, neglect or absolute disdain. Local authorities still have a considerable amount of work to do to educate and train their own workforce on their roles and responsibilities. (Paragraph 38)”

12. This conclusion was reached by the House of Commons Environmental Audit Select Committee in its Twelfth Report on Wildlife Crime dated 15 September 2004. The position in relation to local authority ecologist resourcing has deteriorated substantially since then\(^2\).

3. What role should Defra – or other Government departments – play in co-ordinating policy for rural areas? How effectively are the interests – including social and economic interests - of rural communities being represented within the current structures of Government, and how could representation and co-ordination be improved?

13. In our view DEFRA should continue to be the co-ordinator for rural policy.

**Natural England**

\(^2\) See for example the report of the All Party Parliamentary Group on Biodiversity meeting held on 11 September 2014 “Ecological Capacity in Local Planning Authorities” https://www.cieem.net/news/204/ecological-capacity-in-local-planning-authorities
4. How well has Natural England fulfilled the mandate that it currently has? How well do its wide-ranging functions fit together, and does it have the appropriate powers and resources to perform these functions?

14. Government has imposed drastic resource reductions upon Natural England in successive recent years. Overall the organisation has responded remarkably well in making the changes required. Whilst members of the Working Group recognise that the wide-ranging functions can and do fit well together, the diminished organisation has, at times, been unable to meet operational demand to effectively discharge some of its functions such as species protection and licensing.

5. Are any changes to the remit and responsibilities of Natural England required, either as a result of Brexit or of other significant developments in the period since 2006?

15. The Working Group does not believe that changes to the remit or responsibilities of Natural England are called for. Neither Brexit nor developments since 2006 would be any justification for changes to Natural England.

Sustainability and biodiversity

7. Is the duty to ‘have regard’ to biodiversity, which is contained within the Act, well understood by those bodies to whom it applies? Is any further work required to raise awareness of the duty?

16. The Group is concerned about the extent to which the understanding of the duty penetrates within organisations to whom it applies beyond those who are compelled to be aware of and apply the duty regularly.

17. Joanna Smallwood is likely to have an increased level of empirical evidence in due course because she is intending to interview officers of English bodies to whom the duty.

8a) What has been the practical impact of the 2006 duty?

18. The Working Group has seen a copy of the evidence of Professor Colin Reid of the University of Dundee which is extracts from his book Nature Conservation Law (3rd ed) (2009, W. Green, Edinburgh) and refers the Committee to that text both generally and also specifically in relation to this question.

b) Is any modification to the duty required as a result of developments in our understanding of the value of ecosystems and biodiversity since 2006.

19. The UN 1992 Convention on Biological Diversity (CBD) recognises that to ensure effective protection, biodiversity conservation needs to be incorporated into other sectors beyond just those dealing with conservation. The CBD treaty text includes binding obligations in respect of wider approaches to integrating nature conservation into different sectors through mainstreaming. Further, the concept of mainstreaming has been built upon in 2010 by the CBD Conference of the Parties (COP) through the 2020 Strategic Goal

3 Article 6(b) of the Convention on Biological Diversity requires “Contracting Parties to integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies”. 
and the first 5 Aichi targets which all relate to mainstreaming. As well as these targets there are further decisions and guidance produced at the CBD COP in relation to mainstreaming. Target 2 concerns the integration of biodiversity values into national and local development and poverty reduction strategies and planning processes.

20. Biodiversity mainstreaming can be seen to have been integrated to some extent in the UK through the use of ‘public duties’. In England some public law duties must be considered by other sectors beyond purely those responsible for nature conservation.

21. The relevant duties in England in relation to biodiversity are;

   a. A general duty on all public bodies in relation to SSSIs to take reasonable steps, consistent with the proper exercise of their functions, to further the conservation and enhancement of the features that justified notification of the land as an SSSI. (CROWA 2000 s 28G)

   b. A general duty on all public bodies to have regard to conserving biodiversity. (NERC Act 2006, s40 (1))

   c. Ministers and Government departments, but not public bodies more widely, must have particular regard to the Biodiversity Convention 1992 (NERCA 2006, s40 (2)).

22. The use of the biodiversity duties mechanism therefore contributes to the concept of mainstreaming biodiversity found under strategic goal A and the corresponding Aichi

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4 Strategic Goal A: Address the underlying causes of biodiversity loss by mainstreaming biodiversity across government and society.

**mainstreaming biodiversity across government and society**

**Target 1**
By 2020, at the latest, people are aware of the values of biodiversity and the steps they can take to conserve and use it sustainably.

**Target 2**
By 2020, at the latest, biodiversity values have been integrated into national and local development and poverty reduction strategies and planning processes and are being incorporated into national accounting, as appropriate, and reporting systems.

**Target 3**
By 2020, at the latest, incentives, including subsidies, harmful to biodiversity are eliminated, phased out or reformed in order to minimize or avoid negative impacts, and positive incentives for the conservation and sustainable use of biodiversity are developed and applied, consistent and in harmony with the Convention and other relevant international obligations, taking into account national socio economic conditions.

**Target 4**
By 2020, at the latest, Governments, business and stakeholders at all levels have taken steps to achieve or have implemented plans for sustainable production and consumption and have kept the impacts of use of natural resources well within safe ecological limits.

5 Parties have adopted numerous decisions and declarations to address mainstreaming. Most recently COP13 addressed strategic actions to enhance national implementation, in particular through mainstreaming and the integration of biodiversity across relevant sectors, including agriculture, forestry and fisheries. The result was the Cancun declaration on mainstreaming the conservation and sustainable use of biodiversity for well-being. Parties committed to, “work at all levels within our governments and across all sectors to mainstream biodiversity, establishing effective institutional, legislative and regulatory frameworks, tailored to national needs and circumstances, and incorporating an inclusive economic, social, and cultural approach with full respect for nature and human rights”. [https://www.cbd.int/cop/cop-13/hls/cancun%20declaration-en.pdf](https://www.cbd.int/cop/cop-13/hls/cancun%20declaration-en.pdf) accessed 20/6/17.
Targets, in particular AT 2. However as it stands, England’s biodiversity duty to only have ‘regard for biodiversity’ does not embrace other legal obligations under CBD Aichi Targets 14 and 15 relating to safeguarding and restoring ecosystems that provide essential services and enhancing biodiversity.

“Strategic Goal D. Enhance the benefits to all from biodiversity and ecosystem services.

AT 14. By 2020, ecosystems that provide essential services, including services related to water, and contribute to health, livelihoods and well-being, are restored and safeguarded, taking account the needs of women, indigenous and local communities and the poor and the vulnerable.

AT15. By 2020, ecosystem resilience and the contribution of biodiversity to carbon stocks has been enhanced, through conservation and restoration, including restoration of at least 15 per cent of degraded ecosystems, thereby contributing to climate change mitigation and adaptation and to combatting desertification.”

23. The global agreement of the 2010-2020 CBD Strategic Plan and the Aichi Biodiversity Targets represent a key development in our understanding of the value of ecosystems and biodiversity and they need to be incorporated into English law.

24. One such way this can be achieved is by enhancing the biodiversity duty as has already been done in Wales. Wales have used the ecosystem approach and fulfilled their obligations under the CBD through the creation of an enhanced biodiversity duty as well as supporting legislation that aims to put sustainable development as a priority for the Welsh government.

9. How does the English duty to ‘have regard’ to biodiversity compare to the Scottish duty to ‘further’ biodiversity and the enhanced 2016 biodiversity duty in Wales?

25. The English duty compared to the Welsh duty is significantly weaker and does not comprehensively address the CBD Aichi Targets and strategic plan, in particular AT 14 and 15 relating to ecosystem services.

The Welsh Biodiversity Duty

26. The Environment (Wales) Act 2016 (EWA 2016) contains statutory provisions in relation to managing natural resources in a sustainable way. The EWA 2016 adopts an integrated approach to managing natural resources in order to achieve long term sustainability. The EWA 2016 introduces a new s6 ‘biodiversity and resilience of eco-systems duty.’ This replaces the previous s 40 NERC duty. The biodiversity duty applies to all public authorities (Welsh ministers, local authorities, public bodies and statutory undertakers). Public authorities must also report on actions they have taken in relation to this duty.

26. The enhanced duty requires all public authorities when carrying out their functions in Wales to;

“(1) seek to maintain and enhance biodiversity in the exercise of functions in relation to Wales, and in so doing promote the resilience of ecosystems, so far as consistent with the proper exercise of those functions.
(2) In complying with subsection (1), a public authority must take account of the resilience of ecosystems, in particular the following aspects—

(a) diversity between and within ecosystems;
(b) the connections between and within ecosystems;
(c) the scale of ecosystems;
(d) the condition of ecosystems (including their structure and functioning);
(e) the adaptability of ecosystems."

27. It can be seen that this duty closely reflects the CBD Aichi Targets and in fact uses direct wording from the CBD. The biodiversity duty is also supported by other innovative environmental legislation, the Well-being of Future Generations (Wales) Act 2015 and The Planning (Wales) Act 2015. Together this trinity of legislation forms the basis of a comprehensive system to effectively address biodiversity loss within Wales.

28. Further, the Welsh Government has developed systems to support the effectiveness of the legislation. The Government has adopted a programme for sustainable development change. This 20 year programme promotes change in the behaviour of civil servants to make Wales sustainable. A dedicated manager provides advice and training to policy officials and other civil servants. This work is aimed to complement the Welsh legislation by training civil servants with new ways to shift their behaviour with the aim to shift responses to their behaviour. They are trying to find ways of working better using techniques at the cutting edge of behavioural change.

29. Wales has set a good standard in terms of implementing international obligations at the national level with the enhanced biodiversity duty and supporting legislation and government support to change the way biodiversity is seen and protected within Wales. Such an approach within England would ensure biodiversity is kept high on the agenda and recognise its essential nature in providing England with a huge variety of essential services.

Richard Barlow
Chair UKELA NCWP

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6 The Well-being of Future Generations (Wales) Act 2015 places seven well-being goals into law and requires public bodies to apply the sustainable development principle in five key ways. Sustainable development is defined as “the process of improving the economic, social, environmental and cultural well-being of Wales by taking action, in accordance with the sustainable development principle, aimed at achieving the well-being goals”. When Public bodies are required to act, “in accordance with the sustainable development principle”, they must act in a manner which seeks to ensure that “the needs of the present are met without compromising the ability of future generations to meet their own needs”. The Act includes a duty that each public body must carry out sustainable development. Public bodies are required to take two actions in relation to carrying out sustainable development.

1) Setting and publishing objectives (“well-being objectives”) designed to maximise its contribution to achieving each of the well-being goals, and
2) Taking all reasonable steps (in exercising its functions) to meet those objectives.

7 The Planning (Wales) Act 2015. This Act introduces a duty on Local Planning Authorities to have regard to the ‘local well-being plan’ produced by the Public Service Board (PSB) and to develop greater engagement with local communities at the pre-application stage of planning.
11 September 2017