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The Association of Lawyers for Animal Welfare

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A note from ALAW

Welcome to Winter 2009/Spring 2010 edition of the Journal of Animal Welfare Law.

This edition has a farming theme with two main articles about farm animal welfare. David Bowles and Sasha Foreman, discuss the judicial review claim brought by the RSPCA in relation to the use of ventalition shutdown to kill poultry in the event of an outbreak of avian flu. Alan Bates discusses the continuation of the widespread practice of debeaking despite the broad acceptance of the principles of the Five Freedoms.

In addition, Bridget Martin takes a critical look at the development of law surrounding badger protection in the UK. The Journal also carries a variety of reports, including one looking at the welfare of greyhounds in the racing industry, and case law notes.

I am delighted to be able to take over the role of editor from Christine Orr. Our deepest thanks go to Christine for her hard work in ensuring the development of a high standard Journal.

ALAW continues to welcome contibutions from our readers and membership including articles and case law.

Jill Williams
Editor

The use of ventilation shutdown as a method to kill poultry during a disease outbreak

David Bowles, Head of External Affairs and Sasha Foreman, Solicitor, RSPCA

This article concerns a judicial review claim brought by the RSPCA challenging the lawfulness of the government's decision to permit use of inhumane methods of killing animals during outbreaks of disease. The claim was dismissed by the High Court in October 2008. The Court's judgment is reported as R (on the application of Royal Society for the Prevention of Cruelty to Animals) v Secretary of State for the Environment, Food and Rural Affairs [2008] EWHC 2321 (Admin); [2009] 1 CMLR 387; (2008) Times, 16 October.

Introduction

European legislation lays down methods for killing animals in the event of disease outbreak, which are implemented in England by the Welfare of Animals (Slaughter or Killing) Regulations 1995 (WASK). The Directive on the protection of animals at the time of slaughter or killing (the 'Directive') specifies particular methods that may be used to kill poultry and criteria which the Secretary of State must ensure are met in relation to other killing methods he or she permits to be used. These criteria are to spare the birds any avoidable excitement, pain or suffering during killing and in particular to ensure that, if the method does not cause immediate death, appropriate measures are taken to kill the animals as soon as possible and before they regain consciousness.

Following an outbreak of avian flu (strain H5N1) in Norfolk on 26th February 2006, amendments to WASK were laid before Parliament on 28 April 2006, without prior consultation, to enter into force on 29 April (the "2006 Regulations"). The minister's decision was subsequently debated in the House of Commons Standing Committee on Delegated Legislation on 29 June 2006 when it was approved by a vote. The 2006 Regulations allowed a new method of killing, termed 'ventilation shutdown' (VSD) and defined as *"the cessation of natural or mechanical ventilation of air in a building in which birds are housed with or without any action taken to raise the air temperature in the building"*. At its simplest then, no action would be required other than to switch off any mechanical ventilation in the shed.

This action was taken due to specific problems that became apparent to DEFRA during disease control activities in the Norfolk outbreak. The cull was initially delayed due to insufficient poultry workers presenting themselves to catch birds and transfer them to a unit for gassing or to undertake another permitted method of killing. The only method which avoids the need for catchers is 'whole house gassing' (introducing a gas mixture into the entire poultry house). An argon/carbon dioxide gas mix can be used in whole house gassing as an alternative method to VSD. However, DEFRA considered that insufficient supplies of gas mixtures would be available to deal with a large-scale outbreak of a highly pathogenic disease.

Animal welfare implications of VSD

The RSPCA considers VSD a particularly inhumane method of killing animals because it has a high potential to cause substantial suffering over an indefinitely long period to birds, with death occurring in an uncertain manner. The aim of VSD is to cause death by hyperthermia (over heating) rather than suffocation. Little research has been done on VSD, other than some theoretical modelling of the consequences of using it by the Royal Veterinary College. This work suggested that death would occur after

approximately 45 minutes provided the birds were mature, slaughter-weight broilers closely packed in a sealed shed on a hot day or where supplementary heat could be added.

In reality, a wide range of conditions exist on farms. With younger or more mobile birds, colder climatic conditions, leaky or open-sided sheds, death would not take place within the estimated time period or might not take place at all. Within a shed, conditions such as temperature and humidity vary. Some birds might remain alive and some might drift in and out of consciousness, depending on where they are in the shed. The simple effect of a proportion of birds dying would be to reduce the temperature in the shed and also the chances of death for remaining birds. Poultry workers would then be required to enter the sheds, find survivors amongst the carcasses and kill them by neck dislocation before bagging the carcasses.

> **The aim of VSD is to cause death by hyperthermia (over heating) rather than suffocation.**

Whole house gassing is a more humane and predictable method of killing birds, particularly if inert gasses such as nitrogen or argon are used since birds do not detect their presence at high concentrations. Clearly, though, this method carries additional cost, resources and planning.

It was common ground between RSPCA and DEFRA that VSD is not a humane method of killing. DEFRA has identified its hierarchy of priorities in the event of a disease outbreak as:

1 the protection of human health and life;
2 swift and effective disease control; and
3 animal welfare.

This hierarchy was not challenged by the RSPCA.

Compatibility with EU legislation and international standards

The RSPCA argued that the 2006 Regulations which introduced VSD are incompatible with and *ultra vires* the Directive and incompatible with Community law requirements as to proportionality and legal certainty.

In particular the RSPCA argued that the 2006 Regulations were incompatible with Annex E of the Directive, which stipulates that:

"If methods are used which do not cause immediate death…appropriate measures are taken to kill the animals as soon as possible, and in any event before they regain consciousness; and nothing more is done to the animals before it has been ascertained that they are dead".

The RSPCA argued that the Directive was prescriptive in restricting the type of killing methods that may be used for disease control purposes to those that either cause immediate death or rapid loss of consciousness which persists until death. VSD, it was argued, met neither of these criteria – as it is unlikely in the majority of cases that birds will be rendered rapidly unconscious prior to death or at all. In addition, if they do become unconscious rapidly, it is unlikely that all birds in a shed will *remain* unconscious until death.

Furthermore, VSD may not cause the death of all birds. As such, another killing method would be required or else birds would be left to die of starvation or, if infected, the disease. Applying a second method, it was argued, is inconsistent with the stricture that nothing more is done to the animals before they are ascertained dead.

In addition, the RSPCA argued that VSD is incompatible with the requirement contained in Article 3 of the Directive that animals be "spared any avoidable excitement, pain or suffering during…killing" since it exceeds by a significant margin the period of suffering which is likely to result from other killing methods. The 2006 Regulations require that "no person shall kill birds using [VSD] except on the written authority of the Secretary of State who must be satisfied in the individual circumstances that any other method of killing…is impracticable". It does not follow from this, however, that the Secretary of State will only permit the use of VSD where it is the only remaining option or, of the alternatives, the most humane.

Nor are there specific requirements set out in the 2006 Regulations as to the manner in which VSD may be deployed. For example, there is no requirement for action to be taken to raise the temperature within the building to a certain level within a particular time period.

On the issue of whether VSD could be viewed as a method of last resort, the RSPCA submitted that since it would cause death in only a limited range of conditions, requiring other methods to be used in addition to it, it is not a sensible or suitable fallback method.

DEFRA maintained that they were obligated under Decision 2006/416/EC to bring all poultry inside where there is an outbreak of highly pathogenic avian influenza and kill all poultry without delay to avoid the risk of avian influenza being spread. They stated that they would only use VSD in circumstances where avian influenza presented a significant threat to public health or where resources were significantly stretched. The level of priority given to contingency planning for a potential pandemic from a disease such as avian flu is second only to a terrorist attack. DEFRA emphasised the need to construe the legislative requirements in the context of disease control; as such the safety of human life should take precedence over animal welfare.

DEFRA argued that there were sufficient safeguards built into the 2006 Regulations, namely that the Minister's written authority is required, on the basis that he or she is satisfied that in the circumstances any other method of killing is impracticable.

The scientific evidence on the use of VSD

Three scientific bodies have expressed an opinion on VSD.

The Farm Animal Welfare Council, an independent advisory body established by government, wrote to

> **The World Organisation for Animal Health stated that controlling avian flu…does not justify the use of inhumane killing methods**

DEFRA in September 2006 approving the use of VSD as a method of last resort subject to checks suggested by FAWC being carried out prior to its use.

In a 2008 report, the European Food Safety Authority Panel (EFSA) on Animal Health and Welfare (the independent scientific adviser to the European Commission on risk assessment) specifically identified VSD as a method that should not be used for killing birds with avian influenza and stated that:

"… [VSD] has been suggested as an emergency method of killing birds with AI. It is known that in hot weather when ventilation failure occurs with birds close to slaughter weight that high mortality through suffocation and heat stress can occur rapidly, especially in large, well-insulated buildings. However, for younger birds, breeders, caged layers, etc especially in cooler weather or in older buildings, anecdotal evidence suggests that death may be less rapid, and hence more traumatic, with no guarantee of a rapid complete kill."

In May 2005, the World Organisation for Animal Health (OIE), which has over 170 members including all EU member states, agreed standards on the killing of animals for disease control. The standards pre-date VSD and make no reference to it but state:

"When animals are killed for disease control purposes, methods used should result in immediate death or immediate loss of consciousness lasting until death; when loss of consciousness is not immediate, induction of unconsciousness should be non-aversive and should not cause anxiety".

Referring to these guidelines, the OIE stated in a press release that controlling avian flu at its animal source does not justify the use of inhumane methods of killing.

European Commission view

Prior to the High Court's judgment being handed down, the European Commission announced a proposal to replace the "traditional prescriptive approach" of the Directive with new legislation to give member states greater flexibility as to the methods they use for mass killing of animals for disease control. This proposal is undergoing scrutiny in

> **… [VSD] has been suggested as an emergency method of killing birds with AI.**

the Parliament and Council of Ministers and is not expected to be agreed before 2010.

The High Court's judgment

The High Court (Sir Robin Auld, sitting as a High Court judge) dismissed the RSPCA's judicial review claim. The Court's judgment provided important guidance in four areas:

1. Advice and opinion from scientific bodies.

The judge stated that views of scientific bodies should be taken into account by Member States in their implementation of Directives if these views are clearly expressed and apt for the context. However he did not feel that the views of the two relevant

> **The judge stated that views of scientific bodies should be taken into account**

bodies in this case, EFSA and the OIE, fell into that category. The judge dismissed the advice of the EFSA Scientific Panel as a "somewhat diffident caution against the use of ventilation shutdown". The OIE guidelines were equally inapplicable as they make no express reference to VSD. The judge viewed the reference to use of non-aversive methods to induce unconsciousness, as admitting the possibility of non-immediate unconsciousness, rather than as advice to use methods that cause unconsciousness without pain such as anaesthetic lethal injection.

2. Establishing a balance between the need to protect human health and safety and the welfare of animals and proportionality

The judge felt that it was difficult for the government to strike a scientifically supported balance between the competing interests due to the lack of data on VSD. He did not feel it was appropriate for the Court to give a view on what more the Government might have done to fulfil the task entrusted to it to protect the public against the contingency of a serious outbreak of a highly contagious and dangerous disease.

Similarly in relation to the proportionality of the 2006 Regulations, given their purpose of protection of public health and safety, it was not for the Court to evaluate the weight of conflicting expert evidence as to the availability of alternative killing methods.

3. Whether Annex E of the Directive is prescriptive or permissive in effect

The Court dismissed the RSPCA's arguments that the parameters laid down by Annex E of the Directive precluded the use of methods, such as VSD, that are highly unlikely ever to fulfil the criteria of that Annex. He described this as arguing that only methods which could guarantee or ensure the outcome described in Annex E would be permitted. In his view, the Annex E criteria are requirements as to means rather than outcomes. They require that the means used to kill animals are aimed at rapid transition to death and sparing avoidable pain and suffering, rather than ensuring that this will be the case.

4. Certainty

The argument that VSD is too uncertain in its application to implement the requirements of the Directive failed for the reasons described above. The judge rejected the argument that further legislative attempts were needed to prescribe methods to be used in response to a serious outbreak of a potentially widespread and deadly disease, on the basis that this would be counter-productive to achievement of the primary aim of disease control.

Discussion

The RSPCA questioned, prior to and during the litigation, why DEFRA had not done more to, firstly, ensure that whole house gassing could be used during an outbreak of avian influenza and, secondly, develop other more humane methods presently in the research stage to obviate the need to ever use VSD. DEFRA had always maintained that they were committed to increasing their gassing capability so that whole house gassing would be used instead of VSD. As noted above, DEFRA views the threat that a pandemic influenza outbreak poses as second only to terror attacks for the purposes of contingency planning priorities.

During the procedure of the case, DEFRA moved on two important areas. Firstly they drafted administrative guidance and protocols setting out some specific procedures to determine when and how VSD may be used. DEFRA

> **DEFRA had always maintained that they were committed to increasing their gassing capability**

agreed to publish this guidance. Secondly, they concluded agreements for the provision of culling teams, gas supplies and equipment.

It is hoped that DEFRA's contingency planning is now sufficiently robust to ensure that 'last resort' scenarios requiring the deployment of inhumane methods such as VSD will not be reached.

The poultry beak-trimming ban: Another welfare dilemma

Alan Bates, Barrister, Monckton Chambers

Ever since the Brambell Committee's seminal report of 1965, UK policy on the welfare of farm animals has ostensibly been constructed around the "five freedoms", including "freedom from injury", "freedom from fear", and "freedom to express most natural behaviours". In that context, it may at first appear surprising that we are now, in 2009, discussing whether DEFRA should further delay the prohibition of the beak-trimming of poultry chicks.

The practice of beak-trimming (or 'de-beaking') involves the removal of up to a third of a bird's beak using machinery, without anaesthetic. Although poultry producers have in the past argued that a chick's beak was as insensitive as the tip of a fingernail, that assertion has since been refuted by extensive scientific research. Between the layer of horn covering the beak and the bony structure of the beak itself, there is a thin layer of highly sensitive soft tissue, resembling the quick of the human nail. The hot knife blade typically used to carry out the beak-trimming procedure cuts through this complex of horn, bone and sensitive tissue causing severe pain. Thus, as the Brambell Committee concluded, "there is no physiological basis for the assertion that the operation is similar to the clipping of human fingernails." On the contrary, de-beaked birds suffer acute pain at the time when the procedure is performed, and have also been shown to suffer chronic pain long after the de beaking procedure, including in the form of phantom limb pain. In addition, machine operators are often careless, causing the chicks' eyes to be seared, and blisters in the mouth.

The loss of the beak also results in behavioural changes, since the beak is a primary means by which a bird interacts with its environment. The beak is a complex sensory organ that performs a variety of functions, including grasping and manipulating food particles, while also being integral to nesting behavior, exploration, drinking, preening and defensive or aggressive encounters. Researchers who compared the behavior of de-beaked and normal hens found that "partial beak amputation produced a number of significant alterations to the behavior of the birds." The hens pecked less at their environment after de-beaking and demonstrated less head shaking and beak swiping. They also dozed more and often lapsed into general inactivity: behaviour that is associated with long-term chronic pain and depression.

Facially, therefore, it is difficult to see how beak trimming can be compatible with "freedom from injury", "freedom from fear", or "freedom to express most natural behaviours". Indeed, the Brambell Committee recommended that "beak-trimming should be stopped immediately in caged birds and within two years for non-caged birds." Why, then, almost 45 years later, is there still a raging debate as to whether the practice should be banned?

The answer lies in the fact that the five freedoms are not absolute, but are pursued on the assumption that intensive and semi-intensive systems of husbandry will continue to be used. While it would be going too far to describe the "five freedoms" as mere 'window-dressing' for intensive farming practices, it is fair to observe that those freedoms are pursued not as minimum standards, but as guiding principles the pursuance of which will often involve difficult trade-offs between competing welfare objectives and the means used to pursue them.

Beak-trimming is a good example of this. Although the practice can reasonably be said to directly violate the "five freedoms", it can

also be said to be carried out in pursuance of those principles. That is because beak-trimming reduces the risk of injurious pecking amongst hens – a risk that is particularly pronounced where hens are confined in circumstances where they lack outlets for their normal foraging, dustbathing, and

> **de-beaked birds suffer acute pain at the time when the procedure is performed**

exploratory activities. If unchecked, pecking can lead to cannibalism, including vent picking, feather pulling, toe picking, and head picking, resulting in significant feather and skin damage and even death. In laying hens with untrimmed beaks, the onset of injurious pecking can be sudden and unpredictable, causing significant pain, distress, suffering and death to a substantial proportion of birds.

The practice of beak-trimming started in around 1940 when a San Diego poultry farmer discovered that if he burned off the upper beaks of his chickens with a blowtorch, they were unable to pick and pull at one another's feathers. His neighbor adopted the idea but used a modified soldering iron instead, giving it a chisel edge that enabled operators to apply downward pressure on the bird's upper beak to sear and cauterize it. A few years later a local company began to manufacture 'The Debeaker', a machine that sliced off the ends of birds' beaks with a hot blade.

The 'modern' method used for trimming the beaks of commercial laying hens still involves essentially the same 'hot blade' mechanical technique as was used by 'The Debeaker', and is typically performed on chicks within 7 days of hatching. It is unsurprising, therefore, that the continued use of the practice has attracted strong criticism. Within the legal context, beak trimming qualifies as a "mutilation" under the Animal Welfare Act 2006, which defines a mutilation as "…a procedure which involves interference with the sensitive tissues or bone structure of the animal, otherwise than for the purposes of medical treatment." EU Directive 99/74/EC lays down minimum standards for the protection of laying hens and bans all mutilation, with the caveat that Member States can authorize beak trimming to prevent feather pecking and cannibalism, and only if it is performed by a qualified person on chicks less than 10 days old. English implementing regulations for this Directive specify a complete ban on beak-trimming, to take effect from 1 January 2011. It therefore appeared that the end of beak-trimming was in sight, notwithstanding that some poultry keepers continued to argue that the ban would give rise to a net detriment to the welfare of laying hens.

The debate has, however, been re-opened by the development by a US company of a new beak-trimming technique involving infra-red technology. This technology is designed to be used on day-old chicks in the hatchery and involves focusing a high intensity infra-red beam at the tip of the beak, which penetrates the hard outer horn, damaging a clearly demarcated zone of the underlying dermis and sub-dermal tissues. One to three weeks later, the tissue behind the damaged area heals and the beak tip is lost. During the infra-red procedure, the chick's head is firmly retained in a rubber holder that prevents movement and is said by the manufacturer to facilitate precision and reliability.

The Farm Animal Welfare Council ("FAWC"), an independent expert body funded by the UK Government, has reported that the infra-red technique offers distinct advantages over manual hot blade methods, including the absence of an open wound with its potential for secondary bacterial infection, as well as quicker recovery by the chicks. FAWC also claims that there is little evidence of subsequent stress, pain or lasting effects among the de-beaked birds.

In its latest advice to the Government, FAWC has advised that the ban that was to come into force in 2011 be deferred until further research has been undertaken. In FAWC's view, there is evidence that the adverse effects of beak trimming are "clearly outweighed by the reduction in cannibalism," and that applying the method to younger birds appears to avoid long-term chronic pain in the stump of the beak. In that regard, while FAWC accepts that the benefits of beak-trimming must be weighed

> **The practice of beak-trimming started in around 1940...with a blowtorch**

against the trauma to the bird during the process, as well as any chronic pain or discomfort and the loss by the bird of an important sensory tool, FAWC concludes that beak-trimming can on balance be a justifiable mutilation. In FAWC's view, unless and until other techniques can be shown to consistently reduce the likelihood of injurious pecking among laying hens, beak-trimming will continue to be a necessary evil for allowing large numbers of laying hens to be kept on a commercial scale. FAWC therefore welcomes the new infra-red technique as a way of carrying out that 'necessary' procedure in a more humane way.

Animal welfare groups like Compassion in World Farming (CIWF) are not convinced. CIWF is concerned that the studies relied on by the FAWC have not included any, or any adequate, analysis of the extent to which beak-trimming (whether carried out by the new infra-red, or by the traditional, method) causes pain in the first 10 weeks of a bird's life. In that regard, CIWF points out that other scientific studies have shown that beak trimming results in acute pain, whether performed with the hot-blade or infra-red procedures. Accordingly, even if beak-trimming using the infra-red technique leads to a lower incidence of chronic pain in adult life, the practice may still involve causing acute pain at the time, and in the days after, it is performed. Further, the infra-red technique will do little to change the effects of beak-trimming in preventing and restricting hens' natural behaviours.

In 2002, when the Department for Environment Food and Rural Affairs (DEFRA) decided to ban beak-trimming from 2011, it accepted the scientific argument that the most appropriate way to prevent feather pecking and cannibalism was not beak-trimming, but to keep laying hens in good conditions where they have appropriate feed and opportunities to forage. CIWF and many other groups are keen to see the focus remain on improving birds' *welfare by improving their living conditions*, rather than by finding arguably more humane ways to carry out mutilations such as beak-trimming. Genetic selection for reduced pecking tendencies also has a part to play. Reports from Switzerland – where both cages and beak trimming have been banned since 1992 – suggest that the practice can be made unnecessary through certain factors such as farm type or size, bird type, and husbandry.

"CIWF and many other groups are keen to see the focus remain on improving birds' welfare"

It remains to be seen whose arguments will succeed with DEFRA, as the decision whether to maintain the ban has yet to be taken. Clearly the decision should be based on the best available scientific evidence, based on a holistic view of welfare that takes account of pain, suffering and restriction on natural behaviours, throughout a bird's life.

The debate highlights once again, however, the way that the attractions of the "five freedoms" as laudable concepts can obscure from politicians and the public the reality of the difficult trade-offs made necessary by intensive, and even semi-intensive, farming. In that regard, it should be kept in mind that beak-trimming has not been confined to 'battery cage' systems of egg production, but is also common in barn and some free range systems. While high welfare free range and organic systems, which enable birds to have constant access to foraging opportunities and ample space, may remove the welfare difficulties that are said to require use of beak-trimming, such systems still represent a minority segment of egg production, both in the UK and across the EU.

While voters and consumers have turned strongly against caged production, it remains to be seen whether they can develop the sophistication, not just to side with the "five freedoms" as comforting concepts, but to face up to the extent to which cage-free production methods still involve uncomfortable trade-offs between different forms of animal suffering. Only if voters and consumers are willing to engage with the complexities of modern farm animal husbandry will they be in a position to make the economic and political choices that may lead to some trade-offs being eliminated altogether.

Animal Welfare Reports

Farm Animal Welfare

Farm Animal Welfare Council (FAWC): *Report on the Welfare of Farmed Animals at Slaughter or Killing Part 2: White Meat Animals* (May 2009)

General

The Farm Animal Welfare Council (FAWC) *Report on the Welfare of Farmed Animals at Slaughter or Killing Part 2: White Meat Animals* ('The Report') concerns the welfare of poultry, specifically meat chickens, laying hens, turkeys, ducks, geese, gamebirds and rabbits in the last few hours of their lives up to the moment of slaughter or killing. It examines the experiences of poultry during catching and loading on the farm, the journey to the slaughterhouse, the wait in the lairage, unloading from transport containers, stunning and slaughter as well as the circumstances in which poultry are slaughtered. It is the second part to a 2003 Report concerning the slaughter of Red Meat Species and also reinforces the findings of the 1982 *Welfare of Poultry at the Time of Slaughter* Report. It sets out six principles for humane slaughter and killing, namely:

- All personnel involved with slaughter or killing must be trained, competent and caring;
- Only those animals that are fit should be caught, loaded and transported to the slaughterhouse;
- Any handling of animals prior to slaughter must be done with consideration for the animal's welfare;
- In the slaughterhouse, only equipment that is fit for the purpose must be used;
- Prior to slaughter or killing an animal, either it must be rendered unconscious and insensible to pain instantaneously or unconsciousness must be induced without pain or distress;
- Animals must not recover consciousness until death ensues.

The Report estimates that approximately 839 million fowl (including meat chickens and end-of-lay hens), 15 million turkeys and 17 million ducks and geese are killed in Great Britain each year. It notes that farm animals are recognised as sentient beings in the Treaty of Rome (1957) and the Treaty of Amsterdam (1997) and that as a result, a moral obligation is owed to each individual animal used for human purposes.

The Report notes that cattle, sheep and other red meat species are slaughtered in relatively small numbers, whereas the throughput of many poultry slaughter systems is very high (over 10,000 birds per hour) which can lead to animals being treated as commodities rather than individual sentient beings. It stresses that abattoir workers should be aware that they are dealing with sentient animals in their daily work and be adequately trained to carry out their work compassionately.

The Report also highlights that the majority of poultry that are killed in Great Britain originate on farms operated by large, integrated companies which generally operate their own slaughterhouses. Catching gangs are frequently comprised of company or contracted workers who catch and transport birds from company-owned or independent farms to the slaughterhouse. In contrast, slaughterhouses that operate seasonally, such as those that process turkeys and geese are normally independent. Small scale or seasonal farmers kill birds on their farms or transport them locally for slaughter in seasonal facilities. There is one slaughterhouse in Great Britain designated for the slaughter of rabbits for human consumption, processing less than 10,000 animals per year.

The Welfare of Animals (Slaughter or Killing) Regulations 1995 regulates animal welfare at slaughter or killing in Great Britain and implements the EU Slaughter Directive (93/119/EC). A proposal for a new Slaughter Regulation was issued in October 2008. Since the coming into force in all EU Member States on 1 January 2006 of new food hygiene regulations, slaughterhouses must be approved by the Food Standards Agency (FSA) and monitored by the Meat Hygiene Service (MHS). This is not the case for poultry slaughterhouses handling less than 10,000 birds per annum, though these must still be registered

with the FSA and are subject to Local Authority enforcement controls.

The recent Meat Chicken Directive (Council Directive 2007/43/EC) is set to be implemented in domestic legislation in 2010 and specifies certain growing conditions, stocking densities and a requirement to monitor mortality and post mortem/reject data at processing to aid assessment of on-farm welfare.

The Report suggests that a prescriptive approach to the slaughter methods allowed in the *Welfare of Animals (Slaughter or Killing) Regulations 1995*, whilst easier to enforce, may stifle innovation. Hence it argues that legislation should be drafted in such a way that promising developments can be readily authorised for commercial use after assessment of their effect on bird welfare.

The Report states that the Council was pleased to have seen publication by the Department for Environment, Food and Rural Affairs (DEFRA) of updated guidance on the welfare of poultry at slaughter or killing but also indicated a desire for this guidance to be converted into a statutory Code of Practice once the EU Slaughter Directive has been reviewed and incorporated into domestic legislation.

Welfare issues:

The Report notes that birds are particularly sensitive to extremes of temperature and humidity that can be experienced when they are confined in crates during transport or at the lairage. Ideally, poultry should undergo an ante-mortem *veterinary* inspection on the farm before they are caught rather than simply being the subject of the *farmer's* ante-mortem production report which is used by the Official Veterinarian when assessing the birds upon arrival at the slaughterhouse.

In the event that the flock inspection determines that the flock is showing signs of ill-health, catching and transporting them should not take place. Hence, end-of-lay hens with obvious injuries or birds suffering from painful lameness should not be transported. Birds that cannot stand or walk should be culled from the farm as should severely lame birds or those that are in pain.

Responsibility for the welfare of the birds at all stages needs to be clear amongst all involved such as the farm's owner, manager and staff. Indeed, the Report notes that current legislation requires people handling animals during loading, unloading and transport to be trained and considers that this legislative requirement should also be extended to catching teams.

Exploring the work of catching teams in greater detail, the Report recommends that birds, particularly those with weak bone strength, should be caught and carried by two legs and should only be inverted for the shortest distance and time possible with smooth and careful movements to avoid unnecessary wing flapping. However, the Report also suggests that industry should consider adopting systems that allow end-of-lay hens in particular to be killed or slaughtered in *situ* rather than being caught and transported.

The Report further suggests that animals should be slaughtered or killed as close to the farm as possible with the total journey not exceeding more than 15 hours from the time of loading the first bird to unloading the last bird. Before a driver accepts a consignment of birds, it is their responsibility to be satisfied that the birds are fit for transport.

It appears from the Report's findings that the factors which may affect the quality of the journey for birds include handling during loading of the modules in which they are transported, the stocking density of the modules, vehicle design particularly ventilation, the type of roads and how the vehicle is driven during the journey, weather conditions, vehicle breakdowns and delays due to road works or heavy traffic. EU Directive 853/2004 requires that animal crates and modules be made of non-corrosive material and be easy to clean and disinfect.

The Report notes that the responsibility for assessing animals on delivery to the slaughterhouse lies with the slaughterhouse operator, the Official Veterinarian and the Poultry Welfare Officer (PWO). It argues that slaughterhouse operators should record any injuries and the number of dead-on-arrival birds as part of their welfare controls and that these records should be used to identify persistent problems with particular farms, catching teams or haulers.

Legislation requires that if slaughter or killing is delayed, then if necessary, drinking water should be available and feed should be provided twice daily. The Official Veterinarian, in conjunction with the slaughterhouse operator and any other veterinary advisor, should decide whether to hold birds in the lairage or, in exceptional circumstances, return them to the farm. These assessments should be based on a risk assessment that delivers the best outcome for the birds' welfare.

Once birds are delivered to the slaughterhouse, they are prepared for stunning prior to slaughter. The Report notes that live shackling, whereby birds are removed by hand from transport modules and hung inverted in a metal shackle, so as to present the head for stunning in a water-bath, is commonly used in slaughterhouses employing electrical stunning. The Report notes that both practical experience and scientific

evidence show that current systems of inversion and live shackling raise significant welfare concerns. The pain associated with shackling has also been the subject of research since the Council's *Report on the Welfare of Poultry at the Time of Slaughter* (1982). This research confirms that shackling is likely to be extremely painful for birds. The inversion and shackling of ducks, geese and turkeys is also contrary to good practice described in the Code of Recommendations for the Welfare of Livestock and the Report expresses a preference for such large, heavy birds not being inverted or shackled at all. It suggests that in the long term, current systems of pre-slaughter inversion and shackling of all poultry should be phased out.

The Report also cautions against government acceptance of automated shackling devices which are presently being developed in the United States, preferring that these only be used in the case of dead birds.

The Report notes that the maximum period that birds can be hung in shackles before reaching the stunner in Great Britain is half that in other EU countries, namely, three minutes for turkeys and two minutes for other poultry. Whilst industry may not welcome new legislation to reduce this period further, the Report prefers that the 'hang-on' period be as short as possible.

Concerning the stunning itself, the Report indicates that the Council favours the use of stun-to-kill electrical systems as, although the high voltage required to kill may cause poor meat quality, by preventing a possible recovery to consciousness, it delivers certainty that a bird's welfare cannot be affected once the stun has been administered. In practice, the lower, standard current applied to each bird does not necessarily produce immediate unconsciousness until death by bleeding. Instead, birds with a high electrical resistance may not be stunned adequately while those with low resistance may have strong muscular spasms leading to bone breakage.

The Report also notes that a significant proportion of broiler chickens are killed using controlled atmosphere systems in Great Britain and that the major turkey processors are now using controlled atmosphere systems. In this context, the Report urges that every bird be exposed to the gas concentration that renders it insensible to pain and distress until the moment of death. Monitoring and control of gas concentration throughout the gas enclosure are essential (and are usually done automatically). Most enclosures also have observation windows as birds enter the system. It is a requirement of the *Welfare of Animals (Slaughter or Killing) Regulations 1995* that there be a means of monitoring birds visually and industry should not operate substantially closed systems where neither the Official Veterinarian nor the slaughterman can see the birds under normal conditions or when a problem arises.

It is suggested that a major advantage of controlled atmosphere systems is the avoidance of inversion and live shackling as well as the risk of insufficient electrical current. However, the Report argues that these advantages should not lead to new welfare problems associated with the gas mixture used such as gasping caused by carbon dioxide inhalation.

In relation to the slaughter process, the Report asserts that the stun-to-cut interval must be as short as possible to ensure that death by loss of blood takes place before any return to consciousness. The major blood vessels of the neck, including both carotid arteries should be cut to ensure rapid exsanguination for all recoverable methods of stunning. The Report expresses its support for the EU Commission's proposals for a new Slaughter Regulation that would require the cutting of both carotid arteries and calls on government to support this.

In a discrete section of the Report concerning licensing and training, the Council argues that the skill and performance of the slaughterman are crucial to the welfare of the animal during slaughter. It indicates a desire for a review to be undertaken of the system of licensing slaughtermen, including those involved in emergency killing. It notes that the certificate of competence which must be held by a slaughterman in order for him to be issued with a license is issued by the Official Veterinarian who also has a basic training function. The Report indicates that the Council is convinced that the training, accreditation and enforcement roles of the Official Veterinarian do not sit comfortably together. EC Transport Regulation 1/2005 requires that examiners of drivers for their certificate of competence must be independent. Similarly, the Report argues that a license to slaughter should only be awarded to those who have achieved a level of competence that has been assessed independently.

Finally, as mentioned above, slaughterhouses also contain PWOs who are responsible (in the absence of the occupier of a particular slaughterhouse) for the welfare of animals and have authority to take whatever action may be necessary to safeguard the welfare of the animals. The Report suggests that the role of the PWO is crucial to the identification and monitoring of animal welfare throughout the slaughterhouse. It welcomes the EU Commission's proposals to formalise this role in legislation and urges government to see this maintained in the negotiations on the new Slaughter Regulation.

Animal Welfare Reports

Companion Animals

Report on Companion Animal Welfare Assessment

The Companion Animal Welfare Council (CAWC) launched the *Companion Animal Welfare Assessment* in the House of Commons on 3 February 2009. This Report is directed at animal health and welfare professionals, professional animal carers and all those involved in the implementation of the Animal Health and Welfare Strategy. In its preparation of the Report, CAWC sought the views of the animal welfare sector and asked three questions of it, namely, (1) should companion animal welfare be assessed to enable welfare interventions to be targeted towards specific issues and should welfare programmes be evaluated? (2) what measures are taken at present by your organisation to assess welfare?

> **...scientific evidence show that current systems of inversion and shackling raise significant welfare concerns**

and (3) what information do you have available to inform animal owners and carers about animal welfare? The Council received 22 responses which all agreed that animal welfare should be assessed and provided varying responses to questions (2) and (3).

Ultimately, the Report produced four recommendations which are as follows:

- Welfare assessment indices for the companion animal species are incomplete. Identification of the additional work needed to develop and establish the animal welfare assessment protocols would be useful;
- Further development of companion animal welfare assessment protocols should be undertaken by the private sector. Government and DEFRA should facilitate it;
- A supervisory body should be established which would be tasked to ensure the proper development and application of welfare assessment protocols for each species. It should be appointed by the companion animal sector to ensure the consistent development of welfare assessment protocols for all species to acceptable standards;
- Species working groups should be established under the auspices of the supervisory body to identify gaps in knowledge, bring forward suggestions for research and to develop protocols for welfare assessment.

The starting point of the Report is the five freedoms (of FAWC) and an acknowledgement of the obligations that follow from them, namely, to provide for animals' needs for comfort, good nutrition, good health, avoidance of injury and pain and to ensure an environment that avoids ongoing fear and distress.

The Report notes that although there is a general presumption that companion animal welfare should be improved, to date, the equine health and welfare strategy is the only species-specific document to have been produced. Yet the *Animal Welfare Act 2006* enables the regulation of companion animal activities including the keeping of animals in companion animal welfare establishments such as sanctuaries, animal homes, re-homing centres, boarding establishments, horse livery yards and quarantine facilities; the retail of animals through commercial outlets such as pet shops and pet fairs; animal training and performance in circuses and film; tethering of horses and some

aspects of pet ownership at home. There have been a number of instances of poor welfare and indeed, cruelty associated with some or all of these activities (see case-law below). Although the number of instances is relatively small, the severity of the welfare concerns and animal numbers affected serve to raise general concerns for animal welfare in these establishments. The Council made its recommendations in this Report with a view to reducing the risk of cruelty and poor welfare.

The Report also notes that the *Animal Welfare Act 2006* imposes a general duty of care on owners or keepers of animals. In order to understand the responsibility imposed by this duty, it is necessary for an animal owner to fully appreciate the needs and wants of the animals in question and to be equipped with the knowledge of how to determine if those needs and wants are being met.

The Report notes that welfare assessment is currently used as a research tool to evaluate farm animal husbandry systems and their impact on welfare. The Report indicates that it could similarly be used to investigate and evaluate the ways of keeping companion animals.

The *Animal Welfare Act 2006* does not contain a generic regulation setting out the obligations of owners or carers. The Report asserts that a code should be promulgated and should give an indication of what care should achieve in terms of animal-based outcomes. For example, it may state that effective nutrition should result in optimum body condition, and may also provide guidance for when an owner should seek advice from a veterinary surgeon. However, the Report argues that in the absence of a generic regulation, any codes of practice that aim to inform owners how to meet the duty of care are merely advisory. The Report suggests that a generic regulation along similar lines to schedule 1 of the *Welfare of Farmed Animals Regulation 2000* would have brought tangible benefits for companion animal welfare. In addition, the Report suggests that, as codes are important in interpreting legislation, their drafting should draw upon welfare science and be informed by welfare assessment. Further, all statutory welfare codes should contain legal requirements, recommendations and best practice indicators and should be divided into sections which deal with the specific needs of animals in the context of the obligations created by the Five Freedoms.

“The Report also notes that the Animal Welfare Act 2006 imposes a general duty of care on owners or keepers of animals.”

The Report notes that few scientifically validated, field-based welfare assessment protocols have been developed for companion animals. However, it refers to a number of indicators of animal welfare, providing examples of the indicator in the behaviour of particular animals and exploring its likely utility as a field-based tool for companion animal welfare assessment. These indicators include abnormal repetitive behaviours (‘ARBs’ - such as stereotypical behaviour, escape behaviour, self-injurious behaviour), aggressive behaviour, fearful behaviour, vocalisations, posture, activity, play, allogrooming/allopreening, separation-related behaviour, other ‘problem’ behaviour, self-medication and psychological indicators of welfare including the presence of glucocorticoid, heart rate, immune measures, chromodacryorrhoea (bloody tears), clinical and pathological indicators, health and husbandry records and ‘societal’ indicators such as RSPCA statistics.

A practical national scheme to establish the prevalence of companion animal welfare issues of significance would require the identification of indices of welfare that could be consistently and easily measured, that would be both activity- and species- specific, and that would be readily assessable by the smallest possible number of observers. In this regard, appropriately trained staff in certain veterinary practices could be designated as sentinels. The Report expresses the view that reliable data using a wide range of measures could be obtained by evaluating the present standards of animal care in specific activities as defined, using trained assessors, thereby providing a ‘snapshot’ of welfare. Provided that sample sizes are statistically significant, this research-based approach would give an overview of companion animal welfare, categorised by activity. From this research, sentinel measures could be developed for surveillance.

Animal Welfare Reports

The Welfare Of Greyhounds

Report of the APGAW inquiry into the welfare surrounding racing greyhounds in England

A Report on "The Welfare of Greyhounds" was produced as a result of the inquiry, by the Associate Parliamentary Group for Animal Welfare (APGAW), into the welfare issues surrounding racing greyhounds in England, and published in May 2007.

The inquiry upon which the report was based was commenced in reaction to a July 2006 *Sunday Times* article alleging that for 15 years, a builders' merchant had been killing healthy greyhounds considered by their trainers no longer fast enough to race and burying them in his house at Seaham, County Durham. This article caused a public outcry in relation to the fate of racing greyhounds once they retire. It was thought that other dog disposal operations may also exist throughout the UK. This situation prompted the Report to suggest reforms that would prevent large numbers of dogs being ruthlessly disposed of in the future and improve the welfare of dogs involved in the racing industry at all stages of their lives.

The objectives of the inquiry were to investigate the welfare issues surrounding racing greyhounds in England, to identify factors which may improve standards at all stages of dogs' lives and to advise on measures suitable for secondary legislation concerning the issue under the *Animal Welfare Act 2006*.

The Report notes that the greyhound racing industry falls into two sectors; regulated and unregulated, with 29 racecourses in Britain being regulated by the National Greyhound Racing Club (NGRC) and 14 unregulated, independent racecourses. The NGRC is the industry's regulatory body and is a not-for-profit organisation. The British Greyhound Racing Board, on the other hand, is the sport's governing body.

The Report finds that between 6 and 12 thousand puppies that are bred to supply the British racing industry never make it to the racing track and go missing between the age of 16 weeks and 15 months. Whilst some of these dogs will be re-homed, there is no accurate information about what happens to the remainder. The Report concludes that in the absence of evidence to the contrary, APGAW must assume that a significant number of these young greyhounds are destroyed.

It is further noted that in 2005, the NGRC created its Retired Greyhound Department which involved the recruitment of a Retired Greyhound Coordinator. The NGRC has, since 2005, had one person working full-time on issues relating to the retirement of dogs. In addition, the Retired Greyhound Coordinator works alongside the NGRC's Registry Department to ensure that owners are not allowed to register further greyhounds if they have previous unregistered greyhound retirements. Despite these changes, APGAW believes that the system remains inadequate and that the greyhound industry must improve its tracking of dogs as a matter of urgency. It advocates sanctions for failure to register the fate of retired dogs that are strictly and consistently imposed and carry substantial penalties.

> **"The objectives of the inquiry were to investigate the welfare issues surrounding racing greyhounds"**

The Report notes that decreasing the number of greyhounds bred each year would be an important welfare-related measure. Whilst it would be difficult to restrict the number of greyhounds bred and

transported from Ireland without contravening EU trade regulations (although see decision of ECJ in *Nationale Raad van Dierenkwekers en Liefhebbers VZW, Andibel VZ, Belgishce Staat* decided post-Report and summarised below), it may be possible for DEFRA and its counterpart in Ireland to investigate the instigation of joint initiatives aimed at tackling the problem, by, for example, introducing spot-checks to ensure that transporters are complying with EU transport regulations. Further, the Report recommends the introduction of a licensing system for breeding as well as a system for the registration and regular inspection of breeding premises.

> **decreasing the number of greyhounds bred each year would be an important welfare-related measure.**

The Report refers to evidence provided by a number of witnesses to the effect that presently, too many races take place and each requires too many dogs. The result is increased injury rates, lack of sufficient time for ground staff to prepare the racing surface to optimum safety standards, lack of sufficient time for trainers to diagnose and treat injuries and lack of sufficient rest for greyhounds in between races. The Report recommends, *inter alia*, that a prohibition on greyhounds racing more often than three times per week should be built into regulations. The Report also suggests the extension of the racing life of greyhounds through handicapped races and the expansion of veteran races.

Currently, tracks and trainers' kennels are inspected by NGRC Stipendiary Stewards. They are also inspected by their own vet prior to each day's racing with the vet having the final say as to whether the racing should be allowed to go ahead on that day. However, the fact of the vets being paid by the trainer whose kennel they are to inspect may lead to a conflict of interest. As a result the Report recommends that inspectors be independent of tracks and trainers and that employment directly by the regulatory body be explored.

The Report also recommends that it should be a condition of the licensing of tracks and trainers that a certain standard of training for all staff including kennel hands should be introduced. All training should have a welfare component and, if appropriate to the post, should include assessment of practical skills in the care of greyhounds. The establishment of Centres of Excellence should be considered by the industry. These would provide hands-on training and the dissemination of information relating to good practice in greyhound care.

APGAW expresses its concern in the Report that the surface, design and dimension of tracks could have a significant impact on the welfare of dogs racing on that track. It would be very interested in the results of the two industry-commissioned research projects into track surface and design and would encourage future research projects looking into this welfare issue. In the meantime, the Report indicates that it is imperative that tracks are maintained to the best possible standard.

The Report notes that the industry has had an extremely poor record of recording, collating and reporting injury data. Whilst this is beginning to improve, the publication of injury data requires substantial further improvement as a matter of urgency. At present, the main organisation collecting injury data is the Racecourse Promoters Association, which has a financial interest in maintaining public confidence in the track.

Representatives of the NGRC indicated to APGAW in its preparation of the Report that the existence of an independent sector makes it difficult to enforce NGRC rules because, if trainers are found to be contravening rules and their license is revoked, they always have the option of continuing to race on independent tracks. The existence of an independent sector also makes it harder to track dogs as some who retire go on to race on independent tracks under different names.

In view of this, the Report recommends the establishment of a broad regulatory body along the lines of the type of organisation described by grassroots industry

> **At present, the main organisation collecting injury data is the Racecourse Promoters Association**

representatives, the Greyhounds' Voice, which felt that the role of the organisation should be to agree and administer reform, monitor and stringently police all aspects of greyhound welfare from the birth of the greyhound until their becoming pets. All tracks, owners and trainers would be obliged to adhere to its welfare rules and regulations. The body would be transparent both in terms of policy and funding with annual financial accounts clearly displayed in the racing press. It would include representation from parties such as the NGRC, BGRB, Greyhounds' Voice, the Dogs Trust, RSPCA and other recognised greyhound charities, each with a voice, but with no party having overall control. The body would have overall control of all areas of greyhound welfare to ensure that the greyhounds' welfare is paramount. It would assume various roles, including the employment of vets.

Under the *Animal Welfare Act 2006*, DEFRA has plans to introduce both Regulations and a Code of Practice relating to the welfare of greyhounds. The Welsh Assembly Government also intends to introduce regulations and a Code of Practice. Regulations are made by a Statutory Instrument and are binding whilst the Code of Practice will be approved by Parliament but will not be legally binding. The Code is also likely to be connected to the rules of the regulatory body of the industry so that a breach of the Code could result in, for example, the suspension of a license.

A Consultation was conducted by DEFRA, setting out a number of questions to which a detailed response was made by the Associate Parliamentary Group for Animal Welfare (APGAW). The response is summarised below.

The body would have overall control of all areas of greyhound welfare

- Regulations should set minimum animal welfare standards for all tracks through the promulgation of one broad system of regulation for all and one set of national standards that apply to all greyhound racing;
- All tracks should be licensed;
- All tracks should be regulated to the same standard regardless of whether they are run by the Greyhound Board of Great Britain (GBGB) or are independent. This could be achieved through a requirement of accreditation through one body;
- Any regulations should provide protection for greyhounds throughout their lives and not simply while they are racing at tracks;
- Tracks and trainers' kennels must be regularly inspected by independent bodies to ensure high welfare standards;
- Veterinary attendance at all tracks should be compulsory. Vets in attendance should be independent;
- The Royal College of Veterinary Surgeons should introduce a greyhound specialism – just as a specialism exists for vets wishing to attend horse races, who must possess postgraduate training as well as mandatory mid-career training;
- A vet must examine each dog before it races as well as at the conclusion of a race to ensure that no injury has been sustained;
- A record of all veterinary attendance at tracks should be kept and stored for at least three years;
- Vets should have access to suitable permanent facilities for treating greyhounds;
- All kennels and tracks should be ventilated;
- When greyhounds are transported or kennelled, they should, at all times, be able to stand up at full height and turn around;
- Greyhounds should be properly and permanently identified, possibly through microchipping;
- Track managers should be responsible for ensuring that only greyhounds that are properly identified and registered race on their track;
- Both the owner and trainer of a greyhound should be required to produce identification at least the first time a greyhound runs at any track;
- Tracks should be required to keep injury records and prompt action should be taken if a track appears to have an unusually high number of injuries;
- It should be illegal for a registered greyhound to be put down by anyone other than a vet except in exceptional circumstances;
- All greyhound breeders and their premises should be registered if not licensed by the national regulatory body and regularly inspected;
- The racing calendar should be re organised in order to require fewer dogs, which could result in each individual dog racing less often;
- The registration fee should be regularly reviewed and significantly increased;
- Present guidance should provide more information to ensure the welfare of racing greyhounds.

Other Material: Cases, Legislation and Statutory Instruments concerning Animal Welfare

Regina v Delia Clare Stacey [2009] EWCA Crim 760

On 6 March 2008, the appellant was found by an RSPCA inspector to be keeping on her land a chestnut mare which the inspector had seen in the summer of 2006 and as a result of whose emaciated state at that time the appellant had been disqualified from keeping animals for 3 years. On 24 July 2008, the appellant pleaded guilty to a number of offences and was committed to the Crown Court for sentence. On 19 September, she was sentenced to 56 days' imprisonment for being in breach of a disqualification order and was also sentenced to serve a further 56 days' imprisonment for being in breach of a suspended sentence which had been imposed in 2007 for her first offence. The appellant was ordered to pay £5,000 towards the costs of the prosecution and was disqualified from keeping animals for a further 5 years.

The single judge considering the application for leave to appeal gave permission for the appeal to be argued with respect to the costs order only. However, that matter was abandoned by the appellant mid-appeal and an extension of time was sought to apply for permission to appeal against the question of the disqualification period. The Court of Appeal, however, did not find exceptional circumstances, as is required for a retrospective grant of an extension of time, and accordingly dismissed the appeal.

R *(on the application of Royal Society for the Prevention of Cruelty to Animals) v Secretary of State for the Environment, Food and Rural Affairs* [2008] EWHC 2321 (Admin); [2009] 1 CMLR 12

The RSPCA applied for judicial review of the respondent's provision by regulation of a measure of control of last resort, known as "ventilation shutdown", for the killing of birds in the event of a serious outbreak of avian disease, including influenza. This involved the cutting off of ventilation in buildings in which birds were housed so as to kill them by hyperthermia or organ failure as the temperature in the houses rose. The respondent had amended schedule 9 of the *Welfare of Animals (Slaughter or Killing) Regulations* 1995 by adding ventilation shutdown to the permitted methods of killing animals for the purpose of disease control already prescribed by the regulations which also implemented Directive 93/119. The RSPCA submitted that the amendment was incompatible with and *ultra vires* the Directive and also with general EU requirements as to proportionality and legal certainty of national implementing measures. It was the RSPCA's case that ventilation shutdown was in breach of EU law as it failed to spare birds from avoidable pain or suffering by not guaranteeing rapid unconsciousness until death.

The RSPCA's application was refused on the grounds that (1) though the provisions of the Directive were aimed at rapid transition to death during which animals subjected to it were spared avoidable excitement, pain and suffering, they did not require, as a condition of their use, a guarantee of absence of all such discomfort where the method and the exigency calling for its use as a last resort might not always be able to achieve this, (2) Member States enjoyed a broad margin of discretion in the field of animal health and (3) provision of an effective method of killing for the control of potentially widespread and deadly disease in the event of an outbreak so serious that no other known or developed method was practicable could not sensibly be the subject of detailed prescription for all circumstances. (**See the article 'The use of ventilation shut-down as a killing method for poultry due to a disease outbreak' in this issue for a detailed discussion of the case.**)

Nationale Raad van Dierenkwekers en Liefhebbers VZW, Andibel VZW v Belgische Staat (European Court of Justice – Third Chamber) [2009] Env. LR D2

Actions for annulment of a Royal Decree establishing the list of animals which could be held in Belgium were brought in the domestic courts by an animal protection group and an animal traders association. The domestic court observed that the effect of the Royal Decree was to rule out the holding of the species referred to in Regulation 338/97/EC on the protection of species of wild fauna and flora by regulating trade therein and those not covered by the regulation, so that it had an influence on trade between Member States. Questions referred to the ECJ for a preliminary ruling concerned whether articles 28 EC and 30 EC precluded national legislation under which a prohibition on importing, holding or trading in mammals belonging to species other than those expressly referred to in that legislation applied to species of mammals which were not included in that regulation.

The ECJ held that Regulation 337/97/EC did not prevent Member States from adopting more stringent protective measures which were compatible with the EC Treaty. Articles 28 EC and 30 EC did not preclude national legislation which contained a prohibition on importing, holding or trading in mammals belonging to species other than those expressly referred to in that legislation, if the protection of or compliance with the interests and requirements of animal and human health and life could not be secured just as effectively by measures which obstructed intra-community trade to a lesser extent. Restrictions on free movement of goods could be justified by imperative requirements such as the protection of the environment, including the ecological threat of escape into the wild.

European Ministers of Agriculture agree on new law concerning welfare of animals before slaughter:

On 22 June 2009, European Ministers of Agriculture agreed a new EU law which aims to improve the welfare of animals before they are slaughtered. It adapts to new technologies and scientific findings by requiring that slaughterhouses appoint an animal welfare officer and operators who are trained and issued a certificate of competence before they are permitted to handle the animals.

Eurogroup for Animals describes the alterations made by the law to existing circumstances as "minor" and failing to address the more serious welfare abuses committed in slaughterhouses such as the killing of conscious animals for religious purposes, as well as the inversion and stunning in a water bath of chickens. Eurogroup for Animals also observes that the new Regulation will not come into force until 2013 and permits the introduction by Member States of stricter rules for religious slaughter if they so choose, rather than introducing EU-wide rules. Eurogroup argues that the vote of the Agriculture Committee on 16 March 2009weakened the proposal drawn up by the European Commission and the draft report of rapporteur Janusz Wojcienchowski on limiting the suffering of animals sent to slaughter. The Committee voted against the requirement of having an animal welfare officer present in all slaughterhouses and for all abattoir personnel to be trained and granted a certificate of competence.

Eurogroup for Animals expresses concern over proposal for new EU rules to improve animal transport:

In April 2009, the European Commission proposed to implement new rules aimed at improving the welfare of animals during transport which, inter alia, restricted the time that animals may spend in transport to the slaughterhouse to 9 hours. Eurogroup for Animals believed that the proposal effectively weakened the protection of transported animals by not imposing appropriate measures or including clear specifications. Further, despite the 9-hour restriction, the proposal permitted the granting by Member States of a variety of exemptions. Finally, the very broad definition of "slaughter animals" contained in the proposal also permitted transporters to avoid journey time restrictions by claiming, for example, that the aim of the transport was further fattening of the animals. Eurogroup for Animals wrote to the European Commission to express these and other concerns about the proposed new rules and asked that they be considered before the proposal was sent to the full College of Commissioners.

European Commission Communication on aquaculture:

On 8 April 2009, the Fisheries Directorate of the European

Commission presented a Communication on the EU's aquaculture which recognised the importance of the welfare of farmed fish for the development of sustainable aquaculture. The Commission also indicated its plans to launch a project to evaluate fish welfare in aquaculture with a view to the introduction of legislation in relation to this field.

European Parliament votes against the sale of food from cloned animals:

On 25 March 2009, the European Parliament voted against the sale of food products from cloned animals and their offspring. Rather than including rules concerning cloning for food production in the EU's pending novel foods regulation, the European Parliament requested a specific Commission proposal to prohibit the cloning of animals for food as well as the importation of related products.

In September 2008, the European Parliament made a similar request, through parliamentary resolution, that the European Commission ban cloning. This request was not acted upon. The 25 March vote however, carried greater weight as the novel foods dossier was subject to the co-decision procedure which bestows greater decision-making power upon the European Parliament.

European Food Safety Authority (EFSA) opinion on cow welfare and food safety:

The EFSA Biological Hazards Panel has published a new scientific Opinion on aspects of dairy cow husbandry which affect food safety. It reiterates the importance of the cows' welfare to the safety of their milk and beef products. Interestingly, although the report concludes that husbandry criteria such as the proper management of the herd to prevent animal stress ought to be established to ensure that sufficient biosafety guarantees are met, it also warns of the dangers of certain welfare measures such as access to outdoor spaces, which may contribute to the threat of disease.

The Opinion notes that the importance of proper management of dairy farm operations not only to animal welfare but also food safety is reflected in the passing of *Council Directive 2002/99/EC*, which aims to ensure that only those products originating from healthy animals are brought on the market by laying down general animal health requirements applicable to all stages of production of products of animal origin. In addition, *Regulation (EC) 852/2004* on the hygiene of foodstuffs regardless of their origin, and *Regulation (EC) 853/2004* on specific hygiene rules for foods of animal origin, define the responsibilities of dairy farmers. Further, *Regulation (EC) 882/2004* includes specific duties of competent authorities for the verification of compliance with the General Food Law and the animal health and welfare legislation.

The Biological Hazards Panel also indicates that stress-mediated suppression of immune function caused by trauma and/or malnutrition and production of neuroendocrine hormones stimulates responses such as enhanced growth or virulence. It is known that a number of farming-related factors such as housing conditions may impose stress on animals. These include inappropriate handling by humans, inadequate feeding/watering, inappropriate levels of temperature and noise, higher concentrations of ammonia, hydrogen sulfide or carbon dioxide in confined spaces, disruption of social relationships and mixing with unfamiliar individuals.

However, as mentioned above, the Opinion suggests that access to the outdoors has a number of implications for both farm animals' (including cows) welfare and food safety. For example, the spread and transmission of microbial hazards is increased when grouped animals are kept in confined spaces. Access to the outdoors can also be beneficial for cows, which in turn has beneficial effects on the safety of foods from these animals. However, access to the outdoors can increase animals' exposure to the surroundings and wildlife-associated hazards. Due to insufficient currently available information, the Biological Hazards Panel determines in its Opinion that it is not possible to make a universal judgment on the superiority/inferiority of either indoor or outdoor farming practices from the overall food safety perspective.

Ultimately, the Opinion concludes that in principle, ensuring on-farm welfare of dairy cows contributes to and is beneficial for the food safety aspects of their products entering the food chain. Good farming/hygienic practices that include the provision of optimal animal welfare enhance the animals' resistance to infections and reduce on-farm spread of food safety hazards. However, some dairy farming practices that are considered beneficial for dairy cows' welfare may also increase the risks of food-borne pathogens in the animals and/or their products entering the food chain. Finally, the Opinion asserts that

available information is not sufficient to quantify individually the ultimate food safety outcome of the opposing (welfare-beneficial but food safety-undesirable) effects of these factors. The Opinion made only one recommendation, namely, that further multidisciplinary research on the relationship (positive or negative interaction) between animal welfare and food safety-related factors on dairy farms should be encouraged.

Prohibition on sale of products derived from seals:

On 5 May 2009, the EU adopted a ban on the import, transit and placing on its internal market of seal products obtained as a result of commercial seal hunts, following similar bans enacted into domestic law in Belgium (March 2007), Netherlands (July 2007), USA, Slovenia, Mexico and Croatia. It is anticipated that the UK and Germany will follow the latter's example and also enact domestic legislation bringing about a similar ban. The EU prohibition however, contains an exemption allowing for non-commercial use and sustainable hunting.

MEPs voted overwhelmingly in favour of the ban, ignoring threats by countries wishing to sustain the seal trade to take the EU before a WTO dispute panel.

The idea behind the EU ban began in 2006 when the European Parliament adopted a Resolution requesting the European Commission to propose an EU-wide ban on seal products. Following this move, the European Commission requested that the European Food Safety Authority prepare a study on the welfare aspects of the killing and skinning of seals, which it did in December 2007.

ZOOS

European Commission to take Spain to the European Court of Justice over its failure to properly enforce EU rules on the keeping of animals in zoos:

***Eurogroup for Animals* reports that the European Commission is to take Spain to the European Court of Justice over its failure to enforce the EU's Zoo Directive, which required Spain to have inspected and licensed all of its zoos by April 2005.** This deadline was not adhered to and it is reported that there remain today zoos operating without the necessary licensing and guarantee that the animals residing in them are cared for in welfare-friendly conditions.

Report on failure of EU zoos to implement European rules concerning wild animals:

In May 2009, Eurogroup for Animals produced a report on the enforcement of the EU Zoo Directive which concluded that many EU zoos have yet to fully implement European rules regarding the keeping of wild animals and national authorities are still failing to enforce legislation on zoo keeping. The report highlighted in particular a lack of information provided by authorities, a lack of resources allocated to the licensing and inspection of zoos, and a failure to establish clear guidelines for their scientific and educational activities. Finally, the report called upon the next EU Environment Commissioner to conduct a formal evaluation of the Zoo Directive implementation including stakeholder participation.

ANIMAL EXPERIMENTATION

Proposals for the revision of 1986 Directive on the protection of animals

In May 2009 the European Parliament voted on the proposal for the revision of *Council Directive 86/609/EEC*. The 1986 Directive makes provision for the protection of animals used for experimental or other scientific purposes and was transposed into UK law by the *Animals (Scientific Procedures) Act 1986*.

The European Commission announced its intention to review and revise the 1986 Directive in 2001 and the Proposals for the Revision of Directive 86/609/EEC were published and considered by the Agriculture and Rural Development Committee, the Environment, Public Health and Food Safety Committee and Industry, Research and Energy Committee of the European Parliament.

MEPs voted in favour of better protection for laboratory animals through the development of alternatives to animal testing as well as the promotion of alternatives in education and training. However, the vote did not result in the inclusion of amendments that would have ensured the phasing out of the use of wild-caught primates and weakened the proposed rules for the authorisation of procedures involving testing on animals.

The Welfare of badgers is the law suitable for purpose?

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Badger baiting, although outlawed in 1835[1], still continues to this day. It involves extreme cruelty. Badgers are disabled in various ways then dogs are pitted against them. Often bets are laid. Even severely disabled, the badger can inflict serious damage to dogs and the fights result in terrible injuries to both animals. Badgers that have been removed from their setts before baiting are classified as "captive animals" and, as such, would be protected under the Protection of Animals Act 1911.[2] However, many more badgers are baited in situ, that is, at the sett where they have been dug and it was not until 1973 that the first law was passed to deal with this problem. As loopholes have become apparent, new laws have been passed to fill the gaps. This article will examine both legislation and cases to determine the adequacy of the protection they provide to badgers.

The Protection of Badgers Act 1973 was basic legislation, prescribing a number of offences relating to the wilful killing, injuring or taking of a badger[3] and, significantly, offences relating to the cruel treatment of the animal[4]. However, it was unfortunate that when the Wildlife and Countryside Act 1981 was passed, the animals hardly benefitted. This is because badgers are not rare, so do not qualify for inclusion in Schedule 5 which provides maximum protection for both species and their homes. Instead, the badger is listed in Schedule 6 which protects those animals from being killed or taken by certain methods.[5]

Prosecutions, particularly successful ones, continued to be rare, so when the Wildlife and Countryside Act was amended in 1985, it solved a major evidential problem by reversing the burden of proof. Now, provided the prosecution can establish reasonable evidence that the defendant has attempted to kill/take/injure a badger, it is up to him (or her) to show that this was not his intention.[6] A similar reversal applies where the defendant is charged with digging for a badger,[7] the onus in both cases, being the lighter civil burden.

It is quite remarkable for the home of one particular animal to be the sole subject matter of an Act of Parliament, yet this is the case with badger setts. Although a sett is part of the target matter of badger diggers and baiters, the Wildlife and Countryside Act 1981 can offer no protection because badgers are only listed in Schedule 6. So, in 1991, the Badger Act was passed, making it an offence to interfere with a badger sett. And while the Bill was progressing through Parliament, a video was shown to interested MPs and Lordships. Filmed by an investigative journalist who, undercover, had managed to infiltrate gangs of diggers and baiters, it showed not only the horrendous cruelty which badgers were subjected to, but also the crucial role dogs played in the " sport ". These dogs also needed protection. A second Bill, which became the Badgers (Further Protection) Act 1991, and which set out the powers a court has where a dog has been used or was present at the commission of an offence, was tacked onto the Badger Bill and both were passed together. [8]

The Badger Acts were then consolidated into the Protection of Badgers Act 1992. Since then, other important amendments have been made, particularly in the Natural

[1]By the Cruelty to Animals Act 1835, http://cc.bingj.com/cache.aspx?q=en-GB&setlang=en-GB&W=739f3170,bf9d9cf [Accessed 1 October 2009].

[2]And now the Animal Welfare Act 2006. The terminology has changed, so that, under the new legislation, they would come within the category of "protected animals", that is: not living in a wild state, or, under the control of man.

[3]See now the Protection of Badgers Act (POBA) 1992, section 1.

[4]Ibid, section 2.

[5]Wildlife and Countryside Act (WCA) 1981, section 11.

[6]POBA 1992, section 1(2).

[7]Ibid, section 2(2).

[8]Now POBA 1992, sections 3 and 13.

Environment and Rural Communities Act 2006, which have made it easier to enforce the law, and this is essential if the legislation is to properly fulfil its function.[9] However, only if the incidence of badger digging and baiting has decreased, can the legislation be considered successful.

Unfortunately, badger crime tends to take place in remote locations, thus there has always been a problem even detecting it. In many instances, the police have been alerted by the public, as in the early case of *RSPCA v Brooks*,[10] where they arrived at the crime scene to find stopped up holes in a badger sett, signs of considerable digging, an abandoned spade and evidence of badger baiting. Sometimes it is purely by chance. In *R v Mackin*,[11] while the police were searching the defendant's lorry, which had been stopped as part of an anti-terrorism operation, they found a pregnant badger with a broken leg, tied in a sack that was hidden in the rear of the vehicle. This resulted in the first prosecution under the Protection of Badgers Act 1992, section 4 of illegally transporting a live badger. It was successful.

Even when the crime has been detected, it is often difficult to find sufficient evidence to secure a conviction. Once apprehended, the most common defence put forward by the accused is that they were after foxes or rabbits, both lawful pursuits which have a commonality of paraphernalia, such as spades and camouflage nets. Even similar dogs are used. Long dogs, for example, "are required to chase after rabbits, but can also be set onto badgers that bolt or flee from the sett ".[12] However, the presence of badger tongs can only be sinister, and, on rare occasions, the police may strike lucky and find a badger corpse, video evidence or maps indicating where setts are.

More often, evidence is almost non-existent, and it was this fact that, in 1997, led to the first case to use DNA testing. *In R v Shaw, Pettipiere, Holland and Wragg*,[13] the defendants were found guilty of ill-treating and killing a badger, interfering with a badger sett and digging for a badger. They claimed that the bloodstains on a knife, two bags and an oversuit came from a fox, not from the body of an adult male badger found, still warm, in a shallow grave nearby. However, because they had left the sett before the police arrived, they had to be linked to the crime. Forensic evidence established this, by showing that the DNA in the bloodstains was all from the dead badger.

Lamping and snaring are also legal methods of pest control, and again, both have been abused to kill badgers. Lamping involves the use of a bright light to dazzle the target animal, which is then shot. It is used very successfully to control fox numbers. However, it is one of the methods of killing and taking animals that is specifically forbidden with regard to animals listed in Schedule 6 of the Wildlife and Countryside Act 1981, as the badger is.[14] Unfortunately, because badgers use well-trodden paths, they are easy to lamp, and, in an early case, an Olympic medal winner was found guilty of this crime.[15] Like lamping, snares are also a very popular method of controlling foxes and rabbits, although only the free-running ones can be used and even then their use is strictly controlled.[16] Unfortunately, despite this, some horrific cases, such as *R v Harmson,*[17] do occur. This crime, which occurred in Scotland, was discovered as the result of another investigation. Several animals were found dead or decomposing in snares. They included two badgers, two roe deer, several foxes and a rabbit. The defendant, a gamekeeper, was found guilty of setting a snare to catch badgers and failing to check his snares. This time, it was the procedure of the court that was significant. Officers from the Royal Society for the Protection of Birds gave vital evidence at the trial, which, the defence argued, should be inadmissible because the RSPB did not obtain permission from the landowner to be on the estate. However, this argument was not accepted by the Sheriff who "stated that this kind of crime is so serious that it is in the public interest for the RSPB to give evidence".

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Reasonable evidence must be produced for the burden of proof to be reversed and, initially, this means showing that the sett is an active badgers' sett. Even this is not straightforward and requires a high level of expertise. *In R v Parkes and three others*,[18] the police arrived at a possible dig/bait to find two dogs

[9] The provisions include powers of entry onto premises and increased time limits for bringing cases; the Serious and Organised Crime Act 2005 provides new powers of arrest.

[10] 1992, unreported. Another man was also charged but the case against him was discontinued through lack of evidence.

[11] 1997, unreported. He was also found guilty of a cruelty offence under the Protection of Animals Act 1911 because the badger was captive.

[12] B. Martin, "Protecting badger setts after the Green case" [2003] J.P.L., pp. 1105-1106.

[13] 1997, The Independent, 20 September 1997, p. 6; The Guardian, 20 September 1997, p. 12; Legal Eagle, Winter 1998, No. 19.

[14] WCA. 1981, section 11(2)(c)(iii).

[15] R v Dyson 1995, unreported.

[16] WCA. 1981, section 11(2)(a) makes it illegal to use snares to catch badgers.

[17] 2005. See Legal Eagle, April 2006, No. 48.

[18] 2004, unreported.

emerging from a sett. The defendant claimed he was rabbiting and he had thought the sett inactive. It needed an expert to prove to the court's satisfaction that this was not so. He showed that badgers were present because there were spoil heaps with badger prints on, near the sett, and there was badger hair on a barbed wire fence nearby. An earlier case, *Green and others v DPP,*[19] challenged the exact definition of a sett. The facts were complicated by the complexities of the sett itself. The men were observed and the police alerted only to discover that the hole they had dug had not broken through into either a tunnel or a chamber. As usual, the men claimed to be after rabbits. One of the rare cases to go to appeal, this time, by way of case stated, the judges in the Divisional Court decided that a badger sett does not include the surface above the tunnels and chambers. The men were found not guilty.[20]

The Natural Environment and Rural Communities Act 2006 strengthened enforcement procedures. Schedule 5 extended the provisions of the Wildlife and Countryside Act 1981 section 19(3) to, *inter alia*, the Protection of Badgers Act 1992,[21] so that now, provided there are reasonable grounds for suspecting that an offence has been committed, a search warrant can be granted to any constable, with, or without other persons, to enter and search land to obtain evidence of the crime. This contributed to the successful outcome of "Operation Newark ", when the accused pleaded guilty to two offences of interfering with badger setts. The search warrants had enabled covert surveillance to be undertaken, as a result of which, all the entrances to two setts were found to have been filled with soil, and two men with spades were arrested when they were observed digging into one of them.[22]

The cases still continue to be illuminating. In a recent one, *R v Paddock* 2007[23], the defendant only admitted at his trial that he had killed a badger, claiming that it had happened on humane grounds, after "his dogs had accidentally caught it whilst he was out rabbiting. This was despite him denying any involvement with badgers at three previous interviews." Yet the evidence was considerable. It consisted, inter alia, of "two dogs, both exhibiting old injuries consistent with coming into contact with badgers", as well as video footage on his mobile phone, showing his "two dogs attacking a badger at night whilst he illuminated the scene with a torch".[24] Paddock's voice was heard encouraging the dogs to kill the badger and DNA testing showed badger blood on one of the knives.[25] In 2005, the RSPCA commissioned Wildlife DNA Services Ltd. to set up a data base for storing badger DNA, a very positive development for the collation of evidence.[26]

The final case in this section will describe a most curious set of incidents. They started in November 2000, when two plastic pop bottles that had been left at the site of a badger sett that had been interfered with were DNA tested. The remains of a deer carcase were found nearby. In February 2002, the defendant was found guilty of poaching with dogs. In December 2002, he was found guilty of possessing Ecstasy tablets in a nightclub and his DNA was registered. In January 2003, a hit came back. The DNA was identical to that on the pop bottles. Unfortunately, no action could be taken as the time limit for bringing a prosecution in the badger case had expired.[27]

"a badger sett does not include the surface above the tunnels and chambers"

Badger legislation is distinctive. Unlike most wildlife legislation whose primary purpose is conservation, badger law is concerned with the welfare of these animals, to protect them from cruelty, from the horrific "sport" of badger baiting. Indeed, that two separate Acts of Parliament should be passed in the same year, 1991,[28] to protect the same single species, even though it was in urgent need, is unique and likely to remain so.

Furthermore, both Acts started life as Private Members' Bills, as did the 1973 Act, which itself revolutionised the protection of wild badgers by recognising this could only be achieved by legislation. Most Private Members' Bills are doomed to failure unless they have Government help. This is what happened when the Bill that sought to reverse the burden of proof was incorporated into the Government's own Bill that became the Wildlife and Countryside (Amendment) Act 1985. The fact that the other Bills were passed without such incorporation testifies to the depth of affection felt for these animals both by Members of Parliament and their Lordships, as do

[19] [2001] En. L.R. 15.

[20] See n. 12, pp. 1098-1108, for a discussion of the implications of this case.

[21] As well as the Destructive Imported Animals Act 1932, the Conservation of Seals Act 1970 and the Deer Act 1991.

[22] See Legal Eagle, February 2008, No. 54.

[23] Unreported.

[24] Which could be contrary to WCA. 1981, section 11 (2)(c)(ii), the torch possibly being used as a device to illuminate a target.

[25] See Legal Eagle, No. 55, June 2008.

[26] See Legal Eagle, No. 44, March 2005. Minerology and palynology have also proved to be invaluable tools. They, respectively, analyse and match samples of soil and samples of pollen, leaves, grass etc..

[27] See Legal Eagle, No. 35.

[28] The Badger Act and the Badger (Further Protection) Act.

the debates in Hansard. This was particularly in evidence in the discussion round the contentious definition of a badger "sett", which had to offer as much protection as possible to the badgers while, at the same time, continue to permit essential activities such as pest control. It is encouraging to read how much agreement there was on the opposing sides and how much goodwill was extended to the animals.[29]

Yet despite all this, there is,as far as badgers are concerned, a fatal flaw. The Protection of Badgers Act 1992 section 6 sets out the general exceptions, which include "doing anything which is authorised under the Animals (Scientific Procedures) Act 1986".[30] The problem is bovine tuberculosis (bTB) and the fact that the badger has been demonised as its main transmitter to cattle has already led to some thousands of badgers being killed over the past thirty years, many of which were healthy animals.

In an attempt to discover whether culling badgers in infected areas would be an effective and sustainable management tool, DEFRA undertook the Random Badger Culling Trial (RBCT), and, although the results were confusing and inconclusive, it did highlight a new factor. This is the "perturbation hypothesis", whereby survivors of stable badger groups that have experienced culling no longer stay within their territories but wander haphazardly, possibly spreading infection.[31] There is no doubt that bTB is a disaster, to the cattle, the farmers, and to the tax payer,[32] as well as to the badgers, yet it is an illuminating fact that "the proportion of 11,000 badgers that were killed in the RBCT that carried bTB" was only 11%.[33] Furthermore, Professor John Bourne, who chairs the Independent Scientific Group on Cattle TB, admitted that localised culling would not control TB in cattle and was likely to make it worse.[34]

There is continual pressure on the Government from both farmers and vets for widespread culling of badgers in the infected areas. However, when DEFRA "put the matter out to consultation, the response was an overwhelming 96% of the participants opposed to a cull" (although, using a different approach, this was reduced to 50%).[35] Despite this, and its denial in 2006 of any immediate plans to cull badgers,[36] the Welsh Assembly has now decided to go ahead with a trial badger cull.[37] It will take place in Pembrokeshire, and the area is to be defined by the natural boundaries of the river Teifi and the Presili Hills in an attempt to reduce the perturbation effect.[38] But even a trial cull operating with natural boundaries would surely not produce a valid result, as most killing grounds would lack such features. Furthermore, new badgers can easily move into culled areas that are suitable habitats. This carries the potential of further dangers, as it could result in healthy badgers possibly moving into infected setts and themselves then developing the disease.[39]

This article has shown badgers to be assailed on many fronts. Badger baiting still continues. Road traffic accidents account for many deaths, and the Welsh Assembly proposes a massive cull. Despite this, there are grounds for hope. Where badger crime is detected, prosecutions are becoming more successful and the new Hunting Act 2004 has severely restricted the ability of a defendant successfully to claim that he was "only after foxes". To satisfy the legislative requirements,[40] the defendant must carry written evidence of permission from the landowner for his presence on the land for that purpose. Furthermore, the land itself must be land that is shot over and the defendant must only use one dog,[41] to flush the fox out for the waiting guns.[42] These requirements are not readily satisfiable by potential diggers and baiters. Some Highway Authorities now alert drivers to the possibility of badgers on the road by erecting "badger crossing" signs.[43] What is most encouraging is that DEFRA is proposing, in the summer of 2010, to start six trials in the West Midlands, vaccinating badgers with the BCG vaccine to see whether bTB levels in cattle are reduced, and although these badgers will have to be injected, research is being carried out on a possible oral vaccine.[44]

[29] See n. 12, pp. 1099-1102.

[30] POBA. 1992, section 6(d). The appropriate licenses are then granted under section 10(2).

[31] B. Martin, "Managing wild animals", Journal of Animal Welfare Law, January 2007, pp. 14-15. In fact, this resulted in the reactive cull being halted : "Minister announces the suspension of badger culling in reactive areas of the randomised badger culling trial", http://www.defra.gov.uk/news/2003/0311046.htm [Accessed 14 November 2003].

[32] "Vaccine to tackle badger TB", BBC. Wildlife, September 2009, Vol. 27, No. 10, p.41. An estimated £80 million was spent in 2007-2008.

[33] Ibid.

[34] Ibid.

[35] See n. 31, p. 15.

[36] Jeff Ball, "Government reassesses controls needed to stop TB", Wildlife & Countryside, April 2006, issue 17, p. 27.

[37] "Welsh badger cull slammed", BBC. Wildlife, June 2009, Vol. 27, No. 6, p. 41. This is because, in 2008, there was a 52% rise in the number of cattle killed due to bTB, more than 12,000 cattle, with "the compensation bill ... expected to reach £23.5 million in 2009".

[38] Ibid.

[39] When opponents of badger culling took direct action against badger trapping, they were found guilty of criminal damage – see R v Cresswell [2006] EWHC. 3379 (Admin).

[40] See Schedule 1, which sets out the details that apply to hunting that is exempt. Section 2 prescribes the use of dogs below ground to protect birds for shooting.

[41] Subsection (3)(a)(ii).

[42] Subsection (5)(b).

[43] There is such a sign on the A6003 near Corby.

[44] See n. 32.

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