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Association of Lawyers for Animal Welfare

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The live export trade from Australia: prosecution under the Animal Welfare Act 2002 (WA)

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For many years, Australia has exported live sheep to the Middle East. Geography alone dictates that the journey is a long one, and the ending is often brutal. The loading and transport would be distressing for most animals, but sheep in Australia are kept mostly in extensive systems of agriculture, so that they are relatively unused to human contact or intensive conditions.[1]

Unsurprisingly, animal welfare groups have long had the trade under review. Some, and arguably the worst, aspects are beyond the jurisdiction of the Australian courts. Recently, however, a prosecution was launched in Western Australia under the Animal Welfare Act 2002 (WA) (the "AWA") alleging cruelty in the export of live sheep.

The AWA replaced an earlier Prevention of Cruelty to Animals Act 1920 (WA). There was much debate about, and criticism of, the new Act. In particular it contains a defence, common throughout most of Australia, of compliance with a "code of practice". This greatly undermines the Act's ability to deal with animals used in intensive food production. It means that those industries, which largely draw up the codes of practice, broadly regulate themselves.

The AWA, though, did contain at least one improvement. Section 19 proscribes cruelty to animals. Importantly, section 19(3) includes, in the definition of cruelty, the transport of an animal "in a way that causes, or is likely to cause, it unnecessary harm". This is important in two ways. Firstly, in relation to live export, it can establish jurisdiction in Australia, even though much of the voyage may take place outside Australia's territorial waters. Secondly, the High Court of Australia has given an expansive interpretation to similar phrases. The term "likely" does not mean "probably" or "more likely than not". It means "a real and not a remote possibility".

In November 2003, investigators from the group Animals Australia made observations about the loading and conditions of sheep on the *Al Kuwait.* As a result, they prepared a comprehensive report and returned to Perth to make a formal complaint.

It took almost two years for the prosecution to be brought. The fundamental problem was that the ability to prosecute for an offence under the AWA is confined[2] to a police officer, an inspector or the chief executive officer of the Department of Local Government (the "DLG"). In practice – and leaving aside scientific inspectors, who are concerned with animals used in research – most inspectors are local government employees or staff of the RSPCA. Animals Australia and its employees are not authorised to prosecute under the Act. Like everyone else, they are confined to making a complaint to someone who is.

In the present case, Animals Australia had deliberately approached the Western Australian police rather than the RSPCA.[3] The police, however, declined to prosecute. They suggested that the RSPCA was more experienced, and better equipped, to bring prosecutions for animal cruelty. Against opposition from Animals Australia, they sent the Animals Australia report to the RSPCA.

It is unclear what action, if any, the RSPCA ever took. The RSPCA was in a difficult position. It is not especially well resourced and depends largely on

[1] One of the grounds of the prosecution discussed below is that some sheep were loaded without being accustomed to eating the pellets which are the only food source on the voyage. These sheep – known as "shy feeders" – suffer, and often die from, malnutrition.

[2] See section 82 of the AWA, read with section 5.

[3] It should be noted that RSPCA Australia has no formal connection with RSPCA UK.

public donations. As well, it receives some government support by way of grants. The live export industry in Western Australia, though, works hard to persuade the State Government that the live export trade is vital to Western Australia's large rural economy. The RSPCA's governing body is its Council, whose members seemingly differed in their views about the live export trade. The RSPCA has many good people and staff, and works well in prosecuting cases of deliberate cruelty to domestic and companion animals. It is unclear, though, that it has the capacity to take on the well-resourced live export industry.

In the meantime, and in the light of the reaction from the police, Animals Australia took its complaint to the DLG. This is the department which, in Western Australia, is charged with the administration of the AWA.

From April 2004, for the best part of a year, it did not seem that anything much was happening. The voyage had long since been completed. The primary investigation, too, conducted by an experienced former police officer from Animals Australia, had been largely concluded in November 2003. Most of the evidence had been gathered, although there remained some formalities that required attention before a prosecution was ready for court.

In April 2005, faced with the apparent inactivity of the DLG, Animals Australia began an action for mandamus against the chief executive officer of the DLG. The writ sought essentially to compel her properly to exercise her discretion whether to prosecute under the AWA, based on the materials in the report prepared by Animals Australia. The application relied in part on cases such as *R* v *Metropolitan Police Commissioner; ex parte Blackburn.*[4]

The application was lodged on 24 April 2005. Applications for mandamus in Western Australia[5] still have the two-stage process of an application for an order nisi and a later hearing to determine whether the order should be made absolute. The order nisi can be heard *ex parte*, but in the present case the application was served on the DLG. It chose, however, not to respond and the order nisi was made, unopposed, in the Supreme Court by Acting Master Chapman on 26 April 2005.

Commendably, the DLG did not seek to resist the order. Instead, it agreed to investigate and to consider a prosecution. It engaged the legal advice of the State Solicitor's Office and appointed an experienced and enthusiastic police officer to conduct any further enquiries that seemed necessary.

One issue that had seemingly troubled the RSPCA, and which is still relied upon by the exporters, is that of jurisdiction. When the prosecution notice was first before the Perth Magistrates Court on 12 January 2006, the livestock company's solicitor was reported as saying that the AWA simply did not apply. The sheep, he suggested, were being exported and so were subject to Commonwealth laws concerning shipping and quarantine. Since, in Australia, section 109 of the Commonwealth Constitution means that Commonwealth law prevails over inconsistent State law, the prosecution was in his view misconceived, and was bound to fail.

The issue of jurisdiction is not without interest, and presumably it will be fully agitated in the trial. It would be inappropriate, therefore, to comment further. It might be noted, however, that presumably the State Solicitor's Office has taken a view different from that held by the company's solicitors, otherwise the prosecution would not have been brought.

The case is now before the Perth Magistrates Court. It may take some time to come to trial.

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[4] [1968] 1 All ER 763.

[5] See the Rules of the Supreme Court 1971, O 56.

Dubious legality of vivisection as practised in the UK

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Barrister

Torture and other forms of cruelty to animals are criminal offences that render the perpetrator liable to prosecution under the Protection of Animals Act 1911 (the "PAA").[6] This, I would submit, is indicative of the abhorrence with which the British people view, and for nearly a century have viewed, the abuse of animals. The PAA in essence both reflects, and gives statutory force to, an underlying presumption against the abuse of animals in the UK.

Animals used in scientific research, however, are excluded from the ambit of protection afforded by the PAA.[7] The protection of those animals has since 1986 instead come within the ambit of the Animals (Scientific Procedures) Act 1986 (the "ASPA"), the preamble to which states that it is "[a]n Act to make new provision for the protection of animals used for experimental or other scientific purposes".

The stated aim of the ASPA thus is the "protection of animals". This, too, would thus appear both to reflect, and give statutory force to, the presumption against animal abuse, and the abhorrence with which it is viewed by society in general. That notwithstanding, each year in the UK nearly 3 million animals are used directly in the vivisection industry.

"Vivisection" literally means "cutting while still alive", and is defined as "the act or practice, or an instance, of making surgical operations on living animals for the purposes of physiological research or demonstration" (*The Chambers Dictionary*). In practice, the term has come to mean any harmful experiments or tests performed on animals, and routinely involves confining animals in cages and subjecting them to an array of procedures such as poisoning, burning, blinding, mutilation, irradiation, force-feeding of chemicals and household products and so forth and, ultimately, killing them.

Whereas the ill-treatment thus meted out to animals in research would render the perpetrators liable to prosecution under the PAA, the ASPA instead legalises vivisection provided certain conditions are met. Given that the stated aim of the ASPA is the protection of animals, how is it that cruelty to animals on such a massive scale is accorded any degree of legality, let alone that the perpetrators are accorded immunity from criminal prosecution? The purpose of this article is to examine that issue and question whether indeed the proper application of the ASPA legalises what would otherwise be criminal cruelty.

Licensing regime

The protection of those animals coming within the aegis of the ASPA is afforded by way of a licensing regime. In essence, the ASPA prohibits the application of a regulated procedure to an animal except in accordance with that regime (section 3).

A "regulated procedure" is defined as, *inter alia*, "any experimental or other scientific procedure applied to a protected animal which may have the effect of causing that animal pain, suffering, distress or lasting harm" (section 2). A "protected animal" essentially is any "living vertebrate other than man" (section 1).

The regime provides for two types of licence – a personal licence, and a project licence. A personal licence is granted on the basis of the competencies and skills of the proposed holder, and it continues in force, subject to a review every five years at most, until revoked (section 4). It is the project licence, however, that is of greater relevance here.

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[6] Section 1(1)(a), PAA, for example, makes it an offence to cruelly beat, kick, ill-treat, over-ride, over-drive, over-load, torture, infuriate or terrify any animal.

[7] See section 1(3) PAA. The Animal Welfare Bill, currently before Parliament, will lead to the repeal of the PAA. However, as with the PAA, animals used in research are excluded from its ambit.

The granting of project licences is governed by section 5, which provides that a project licence shall not be granted unless the Secretary of State is satisfied:

- that the programme is to be undertaken for one of the purposes listed (subsection 3),
- that it is not reasonably practicable to achieve the purpose except by the use of animals (subsection 5), and
- that the procedures to be used are those that minimise the numbers and suffering of the animals involved consistent with the results sought (subsection 5) (emphasis added).

The terminology of section 5 in my view suggests both:

- that there is no underlying presumption in favour of the granting of project licences, and
- that the onus is borne by those seeking a licence to establish to the Secretary of State's satisfaction that each of the prescribed criteria is met.

Cost/benefit analysis

The Secretary of State, moreover, is under a clear obligation to "weigh the likely adverse effects on the animals concerned against the benefit likely to accrue as a result of the programme" (subsection 4). The ASPA thus requires in effect that no animal be subject to a procedure unless, and until, an assessment has been made of two factors, namely:

- the likely benefit that might arise from the procedure, and
- the likely adverse effects on the animals who are to be subjected to the procedure.

The ASPA requires then a cost/benefit analysis – as to whether the likely benefit outweighs the likely adverse effects. The phrases "likely benefit" and "likely adverse effects" each incorporate two elements, one quantitative and the other predictive. The Secretary of State accordingly is required to determine not only the degree of anticipated benefit/suffering, but also the predictability of such benefit/suffering.

It is a prerequisite of the application of the ASPA that protected animals are subjected to experimental or other scientific procedures "which may have the effect of causing [them] pain, suffering, distress or lasting harm". In reality, the suffering of animals in laboratories is almost inevitable, and it is the other side of the equation – the benefit likely to accrue, that is variable.

The benefit likely to accrue must be for one or more of the purposes listed in section 5(3). Whereas the purposes include animal beneficiaries, in practice the majority of animals are used for the benefit likely to accrue to humans (although there are some infamous exceptions, e.g. "metabolic" experiments conducted on cats and dogs on behalf of pet food manufacturers). Accordingly, in practice, the cost/benefit analysis that the Secretary of State is required to conduct is between human benefit, both as to significance and predictability, and the adverse effects on the animals involved.

Recalling that it is a prerequisite of the grant of a licence that benefit and predictability of benefit outweigh the adverse effects, and bearing in mind that the latter in practice is almost inevitable, it might reasonably be anticipated that no licence would ever be granted unless and until the Secretary of State was satisfied both as to the significance to human health and well-being of the benefit sought, and as to its predictability. It is in the context of research purportedly for human benefit, however, that questions regarding the legality of vivisection in practice are most readily discerned.

Significance of benefit

It is a popular perception that animals are used only for important medical research. Project licences, however, are sought for such purposes as the development of personal and household products, weapons testing[8] and other purposes of minor, or

[8] The Home Office has adopted a policy against granting licences for "offensive" weapons testing, but "non-offensive" weapons testing continues.

highly questionable, "benefit" to anyone. Furthermore the level of suffering inflicted on the animals involved is often extreme. In so-called "safety" tests, for example, animals are force-fed or injected with enormous doses of various substances such as washing detergents, toilet cleaners, air fresheners, glues, paints, dyes, pesticides, herbicides, solvents and the like.

As stated above, there is no presumption in favour of granting a licence, and those seeking to obtain one accordingly bear the burden of presenting evidence sufficient to satisfy the Secretary of State that the likely benefit outweighs the adverse effects on the animals used. In view of the minor or questionable benefit of many of the purposes for which licences are sought, it is difficult to imagine how those seeking a licence in such cases could discharge that burden. It is even more difficult to imagine how the Secretary of State conducting the cost/benefit analysis required by the ASPA could grant such licences. This, nevertheless, is what has happened and continues to happen.

Predictability of benefit

Even assuming that the potential benefit is of genuine significance, the Secretary of State is also required to assess the predictability of such benefit. Predictability is the *sine qua non* of science – an indispensable condition. A test that cannot be replicated, and is not predictive of outcome (see below), simply has no place in scientific methodology. Without predictability, one strays out of the realms of science and into that of hope and belief – more commonly associated with faith, rather than science (or, indeed, law).

There has, however, never been an evaluation of the ability of animal experimentation to predict outcome (beneficial or deleterious) in humans. Whereas there is much anecdotal "evidence" of instances in which the outcome of animal testing has been reflected in subsequent human application, these are merely examples of coincidence rather than evidence of predictability. By way of illustration, regard the "litmus test".

Litmus paper turns blue in an alkaline solution, and red in an acid. This effect is wholly reliable and is thus of scientific value in terms of indicating the pH of the solution in question. If, however, litmus paper only sometimes turned red in acid and blue in alkali, and on other occasions turned a random and unpredictable colour in either acid, or alkali, the archetypal litmus test would loose entirely its value as a scientific tool. It would not be until further, different tests had been conducted that it could be ascertained whether the information provided by the litmus test had in fact been accurate. Conducting the litmus test would thus have rendered no usefully predictive information because no reliance could be placed on it in predicting the acidity/alkalinity of a substance of unknown pH.

If animal experimentation had any value as a scientific methodology, it would resemble the real litmus paper rather than the hypothetical (and useless) one described in that illustration. There is, however, no clear and irrefutable evidence that animal experimentation is capable of being reliably predictive of benefit (or detriment) to humans. Consider the following:

- In March 2004, Caroline Flint MP, responding on behalf of the Home Secretary to a question asked by Mike Hancock MP, stated that the Home Office had not commissioned or evaluated any formal research on the efficacy of animal experiments, and had no plans to do so.[9]

- According to a report in the British Medical Journal,[10] 5% of all hospital admissions are due to adverse

[9] Written parliamentary question No 148, 25 March 2004.

[10] Pirmohamed, M., "Adverse drug reactions as cause of admission to hospital: prospective analysis of 18,820 patients", *British Medical Journal*, Volume 329, July 2004, pp. 15-19.

reactions (ADRs) to prescription drugs, and 2% of those admitted actually die, i.e. more than 10,000 people a year die because of ADRs (more than three times the number killed in road traffic incidents). It is the fourth leading case of preventable death in the UK, and the cost to the NHS is estimated at nearly £500 million a year.

- Dr Richard Klausner, Director of the National Cancer Institute (NCI), has stated: "The NCI believes we have lost cures for cancer because they were ineffective in mice."[11]

- Aspirin causes birth defects in most animals experimented on in laboratories,[12] and Paracetamol is toxic to cats.[13]

- The development of the polio vaccine was delayed for some 25 years. As Dr Albert Sabin, the inventor of the vaccine, explained: "prevention [of polio] was long delayed by the erroneous conception of the nature of human disease, based on misleading experimental models of the disease in monkeys".[14]

- Alexander Fleming abandoned penicillin as an antimicrobial when it proved ineffective on rabbits, only to try it serendipitously – and successfully – in desperation on a critical human patient a decade later.[15] He later admitted that misleading results from animal testing almost prevented the discovery of the entire field of antibiotics.

- No one has ever been able to demonstrate, through animal experiments, that inhaling tobacco smoke – no matter in what quantities or concentrations – causes lung cancer.[16]

- The arthritis drug Vioxx, withdrawn in 2004, appeared safe in animals but is estimated to have killed up to 60,000 people worldwide.[17]

Conclusions

In the absence of any scientific evaluation of the efficacy of animal testing in predicting benefit to humans, the likelihood of benefit to humans is at best an unknown quantity and at worst a deficit.

There are thus no objective and independent criteria against which the Secretary of State could assess the likelihood of benefit in relation to a particular project licence application.

In the absence of such assessment, the Secretary of State cannot be satisfied, in conducting the cost/benefit analysis required by the ASPA, that the likely benefit outweighs the likely adverse effects on the animals.

As such an analysis is a precondition to the grant of a project licence, no such licence should be granted in accordance with the ASPA.

In the absence of a project licence, the cruelty inflicted on animals involved in vivisection is contrary to the PAA.

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[11] *LA Times*, 6 May 1998.
[12] Menache, A., *Animal Experiments, Bad Ethics, Bad Science*, March 2005, p.1.
[13] Ibid.
[14] Statement before the Subcommittee on Hospitals and Health Care, Committee on Veterans' Affairs, House of Representatives, USA, 26 April 1984, serial No 98-48.
[15] Greek, C.R., MD & Greek J.S., DMV, *Specious Science: How Genetics and Evolution Reveal Why Medical Research on Animals Harms Humans*, 2002, p. 107.
[16] Colby, L.A., *In Defence of Smoking*, 1999, Chapter 9, "Smoking Animals"– referring to evidence given in a lawsuit brought in 1998 by the State of Minnesota against tobacco companies during which experts for both the plaintiff (the State) and the defendants (the tobacco companies) agreed that, despite many animal inhalation experiments over a period of many years, all of the experiments had failed (see www.lcolby.com/b-chap9.htm).
[17] *The Sunday Times*, 21 August 2005.

New European chemicals testing policy: "REACH"

David Thomas
Solicitor

"REACH" stands for the Registration, Evaluation and Authorisation of Chemicals. It is an EU initiative and has the objective of ensuring that chemicals are safe, both for people and the environment. It is in part intended to comply with the global commitment agreed at the World Summit on Sustainable Development in Johannesburg in 2002 to improve, by 2020, the safety of chemicals. Everyone shares this objective, of course. In 2003, the European Commission published a draft regulation setting out its proposals.[18]

REACH is particularly directed at the tens of thousands of chemicals which have been in use since before April 1981. The significance of that date is that the legislative regime changed then: chemicals used for the first time since then have had to undergo stringent safety tests. This is under Directive 67/548/EEC,[19] as substantially amended in 1992. For chemicals in use before then, the safety requirements are far more relaxed (under Regulation (EC) No 793/93[20]).

These older chemicals are called "phase-in substances" under the draft REACH regulation. This is because the new regime will only apply gradually to them. This largely depends on the total tonnage in which the chemical is produced or imported into the EU in a year, although substances classified under Directive 67/548/EEC as carcinogenic, mutagenic or toxic to reproduction ("CMR substances") have to be registered in the first phase if they meet a threshold of one tonne. The definition of "substance" begins "a chemical element and its compounds in the natural state or obtained by any manufacturing process".

Not all chemicals are covered. For example, medicines and food additives are largely excluded. There is confusion about the extent of overlap with Directive 76/768/EEC[21] concerning cosmetic products (see below).

Under the **registration** limb of REACH, each producer and importer of substances in volumes of one tonne or more per year will have to register them with the new EU Chemicals Agency, submitting information on properties, uses and safe ways of handling. They will also have to pass safety information onto manufacturers which use the substances in their production processes. Under **evaluation**, Member States will look in more detail at registration dossiers, particularly substances of concern. **Authorisation** will be necessary for CMR substances or those which accumulate in the human body or the environment. Companies will have to show that the risks are adequately controlled, or that the social and economic benefits outweigh the risks and there are no suitable alternatives (if there are the substitution principle applies).

In addition, the Commission will be able to restrict the use of certain dangerous chemicals at EU level.

The draft regulation is subject to what is known as the co-decision procedure. This means that it has to receive the agreement of both the Council of Ministers and the European Parliament. The current position is that, in November 2005, the Parliament made a number of amendments at first

[18] COM (2003) 644.
[19] Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances, OJ L 196, 16.8.1967, p. 1.
[20] Council Regulation (EC) No 793/93 of 23 March 1993 on the evaluation and control of the risks of existing substances, OJ L 84, 5.4.1993, p. 1.
[21] Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products, OJ L 262, 27.9.1976, p. 169.

reading. The Council has subsequently agreed to some of those but has also made some of its own. Agreement will probably be attained this year. If so, the new regime will come into force next year.

REACH will have very serious consequences for laboratory animals. Estimates have varied widely, but the latest suggests that over 5 million animals will be used in toxicity (poisoning) tests. This is despite the fact that there should be nothing automatic about testing on animals under the new regime – a judgement should, in principle, be made on a case-by-case basis, depending on the available data and assessment of risk. There are numerous types of test, including eye irritancy (requiring a minimum of three rabbits), skin irritancy and corrosivity, repeat dose toxicity (which can use 80 rats and/or 32 dogs over a 90-day period), chronic toxicity (160 rodents and 32 dogs over much longer periods), carcinogenicity and teratogenicity (birth defects). There is no dispute that the tests are often highly invasive.

An increasing number of scientists regard animal toxicity tests as scientifically dubious, because of the proven difficulty of extrapolating results from animals to people. *The Way Forward*, a report by the British Union for the Abolition of Vivisection (BUAV)[22] argues for a step-by-step approach, under which non-animal tests which are already available and which it regards as more reliable would be used and sufficient resources devoted to the development of others.

In a later briefing,[23] the BUAV argues, in relation to acute toxicity tests (which are particularly unpleasant):

"Existing data on acute toxicity in humans, for example from records of accidental poisoning, should take precedence over animal data and should be sought from all possible sources. Human data, and data obtained from *in vitro* [non-animal] studies, should be used to classify and label chemicals according to the Globally Harmonised System for Classification and Labelling.

In screening large numbers of chemicals to prioritise those in need of further testing, chemicals without existing acute toxicity information should first be assessed for potential to use read-across techniques from structurally related analogues. (Q)SAR models and *in vitro* cytotoxicity tests (currently under validation) would be applied for the identification of highly toxic substances.

A fuller assessment of acute toxicity, if needed in some cases, would be based on the addition of absorption/penetration assays *in vitro* and *in silico*, test-tube measurements of plasma protein-binding and likely target organ distribution (via blood/tissue partitioning *in vitro*); plus *in vitro* metabolism studies. This information would be brought together by means of toxicokinetic modelling."

The BUAV also argues that the mass of existing animal data held by companies should be made available.

A number of amendments to the draft regulation have been proposed, particularly by the Parliament, to lessen the impact on animals. In some respects, it and the Council agree. For example, they agree that there should be less demanding information requirements (and therefore, in practice, fewer animal tests) for substances produced in the 1-10 tonne band.

An important amendment introduced by the Parliament (and agreed to by the Council) requires there to be only one registration per chemical, with data-sharing. This was at the instigation of the UK Presidency and Hungary. Phase-in substances will have to be pre-registered between 12 and 18 months after REACH comes into effect. This is designed to minimise duplicate animal testing, which occurs when a company does not know that another company has already carried out particular animal tests, or cannot access the data. Although there are still

[22] 2003.
[23] *Acute toxicity testing in REACH*, 2005.

some ambiguities, the two sets of data-sharing amendments, though they differ in some respects, bring the Commission's rhetoric about the mandatory sharing of animal test data closer to reality.

In short, companies will not be able to register substances unless they share data (with cost-sharing arrangements). The Council amendments do not, however, extend to non-animal test data, as do the Parliament's. This is an important omission, because the existence of non-animal data can obviate the need for animal tests, a principle accepted by the draft regulation as a whole.

Data-sharing apart, the Parliament's amendments are generally better for animal protection than the Council's. For example, the Parliament proposed that, if the European Centre for the Validation of Alternative Methods (ECVAM) (an EU agency), says that a non-animal method is valid, a procedure to replace the equivalent animal method in the technical annexes to the draft regulation should be initiated within 14 days.

Similarly, a Parliament amendment requires proposals to carry out animal tests to be open for comment by interested parties and evaluated by experts on non-animal methods (including ECVAM) before being given the go-ahead. Finally, the Parliament proposed that part of the registration fee should be allocated to the development of non-animal test methods.

In each case, proposals which seem eminently reasonable have not found favour with the Council. There is a sense that a prime concern for the Council is to protect the competitiveness of the EU chemicals industry – the largest in the world.

In addition, the Parliament and Council have come up with very different proposals with respect to the relationship between REACH and Directive 76/768/EEC. Under the latter, tests on animals for cosmetics carried out in the EU will be prohibited by 2009 at the latest. The complication is that chemicals used in cosmetics are often also used in other products. In *French Republic* v *European Parliament and Council of the European Union*,[24] in which France sought to strike down the animal protection parts of a 2003 amendment to Directive 76/768/EEC,[25] Advocate-General Geelhoed said:

"… it seems clear that the ban on animal tests applies equally to tests performed for the purposes of complying with other legislation, in so far as substances that have been the subject of such tests may not be used as or in cosmetic products. This interpretation seems necessary for the *effet utile* of the Directive and is consistent with the intention expressed in the preparatory documents leading up to its adoption."

At present, neither the Parliament's nor the Council's amendments make the obverse clear – that ingredients intended to be used in cosmetics are outside the scope of REACH.

The primary position of animal protection organisations is that it is ethically wrong to cause suffering to animals to test chemicals. They also point to the scientific drawbacks of the animal tests and the greater reliability and potential of non-animal methods. However, since some use of animals under REACH is inevitable, they believe there is an imperative to reduce it as much as possible, by focussing on good-quality science, full use of different types of data and the promotion of alternatives.

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[24] Case C-244/03, not yet published in the European Court Reports.

[25] Directive 2003/15/EC of the European Parliament and of the Council of 27 February 2003 amending Council Directive 76/768/EEC on the approximation of the laws of the Member States relating to cosmetic products, OJ L 66, 11.3.2003, p. 36.

MEDIA WATCH

"**The Technical Board of Appeal decision in the *Oncomouse* case**", *European Intellectual Property Review,* Volume 28(1), 2006
David Thomas and Georgina A. Richards discuss the Board's decision to narrow the scope of the patent to mice.

"**The ethics of research involving animals: a review of the Nuffield Council on Bioethics report from an antivivisectionist perspective**", *ATLA*, December 2005
David Thomas

EUROPEAN DEVELOPMENTS

MEPs demand action on bear farms

A European Parliament resolution calling on China to ban the farming of bears for their bile was passed in January. The Resolution was approved by more than half of the Parliament's 732 members, with cross-party support, making it official European Parliament policy.

Asiatic Black Bears (Moon bears) are incarcerated in tiny wire cages with rusting metal catheters implanted in their abdomens through which bile is extracted for use in traditional medicines. The procedure causes extreme agony. Although the Chinese Government has closed down some farms, there are still more than 7,000 bears imprisoned in cages on over 200 farms across China. Moon bears can expect to live up to 30 years in the wild, but life expectancy falls to 10-12 years for caged bears.

The Resolution has been forwarded to the European Commission, the Council of Ministers and the Member States.

European Commission launches Action Plan

Also in January, the European Commission (DG Health and Consumer Protection) launched an Action Plan on the Protection and Welfare of Animals, the overall aim of which is to promote animal welfare over the next five years. It set out the following primary objectives:

- to give a clearer direction to EU animal welfare policies,
- to continue the promotion of high animal welfare standards,
- to provide better focus for the allocation of resources,
- to support future trends in animal welfare research,
- to continue to seek alternative solutions to animal testing,
- to ensure a more consistent and coordinated approach to animal welfare across all EU policy areas.

Welfare of non-native species

Bridget Martin
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Rarely a week passes without some mention of alien or non-native species. Some, such as rabbits, have been in the UK for centuries, others, such as the grey squirrel, are more recent arrivals. Some were deliberately brought here, while others arrived by chance.[26]

In recent years, it has become increasingly apparent that some non-native species, the invasive ones, come at a cost. Sometimes the cost is so high that the particular species must be totally eradicated to protect threatened native species[27] and to fulfil the UK's obligations under the United Nations Convention on Biological Diversity.[28]

Indeed, it may appear that much of the legislation relating to non-native species is somewhat draconian. It is, for example, a criminal offence under the Wildlife and

[26] See Yalden, D., "The History of Mammalien Introduction in the UK", a paper given at "Mammaliens – A One Day Conference on the Problems Caused by Non-native British Mammals" on 23 February 2002, p. 35.
[27] See Martin, B., "Culling of non-native species", *Journal of Animal Welfare Law*, November 2005, pp. 12-15.
[28] Entered into force in 1993.

Countryside Act 1981 (the "Act") to release any alien animal into the wild. This has major implications for animal welfare. Where such an animal is found injured, and is taken into captivity for treatment, which proves successful, any attempt to re-release back into the wild will constitute the offence. The present article will consider just this situation. It will examine the relevant sections of Part I of the Act, and will seek to identify those actions which are lawful, and others which, if undertaken, could result in the actor(s) being prosecuted. Finally, it will discuss proposed reforms to the Act.

Section 14 of the Act makes it a criminal offence for any person to release, or allow to escape into the wild, any alien species of animal or any animal included in Part I of Schedule 9 to the Act. For example, if a person took a grey squirrel with a non-fatal injury to his veterinary surgeon he would expect it to be treated, and set free once it had recovered. He would not expect it to be put down. Yet, under the current law, this is the only thing that could happen to the animal. This is because, although the law does not forbid veterinary treatment, it is an offence to release the squirrel back into the wild. Furthermore, under the Grey Squirrels (Prohibition of Importation and Keeping) Order 1937,[29] it is an offence even to keep the creature. A similar situation would arise in the case of an injured American mink, now that the Mink Keeping (Prohibition) (England) Order 2004[30] has been made.

Even where there is no legislation forbidding the keeping of the species concerned, the situation is little better. For example, an injured sika deer could be kept in captivity while it was being treated. However, it could not be released back into the wild when it had recovered. This is an undesirable situation for a wild animal to find itself in, unless the injuries it has sustained are so severe as to make it incapable of surviving in the wild, although recovered. No problems arise if a non-native animal is so seriously injured that it must be humanely destroyed.[31]

The problem regarding non-native birds is even more convoluted. Section 1(1) of the Act makes it an offence intentionally to kill, injure or take any wild bird. However, section 4(2)(b) provides a defence to the offence of killing if the accused "shows that the bird had been so seriously disabled otherwise than by his unlawful act that there was no reasonable chance of its recovery". In other words, the bird has been mortally wounded, but not by the accused. Furthermore, section 4(2)(a) provides a defence for a person accused of taking any wild bird, if he can show that he did not disable it, and was taking it solely to treat it, the bird to be released when sufficiently recovered.

A bizarre situation then arises where any non-native bird or bird listed in Part I of Schedule 9, found slightly injured, is taken to a vet for treatment which would ensure its recovery. Because the bird is non-native or so listed, it cannot be released back into the wild. But it is also a criminal offence under section 1(1) to kill it. To exacerbate matters even further, the defences provided in section 4(2)(a) and (b) do not seem to apply.

Again, a case study will demonstrate the problem. A person finds a wild ring-necked parakeet with a broken wing. He takes it to a vet. In effect, a crime has been committed. He has intentionally taken a wild bird, an offence under section 1(1). The bird cannot be released back into the wild as this is an offence under section 14 (1). Furthermore, if the vet decides, therefore, to humanely destroy it, he too will be committing a criminal offence, under section 1(1), as he will have intentionally killed a wild bird which would have survived its injury.

The statutory defences cannot be relied on by any of the protagonists. Although the

[29] Statutory Instrument 1937/478.
[30] Statutory Instrument 2004/100.
[31] See Fasham, M. and Trumper, K., "Review of non-native species, legislation and guidance", P328 DEFRA NNS review V5.doc, 2001, p. 42.

person can show that he did not injure the bird, and was taking it to the vet for treatment, it cannot be released back into the wild when sufficiently recovered. So he cannot put forward the section 4(2)(a) defence. The vet cannot rely on section 4(2)(b), because if a person kills any wild bird, humane destruction included, he must show "that the bird had been so seriously disabled otherwise than by his unlawful act that there was no reasonable chance of its recovering", which, in this case, there was.

Perhaps an entirely new provision in section 4 is required, to the effect that a person is not guilty of an offence if he takes an alien wild bird solely for the purpose of tending it and a licence to release it is issued when it is recovered, or if he humanely destroys it following failure to obtain such a licence.

Under section 16(4)(c) of the Act, licences can be granted to effect re-release into the wild of rehabilitated alien species. The problem here is that currently there is only one licence available, and that relates to the release of muntjac deer. Presumably this means that all other non-native animals or those listed in Schedule 9 and finding themselves in this situation "should be destroyed or … kept in secure accommodation until they die of natural causes".[32] The reason given for this approach is the adverse ecological impacts of release. Given that a licensing system is already in place, perhaps it could be put to better use if each release was considered on a case-by-case basis. For example, there would seem little point in refusing to re-release a grey squirrel into the wild in a location where it could do little damage to forestry and where it was far from the habitats of red squirrels.[33] With American mink, the situation is arguably different as these animals are very aggressive and destructive to so much wildlife. A further point is that the current system runs counter to section 10(3)(b) which requires an animal to be released when it is no longer disabled.

In addition to better use being made of the licensing system, section 14 could be amended. This could be to the effect that a person would not be guilty of an offence if he released back into the wild any non-native species of animal, or an animal listed in Part I of Schedule 9, which has been injured, brought in for treatment and, when no longer disabled, set free under the provisions of a licence.

The problem of the release of rehabilitated non-native species has been considered by the Department for the Environment, Food and Rural Affairs (DEFRA).[34] It is fully aware "there is an animal welfare dilemma"[35] regarding re-release into the wild. Furthermore, it recognises the fact that "[e]uthanasia of animals that are likely to fully recover their health is publicly unacceptable in cases where … release back into the wild would cause no ecological impact…".[36]

It is minded to do something. Two options to amend the current licensing system are being considered. The first would be to use individual licences, to apply to each particular case. The second option is "to adopt the use of a general licence to allow the re-release of certain rehabilitated non-native species subject to certain conditions".[37]

Conclusion

An examination of the relevant sections of Part I of the Act has revealed deficiencies in the legislation relating to the welfare of non-native species. A serious dilemma exists in relation to the welfare of alien animals other than birds, but the situation is even worse when dealing with non-native birds.

However, some suggested changes to the law have been put forward as to how these dilemmas might be resolved. These include

[32] Ibid, p.42
[33] Ibid, p.42

[34] See "Review of non-native species policy", a report of a DEFRA Working Group, 2003, p. 89, and "Review of Part I of the Wildlife and Countryside Act 1981", DEFRA, 2004, p. 41.
[35] "Review of Part I of the Wildlife and Countryside Act 1981", DEFRA, 2004, p. 41.
[36] Ibid, p.41
[37] Ibid. p.41

possibly introducing a new provision in section 4, an alteration to the licensing system and the amendment of section 14.

DEFRA has made it quite clear that it is fully aware of the problems and of the need for reform. Indeed, in its recent review of Part I of the Act,[38] it has put forward a positive proposal, which, if adopted, should ameliorate the situation. However, until the amended Part I has been passed into law, it will not be possible to assess exactly what has been achieved.

Killing of dolphins and other cetaceans as "bycatch"

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Few animals inspire as much public affection across the EU as dolphins. And yet still the battered and bloodied bodies of these beautiful mammals shame the beaches of South-west England and Northern France each winter, sacrifices to the European Common Fisheries Policy (CFP) and the European Commission's dilatory processes.

Around 2,500 dolphins and other cetaceans are thought to be killed by pair trawler nets in the Western Channel every year. The pitiful carcasses that cause such public outrage on the South-west coast are but a fraction of the total killing, since it is estimated that less than 10% of cetaceans that die as a result of contact with fishing nets are washed ashore. Pair trawlers fishing for sea bass are thought likely to be the most frequent culprits.

Pair trawling is the practice of towing a huge net (which can be large enough to contain the Sydney Opera House) between two boats. Although the mesh nearest to the boats is wide enough to allow dolphins to escape, the mesh at the bottom of the net is much finer. As the net is towed through the water, the wanted fish, as well as "bycatch" (unwanted fish, cetaceans and other sea creatures), are gathered at the bottom of the net ready to be hauled out of the water. The wanted fish are kept; the bycatch are swept roughly back into the sea.

Washed-up cetacean carcasses are often found to have broken beaks, jaws or teeth, bloody scarring and torn fins. Once a dolphin has become entangled in a net and is unable to rise for air, it will panic and thrash around furiously in an attempt to break free. Eventually it will run out of oxygen, suffocate and die. Thus, the death of dolphins and porpoises in fishing nets is not only a conservation issue, but also a critical welfare matter.

The relevant legislation

The UK Government is under an obligation to address the bycatching of small cetaceans pursuant to the EU Habitats Directive[39] and the Agreement on the Conservation of Small Mammals of the Baltic and North Seas ("ASCOBANS").[40] At the third meeting of the parties to ASCOBANS in 2001 a resolution was passed calling on the competent fisheries authorities to ensure that the total "anthropogenic removal" (a euphemism for killing) of marine mammals was below 1.7% of the best estimate of abundance, and to work towards bringing that figure down to below 1%.

The UK Government's domestic law power to act to protect cetaceans includes powers to prohibit all or specified fishing in any specified area (Sea Fish Conservation Act 1967, sections 5 and 5A). That power is ostensibly very wide, allowing for that ban to cover both UK and non-UK boats fishing within 200 nautical miles of the UK coast.

[38] Ibid. p.41

[39] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p.7, Article 12(4) of which requires Member States to establish a system to monitor the incidental killing of (among other animals) cetaceans and, in the light of the information gathered, to take further measures to ensure that incidental capture and killing do not have a significant negative impact on the species concerned.

[40] Entered into force in 1994.

The UK's powers to act are in practice, however, constrained by the CFP. This is unfortunate in circumstances where the EU's own measures to protect small cetaceans[41] do not include any specific measures to reduce bycatch, partly because little data was available about the scale of the problem and partly because of a lack of effective remedies (other than the politically unpalatable option of closing the relevant fisheries or prohibiting pair trawling).

Article 7 of the CFP Framework Regulation[42] authorises the Commission to impose emergency measures lasting no more than six months "if there is evidence of a serious threat to the conservation of living aquatic resources, or to the marine ecosystem resulting from fishing activities and requiring immediate action". But Article 8 only allows Member States to take such action within their territorial waters if there is a "serious *and unforeseen* threat" – and even then only for up to three months and subject to the Commission's right to confirm, cancel or amend the measures in question. Article 9 allows Member States a more general right to adopt non-discriminatory measures which apply only within 12 nautical miles of their baselines, but those measures, insofar as they affect the vessels of another Member State, may be cancelled by the Commission.

UK action

The UK has been commendably prominent in funding research into levels of bycatch and how those levels can be reduced. One of the bodies in receipt of UK Government funding is the Sea Mammals Research Unit (SMRU). In the summer of 2004, the SMRU presented the Department for the Environment, Food and Rural Affairs (DEFRA) with a report showing a substantial increase in bycatch dolphin deaths in the 2003/2004 season as compared with previous seasons, and that the level of deaths had exceeded the 1.7% ASCOBANS limit. Accordingly, the UK Government asked the Commission to take action under Article 7 of the CFP Framework Regulation to close the Western English Channel bass fishery. The Commission refused to do so, and the UK was therefore left having to decide what measures it could take itself.

In October 2004 DEFRA consulted on a proposal to ban all bass pair trawling within the 12-mile zone (pursuant to Article 9 of the CFP Framework Regulation), and also to introduce a system of licensing for UK vessels within the 12 to 200 miles zone in order to restrict UK access to that fishery to boats with a long-term involvement in that fishery and which were willing to employ devices to mitigate the amount of cetacean bycatch and carry scientific observers.

Greenpeace, the RSPCA, the SMRU and a number of other conservation bodies reacted unenthusiastically, pointing out that a ban within the 12-mile limit might simply displace fishing vessels to outside of that limit. Since the available evidence suggested that levels of cetacean bycatch were greater outside of the 12-mile limit than within it, the ban was likely to be counterproductive, ironically increasing the number of dolphins killed. Its real political impact would be to reduce the public pressure on the UK Government, since the number of dolphins washed up on beaches in South-west England would fall and the Government would be able to claim it had taken decisive action, even if that action had not resulted in a net reduction in cetacean deaths. Despite these concerns the UK Government decided to press ahead with the ban.[43]

[41] Council Regulation (EC) No 812/2004 of 26.4.2004 laying down measures concerning incidental catches of cetaceans in fisheries and amending Regulation (EC) No 88/98, OJ L 150, 30.4.2004, p. 12.

[42] Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, OJ L 358, 31.12.2002, p. 59.

[43] The ban was imposed by way of the South-west Territorial Waters (Prohibition of Pair Trawling) Order 2004 (Statutory Instrument 2004/3397).

In February 2005 Greenpeace commenced judicial review proceedings. Shortly afterwards, the Commission rejected the UK's request to apply the ban to vessels from other Member States, giving as one of its reasons the fact that the ban was an "arbitrary measure, unlikely to achieve the desired goal" since pair trawler activity would simply be displaced elsewhere. As a result, the ban could only be applied to UK vessels.

When the claim came before Stanley Burnton J in the High Court, Greenpeace argued that the Minister had failed to take into account the views of the consultation respondents that the ban was liable to increase the number of dolphin deaths. DEFRA then obtained an adjournment to adduce evidence that the Minister had in fact been alive to the possibility of the ban causing displacement of pair trawler activity to outside of the 12-mile limit.[44]

What was clear from DEFRA's evidence was that the motivation for the ban was political: the UK Government wished to demonstrate its willingness to take action even at the cost of UK interests, thereby increasing the moral pressure on France and the Commission to agree to EU-sponsored action (which would be far more effective than any action that the UK could take unilaterally). As the judge found, the ban had no scientific basis whatsoever: even the Minister had accepted that the ban was "more of a gesture … than anything that would actually help the dolphin and porpoise population".[45]

Nevertheless, the judge refused to quash the ban for irrationality, holding that the Minister had considered the relevant issues (including the risk and potential impact of displacement) and had genuinely been motivated by a desire to reduce cetacean mortality. The validity of the ban did not rest on its intrinsic individual merits: it was legitimate for the Minister to adopt a "stepwise" approach of introducing the ban as a step towards further hoped-for action at the EU level.[46]

The Court of Appeal dismissed an appeal in which Greenpeace had argued, *inter alia,* that the Minister lacked the power to introduce a ban which was (as the judge had found) devoid of any scientific basis.[47]

This unhappy tale illustrates the lack of transparency and accountability that frequently afflict popular campaigns to achieve improvements in environmental and animal welfare standards in areas within the competence of the EU. Both the High Court and Court of Appeal found themselves upholding the rationality of a ban which lacked any scientific justification and was introduced almost entirely for political reasons (to put pressure on the Commission and other Member States, but also, no doubt, to appease public anger over the number of dolphins being washed up on the South-west coast). It is time for animal welfare and environmental campaigners to join the calls for democratisation of the EU's decision-making processes to make them more responsive to popular concerns about these vital issues.

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[44] DEFRA also argued that the risk of displacement was limited, both by the proposed licensing scheme (which had not, in the event, proved necessary to prevent displacement or opportunistic fishing from occurring) and because smaller vessels which had been operating within the 12-mile limit might not, for reasons of health and safety, be able or willing to move further out to sea.

[45] *R (Greenpeace Ltd)* v *Secretary of State for the Environment, Food and Rural Affairs* [2005] EWHC 2144 (Admin), [2006] Env LR 19, at para. 68.

[46] However, no order for costs was made, partly in recognition of the lateness with which DEFRA had introduced the further evidence, but also in recognition of the principle that "there should be free access to [the] court when genuine questions ar[ose] as to the lawfulness of government actions" and of the "important common interest [of both parties] in the preservation of all species of cetaceans".

[47] *R (Greenpeace Ltd)* v *Secretary of State for the Environment, Food and Rural Affairs* [2005] EWCA Civ 1656 (unrep., judgment of 31 October 2005). In addition, the Court of Appeal refused DEFRA permission to appeal against the judge's refusal to award costs.

BUAV obtains protective costs order

David Thomas
Solicitor

The British Union for the Abolition of Vivisection (BUAV) has become the first animal protection organisation to be granted a protective costs order (PCO). This was in the context of its judicial review against the Home Secretary following its undercover investigation of primate neuroscience research at Cambridge University. The BUAV contends that the Home Secretary underestimated the suffering of marmosets (thereby distorting the cost/benefit assessment which lies at the heart of the regulatory regime under the Animals (Scientific Procedures) Act 1986) and that the arrangements for care were inadequate, particularly in the post-operative period, when marmosets were routinely left unattended for long periods.

Because of the technical nature of the evidence and the novelty of the legal points raised, the case is expensive. The Home Office put its costs at up to £150,000. The BUAV said it could not afford to run the risk of costs of this magnitude and therefore applied for a PCO, offering to pay £20,000 (plus VAT) towards the Home Office's costs if it lost and to limit its own claim for costs to the same figure.

Mr Justice Bean granted the application on 31 January, substituting £40,000 for £20,000. The fact that the BUAV had sufficient reserves to meet a full adverse costs order was not a bar. The case will now proceed to a hearing, probably in the summer.

Only a handful of PCOs have been granted in judicial reviews. They are likely to become more frequent following the Court of Appeal's decision in *R (Corner House Research)* v *Secretary of State for Trade and Industry*.[48] An applicant (in practice an NGO) must show (*inter alia*) that the issues raised are of general public importance, that it has no private interest in the case, that having regard to the financial resources of the parties and to the amount of costs that are likely to be involved it is fair and just to make the order, and that if the order is not made it will probably discontinue the proceedings and will be acting reasonably in so doing.

The decision is particularly important in the animal protection context because animals need an NGO to represent their interests in court. Unless NGOs can obtain costs protection in appropriate cases, they are likely to be deterred from litigating and alleged unlawfulness will then not be cured.

[48] [2005] EWCA Civ 192.

What is ALAW?

ALAW is an organisation of lawyers interested in animal protection law. We see our role as pioneering a better legal framework for animals and ensuring that the existing law is applied properly.

We believe that lawyers should, as well as interpreting laws, ask questions about the philosophy underlying them: they have always had a central role in law reform. There is also a real need to educate professionals and public alike about the law.

Animal cruelty, of course, does not recognize national boundaries and we are building up a network of lawyers who are interested in animal protection in many different countries.

What ALAW will do

ALAW will:

- take part in consultations and monitor developments in Parliament and in European and other relevant international institutions,
- highlight areas of animal welfare law in need of reform,
- disseminate information about animal welfare law, including through articles, conferences, training and encouraging the establishment of tertiary courses,
- through its members provide advice to NGOs and take appropriate test cases,
- provide mutual support and information exchange for lawyers engaged in animal protection law.

Who can be a member?

Solicitors, trainee solicitors, legal executives, barristers, pupil barristers, judges and legal academics are eligible to join and will receive regular issues of the Journal of Animal Welfare Law. Other interested parties can become subscribers to the Journal and receive information about conferences and training courses. Membership fees: UK and EU – £25.00; overseas – £35.00; concessionary (student/retired etc) – £5.00.

How can you help?

Apart from animal protection law itself, expertise in many other areas is important – for example, public law, civil liberties, environmental health, planning law, freedom of information, civil litigation, media law, company law, charity law and many others.

In addition, lawyers have well-developed general skills such as advocacy and drafting which will be useful in myriad ways. Help with articles and training will also be welcome.

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