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# Journal

## of Animal Welfare Law

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The Association of Lawyers for Animal Welfare

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## A note from ALAW

At the time of publication (August 2013), the government is conducting a consultation in relation to whether the penalties for an owner whose dog kills or severely injures a person or their assistance dog should be increased. The issue of 'dangerous dogs' is one which frequently generates more heat than light where pragmatic and sustainable solutions are often sidelined in favour of sensationalist less effective approaches. Gareth Spark provides a calm, detailed and insightful analysis of a controversial issue.

Nicolas Fry considers the development of discrimination law in relation to protecting an animal activist who was unfairly dismissed from his job because of his beliefs regarding animal welfare. Dominika Flindt explores the history of animal welfare and how it sits in relation to charitable status.

Thank you for your continued support of ALAW and it aims.

Jill Williams  
Editor

# Striking the balance: The Dangerous Dogs Act, Dog Welfare and Public Protection

**Dr Gareth Spark, Lecturer in Law  
University of East Anglia**

**T**here has surely never been any doubt that the Dangerous Dogs Act 1991 (DDA) is an Act primarily concerned with protecting the public rather than with promoting the welfare of dogs. Whether one agrees with the contention that the Act 'is a cardinal example of poor, ill-thought-out regulation',<sup>1</sup> whether one agrees with the assertion that the ban on certain types of dogs is (stripped to its core aim of eradicating certain types of dog), justifiably likened to Nazism,<sup>2</sup> one cannot reasonably doubt the fact that the DDA was not, as originally conceived, concerned with the welfare of dogs in any meaningful way. No law which put to death loving family pets, regardless of their behaviour, simply because they had certain characteristics and had not

been added to an exemption list which requires them to be spayed or castrated to prevent them from breeding,<sup>3</sup> could truly be said to be concerned with animal welfare.

The Dangerous Dogs (Amendment) Act 1997 attempted to restore some balance by removing the original mandatory nature of destruction orders for banned dogs not added to the Index of Exempted Dogs and for other dogs which had caused injury to a person (even if only on a single occasion and due, not to the nature of the dog, but to the poor standard of care and control exercised by the owner) whilst (i) dangerously out of control in a public place<sup>4</sup> or (ii) in a non-public place it was not permitted to be.<sup>5</sup> As such, no dog should now be put to death under the DDA if the court is satisfied that it does not pose

a danger to public safety,<sup>6</sup> and, in this sense, the Act shows a modicum of concern for the welfare of dogs.

However, the 1997 amendment did nothing to address that which is, it is submitted, the fundamental flaw of the DDA: viz., the assumption that it is dogs themselves, whether of a banned type, having simply shown

**“no dog should now be put to death under the DDA if the court is satisfied that it does not pose a danger to public safety”**

<sup>1</sup> C. Hood, 'Assessing the Dangerous Dogs Act: When Does a Regulatory Law Fail?' [2000] *Public Law* 282, 282. Hood actually suggests that, from the point-of-view of assessing it as a regulatory law, the DDA is not the universal failure it is often portrayed to be.

<sup>2</sup> S. Hallsworth, 'Then They Came for the Dogs' (2011) *55 Crime Law and Society Change* 391, 392. Of course, many people will have an immediate aversion to such a comparison, believing it to be rather sensationalist and perhaps even in bad taste. However, it must be noted that there are philosophical similarities in approach. Some might wish to distinguish the two situations on the basis that one course of action was directed towards people and one is directed towards dogs. It is submitted that such an approach is inappropriate because it inherently sanctions the belief that the lives of dogs, and non-human animals generally, are worth less than the lives of humans. There is no doubt that society and the law do take this approach. For, e.g., it is not a crime, in

itself, to kill and eat a cow, or to destroy a perfectly healthy dog, but it would be a crime to carry out such action in relation to a human. However, it is submitted that there is no moral justification for such a view. Nonetheless, it must be recognised that there are some genuine and important differences between the approach under the DDA and in Nazi Germany. First and foremost, the possibility of exemption has always existed for banned dogs. This is not to say that the approach of destroying completely innocent dogs not on the exempted lists, or requiring dogs to be put on the exempted list (and thus spayed or castrated) in order to live, is appropriate. Second, the scope of the institutionalised murder under the DDA is far less extreme in numerical terms. Nonetheless, it must be recognised that these differences are differences in scope; they do not distinguish the philosophical approach taken by the DDA and the Nazis: viz., eradication of certain types of living creatures.

<sup>3</sup> DDA, ss.1 and 4, as originally enacted.

<sup>4</sup> *Ibid.*, s.3(1).

<sup>5</sup> *Ibid.*, s.3(3).

<sup>6</sup> *Ibid.*, ss.4(1A) and 4A; *R v. Flack* [2008] EWCA Crim 204, *R v. Davies* [2010] EWCA Crim 1923, *Kelleher v. DPP* [2012] EWHC 2978 (Admin), *R v. Baballa* [2010] EWCA Crim 1950, *R v. Ashman* (unreported, 18th October, 2007). If the court imposes a contingent destruction order because satisfied that the dog would not constitute a danger to the public, the dog will nonetheless be subject to immediate destruction if the conditions are breached, even if the dog still does not pose a danger to public safety. Whilst punishment of an owner who breaches the conditions is appropriate, it is submitted that the court should still not have to order destruction if satisfied that the dog does not pose a danger to public safety; a dog should only ever be subjected to a destruction order if it poses a danger to the public.

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**As many people know, it is irresponsible, sometimes neglectful or even cruel, owners and carers which are the real problem**  
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some "aggression"<sup>7</sup> outside of their home, or otherwise, which pose the real danger to public safety. As many people know, it is irresponsible, sometimes neglectful or even cruel, owners and carers which are the real problem.<sup>8</sup> Therefore, this is the problem that the law should be seeking to solve.

It will be considered below whether (and, if so, how) the law, either as it stands or with appropriate amendment, can be used to tackle the true problem, ensuring the appropriate balance between the welfare of dogs and public safety. However, before this analysis, it must be noted that, whilst any contention that dogs (or any species of non-human animals) are intrinsically less important than people is summarily

rejected, this is not to say that a concern for public safety can never trump a concern for animal welfare. Without wishing to become embroiled in a utilitarian debate, if destroying thousands of dogs would save millions of lives (human and/or non-human), it must be legitimate for the legislature to *consider* this option. But only if there is no less harmful way to save the lives.

A (surely uncontroversial) contention of this article is that there are far less harmful ways to protect the public than destroying innocent<sup>9</sup> dogs. Indeed, it is contended that there are methods of protecting the public, not at the expense of the welfare of dogs, but by improving their welfare.<sup>10</sup> It will be argued that some of the case law under the DDA regime has attempted to strike a balance between public safety and welfare by maximising the protection from destruction under the 1997 amendment, without compromising protection of the public.<sup>11</sup> Moreover, it will be suggested that this case law could have been used to extend further the concern for welfare, again without increasing danger to the public.<sup>12</sup> However, this approach is hindered by the (unfortunately, correct) interpretation of the

legislation by the Court of Appeal in *R v. Donnelly*,<sup>13</sup> which holds that, in considering whether a dog poses a danger to public safety (and thus whether it should be immediately destroyed), the court is bound to consider only the present circumstances (albeit including the *immediate* effect of any conditions that could be imposed under a contingent destruction order), rather than any change of circumstances which would lead to a *future* improvement in the behaviour of the dog or the standard of care and control exercised by the owner.

As such, it will be argued that, whilst some minor improvement in the law's concern for the welfare of dogs can be achieved without statutory reform, reform is ultimately needed

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<sup>7</sup> By s.10(3) DDA, 'a dog shall be regarded as dangerously out of control on any occasion on which there are grounds for reasonable apprehension that it will injure any person, whether or not it actually does so'. Clearly, this definition could be satisfied even if a dog is acting in an entirely defensive fashion, in response to what it perceives to be a threat to it or a companion (human or otherwise). As S. Wise (*Drawing the Line: Science and the Case for Animal Rights*, Massachusetts, USA: Perseus Books, 2002, 116) states, the problem is that people often do not understand 'that what appears [to people] to be vicious behaviour...may be something altogether different from a dog's point of view'. Of course, such behaviour can still endanger the public, but any given instance(s) of such behaviour is/are not in any way indicative of the likelihood of a dog posing any danger to anyone in the future, provided that it is properly controlled.

<sup>8</sup> As noted by, e.g., Anne McIntosh, MP, chair of the Environment, Food and Rural Affairs committee reviewing proposals for reform of the current DDA regime. See <http://www.bbc.co.uk/news/uk-politics-21464402>, accessed on 27/03/13.

<sup>9</sup> It is submitted that, in truth, even aggressive dogs are innocent, because the aggression will have been caused by improper care and/or control by humans.

<sup>10</sup> E.g., by educating owners how to care for and control their dogs properly.

<sup>11</sup> E.g., *R v. Flack* [2008] EWCA Crim 204, *R v. Davies* [2010] EWCA Crim 1923 and *Kelleher v. DPP* [2012] EWHC 112978 (Admin) require the court to consider whether imposing conditions on the care, control and ownership of a dog in relation to which a s.3 offence has been committed (and which is thus subject to the possibility of a destruction order under s.4) would prevent it from posing a danger to public safety, thereby sparing the dog from immediate destruction (with a s.4A contingent destruction order being favoured), when, without such conditions, the dog would be deemed a danger and therefore destroyed. *R v. Baballa* [2010] EWCA Crim 1950 is to similar effect for a s.1 banned dog in relation to which the conditions for exemption have been breached (but the court can only consider whether compliance with the existing statutory conditions for exemption would prevent the dog posing a danger; it cannot impose

additional conditions, even if this would ensure that the dog is not dangerous: *R (On the Application of Sandhu) v. Isleworth Crown Court* [2012] EWHC 1658 (Admin)). Moreover, *R v. Ashman* (unreported, 18th October, 2007) allows the court to refuse an order for immediate destruction of a dog in relation to which a s.1 offence has been committed (imposing a contingent order instead) if satisfied that a transfer of "keepership" of the dog would prevent it from posing a danger to public safety, when it would otherwise be deemed a danger and therefore destroyed. *R (On the Application of Housego) v. Canterbury Crown Court* [2012] EWHC 255 (Admin) is to similar effect for non-banned dogs.

<sup>12</sup> E.g., by imposing attendance at dog-training and owner-education classes as a condition to prevent destruction, when this would ensure that a dog which would otherwise pose a danger to public safety (and thus be subjected to immediate destruction) does not, and can therefore be spared destruction.

<sup>13</sup> [2007] EWCA Crim 2548.

in order to strike the appropriate balance and ensure sufficient concern for welfare. Yet there remains the burning question of whether society possesses the resources and inclination to improve the welfare of dogs in this regard.

### **Striking the Balance: Protecting the Public and Maximising Animal Welfare**

As far as I am aware, there are no useful statistics comparing incidents of (i) attacks by dogs who (and whose owners, by attending training classes with the dog) have been properly trained and (ii) attacks by dogs which have received no training. Moreover, statistics recording dog attacks do not normally seek to record whether the dog involved had been trained, how it was cared for, or whether it has any history of mistreatment by humans. Given the many problems noted with the recording of dog-attack statistics,<sup>14</sup> this is not surprising. However, regardless of the lack of empirical data, it surely cannot be seriously doubted that well-trained dogs which are properly cared for and controlled (in and out of their homes) are far less likely to show aggression towards humans and are, thus, less likely to pose a danger to public safety. Indeed, it is contended that requiring owners to attend, with their dogs, training classes designed to educate human and dog alike, would be a far more effective way to protect the public than to destroy dogs of a certain type or which have shown instances of aggression in contravention of the DDA. Moreover, this would improve the welfare of dogs even if we retain the current destruction regime, as it would lead

to an overall better standard of care and control of dogs and a consequent reduction in offences (and thus destruction) under the DDA.

Nonetheless, it must immediately be appreciated that such a universal requirement is unlikely to be accepted. If the government did decide to reintroduce mandatory dog licensing (either for all dogs or for, e.g., section 1 DDA banned dogs), attending classes could be a condition of acquiring a licence.<sup>15</sup> However, there are a number of reasons why such an approach might not be appropriate. First, it is those who would be likely to comply with the law who would be most likely to care for their dogs properly in the first place; those whose dogs would be more likely to pose a danger to the public because of a lack of proper care and control would probably be more likely to ignore the licensing requirements by failing to attend the training sessions. Second, it is doubtful whether, particularly in the current economic climate, the government would be willing to spend the necessary money to put such a scheme in place, even assuming that the costs would ultimately be met by dog owners.

Third, there is the possibility that such a scheme could actually have negative welfare consequences. For example, although it is contended that better education of dog owners and better training of dogs would lead to fewer DDA offences being committed (and thus fewer dogs becoming the subject of a destruction order), it is possible that requiring attendance at classes would

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lead to fewer people being willing to adopt a dog, particularly if the cost of the sessions had to be borne by the owner. Eventually, this would lead to professional breeders breeding fewer dogs (thereby reducing the dog population in this respect), as they would not be able to sell as many dogs. However, it would also lead to fewer people being willing to adopt dogs from shelters or from the homes of people whose dogs have had puppies. From a welfare perspective, it is, in one sense, desirable to dissuade from adopting a dog people who do not have the necessary resources and/or inclination to care for that dog properly. Yet this would surely lead to shelters, whose resources are already stretched, having to care for more and more dogs, reducing the standard of care for dogs in shelters.<sup>16</sup> The ultimate horror of such a position would be if it reached the stage at which it would be better for a dog (potentially including dogs who would never have become the subject of a destruction order under the DDA if they had been adopted) to be destroyed than to continue to live in inadequate conditions; from a welfare perspective, it would not make any difference if the inadequate standard of care were due to neglect, cruelty or a simple lack of resources in those who desperately want to care for the dogs to the best of their ability.

It is, of course, not submitted that educating dogs and their owners should be ignored; education and

<sup>14</sup>See, e.g., S. Collier, 'Breed-specific Legislation and the Pit Bull Terrier: Are the Laws Justified?' [2006] 1 *Journal of Veterinary Behaviour* 17.

<sup>15</sup>Or a condition for obtaining an exemption certificate, if licensing were not to be re-introduced and

educational/training requirements were limited to owners of banned dogs.

<sup>16</sup>The Dogs' Trust, a leading UK dogs' charity, argues that '[t]he licensing regime was essentially a tax on dog ownership[;] it did not encourage a more responsible

attitude towards dog ownership in the long term, nor did it protect in any way the welfare of dogs in the short term.' See <http://www.dogstrust.org.uk/az/d/doglicences/#.UVKyBIwgGSM>, accessed on 27/03/13.



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training remains a fundamentally important step towards improving the welfare of dogs and protecting the public from dogs reacting dangerously to improper care and control. Indeed, it is contended that more should be done to increase the number of education/training classes available.<sup>17</sup> However, it seems unrealistic to expect Parliament, in the foreseeable future, to ensure an increase in the availability of, and incentives to attend, dog-training and owner-education classes on a scale sufficient to secure the required balance between improving the welfare of dogs and protecting the public.<sup>18</sup> Therefore, an alternative method of striking the necessary balance must be found.

In this regard, it will be argued that, by using existing case law, judges can legitimately mandate an increase in attendance at dog-training classes, to prevent the need to destroy a dog which has been involved in committing a section 3 DDA offence (and which might, considering its present condition in isolation, potentially pose a danger to public safety), whilst ensuring better protection of the public (by ensuring that the dog does not pose a danger).<sup>19</sup> However, as noted above,

it will be explained that this beneficial principle cannot extend as far as one would like, because the amended DDA still marginalises a concern for the welfare of dogs. As such, it will be contended that legislative reform is still appropriate to ensure proper respect for welfare, but *an* improvement can be made without the necessary reform.

### Striking the Balance Using the Existing Law

Under sections 3 and 4 of the DDA, any dog (i) which is dangerously out of control in a public place or (ii) which, whilst in a non-public place it is not permitted to be, gives grounds for reasonable apprehension that it will injure someone (whether it does or not)<sup>20</sup> can be destroyed. If the dog actually injures someone, it is subject to a "quasi-mandatory" destruction order (that is, it must be destroyed unless the court is satisfied, in the words of section 4(1A), 'that the dog would not constitute a danger to public safety').<sup>21</sup> If the dog does not injure someone, the court should not order destruction unless satisfied that the dog would pose a danger to public safety.<sup>22</sup> Crucially, in either case, the court can, even if minded to impose a destruction order, impose a contingent destruction order under section 4A(4), by which the dog will only be destroyed if the owner fails to keep it under proper control (including satisfying any conditions imposed by the court under section 4A(5)).

Moreover, case law makes it clear that, in determining whether a dog would pose a danger to public safety, the court must consider whether imposing any conditions under a contingent destruction order would, if those conditions are complied with,<sup>23</sup> prevent it from posing a danger to public safety.<sup>24</sup> That is to say, for quasi-mandatory destruction orders, the court should not order destruction if the appellant proves that the dog would not pose a danger to public safety if not destroyed. If the appellant cannot satisfy this burden purely in relation to the dog's present circumstances, he must still be given the chance to prove that, with the imposition of appropriate conditions, the dog would not pose a danger. If he cannot prove this, an immediate destruction order will be made; if he can prove this, a contingent destruction order will be made. For completely discretionary destruction orders, the court should not order destruction unless it is satisfied (on the evidence before it,

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<sup>17</sup>For example, perhaps some of the increase to the fee for adding a s.1 banned dog to the Index of Exempted Dogs could be used to subsidise classes educating owners and training dogs, either generally or in relation to banned dogs.

<sup>18</sup>Under the Control of Dogs (Scotland) Act 2010, s.2, a dog control order can require an owner to attend training classes with his dog, but the recent DEFRA consultation (see n.41, below) did not recommend such an approach for England.

<sup>19</sup>It will be shown why, unfortunately, this approach cannot be used for s.1 banned dogs. However, amendment to the Dangerous Dogs Compensation and Exemptions Schemes Order 1991 is all that would

be required for the approach to work in relation to banned dogs.

<sup>20</sup>It can be seen that this replicates the s.10(3) DDA definition of being dangerously out of control. (See n.7, above.)

<sup>21</sup>In such cases, the burden to prove that the dog would not pose a danger is on the party arguing against destruction and requires proof on the balance of probabilities: *R v. Davies* [2010] EWCA Crim 1923, at [14].

<sup>22</sup>*Kelleher v. DPP* [2012] EWHC 2978 (Admin), at [12]. It is important to note that the burden is not on the party arguing against destruction to prove that the dog

would not pose a danger; the court must start from the position that the dog would not pose a danger and order destruction only if satisfied otherwise.

<sup>23</sup>The court will inevitably consider the likelihood of compliance, which will thus require the conditions to be reasonably practicable.

<sup>24</sup>*R v. Flack* [2008] EWCA Crim 204 (aggravated offences: i.e., those involving actual injury to a person); *Kelleher v. DPP* [2012] EWHC 2978 (Admin), especially at [24] (non-aggravated offences: i.e., those not involving injury).

starting from the position that the dog is not dangerous) that the dog would pose a danger to public safety. If the court is satisfied of this on the basis purely of the dog's present circumstances, it must still satisfy itself that imposing any appropriate conditions<sup>25</sup> would not prevent it from posing a danger. If the court is so satisfied, an immediate destruction order will be made; if the court is not so satisfied, a contingent destruction order will be made.

It is submitted that the significance of this case law is that the court can and should consider imposing attendance at dog-training/owner-education classes under a contingent destruction order.<sup>26</sup> Imposing such a condition would be the most effective way of ensuring that a dog which could (looking at its present circumstances in isolation) potentially be a danger to public safety would not actually be a danger. There is nothing in the DDA to prevent such a condition being imposed, and any caring and responsible owner would be willing to comply with such a condition to save his dog.<sup>27</sup>

However, there is a potential obstacle in the current case law, in the form of *R v. Donnelly*, in which the Court of Appeal held that, when considering whether to impose a destruction order, the court has to consider whether the dog, 'in the condition in which he [or she] [is] and having regard to the circumstances in which he [or she] live[s], constitute[s] a danger to public safety'.<sup>28</sup> The court should not, it was held, accept the

argument that a destruction order should not be made simply because any danger posed to the public comes, not from the inherent nature of the dog, but from its behaviour in response 'to the care the dog had received'.<sup>29</sup> Therefore, it would seem that the argument that a dog which currently does pose a danger to public safety should not be destroyed because, in the future, it will not, if it is properly trained and its owner is properly educated, would fall foul of *Donnelly*. That is to say, a contingent destruction order can, and should, be utilised when the imposition of appropriate conditions (potentially including dog and owner attendance at training classes) would immediately prevent the dog from posing a danger to public safety, but it cannot be used when the conditions would not achieve this immediately.

Section 4(1A) states that the court is not obliged to order destruction of a dog in respect of which the section 3 aggravated offence has been committed (and which is thus subject to a quasimandatory destruction order) 'if...satisfied...that the dog would not constitute a danger to public safety'. Use of the subjunctive 'would' raises issues as to timing, but it is submitted that, given the purpose of section 4(1A), the appropriate time is surely the time at which the destruction order is, or is not, made. That is to say, it seems that the court should be satisfied that the dog would not constitute an *immediate or future* danger to public safety if an immediate destruction order is not made (taking into

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account any conditions which could be imposed under a contingent destruction order and which would have an immediate effect in preventing the dog from posing a danger to the public). As such, arguments that the dog should be spared destruction because it would not pose a danger after, say, a few months' (or even weeks' or days') training will surely not be accepted in relation to a dog which is deemed to pose an immediate danger to the public.

However, it is submitted that there is another line of case law which the courts could utilise to spare from destruction a dog which is the victim of poor care and control, whilst requiring attendance at owner-education/dog-training classes and thereby improving the dog's welfare and protecting the public. Consider the example of a dog which the court is satisfied does not, by its nature, pose a danger to public safety (because it is not generally aggressive towards humans), but which is dangerous when subjected to the poor standard of care and control it receives from its present

<sup>25</sup>Inevitably, although the burden is on the court to satisfy itself that the dog does pose a danger to public safety, it will be for the party opposing destruction to raise any conditions other than those listed in s.4A(5) (i.e., muzzling, keeping on a lead, banning from certain places, or castration). The court would then have to satisfy itself that such a condition or

conditions would not prevent the dog from posing a danger to public safety.

<sup>26</sup>Clearly, the court would have to be satisfied that the classes are properly run by appropriately qualified experts, and attendance would have to be monitored, but there is no reason why this should present a problem.

<sup>27</sup>Of course, issues of cost might have to be addressed for owners who cannot afford to pay for the classes. In such cases, government or charity subsidisation might be required.

<sup>28</sup>[2007] EWCA Crim 2548, at [15].

<sup>29</sup>*Ibid.*

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owner. It seems that, under Donnelly, the court would have to order immediate destruction even if the owner is willing to attend training classes as soon as practicable. Attendance at such classes would teach the owner how to care for and control the dog properly, to ensure that it does not pose a danger to public safety. Along with attendance by the dog, this could work to remove any danger from the public within a short space of time. Nonetheless, the dog would, in the interim, pose a danger to public safety, so it would seemingly have to be destroyed. It would perhaps be possible to impose additional, stringent control conditions, such as preventing the dog from being in a public place (other than on the way to, and attendance at, training classes, when it would have to be muzzled and appropriately restrained, unless otherwise required at the sessions) until training has been completed, provided that such conditions would not themselves

unduly compromise the dog's welfare.<sup>30</sup> Indeed, it is contended that a court should consider imposing such conditions where practicable and if satisfied by expert evidence that the dog's welfare would not be unduly hindered (bearing in mind that the alternative is death). However, it is accepted that a court might well not be willing to do so, for fear that the interim control measures would not work to protect the public. For example, as noted, it would surely be necessary for the dog to be in a public place on the way to the classes,<sup>31</sup> and judges might be concerned that the owner's poor standard of care and control in this situation could lead to the dog being a danger to the public.<sup>32</sup>

Nonetheless, in cases in which the problem is the owner, it is submitted that the court could utilise the transfer of "keepership" case law developed in relation to section 1 banned dogs. For example, in *R v. Ashman*,<sup>33</sup> the court held that a banned dog in relation to which the conditions of exemption have been breached can be spared destruction if the court is satisfied that it would not pose a danger to public safety if "keepership" (effectively, full responsibility for care and control of the dog) is passed from the owner to someone else (and the conditions for exemption are satisfied within two months or such longer period as the court provides for under section 4A(2)).<sup>34</sup> If an owner is willing to give

care and control of a non-banned dog to a more responsible person (who is willing to assume responsibility for the dog) whilst he secures the necessary training by attending classes with the dog (and the interim keeper, to ensure that the dog is properly controlled on the way to, and at, the sessions), the court could impose this as a condition under a contingent destruction order, with the owner allowed to resume care and control of the dog when he has satisfactorily completed the class. The dog will not pose a danger to public safety whilst the owner is being educated, as it will be in the care and control of a responsible person, and it will not pose a danger when the owner is properly educated.<sup>35</sup>

Indeed, in *R (On the Application of Housego) v. Canterbury Crown Court*,<sup>36</sup> the High Court accepted that courts have the power to consider the effect of transfer of ownership/keepership of a non-banned dog when determining whether or not it is dangerous and thus whether a contingent destruction order is appropriate. Moreover, the Court recognised the generality of conditions which can be imposed under section 4A(5).<sup>37</sup> Therefore, there is nothing in the DDA or the case law to prevent the court from utilising the approach suggested above to balance the welfare of dogs with protection of

<sup>30</sup>For example, if the owner had a secure garden in which the dog could be exercised.

<sup>31</sup>An important part of the training, for dog and owner, would of course be ensuring that the owner can control the dog outside of its home environment.

<sup>32</sup>If keeping the dog on a lead and muzzle in public were thought to be sufficient to prevent this, there would be no need for any other conditions, such as attendance at classes, to be imposed.

<sup>33</sup>Unreported, 18th October, 2007.

<sup>34</sup>T. Latham, 'Dangerous Dogs Law' (2010) 174 *JPN* 212 rightly notes that, in relation to s.1 banned dogs, this case law can cause problems (i) as amounting to a *de*

*facto* transfer of ownership (when transfer of ownership by sale or gift is prohibited under s.1) and (ii) by complicating the requirement to ensure third-party liability in respect of the dog (which is required as a condition for exemption under the Dangerous Dogs Compensation and Exemption Schemes Order 1991). However, first, it is submitted that these concerns are outweighed by the positive effect on welfare, without any negative effect on public safety, as the law applies to spare from destruction only dogs which the court is satisfied are not dangerous. Second, such problems obviously do not arise for dogs in relation to which a s.3 offence has been committed but which are not of a type banned under s.1.

<sup>35</sup>Of course, if an owner is not willing or able to attend education classes, the court could still utilise the transfer of "keepership" case law, requiring transfer of ownership to a responsible person as a condition of saving the dog, if the current owner and prospective owner are both willing.

<sup>36</sup>[2012] EWHC 255 (Admin).

<sup>37</sup>*Ibid.*, at [15].



“  
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dog to the original  
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the public.<sup>38</sup> There is established case law allowing the dog to be spared when transfer of permanent control of it to a responsible person would prevent it from being a danger to the public and this is imposed as a condition of a contingent order. Furthermore, there is no reason why transfer of temporary control of the dog, whilst the owner secures the necessary education (with the dog also attending, under the proper supervision of the responsible person) could not be imposed, provided that there is a responsible person willing to assume care and control of the dog.<sup>39</sup>

However, it is arguable that many judges might well be reluctant to use such a condition to save a dog they think otherwise does pose a danger to public safety, even where the evidence suggests that the poor standard of care and control of the dog was the reason for the offence.<sup>40</sup> For example, they might not be sure that such training/education would work to prevent the dog posing a danger to public safety; they might not be sure how to identify whether the dog or the owner is the main problem; they might not be sure how to determine whether the proposed

interim keeper is an appropriately responsible person. Of course, expert evidence would be relevant to assessment of these concerns, and the second and third issues have not proved to be insurmountable problems in cases in which permanent transfer of ownership or keepership has been ordered. Yet the extra step of allowing return of the dog to the original owner might prove an interpretive step too far for many judges. Therefore, it is contended that reform, to place the suggested principles on a statutory footing, would be preferable. It remains to be seen whether convincing judges to adopt this approach or convincing Parliament to enact the necessary reform is more likely (or whether perhaps neither is possible).

Before the necessary statutory reform is considered, it is contended that, even if imposition of a requirement to attend dog-training/owner-education classes is not to be used to save dogs that would otherwise be subjected to an immediate destruction order, it could potentially be routinely used as part of a contingent destruction order in any case in which the owner's care and/or control of a dog has been shown to have played a part in the dog's dangerous behaviour. For, the court could still impose such a condition even if satisfied that imposition of other conditions, without a

requirement to attend classes, would prevent the dog from posing a danger to the public. Provided that the owner has the resources and inclination to attend classes, such a condition would surely improve the welfare of the dog, both by raising the standard of care it receives and by reducing the likelihood of any future incident that could lead to destruction. The problem with this is that failure to comply with the condition would render the dog liable to be immediately destroyed even if the failure does not mean that it poses a danger to public safety. As such, it is submitted that statutory reform is surely needed to introduce a satisfactory scheme allowing imposition of court-ordered attendance at training classes.

### Legislative Reform

Last year, DEFRA concluded a consultation into the working of the DDA.<sup>41</sup> The proposals resulting from

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<sup>38</sup>It must be noted that, although the court has similar discretion not to order destruction of a section 1 banned dog which has not been properly added to the Index of Exempted Dogs, it does not have power to impose conditions in addition to those imposed for exemption under the Dangerous Dogs Compensation and Exemptions Schemes Order 1991 (see, e.g., R (On the Application of Sandhu) v. Isleworth Crown Court [2012] EWHC 1658 (Admin)). However, in R v. Baballa [2010] EWCA Crim 1950, at [22-23], the Court of Appeal confirmed that the approach to contingent destruction orders set down in Flack should apply to s.1 banned dogs. That is to say, destruction should not be ordered if the court is satisfied that the statutory conditions would ensure that the dog will not pose a danger to public safety. It

is submitted that the Secretary of State should consider adding attendance at training classes as one of the conditions for exemption.

<sup>39</sup>A condition could be that, if the owner does not satisfactorily complete the training, ownership of the dog will pass to the responsible person, or the dog will be destroyed if that person or some other appropriate person (who would have to prove his suitability to the court) is not willing to assume ownership.

<sup>40</sup>Of course, if a dog is generally aggressive towards people (and thus poses a danger to public safety), because of the poor standard of care it has received, the court would probably not accept the argument that the dog should not be destroyed because proper training, even if accompanied by a transfer of

ownership, will, in the future, control that aggression. For, the court would have to be persuaded that there would be no realistic chance of the dog posing a danger to public safety in the interim, which would seem unlikely unless the new owner had appropriate accommodation on which the dog could be permanently kept without being likely to come into contact with the public and without its welfare being unduly compromised. If keeping the dog on a lead and muzzled were enough, then a contingent destruction order would surely be imposed, anyway.

<sup>41</sup>See 'Dog Ownership - Measures to Encourage More Responsible Behaviour': <http://www.defra.gov.uk/wildlife-pets/pets/dog-ownership/>, accessed 25/03/13.

this consultation recommend some reform of the existing legislation. One proposal is to extend the scope of the offence of being the owner, or in charge, of a dog which is dangerously out of control, to include incidents in any location. There is little doubt that this makes sense,<sup>42</sup> but it will be important to ensure that judges recognise that any seemingly aggressive behaviour which a dog exhibits inside his or her home or at some other familiar private location might well be strongly motivated by defensive instincts. Of course, this should not prevent a person from being liable to criminal sanctions for failing to control a dog, but it must be a crucial factor in determining whether a dog should be deemed dangerous and become the subject of a destruction order.

The second proposal for legislative reform is one that can have a potentially positive effect on the welfare of dogs, as it allows the police discretion not to seize a dog they suspect is of a banned type and in relation to which the conditions

**“One proposal is to extend the scope of the offence of being the owner, or in charge, of a dog which is dangerously out of control”**

for exemption have not been satisfied. This proposal would allow the police to leave a dog with, or return it to, its owner 'where they are completely satisfied that it does not pose a risk to the public and is in the care of a responsible owner.'<sup>43</sup>

However, the proposals do not address the key welfare concerns noted above. In particular, after receiving responses to the consultation, DEFRA did not propose any substantive amendment in relation to (i) the banning of certain types of dog or (ii) the destruction of dogs involved in the commission of an offence under the Act.<sup>44</sup>

The Dangerous Dogs (Amendment) Bill does propose an amendment relevant to determining whether a dog poses a danger to public safety, and thus whether it should be destroyed after having been involved in the commission of an offence or having been seized under section 5 of the DDA. The proposed amendment would require the court to consider the temperament and past behaviour of a dog, as well as whether the owner or person for the time being in charge of it 'is a fit and proper person to be in charge of the dog'. Additionally, it would authorise the court to consider 'any other relevant circumstances. Whilst it is important for the temperament of dog to be considered when determining whether it should be destroyed, first, it is clear that the courts already considered this as a relevant factor.<sup>45</sup> More importantly, there is nothing in

<sup>42</sup>The recent incident leading to the death of a girl in Wigan, widely reported in the UK media, highlights that serious incidents can take place in private places in which a dog is allowed to be. Moreover, it emphasises, yet again, the need to ensure proper care and control of dogs, for the welfare of dogs and for protection of the public.

<sup>43</sup>DEFRA, 'Dog Ownership - Measures to Encourage More Responsible Behaviour', at n.41, above.

<sup>44</sup>Whether a s.1 (banned dogs of a type putatively bred for fighting), 2 (other banned dogs of a putatively dangerous type) or 3 (being the owner, or in charge, of a dog dangerously out of control in a public place or private place the dog is not allowed to be) offence.

<sup>45</sup>E.g., *R v. Flack* [2008] EWCA Crim 204. Note that the character of the owner was also considered as relevant to determination of whether an immediate destruction order should be imposed (i.e., in deciding whether the

**“Under the current regime, any dog of a section 1 banned 'type' is subject to a quasi-mandatory destruction order”**

the amendment which seeks to address the key welfare concern of subjecting to a destruction order a dog which is a victim of poor care and control.

It is submitted that the first crucial reform, to improve the welfare of dogs without in any way reducing protection of the public, would be to repeal the section 1 ban on types of dogs which are deemed to be dangerous because they have apparently historically been bred for fighting.<sup>46</sup> Under the current regime, any dog of a section 1 banned 'type'<sup>47</sup> is subject to a quasi-mandatory destruction order if the owner does not properly comply with the exemption criteria. It is strongly contended that there is no such thing as a dangerous breed or type of dog; any dog which is properly cared for and controlled will be a loving companion which will not pose a danger to public safety. However, there is no doubt that certain types of dog can inflict greater damage if they attack. As such, it would be appropriate to retain the requirement that particular types of dog are kept on a lead and muzzle whenever they are in a public place. Indeed, it is submitted that the requirement should be extended to include any unenclosed private place, which should be defined as any private place which lacks physical

dog would pose a danger to public safety).

<sup>46</sup>S.2 empowers the Secretary of State to enact legislation imposing conditions on other types of dog he deems pose 'a serious danger to the public', but no order has been made under this section.

<sup>47</sup>'Type' has always been interpreted more widely than 'breed': see, e.g., *R v. Knightsbridge Crown Court, ex parte Dunne* [1993] 4 All ER 491.

barriers sufficient to keep the dog within it.<sup>48</sup>

Moreover, it is suggested that, in place of a ban on certain types of dogs (with the possibility of destruction if the conditions of exemption, including spaying of females and castration of males, are not satisfied), it would be appropriate to have a requirement that anyone who wishes to own one of these types of dog must attend training classes with the dog. The classes would be designed to educate the owner to care for and control the dog properly, including basic training for the dog. The current Index of Exempted Dogs (IED) would be modified, requiring owners to register their dog with proof of satisfactory completion of the necessary training<sup>49</sup> within the stipulated time.<sup>50</sup>

Mandatory attendance at education and training classes<sup>51</sup> will improve the welfare of dogs, first, by ensuring that their owners know how to care for and control them properly and, second, by reducing the possibility that they will become the subject of a destruction order. This latter purpose will be achieved by (i) ensuring that fewer previously banned dogs act in a way which would be deemed legally dangerous (and which would thus

render them subject to the possibility of destruction), and (ii) reform of the circumstances in which the court can order destruction of a dog.<sup>52</sup>

Moreover, mandatory attendance at training classes will improve public safety by ensuring that fewer dogs attack.

It is submitted that, if the owner<sup>53</sup> of a dog to which mandatory attendance at classes applies refuses or fails to comply with the conditions (i.e., attendance at classes and keeping the dog muzzled and on a lead in all public, and unenclosed private, places), the dog should not on this basis become subject to the possibility of a destruction order. If the owner<sup>54</sup> refuses to comply, the court should have the power, and be obliged, permanently to remove the dog from his ownership and control and give the dog to an appropriate

person who has, or is willing to acquire (within the stipulated period), the necessary training.<sup>55</sup>

If an owner fails to comply with the requirement satisfactorily to complete training within the stipulated period, he should be subjected to a fine and the court should have the same power permanently to remove the dog from his care, control and ownership. However, it should also have discretion (i) to remove the dog temporarily (giving responsibility for it to an appropriate person with the necessary expertise) and allow the owner a further prescribed period to complete the training, or (ii) to allow the dog to remain with the owner whilst<sup>56</sup> he is given additional time to complete the training.<sup>57</sup> At this stage, permanent removal should only be imposed when the dog would otherwise have to be destroyed because there are no other reasonably practicable conditions which would prevent it from being dangerous.<sup>58</sup>

A second failure to comply should also attract a fine and give the court similar discretion (i) to remove the dog permanently, (ii) to remove the dog temporarily and allow the owner additional time to complete the classes with the dog and temporary carer, and with the dog being

**“ permanent removal should only be imposed when the dog would otherwise have to be destroyed ”**

<sup>48</sup>This would include, e.g., a garden with insufficient fencing or a garden in which the gate is left open, allowing the dog to escape.

<sup>49</sup>Properly accredited education centres, issuing official certificates, would be established. This would be funded by use of the fee payable to add a dog to the IED. Consultation with appropriate experts will be necessary to determine the requirements of the classes, including duration of sessions, number of sessions which must be attended, contents of the sessions, testing, etc.

<sup>50</sup>It is submitted that two months would *prima facie* be an appropriate period.

<sup>51</sup>Including by those who already own dogs on the IED. It is submitted that, in all cases, it should be the owner's responsibility to ensure that anyone who has actual care and control of the dog is properly instructed in how to look after it, with the owner remaining legally liable for any infringement committed whilst the dog is in the care or control of another person.

<sup>52</sup>To be discussed below.

<sup>53</sup>If there is more than one owner, they should all be required to attend classes with the dog.

<sup>54</sup>In the case of multiple owners, if any owner refuses, he should have his ownership of the dog terminated, and the owner who does, or owners who do, attend classes should have a legal obligation to ensure that the dog is never in the primary care or control of the defaulting former owner.

<sup>55</sup>This would most likely be an animal charity or appropriately qualified foster carers. If no one is willing to take responsibility for the dog, the only option would be for the court to order that it be sent to a pound, where it would ultimately, and tragically, be destroyed if no appropriate person (who has the necessary expertise or who is willing to acquire it by attendance at classes) was willing to assume responsibility for it.

<sup>56</sup>If the dog is temporarily removed, the order will (i) require that the appropriate person attends classes with

the owner and the dog and (ii) specify that the dog is to be returned to the owner upon satisfactory completion of the classes.

<sup>57</sup>In cases of co-ownership of a dog, if one or more owner fails to comply with the conditions but at least one other owner successfully complies, permanent removal would constitute terminating the defaulting party or parties' ownership and obliging the remaining owner(s) to ensure that the defaulter(s) never have primary responsibility for care or control of the dog; temporary removal would constitute obliging the complying owner(s) to ensure that the defaulter(s) do not have primary responsibility for care or control of the dog in the period of temporary removal.

<sup>58</sup>See below.

returned upon satisfactory completion, or (iii) to allow the dog to remain with the owner and allow additional time to complete the classes. However, with a second failure, the court should require proof of exceptional circumstances (such as illness preventing attendance at classes) before being willing to allow the owner another chance (i.e., before exercising its discretion not permanently to remove the dog). Upon a third failure, the dog should be permanently removed.<sup>59</sup> Any time a dog is permanently removed, the court should have the power, and be obliged, to disqualify the previous owner from being responsible for any dog for such time as the court thinks appropriate.

If the owner fails to keep the dog muzzled and on a lead when in a public, or unenclosed private, place, he should be subjected to a fine, with

the court given discretionary power permanently to remove the dog.

It will be noted that, under the proposed reforms as so far discussed, there is no power for the court to order destruction of a dog. It is submitted that no dog, *of any type*,<sup>60</sup> should be subjected to the possibility of a destruction order unless it is proved that the dog is dangerous, which should be defined as *likely at any time to be out of control and to attack a person*. If this is affirmatively proved after any failure<sup>61</sup> (which are applicable to what are currently banned types of dogs), or in relation to any dog which is dangerously out of control<sup>62</sup> in any place,<sup>63</sup> the court should have the power to impose a destruction order, *but only if satisfied<sup>64</sup> that imposing any reasonably practicable conditions would not prevent the dog from being dangerous*.

If the court is not satisfied that any reasonably practicable conditions would prevent the dog from being dangerous, the dog would unfortunately have to be destroyed. However, it is submitted that this should happen only in extreme cases, as the legislation will expressly state that possible conditions include:

1. Transferring ownership and permanent responsibility for the care

**If the owner accepts the conditions but fails to comply with them within the stipulated period, he should be subjected to a fine**

and control of a dog to an appropriate person with expertise in dealing with dangerous dogs and who has appropriate accommodation on which the dog can live without its welfare being compromised, but also without it being likely to come into contact with anyone who does not live with the dog, or who is willing to visit it (e.g., vets, professional groomers, friends and family of the new owner).<sup>65</sup> Permanent removal of a dog should only be imposed for a first offence if the court is satisfied that the dog would otherwise be dangerous and thus have to be destroyed.

2. Transferring temporary care and control of the dog to such a person whilst the owner secures the necessary training (with the appropriate person also attending with the dog) and complies with any other appropriate requirements.<sup>66</sup>

3. Imposing special conditions on the owner's control of the dog whilst the necessary training is secured and any other appropriate requirements are satisfied. The control conditions could include keeping the dog on the

**under the proposed reforms as so far discussed, there is no power for the court to order destruction of a dog**

<sup>59</sup>It is accepted that permanent removal can have negative welfare consequences, first, because even a dog which has not been properly cared for will often have developed emotional attachments to its carers, and, second, because many permanently removed dogs will likely end up in pounds, with the possibility of being destroyed if no one adopts them. However, permanent removal will only be exercised when the previous owner has shown himself to be an inadequate care-giver, such that leaving the dog with him would seriously compromise the dog's welfare.

<sup>60</sup>I.e., whether one to which the requirement of attendance at training/education classes would apply (those dogs which are currently s.1 banned dogs) or not.

<sup>61</sup>I.e., the owner (i) keeping the dog muzzled and on a lead when in any public place or unenclosed private place and (ii) satisfactorily completing training classes with the dog.

<sup>62</sup>Maintaining the current s.10(3) DDA definition. As noted at n.7, above, this would include defensive behaviour. However, expert evidence showing that the dog was acting defensively would be relevant to determining whether the dog is dangerous within the new statutory definition, as it must be relevant to determining whether the dog poses a danger to public safety under the current legislation.

<sup>63</sup>It would be an offence to be the owner of a "banned" dog not properly added to the IED and an offence to be the owner or in charge of a dog dangerously out of control in any place.

<sup>64</sup>It is accepted that, in all cases in which it has been affirmatively proved that the dog is dangerous (ignoring any possible conditions which could prevent this), it should be for the party arguing against destruction to prove, on a balance of probabilities, that any conditions he suggests would prevent the dog from being dangerous.

<sup>65</sup>This would put the transfer of "keepership" case law (e.g., *R v. Ashman* (unreported, 18th October, 2007)) discussed above on a statutory footing, but allowing full legal ownership to pass. If this condition were to be attached to an order relating to a dog in respect of which mandatory attendance at training classes were required, the new owner would have to prove he had the necessary expertise to be awarded the appropriate certificate allowing the dog to be added to the IED in the new owner's name.

<sup>66</sup>E.g., erecting proper fencing around his land, castrating a male dog if appropriate.



owner's (properly enclosed) land except when on the way to, and during attendance at, classes (when the dog would have to be muzzled and appropriately restrained unless the training required otherwise). The court would have to be satisfied by expert evidence that the dog's welfare would not be unduly compromised by such conditions.

These three categories of conditions could all be applied even if the evidence suggests that the nature of the dog was a factor in any offence, because they would still ensure appropriate protection of the public in such circumstances. However, for the second and third categories, the court would have to be satisfied by expert evidence that training would work to change the dog's nature within a reasonable time.<sup>67</sup>

Similarly, the court could order castration of a male dog if satisfied by expert evidence that this would work to reduce the dog's aggression, with interim control measures also being imposed, if appropriate. Indeed, there would be no limit on the conditions which the court could impose.<sup>68</sup> However, it is contended that the suggested conditions would allow the court to deal with most of the serious cases of dangerous dogs without endangering the public or requiring destruction of the dog. Of course, the utility of such conditions will depend upon people being willing to take permanent or temporary responsibility for a

dangerous dog, but it is hoped that there are many charities, and private shelters and individuals, who have the expertise and inclination to do this in order to save dogs' lives.

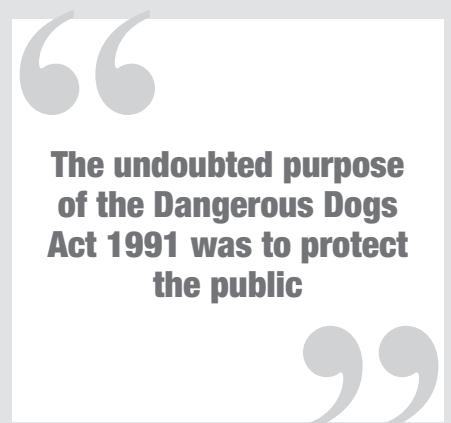
If the court is willing to spare a dog by imposing appropriate conditions on its care and control and the owner is willing to accept the conditions, the court will have no power to order destruction of the dog at this stage. If the owner is not willing to accept the conditions, then the court should have the power, and be obliged, permanently to remove the dog from his care, control and ownership,<sup>69</sup> transferring the dog to an appropriate person, who would have to be willing to accept such conditions. If there is no such person, the dog would unfortunately have to be sent to a pound, where it would tragically have to be destroyed if no appropriate person (who would have to undertake to the court full responsibility for complying with the conditions) was willing to adopt it.

If the owner accepts the conditions but fails to comply with them within the stipulated period, he should be subjected to a fine and the court should have the power (i) to remove the dog permanently, (ii) to remove the dog temporarily whilst the owner complies with the conditions, or (iii) to allow the owner another chance to comply with the conditions whilst retaining care, control and ownership of the dog. Upon any breach of the imposed conditions, the dog should

only be subjected to a destruction order if the court is satisfied that none of these options (or any fresh conditions not originally imposed) would prevent it from being dangerous.<sup>70</sup> Again, this should rarely be so even in serious cases, provided that there is an appropriate person willing to assume responsibility for the dog.

## Conclusion

The undoubted purpose of the Dangerous Dogs Act 1991 was to protect the public. However, unfortunately, it sought to achieve this protection in a fashion which gave no real consideration to the welfare of dogs. The Dangerous Dogs (Amendment) Act 1997 went some small way towards redressing the balance by providing courts with the discretion not to order the destruction of dogs in relation to which an offence had been committed. Moreover, the courts have, in cases such as *R v. Ashman*,<sup>71</sup> *R v. Flack*,<sup>72</sup> *R v. Davies*,<sup>73</sup> *R (On the Application of Housego) v. Canterbury Crown Court*<sup>74</sup> and



<sup>67</sup>The nature of the dog's accommodation would ensure that the dog was not dangerous, within the statutory definition, in the interim.

<sup>68</sup>E.g., the court could order the owner to erect and maintain proper fencing in his garden, to ensure that a dog cannot escape. This could, if appropriate, be accompanied by temporary removal of the dog whilst the fencing is erected. Of course, the court would always be required to ensure that any conditions it imposes do not unduly hinder the dog's welfare, bearing in mind that the alternative is death.

<sup>69</sup>And to impose a disqualification order.

<sup>70</sup>That is to say, mere failure to comply with the conditions of what is, under present terminology, a contingent destruction order, would not lead to destruction. No destruction order should ever be made unless the court is satisfied that no reasonably practicable conditions can prevent the dog from being dangerous. Although breach of a conditional order (in relation to any type of dog) would not automatically lead to the dog being destroyed, the owner would be subjected to a mandatory fine and the possibility of having his dog permanently or temporarily removed from him, which should be a sufficient compulsion to comply with the order, without requiring destruction

of a non-dangerous dog who would be the innocent victim of the owner's infringement.

<sup>71</sup>Unreported, 18th October, 2007.

<sup>72</sup>[2008] EWCA Crim 204.

<sup>73</sup>[2010] EWCA Crim 1923.

<sup>74</sup>[2012] EWHC 255 (Admin).



*Kelleher v. DPP*<sup>75</sup> attempted to utilise this discretion in a positive fashion. It has been explained above that the courts should combine the positive effect of this case law, refusing to order destruction of a dog if satisfied that transferring temporary care and control of it to a responsible person (whilst requiring the owner to attend education classes with the dog and temporary keeper) would prevent the dog from posing a danger to public safety. However, it was also noted that courts might be unwilling to utilise this power, because they might not be convinced that it would offer sufficient protection to the public. This is particularly likely to be so for cases in which the dog is deemed to have an "aggressive" nature.

Therefore, it is contended that the time has come for substantial legislative reform of the DDA regime, to ensure proper respect for the welfare of dogs without compromising protection of the public. The appropriate reform has been discussed above, but the key requirements are:

1. Removing the ban on certain types of dog. This should be replaced by a requirement that anyone who wishes to own such a dog must satisfactorily complete training classes with the

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”**

dog. The dog would not have to be spayed or castrated.

2. Providing the court with power permanently to remove a dog from an owner who does not secure the requisite training, whose dog has been dangerously out of control in any place, or who fails to comply with any other condition imposed by the court upon commission of either of these offences.

3. Providing the court with the power temporarily to remove a dog whilst the owner is given another chance to complete the classes satisfactorily and/or comply with any other conditions imposed.

4. Statutorily defining 'dangerous dog' as a dog likely to be out of control and attack a person.

5. Putting on a statutory footing that no dog can be destroyed unless the court is satisfied that there are no reasonably practicable conditions which can prevent it from being dangerous.

6. Expressly stating that reasonably practicable conditions include, inter alia, (i) transfer of ownership of an otherwise dangerous dog to a person with appropriate expertise and accommodation to prevent the dog from being dangerous; (ii) transfer of temporary control of a dog to an appropriate person (with appropriate accommodation, if necessary) whilst the owner secures the necessary training and/or complies with any

other conditions to ensure that the dog is not dangerous when returned to the owner.

It is contended that these amendments to the law would greatly improve the welfare of dogs, reducing the chance of innocent victims of poor care and control being sentenced to death, without compromising public safety. Indeed, the likelihood of an improvement in the standard of care and control of dogs would surely increase public safety.

**“  
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reform of the DDA regime,  
to ensure proper respect  
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”**

<sup>75</sup>[2012] EWHC 2978 (Admin).

# Cases, Materials and News

## Animal Experimentation

**The Animals (Scientific Procedures) Act 1986 Amendment Regulations 2012**

The regulations amend the Animals (Scientific Procedures) Act 1986 to transpose EC Directive 2010/63/EU on the protection of animals used for scientific purposes. The EC Directive 2010/63/EU replaces Directive 86/609/EEC.

### Medicines labelling and animal testing

The *Medicinal Labelling Bill 2013* (HL Bill No.11) was introduced for in the House of Lords for its 1st reading on 13 May 2013. The Bill requires that all medicines are labelled so as to declare whether the product has been produced as a result of research on animals. It was introduced by Lord Winston, not out of a belief that public pressure would result in people switching to non-tested medicines, but to emphasize the importance of animal research in producing safe medicines. It is thought that the Government and pharmaceutical industry is likely to oppose the Bill on grounds that it may deter some patients from taking medicines which they have been prescribed.

**Article** – David Thomas discusses the impact of the Freedom of Information

Act 2000 on disclosures relating to animal research and considers how the system might be improved. Public Law P.L. (2013), January Pages 10-19.

## Criminal Law – Animal Offences

**(1) R (on the application of James Gray) (2) James Gray & Julie Gray (Claimants) v Aylesbury Crown Court (Defendant) & RSPCA (Interested Party)**  
[2013] EWHC 500 (Admin)

The claimants were a horse trader and his wife, from whom a large number of horses were seized on welfare grounds. Both were convicted of offences under the Animal Welfare Act 2006 ('the 2006 Act') and ordered to pay towards the prosecution costs. Both appealed to the Crown Court, resulting in two of the charges being dismissed. Both claimants were ordered to pay £200,000 each towards the prosecution's costs of the appeal.

The Crown Court refused James Gray's request to state a case on points of law, and Julie Gray's request in respect of the costs order made against her. The claimants applied for judicial review. The High Court held that the judge had correctly directed himself that the prosecution had to establish that the defendant knew or ought to have reasonably known that

his act or failure would cause an animal to suffer and that the suffering was unnecessary, for the purposes of s.4(1).

In relation to s.9(1) of the 2006 Act it was held that the judge had correctly interpreted this section as setting an objective standard of care which a person responsible for an animal was required to provide.

The High Court rejected a complaint that the seizure of the horses was unlawful as the certification by the inspector had not been in writing. Whilst the court held that the certification under s.18(5) had to be in writing, this did not render the seizures unlawful in this case as the officer acted lawfully under s.18(6) which provides that an inspector or constable may act without a certificate under certain circumstances. Even if that was

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**the defendant knew or ought to have reasonably known that his act or failure would cause an animal to suffer**  
”

**“  
The High Court also  
rejected submissions  
that the costs were  
grossly disproportionate  
to the fine  
”**

wrong, the probative value of the evidence justified its admission and no significant prejudice was caused by the fact that the vets' assessment was not in writing.

The High Court also rejected submissions that the Crown Court had no jurisdiction to hand down deprivation orders after an appeal.

In relation to the complaint that a conviction under s.9 (failure to take such steps as are reasonable in all the circumstances to ensure that the needs of an animal for which he is responsible are met) was bad for duplicity if it was based upon the same facts as a conviction under s.4 (causing an animal unnecessary suffering) the High Court held that the court should not generally convict for a less serious offence as the guilty conduct would be subsumed within the more serious offence, however there was no obvious duplication in this case and no reason to interfere with the conviction under s.9.

The High Court also rejected submissions that the costs were grossly disproportionate to the fine. It found that the Crown Court had been entitled to impose the costs order that it had upon James Gray. There were a high number of animals involved and there had been lengthy proceedings, including a lengthy appeal. The approach was consistent with the

principle that the purpose of a costs order was to compensate the prosecutor, not to punish a defendant.

The High Court did find that the court was wrong to hold both claimants equally liable for the prosecutions costs and held that the proper approach would have been to consider what the position would have been had Julie Gray been tried alone. The matter of her costs was remitted for further determination.

**R (on the application of RSPCA) v Guildford Crown Court**  
[2012] EWHC 3392 (Admin)

The RSPCA applied by way of judicial review for a declaration as to the court's discretion when making disqualification orders under s.34 (2) of the Animal Welfare Act 2006 ('the 2006 Act'), which enables the court to disqualify a person from owning and keeping animals, participating in the keeping of animals and from being party to an arrangement under which he is entitled to control or influence the way in which animals are kept.

The declaration was sought after a traveller and horse dealer prosecuted for offences relating to the ill treatment of horses was subject to a disqualification order under s.34 (2) of the 2006 Act. On appeal the Crown Court varied the order so that he was relieved from the disqualification from participating in the keeping of animals, due to concern that given his lifestyle, could result in an inadvertent breach of the order.

The High Court held that there was no discretion under s.34 to relieve a defendant from any of the activities from which he had been disqualified, however in certain circumstances the construction of the section could be modified to meet the obligation under the Human Rights Act 1998 to

interpret legislation in a way which was compatible with the European Convention on Human Rights 1950 in relation to which Article 8 was relevant, as the defendant's private life would have been disproportionately interfered with had he been disqualified from participating in the keeping of animals.

**R (on the application of Rees) v Snaresbrook Crown Court**  
[2012] EWHC 3879 (Admin)

The claimant (a sheep farmer) applied for judicial review of a decision of the Crown Court arising out of a successful appeal from a conviction of an offence of cruelty following which the court had refused to make an order for costs in his favour out of central funds. The court commented that 'it was not certain' that he had told the truth. The claimant argued that it was unlawful not to order that his costs be paid and also submitted that the court's comments about him violated the presumption of innocence.

In relation to the decision about costs, the High Court considered whether the decision fell within the class of cases where the defendant should not be deprived on his costs despite his acquittal (*see Practice Direction (CA (Crim Div): Costs: Criminal Proceedings*) [2004] 1 WLR 2657).

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under the Human Rights  
Act 1998  
”**

The key point was whether there were positive reasons for depriving a defendant of his costs, which included circumstances where a defendant had brought suspicion on himself or where the court was sure that the defendant had perjured himself, or the prosecution had been ambushed by the nature of the defence. If the court was sure as to any of these matters it could deprive a party of costs, but should do so without expressing a view which might be taken as suggesting that the defendant was guilty of the offence. The reasons given by the crown court did not meet the test set out in the Practice Direction and the claimant was awarded his costs from central funds.

## Animal Livestock and Transportation

**R (on the application of Barco De Vapor) v Thanet District Council** [2012] EWHC 3429 (Admin)

As a result of an incident at Ramsgate Dock resulting in the death of some lambs who had escaped from a transporter the local authority banned the shipment of livestock through Ramsgate. The claimant, a livestock haulier, who had a consignment due, sought to quash the ban on the grounds that it was in breach of article 35 of Regulation 1/2005 and that there was no justification for imposing a ban. The claimant also sought an order restraining the local authority from preventing the shipment of its animals through Ramsgate.

The court refused to quash the ban imposed by the local authority pending a review into whether the facilities were adequate to cope with a livestock emergency, but the court

restrained the local authority from preventing a shipment by the claimant of a shipment that had been arranged before the ban was imposed.

### **The Welfare of Animals (Slaughter or Killing) (Amendment) (England) Regulations 2012**

These Regulations (which apply in England only) amend the Welfare of Animals (Slaughter or Killing) Regulations 1995<sup>1</sup> to:

- permit the use of a biphasic carbon dioxide gas mixture to kill poultry in Slaughterhouses. The restriction is removed which limits the killing of birds on-farm by gas, to end-of lay and end-of-life breeder hens only.
- extend the range of birds that can be killed by gas mixtures on premises where they have been kept for the production of meat or eggs to domestic fowl, turkeys, pheasants, quail, partridges, geese, ducks and guinea fowl; and
- extends the time limits under which a prosecution may be brought, bringing the Regulations in line with other animal welfare legislation, such as the Animal Welfare Act 2006.

The Government states<sup>2</sup> that the amendment to permit 'the use of a biphasic gas mixture in slaughterhouses to kill poultry in line with latest scientific evidence, Farm Animal Welfare Council recommendations and the implementation of Council Directive 93/119/EC by other Member States.'

The amendments are also a response to pressure from the poultry industry to permit the use of gas rather than manual culling methods such as neck dislocation, which is time and

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”

resource intensive. The measures are anticipated by the Government to improve welfare and enable the poultry industry to respond to emergencies which require the culling of a large number of birds.

During the consultation phase the RSPCA and Compassion in World Farming raised a number of concerns about the use of biphasic carbon dioxide gas mixture to kill poultry, particularly if 'the phase 1 gas mixture was restricted to a mixture of carbon dioxide above 30% in volume and air.' There was also concern that gas should only be used to kill birds on farms as a last resort where other more humane methods were not viable. In response the Government permitted by the 2012 Regulations the mixing of carbon dioxide with other gases' allowing use of more welfare-friendly hyperoxygenated gas mixtures.'

### **The Welfare of Animals at the time of killing (Scotland) Regulations 2012**

These Regulations which came into force on 1 January 2013 make provision in Scotland for the implementation of Council Regulation (EC) No 1099/2009 on the protection of animals at the time of killing. The Regulation 1099/2009 is directly applicable in Scots law, however it was considered necessary to make legislative provision to ensure that the Regulation can be properly enforced with appropriate sanctions.

The 2012 Regulations replace the *Welfare of Animals (Slaughter or*

<sup>1</sup> which give effect to Council Directive 93/119/EC on the protection of animals at the time of slaughter or killing.

<sup>2</sup> See Explanatory Memorandum 2012 No. 501

*Killing Regulations* 1995 (which give effect to the provisions of Council Directive 93/119/EC and continue to apply in England and Wales). However due to problems with that were identified with Directive 93/112/EC the European Commission brought forward proposals to replace the 1993 Directive with Regulation 1099/2009, a key objective of which is to improve the protection of animals at the time of killing.

## Wildlife

### The Mink Keeping (Prohibition) (Wales) Order 2012

This Order imposes an absolute prohibition upon the keeping of mink in Wales. The keeping of mink is already prohibited by the Destructive Imported Animals Act 1932, except as permitted by licence. An absolute prohibition was imposed in England by the Mink Keeping (Prohibition) (England) Order 2004 (S.I. No. 100) and the Mink Keeping (Prohibition) (Wales) Order 2012 (S.I. No. 1427) makes similar prohibition for Wales, although licenses can be issued in exceptional circumstances. In Scotland, there are similar provisions which apply to the keeping of mink, muntjac deer, muskrat and other “invasive animals” under the Wildlife and Countryside Act 1981 and the Wildlife and Countryside Act 1981 (Keeping and Release and Notification Requirements) (Scotland) Order 2012 (S.S.I. No. 174).

## Companion Animals

### The Welfare of Animals (Docking of Working Dogs’ Tails and Miscellaneous Amendments) Regulations 2012

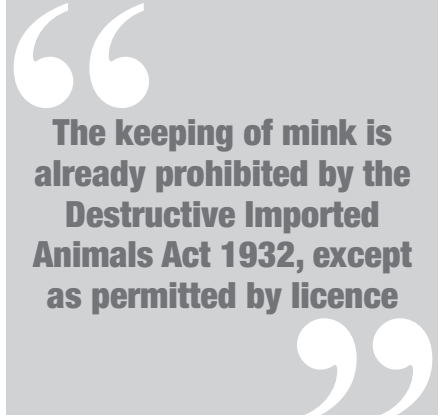
The tail docking of dogs was banned in Northern Ireland from 1 January 2013. The Regulations were made under the Welfare of Animals Act

2011. There are however exemptions from the ban for certain breeds of working dog, of no more than five days of age, who may have their tails docked by a veterinary surgeon, and in circumstances where docking is required as part of medical treatment or in an emergency to save the dogs’ life. The Regulations also ban the showing of dogs which are docked on or after the 1 January 2013, at events where the exhibitor pays a fee or members of the public pay an admittance fee. This ban does not apply where a dog is shown only for the purpose of demonstrating its working ability. The offence carries with it an unlimited fine and maximum of two years imprisonment.

### Control of Dogs (Wales) Bill

Following a consultation period on the Control of Dogs (Wales) Bill, Alun Davies AM, Minister for Natural Resources and Food in the Welsh Government announced in May 2013 that work on the Bill would be suspended to explore the potential of a joint collaborative approach with the UK Government. In particular consideration is given to whether Defra’s proposals to amend the Dangerous Dogs Act may include provision for it to be an offence for dogs to be out of control on private premises and to provide protection for assistance dogs, including statutory training and a dog welfare regime. If agreement cannot be reached the Welsh Government may still pursue the option of introducing a Welsh bill.

Article – Tim Ryan of Warners Solicitors comments upon the law relating to dangerous and out of control dogs, including new sentencing guidelines and penalties for dangerous dog offences. Solicitors Journal S.J 2012) Vol.156 No.33 (Pages 10-11).



**The keeping of mink is already prohibited by the Destructive Imported Animals Act 1932, except as permitted by licence**

### Microchipping for Dogs in Wales

Alun Davies AM, Minister for Natural Resources and Food announced in April 2013 plans by the Welsh Assembly Government to introduce compulsory microchipping of dogs by 2015. In support of this proposal, which was backed by the majority of respondents (including the Dogs Trust) to a public consultation in 2012, he said: *“It is increasingly important that we have a method of tracing dogs back to their owner. Dog owners already have a duty of care under the Animal Welfare Act but it can be difficult to ensure that this duty is being met without a reliable form of identification.... By microchipping all dogs in Wales we can formalise the relationship between an owner and pet and ensure an increased level of accountability.”*

In England compulsory microchipping will not come into force until April 2016.

### Judgment in Case T-526/10 Inuit Tapiriit Kanatami and Others v Commission

The General Court confirms the validity of the Regulation on the marketing of seal products. Inuit Tapiriit Kanatami, which represents Canadian Inuits, the manufacturers and traders of seal products) took issue with regulation.

## Animals in Entertainment

### The Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012

*The Welfare of Wild Animals in Travelling Circuses (England)*



Regulations 2012, SI 2012/2932 were introduced from 20 January 2013 to regulate the use of wild animals in travelling circuses.

The Regulations are intended to act as a stop gap until primary legislation (the Wild Animals in Circuses Bill) is enacted banning the use of wild animals in travelling circuses on ethical grounds.

Animal welfare groups including the RSPCA, the Born Free Foundation and Animal Defenders International all support an outright ban and are strongly opposed to the licensing system introduced by the Regulations and opted not to respond to the public consultation on them. They argue that the welfare of animals cannot be met in the travelling circus environment and that licensing conditions are unenforceable. Supporters of the Regulations however contend that licensing is preferable and that there is insufficient evidence of welfare problems to justify a ban.

The prospect of a complete ban on the use of wild animals contemplated by the Wild Animals in Circuses Bill was dealt a blow however when earlier in the year the EFRA Select Committee recommended that the Government bans certain species rather than banning all wild animals.

## Is Religion good for your Cat and Dog?

A new research project at Oxford will examine whether animals benefit or suffer thanks to religion.

Inspired by Baptist Preacher Charles Spurgeon's claim that a person cannot be a true Christian if his dog or cat is not the better off for it, the Centre will explore whether religious traditions are animal-friendly. The questions to be addressed include

whether religious people and religious institutions benefit animals? Are they more or less likely to be respectful to animals – either those kept as companions or those used for other human purposes?



The project is being organised by the Oxford Centre for Animal Ethics. It will be multidisciplinary, multifaith, and draw in not only theologians and religious thinkers, but also other academics including social scientists, psychologists, historians, and criminologists. *“We want to know whether religion makes any difference for animals”*, says Oxford theologian, Professor Andrew Linzey, who is Director of the Oxford Centre for Animal Ethics. *“We often hear of how religion is detrimental to human rights, but is it also detrimental to animal protection?”*

Academics interested in contributing to the project should contact the Centre's Deputy Director, Clair Linzey, in the first instance [depdirector@oxfordanimaethics.com](mailto:depdirector@oxfordanimaethics.com) or (+44) (0)1865 201565.

## ESRC Green criminology Research Seminar Series

Green criminology applies criminological insights to the problems of animal abuse and

environmental harm. A unique seminar programme is taking place covering such key topics as wildlife crime and animal abuse. For information about future seminars and videos of previous seminars go to: <http://www.northumbria.ac.uk/sd/academic/sass/about/socscience/events/greencrime>

## New Blog from the Centre for Animals and Social Justice

The Centre for Animals and Social Justice (CASJ) has a new blog called 'Animal Republic' which aims to provide a forum for academics and other animal protection experts to discuss the latest in research and other developments in animal politics. In the first blog post, Dr Alasdair Cochrane discusses 'animal welfare' and 'animal rights' and challenges the assumption that these two concepts are strongly antagonistic. Dr Cochrane lectures in political theory at the University of Sheffield. <http://www.casj.org.uk/blogs/animal-welfare-vs-animal-rights-false-dichotomy/>

## Breaking News – August Bank Holiday Monday 2013

The Badger cull has started. See the following links for more information:

<http://www.league.org.uk/content/643/Badger-Cull>

<http://www.league.org.uk/uploads/media/17/11253.pdf>

<http://www.teambadger.org.uk/press.html>

[http://www.badger.org.uk/\\_Attachments/Resources/911\\_S4.pdf](http://www.badger.org.uk/_Attachments/Resources/911_S4.pdf)

[http://www.badger.org.uk/\\_Attachments/Resources/903\\_S4.pdf](http://www.badger.org.uk/_Attachments/Resources/903_S4.pdf)

[http://www.badgertrust.org.uk/\\_Attachments/Resources/908\\_S4.pdf](http://www.badgertrust.org.uk/_Attachments/Resources/908_S4.pdf)

# ‘Philosophical belief discrimination’: Employment Law Protection for workers with strongly held beliefs about Animal Welfare

Nicholas Fry BA MRes LLB, solicitor at Bindmans LLP

This article reviews a significant development in the discrimination law of England & Wales and how that development came to protect an animal rights activist who was unfairly dismissed from his gardening job because of his beliefs about the rights of animals. The case was resolved in the Southampton Employment Tribunal, a court of first instance and is therefore not a legally binding precedent. However, the case tested new law and illustrated how that law could be relied upon by employees who are being discriminated against at work because of their beliefs about animal rights.

## Employment Equality (Religion or Belief) Regulations 2003

In 2004 the Employment Equality (Religion or Belief) Regulations 2003 (‘the 2003 Regulations’) came in to force to protect workers from being discriminated against at work because of their religion or belief. The 2003 Regulations give effect to Council Directive 2000/78/EC<sup>1</sup>, which sets out a general framework to promote and

ensure equal treatment in employment and occupation.

The Directive is clear in its aim to protect individuals holding ‘beliefs’ as well as those holding religious beliefs. It reads: ‘*The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment*’.<sup>2</sup> The fundamental right underpinning the Directive can be found in the European Convention of Human Rights (ECHR), which provides at Article 9 that ‘*Everyone has the right to freedom of thought, conscience and religion; ... Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society...*’<sup>3</sup>

The wording in these legal frameworks begs the question: what kind of non-religious beliefs should or do attract legal protection? One might have expected the 2003

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Regulations to offer some guidance. Unfortunately not, those regulations simply provide at section 2 that ‘belief’ means ‘*any religious or philosophical belief*’.<sup>4</sup> The matter has been left for the courts to resolve and it was not until Mr Tim Nicholson brought an employment tribunal claim against his employer Grainger plc in 2009<sup>5</sup> that this question received a clear, or clearer, answer in the UK courts.

### *Grainger Plc v Nicholson*

Mr Nicholson had strongly held beliefs about climate change and was an active campaigner for protecting the environment. In particular, he held the belief that human beings would be the cause of catastrophic

<sup>1</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

<sup>2</sup> *Ibid.* Ch 1, Art 1.

<sup>3</sup> Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, Rome, 4.XI.1950, Art 9.

<sup>4</sup> Employment Equality (Religion or Belief) Regulations 2003, s 2.

<sup>5</sup> *Mr T Nicholson v Grainger plc & Others*, Case Number 2203367/2008, unreported employment tribunal claim withdrawn before hearing.

climate change unless immediate preventative action was taken. His beliefs were a part of the way he lived his everyday life and his job at Grainger plc as Head of Sustainability tied into his environmental objectives.

Represented by Shah Qureshi, Head of Employment Law at Bindmans, Mr Nicholson presented a claim to the Employment Tribunal relying on the 2003 Regulations asserting that Grainger plc had discriminated against him on the grounds of his philosophical beliefs. The question of whether Mr Nicholson held a philosophical belief for the purposes of the 2003 Regulations became a heavily contested issue. There was a preliminary hearing at which the tribunal of first instance decided that Mr Nicholson did in fact hold a philosophical belief and therefore that it would be unlawful to discriminate against him because of those beliefs. Grainger plc was inevitably unsatisfied with this and appealed against the decision to the Employment Appeal Tribunal ('EAT').

The EAT decision in *Grainger Plc & Ors v. Nicholson*,<sup>6</sup> went in favour of Mr Nicholson and perhaps more significantly reviewed the existing jurisprudence to ascertain the current state of the law on philosophical belief. This was done with the assistance of Queen's Counsel on both side, Dinah Rose QC with Ivan Hare for Mr Nicholson and John Bowers QC for Grainger plc. Mr Justice Burton sitting alone considered that there was ample guidance within domestic and European jurisprudence to determine the issues. Helpfully he went on to crystalize that guidance into clear

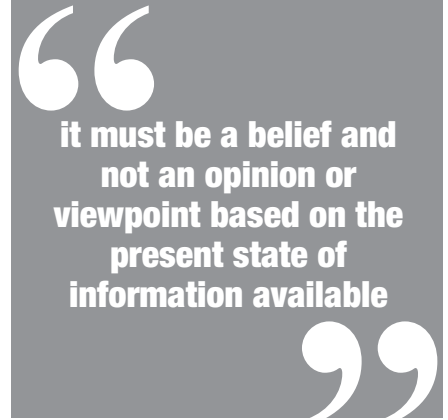
criteria for deciding whether a particular belief is capable of protection under the regulations. He set out those criteria in his judgment as follows:

1. the belief must be genuinely held;
2. it must be a belief and not an opinion or viewpoint based on the present state of information available;
3. it must relate to a weighty and substantial aspect of human life and behaviour;
4. it must have a certain level of cogency, seriousness, cohesion and importance;
5. it must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others.<sup>7</sup>

Later in 2009 Bindmans was approached by Mr Joe Hashman, an international animal rights activist, journalist, author and gardener. Mr Hashman had heard about the decision in Mr Nicholson's case and wanted advice in relation to his employment at Orchard Park garden centre in Dorset. Mr Hashman had been an active hunt saboteur for many years and had previously successfully challenged a binding over order in the European Court of Human Rights (ECtHR) in the case of *Hashman and Harrup v United Kingdom*.<sup>8</sup>

#### ***Hashman and Harrup v United Kingdom***

On 3 March 1993 Mr Hashman and one of his fellow saboteurs, Ms Harrup, had sought to disrupt the activities of the Portman Hunt by blowing a hunting horn and hallooing



to distract the hounds from hunting and killing foxes. On 7 September 2013 they were "*bound over to keep the peace and be of good behaviour in the sum of 100 pounds sterling for twelve months*".<sup>9</sup> Significantly, the binding over order was made despite the fact that they had not been charged with a criminal offence and were found not to have breached the peace. The legal challenge that followed and which was not concluded until 1999 was fought on the ground that the findings and order against them unlawfully interfered with their right under Article 10. The ECtHR found in particular that the sabotage "*constituted an expression of opinion within the meaning of Article 10*"<sup>10</sup> and therefore that the order imposed did interfere with their fundamental rights. Further, it found that the interference was not "*prescribed by law*"<sup>11</sup> within the meaning of Article 10 because the applicants had not breached the peace and the nature of the order was such that it was not sufficiently clear what they were being bound over not to do.

The finding was a major triumph and had shown that the United Kingdom had arbitrarily and unlawfully breached Mr Hashman's human rights in an attempt to prevent him from continuing his ant-hunting activities. Mr Hashman's freedom to manifest his strongly held beliefs about the welfare of animals had been infringed.

<sup>6</sup> *Grainger Plc & Ors v. Nicholson* [2009] UKEAT 0219\_09\_0311.

<sup>7</sup> *Ibid.* Para 24.

<sup>8</sup> *Hashman and Harrup v United Kingdom* – 25594/94 [1999] ECHR 133 (25 November 1999).

<sup>9</sup> *Ibid.* Para 5.

<sup>10</sup> *Ibid.* Para 28.

<sup>11</sup> *Ibid.* Para 41.

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### *Hashman v Orchard Park*

In 2009 Mr Hashman had taken up employment on a freelance basis at Orchard Park Garden Centre. His work involved running a show-plot in the garden centre growing fruit and vegetables and educating customers in gardening. Mr Hashman continues to work as a professional gardener and has published several books on the subject (in some cases using the pseudonym ‘Dirty Nails’).

At the end of 2009 Mr Hashman was unexpectedly asked by his manager to give the garden centre a miss for a few days, and then later told that his services were no longer required. This had come completely without warning and some days later Mr Hashman started making enquiries in an attempt to understand what was behind the decision. Finally, in a conversation with his Manager he was reluctantly told that the owners of the business, Mr and Mrs Clarke, had given the order for his contract to be terminated and that the decision was related to certain issues from the past. The decision had coincided with the funeral of a local huntsman and friend of the Clarke’s, Mr Andrew Prater. It emerged that part of the funeral proceedings would make use of the garden centre during the day and this was the day on which Mr Hashman had been asked to stay away. The circumstances eventually led Mr Hashman to conclude reluctantly that his dismissal was related to his beliefs about hunting.

Mr Hashman lodged a claim in the Southampton employment tribunal under section 3 of the 2003 Regulations (whose provisions are now contained in the Equality Act 2010) asserting that the termination of his employment was direct discrimination on the grounds of belief.<sup>12</sup> That section provides that ‘a person (“A”) discriminates against another person (“B”) if — (a) on grounds of religion or belief, A treats B less favourably than he treats or would treat other persons...’<sup>13</sup> A pre-hearing review (PHR) was listed to determine the issue of whether Mr Hashman held a ‘philosophical belief’ that would qualify him for protection under the 2003 Regulations.

### Pre-hearing Review

Mr Hashman presented a bundle of evidence documenting his life’s work campaigning to protect the welfare of animals. This clearly showed his active commitment to animal welfare from the early age of 13 years (Mr Hashman was born in 1968) including: participating in demonstrations, civil disobedience campaigns and hunt sabotage; being an active member of the Hunt Saboteurs Association and working with other animal rights and anti-

blood sports organisations and pressure groups; consulting on hunting issues for the International Fund for Animal Welfare; being a vegan and only consuming vegan products; and, writing extensively on this area throughout his life. Mr Hashman summarised his belief at the PHR as a belief in the ‘sanctity of life’ which included active opposition to fox hunting and hare coursing.

Employment Judge Guyer heard arguments from Orchard Park in relation to each of the criteria set out in *Grainger plc v Nicholson*.<sup>14</sup> Orchard Park attacked Mr Hashman’s belief on a variety of grounds arguing among other matters; that the belief was incoherent because Mr Hashman had advocated the killing of certain insects in relation to gardening vegetables and because he worked for an organisation (Orchard Park) that butchered meat; that his belief was more political than philosophical because it related to ‘class war’; and, that it infringed the fundamental rights of others, said to be demonstrated by the illegality of some of Mr Hashman’s campaigning actions. Employment Judge Guyer was not persuaded by Orchard Park’s arguments and in his judgment dated 4 March 2011 commented in relation to the alleged inconsistencies in Mr Hashman’s conduct, ‘Sometimes ones moral decisions cannot be based on a simple set of black and white principles...’ He went on: ‘I have no hesitation in finding that Mr Hashman thinks very deeply about the issues arising from his beliefs and that he attempts to live his life in accord with those beliefs. I find that his beliefs are truly a part of his philosophical belief both within the

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<sup>12</sup> *Mr J Hashman v Milton Park (Dorset) Ltd t/a Orchard Park*, Case Number 310555/2009, unreported employment tribunal claim.

<sup>13</sup> Employment Equality (Religion or Belief) Regulations 2003, s 3.

<sup>14</sup> *Grainger Plc & Ors v Nicholson* [2009] UKEAT 0219\_09\_0311, Para 24.



ordinary meaning of such words and within the meaning of the 2003 regulation.”<sup>15</sup>

The belief itself was defined by Judge Guyer in the judgment as follows: “*The Claimant has a belief in the sanctity of life. This belief extends to his fervent anti fox-hunting belief (and also his anti hare coursing belief) and such beliefs constitute a philosophical belief for the purposes of the Employment Equality (Religion or Belief) Regulations 2003.*”<sup>16</sup> Judge Guyer was cautious however to clearly record that the finding applied to Mr Hashman only and was a finding of fact in relation to the specific facts of Mr Hashman’s case. In April 2011 Orchard Park presented a Notice of Appeal to the EAT challenging the decision but, having no reasonable prospects of success, the challenge failed to pass the EAT’s initial sift stage.

## Full Merits Hearing

The parties resumed their preparation for the full merits hearing at which the test in *IGEN Ltd & Ors v Wong*<sup>17</sup> would need to be satisfied for a finding of discrimination to be made; Mr Hashman would need to prove a prima facie case of discriminatory dismissal and Orchard Park would then need to fail to show that the dismissal was in no way whatsoever because of belief.

Mr Hashman had been recruited and managed by an employee of the garden centre and only discovered later that the Garden Centre was part-owned by the Clarkes, who Mr Hashman knew from his own experience were very closely involved with the local South and West Wiltshire hunt. He suspected that his

dismissal was linked to Andrew Prater’s death and his reputation as a hunt saboteur. Mr Hashman relied on emails and contemporaneous notes of conversations with his manager about his dismissal and was able to show a prima facie case of discrimination because of his belief. Orchard Park, calling only one witness, Mr Hashman’s manager, was then unsuccessful in persuading the tribunal that the decision to dismiss was for business reasons and not because of Mr Hashman’s belief. One of Orchard Park’s major difficulties was that the decision to dismiss had been taken by Mr and Mrs Clarke but they did not attend the tribunal to defend the basis of their decision.

On 26 October 2011 after final deliberations on the operation of the shifting burden of proof (*IGEN v Wong*), the scope of the 2003 Regulations (and whether a line could be drawn between discriminating on the grounds of belief and discriminating on the grounds of how a belief has been manifested, for example where it was manifested by illegal actions), and the parties credibility, judgment was given in favour of Mr Hashman. The tribunal ruled, “*The unanimous Judgment of the tribunal is that the Respondent directly discriminated against the Claimant on the grounds of his anti-fox hunting belief in breach of the provisions of the Employment Equality (Religion or Belief) Regulations 2003’ ... ‘Their views [the Clarkes’] were diametrically opposed to those of the claimant and the recent events, particularly the death of Mr Prater, had rendered it intolerable for them to continue to sanction the continuing arrangement*

“**the decision to dismiss had been taken by Mr and Mrs Clarke but they did not attend the tribunal to defend the basis of their decision**”

*between the respondent and the claimant.*”<sup>18</sup>

This case was a triumph for workers and for animal rights. The case confirmed that where a genuine philosophical belief that satisfies the criteria in *Grainger Plc v Nicholson* is held by a worker it will be unlawful for an employer to discriminate against them because of that belief. Individuals such as Mr Hashman who have strongly held philosophical beliefs about the welfare of animals are entitled, in the same way as individuals holding religious beliefs, not to be discriminated against at work because of their beliefs.

Since Mr Hashman presented his case, the 2003 Regulations have been replaced by equivalent provisions in the Equality Act 2010. That act groups ‘religion and belief’ as a ‘protected characteristic’ (together with race, sex, age, etc.) Belief is again defined as ‘*any religious or philosophical belief*’,<sup>19</sup> but helpfully the criteria set out in *Grainger plc v Nicholson*<sup>20</sup> are included in the explanatory notes.<sup>21</sup>

22 July 2013

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Nick Fry and Shah Qureshi acted for Joe Hashman in his employment tribunal claim.

<sup>15</sup> *Mr J Hashman v Milton Park (Dorset) Ltd t/a Orchard Park*, Case Number 3105555/2009, unreported employment tribunal claim, Judgment on Pre-Hearing Review.

<sup>16</sup> *Ibid.*

<sup>17</sup> *IGEN Ltd & Ors v Wong* [2005] 3 All ER 812, Para’s 5-37.

<sup>18</sup> *Mr J Hashman v Milton Park (Dorset) Ltd t/a Orchard Park*, Case Number 3105555/2009, unreported.

<sup>19</sup> *Equality Act 2010*, S 10.

<sup>20</sup> *Ibid.* S 10(2).

<sup>21</sup> *Ibid.* Explanatory Notes, Para 52.



# The Legal meaning of Charity and how the Public Benefit Test affects Animal Protection Organisations

**Dominika Flindt LL.B.**

Section 1 of the Charities Act 2011 (the Act) states that “charity means an institution which (a) is established for charitable purposes only, and (b) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities”. According to section 2 of the Act, charitable purposes set out in section 3 must be for public benefit. As this article will explain, the public benefit that animal welfare charities must satisfy is to raise the moral standard and educational level of human beings and any benefit achieved to animals is only indirect.

The first cases concerning animal welfare charities arrived before the English courts over three centuries ago. At the time society did not give

thought to the relationship between humans and animals. John Locke was one of the first philosophers who saw that there existed similarities between Man and beasts.<sup>1</sup> However, in the 18th century his views on the benefits of treating animals well had not yet taken effect can be seen in *Attorney General v Whorwood (1750)*,<sup>2</sup> in which a gift for feeding sparrows was found to be invalid as Lord Hardwick found it to be for “odd or whimsical use”.

In the 1800’s philosophers as well as higher classes of society having had advantage of access to information and education began to express their disapproval of the way animals were used in scientific experiments, hunting, bull – baiting, and farming. In this period Bentham’s utilitarian views came to light. An Act to Prevent Cruel and Improper Treatment of Cattle became the law. The Society for the Prevention of Cruelty to Animals (SPCA), which was later renamed to RSPCA, was established in 1824. It is from here on that the influence of charities would appear to bring positive legal outcomes to animal welfare charities. Most cases from this period concerned gifts left in Wills to animal causes. The case of *London*

*University v Yarrow (1857)*<sup>3</sup> concerned the establishment of an animal hospital that was to study and cure animals useful to Man as well as giving lectures to this end. As this was clearly of use to mankind the public benefit was evident and the gift was therefore seen as charitable.

In the post-Albert Victorian period a number of still existing animal welfare charities came into existence notably the Battersea Dogs Home in 1860 and Blue Cross in 1897. Frances Power Cobbe, a witness to vivisection abroad, founded the British Union for the Abolition of Vivisection in 1875. A year later the Cruelty to Animals Act came into force to control experiments on animals. This legislation not only brought vivisection under legal control but also barred public scrutiny, as licences were granted in secret, which is still ongoing today, to hide it from the eye of the societies who had sprung up in the defence of the animals.<sup>4</sup>

Meanwhile in courts as more people left gifts for animal charities in their Wills many next of kin raised objections, often claiming the gifts were not for charitable purposes, and

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<sup>1</sup> John Locke, *An Essay Concerning Human Understanding* [1690].

<sup>2</sup> 1 Ves Sen 534.

<sup>3</sup> 1 DE G&J 72.

<sup>4</sup> Hills (2005) pp. 16 - 17 “It became an offence to perform an experiment giving pain to a living animal,

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tried to have the gifts failed. In 1864 the case of *Tatham v Drummond*<sup>5</sup> confirmed that a gift for an animal welfare charity could be valid if it was for public benefit. However, in this case the gift was not allowed as it involved the purchase of land. A subjective test was applied in *Re Douglas* where the court was contemplating whether the testatrix meant to leave a gift for two animal welfare charities. With reference to *University of London v Yarrow* the court found the gifts to be valid as that was the intention of the Will. In *Re Cranston [1898]*<sup>6</sup> Holmes LJ stated “*gifts the objects of which is to prevent cruelty to animals and to ameliorate the position of the brute creation are charitable...If it is beneficial to the community to promote virtue and to discourage vice, it must be beneficial to teach the duty of justice and fair treatment to the brute creation, and to repress one of the most revolting kinds of cruelty*”.

In 1891 Lord Macnaghten delivering a judgement in the *Pemsel*<sup>7</sup> case categorised charitable purposes into four categories. Animal welfare charities continued to be seen by the courts to have indirect benefit to the public yet still be able to be charities and as such an animal welfare organization wishing to become a charity still had to prove to be for public benefit just as prior to this case law. The three cases in that period that come to attention with regard to public benefit and animals were *Re Joy (1888)*,<sup>8</sup> *Armstrong v Reeves (1890)*<sup>9</sup> and *Re Foveaux (1895)*.<sup>10</sup> All three cases were concerned with gifts for anti-vivisection societies and the approach of the courts in these cases

was quite different from the one adopted in 1948.

In *Re Joy* a gift left for two societies was put to question before Chitty J as the societies in question had since the writing of the Will amalgamated. It can be seen from this case that anti-vivisection societies were seen to be charitable and the new united society received both gifts left for them in the Will. In *Armstrong v Reeves* it was held by the Vice-Chancellor of Ireland that anti-vivisection societies had a charitable purpose as a sub-standing under cruelty to animals. The debate in this case focused on whether the gift was based on an honest belief by the testatrix that the societies were charitable and as the judge found this to be the case the gifts were allowed. In *Re Foveaux* Chitty J referred both to *Armstrong and Pemsel* in accepting that anti-vivisection fell under charitable status, but he expanded on the reasoning. He argued that anti-vivisection organisations fall under the type of societies that operate for the prevention of cruelty to animals and as such are for public benefit. He saw the distinction as one of “*what is and what is not justifiable is a question of morals, on which men’s minds may reasonably differ and do in fact differ.*” As such he found that a dialogue of this kind promotes “*morals and education among men*” and further commented that it is not the courts but society that should decide upon what is for public benefit.

What is interesting, and was refuted in 1948, is that in all three cases the judges were focused on the honest belief of the testators and were

willing to accept their opinion as relevant, as long as the named charity gave benefit to a sufficiently large section of the public. In 1898 in *Re Cranston*<sup>11</sup> a gift was left for a vegetarian society that intended to promote benefits of abstaining from meat and through that improving the morals of people. Although the intention was seen to be for public benefit the gift was found not to be of charitable nature as “it was a universal habit to kill animals for food”.

At the beginning of the 20th century attitudes towards animals began to change radically. The Protection of Animals Act 1911 was passed to include “any animal”. This legislation as today, however, did not include animals used in scientific research. A number of interesting cases also saw light. In *Re Wedgwood [1915]*<sup>12</sup> the claim was that the gift was too wide and therefore not seen as charitable. The defendant had been entrusted, by the testatrix, with a sum towards the “*protection and benefit of animals*” which in private dialogue had been voiced as, for instance, to forward municipal abattoirs to provide humane slaughtering methods. The court held that it was a valid trust as “*objects of general mercy to animals of all kinds...are charitable*”. This case shows how the courts mainly looked at gifts from the view of the testatrix and whether they had had an honest belief in the charitable purpose of the receiving charity and

<sup>5</sup> (1864) 4 De GJ & Sm 484, 887.

<sup>6</sup> 1 I.R. 457.

<sup>7</sup> [1891] AC 531.

<sup>8</sup> 60 LT.

<sup>9</sup> 25 LR Ir 325.

<sup>10</sup> 2 Ch 501.

<sup>11</sup> IIR 431

<sup>12</sup> 1 Ch 113



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if said charity could be said to fulfil the public benefit test. They had, as in *Re Foveaux*, avoided passing judgement on the morals of the beneficiaries.

*Re Grove Grady* [1929]<sup>13</sup> concerned a gift to the establishment of a charity that was, among other objectives, to provide sanctuaries where animals could be left free from mankind. The Court of Appeal failed this gift on the ground of insufficient public benefit as the sanctuary would not be accessible and provide a benefit to Man. Russell LJ in this case referred obiter to *Re Foveaux* that cases of anti-vivisection “*might possibly in the light of later knowledge in regard to the benefits accruing to mankind from vivisection be held not to be charities*”.

How right he was, as in 1948 the National Anti-Vivisection Society<sup>14</sup> appealed to the House of Lords to defend their charitable status against the Inland Revenue Commissioners’ claim that should the National Anti-Vivisection Society succeed in their purpose the detriment to society would outweigh the benefit of the improved morals of Man and that their cause was one of political issue, rather than for public benefit solely. The House of Lords (4:1) held that the anti-vivisection society could not be exempted from income tax as a charity as the object of their work was both political and, should they succeed, would outweigh the public benefit of vivisection. Despite

Lord Porter’s dissenting voice the decision was to overturn the subjectivity test applied in *Re Foveaux* in favour of a test of objectivity where it is up to the court to decide whether a charity is more detrimental to society or of greater benefit.

In *Re Moss* (1949)<sup>15</sup> a gift left “*for the welfare of cats and kittens needing care and attention*”<sup>16</sup> was held to be of benefit as it brought up the “*finer side of human nature*”.<sup>17</sup> The gift in *Re Vernon* (1957)<sup>18</sup> was left in order to build a drinking fountain for animals but as only half of the money was spent on the first fountain, another was built with the rest of the money due to the *cy-pres* doctrine. This was found to be “*a good charitable gift*” by Vaisey J.

Further change of Man’s positive changing attitude towards animals can be seen with time. In *Re Murawski’s Will Trust* [1971]<sup>19</sup> and in *Re Green’s Will Trust* [1985]<sup>20</sup> the courts again confirmed that gifts for animal welfare charities would be valid if for public benefit. These cases were based on technical issues.

In 2003 the Wolf Trust applied to become a registered charity in order to “[p]romote the conservation, rights and welfare particularly of wolves but also of other predators and related wildlife”. The trust’s application was not accepted by the Charity Commission as in its opinion, for the Trust to succeed they would have to bring about a change in government policy and as such they were seen as having a political purpose. However, it was stated that “*conservation of dangerous animals*” could be seen, in some instances, to have a

charitable purpose.<sup>21</sup> Here it can be seen what a powerful regulator the Charity Commission is as they are in effect able to sidestep previous case law such as *Re Wedgwood*.

The issue of charities and the public benefit test came to light again at the end of last year when the RSPCA was warned that its alleged involvement in political campaigning might compromise the organisation’s charitable status.<sup>22</sup> The League Against Cruel Sports, established in 1924, has only recently become a registered charity.

The question, which inevitably arises with regard to the public benefit test, is whether it is outdated and should be aligned with *Re Foveaux* essentially allowing the public to decide which causes are for their benefit and which are not. After all it is the public who, to a large extent, sponsors charities and animal protection organisations. Without donations many organisations working tirelessly on behalf of animals would not exist today. It is only reasonable that the public would wish to have a say.

<sup>13</sup> 1 Ch 557

<sup>3</sup> 1 DE G&J 72.

<sup>4</sup> Hills (2005) pp. 16 - 17 “*It became an offence to perform an experiment giving pain to a living animal,*

*unless that experiment would advance physiological knowledge, reduce suffering or prolong life.*”



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## What is ALAW?

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

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

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

## What ALAW will do?

ALAW will:

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

## Who can be a member?

Solicitors, trainee solicitors, legal executives, barristers, pupil barristers, judges and legal academics are eligible to join and will receive regular issues of the *Journal of Animal Welfare Law*. Other interested parties can become subscribers to the *Journal* and receive information about conferences and training courses.

## How can you help?

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

In addition, lawyers have well-developed general skills such as advocacy and drafting which are useful in many ways. Help with training and contributions to the *Journal* are also welcome.