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Considering the 2018 English Licensing of Activities involving Animals Regulations

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EDITOR'S NOTE

Working through some of the implications of Brexit for animal welfare has been a key element of ALaw's work during 2018. Paula Sparks ALaw's Chair with Judith-Anne MacKenzie discusses the Draft Animal Welfare (Sentencing and Recognition of Sentience) Bill, citing specific concerns and the actions taken by A-law to raise these with Defra.

Some of you may have attended the Walk for Wildlife in September this year. If so, you will remember that rewilding was mentioned by a couple of the speakers. Rob Espin provides a well-timed analysis of rewilding from a legal perspective.

Sarah Clover discusses the licensing regime in respect of animals while David Bowles from the RSPCA considers the importance of regulating animal sanctuary's and shelters. Michelle Strauss looks at the decision to allow the conduct of the Veterinary Council of Ireland proceedings to be heard in private and the implications of this for animal welfare and the reputation of the veterinary profession.

Edie Bowles, Dr Katy Taylor and David Thomas provide an extended case study of the work of Cruelty Free International in relation to the welfare impact and legal framework of botox testing.

Finally, all good wishes for 2019 to our readers and thank you for your support.

Jill Williams
Editor

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The Animal Welfare (Licensing of Activities Involving Animals) (England) Regulations 2018

Sarah Clover, Licensing Barrister at Kings Chambers

Introduction

Animal Licensing is the latest regime in the licensing regulatory scheme to receive the modernising consolidation treatment. This is a continuation of a pattern seen in the Licensing Act 2003 for alcohol and entertainment licensing, and the Gambling Act 2005. The taxi licensing regime has also long been overdue for the same overhaul. For animal licensing, however, the need was pressing. The animal licensing regime has become particularly complicated, with an inevitable consequent absence of consistency and enforcement by the regulating local authorities. This has impacts on animal welfare.

The need for change

The Animal Welfare Act 2006 is (and remains) the primary legislation concerning animal welfare in England and Wales. It contains the overarching duty of care regarding animal welfare, and the statutory penalties for non-compliance.

Alongside the AWA 2006, a raft of other, somewhat elderly legislation controlled the specific licensed activities concerning animals. Regulation of pet shops, for example was still governed, until the recent reforms, by the 1951 Pet Animals Act, requiring a person keeping a pet shop to have a licence granted by the local authority for the purpose. This was at a time when a pet shop would have resembled much more something from a music hall song, and long before the advent of the internet. Modern pet selling is unrecognisable from those times, and the declining impact on animal welfare has been significant as a consequence.

'The animal licensing regime has become particularly complicated, with an inevitable consequent absence of consistency and enforcement by the regulating local authorities.'

One of the issues has been that the definition of terms in these old statutes posed risks and challenges to animal welfare that had become unsustainable. There was nothing to prevent a "pet shop", for example, from being a private dwelling, but this has presented obstacles to effective enforcement, including curtailed powers of entry to peoples' homes. Online sales of pets have become a dominant source, but do not fall clearly within the definition of "pet shop" at all.

The complications were exacerbated by a range of exemptions in the legislation, benefitting those selling pedigrees, the offspring of pet animals and animals unsuitable for showing or breeding, with the net result that the commercial sale of animals from private dwellings became so difficult to monitor that it was, in effect, largely unregulated.

Legislation concerning the breeding of dogs was similarly outdated, being comprised in the Breeding of Dogs Act 1973, as amended by the Breeding of Dogs Act 1991 and the Breeding and Sales of Dogs (Welfare)

Act 1999, extending powers of inspection and make further provision in relation to the commercial breeding and sale of dogs.

The Riding Establishments Acts 1964 and 1970 imposed the licensing regime on that licensable activity. The Animal Boarding Establishments Act 1963 controlled the business of providing accommodation for cats or dogs. The legislation for performing animals was technically a light touch "registration" system, not a licensing system at all. The Performing Animals (Regulation) Act 1925 required individuals who wanted to exhibit or train any performing animals to register for this purpose for an open-ended permit.

'One of the key innovative features of the new licensing regime is its flexibility based upon quality and performance testing.'

The Regulations

The change in law has come through the medium of The Animal Welfare (Licensing of Activities Involving Animals) (England) Regulations 2018: secondary legislation, not statute.

The Regulations sit underneath the umbrella of the AWA 2006, and have been introduced using the powers conferred on the Secretary of State by section 13 of the 2006 Act. This is only the third occasion upon which these powers have been so used by the Secretary of State.

The remit of the Regulations is relatively extensive. At the time of the reform, the Explanatory Memorandum stated that estimates revealed approximately 2,300 licensed pet shops, 650 licensed dog breeders, 1,800 licensed riding establishments, and 6,300 licensed animal boarding establishments in England. These premises have the potential to affect a large number of animals. The animal licensing regime represents the fourth largest, after alcohol & entertainment, gambling and taxis. In common with those other regimes, the outdated system proved excessively onerous and burdensome for the local authorities, both in terms of the enforcement requirements, but also in terms of administration, including renewals based on a calendar year, requiring intense periods of inspection, and the necessity for some businesses to hold multiple licences to cover different activities. No differentiation could be made, either in terms of recognition, or fees, between high-performing, quality businesses and those that failed to meet high standards. Streamlining was to be welcomed.

Guidance regarding minimum animal welfare standards has always been available, but it was relatively little used by local authorities. The new regime is heavily dependent upon detailed statutory guidance, relating to the individual specific licensable activities, and also to overarching administration and welfare conditions, and it is mandatory in its application.

The guidance works on the basis of identifying conditions, general and specific, that apply to all licences issued by the local authority. One of the key innovative features of the new licensing regime is its flexibility based upon quality and performance testing. Depending upon the quality of the business at the time it first presents to the local authority for inspection and authorisation, and its continued performance thereafter, the business can "earn recognition", or credit, which can be reflected in the grant of a longer licence, which means a reduced licence fee burden. This could be seen as a "stick and carrot" approach, which incentivises businesses to perform at a higher standard to achieve benefits, and penalises businesses that are failing to protect standards, and pose a risk to welfare. Local authorities can apply this risk-based approach at any time during the year, and thus spread their own work-load and resource demands (with the exception of "Keeping or Training Animals for Exhibition" where all licences are issued for 3 years).

The star rating system

A standard scoring matrix for premises is set out within the statutory Guidance. The model takes into account both the animal welfare standards adopted by a business as well as their level of risk (based on elements such as past compliance). Businesses must be

given a star rating by the Council, ranging from 1 star to 5 stars, based on the standard model, and the results of their inspection. This star rating must be listed on the licence by the issuing local authority officer. The system incorporates safeguards to ensure fairness to businesses. This includes an appeal procedure and a mechanism for requesting a re-inspection for the purposes of re-rating when improvements have been made.

Businesses are rated following an inspection that takes place prior to grant or renewal of the licence. Inspections can also take place if they are requested by the licensee, or unannounced, for example after a complaint.

Where multiple licensable activities are being conducted on one site, the business will receive only one risk rating which must cover all licensable activities. Where different activities are achieving different standards, the lower of the standards must be applied. The Council's risk rating will be issued in writing, with explanation as to what the business is getting right and getting wrong, in the eyes of the Authority and an explanation of how the score has been calculated. There is the option for the licensee to dispute the star rating that they are given, and appeal. They can apply to be reassessed, and have a further inspection, by an independent officer, not previously involved.

The star rating is visible in the licence which should be displayed by the business and can be on the Council website.

Councils can suspend, vary or revoke a licence on application or in circumstances where:

- The licence conditions are not being complied with;
- There has been a breach of the Regulations;
- Information supplied by the licence holder is false or misleading; or,
- It is necessary to protect the welfare of an animal.

Licensees can make written representations against these decisions and have the ultimate option to appeal.

Licensable activities

The regime, in common with the other licensing regimes works on the basis of identifying licensable activities, which meet certain definitions which qualify the activity for authorisation.

The Licensable activities are:

- Selling animals as pets (or with a view to their being later resold as pets) in the course of a business, including keeping animals in the course of a business with a view to their being so sold or resold.
- Cat and dog boarding – providing or arranging for the provision of boarding for cats or dogs. This would include the head business in a franchise arrangement, as well as the individual homes in which the pets are kept.
- Hiring out horses in the course of a business for either or both (a) riding (b) instruction in riding.
- Breeding of dogs, which comprises either or both (a) breeding three or more litters of puppies in any 12-month period; (b) breeding dogs (any number) and advertising a business of selling dogs.
- Keeping or training animals for exhibition in the course of a business for educational or entertainment purposes(a) to any audience attending in person, or (b) by the recording of visual images of them by any form of technology that enables the display of such images.

Performing animals are included in a "light touch" licensing scheme, in which the licence will be granted for 3 years following a satisfactory inspection.

Licensable activities requiring a licence

Not all those conducting licensable activities will require a licence. The legislation applies to licensable activities that are undertaken by businesses. The definition of "business" is not fixed, but the test is designed to identify those who conduct the activity for a money reward and who therefore pose the greatest risk to compromising animal welfare for financial gain. The regulations specify two example business tests to

be considered when determining whether an activity is considered commercial, and thus within scope. They are not the exclusive factors to be considered but are examples, and other factors may also be relevant. The regulations include the following on this issue:

"The circumstances which a local authority must take into account in determining whether an activity is being carried on in the course of a business for the purposes of this Schedule include, for example, whether the operator—

(a) makes any sale by, or otherwise carries on, the activity with a view to making a profit, or

(b) earns any commission or fee from the activity".

None of the definitions are concrete. All work on the basis of meeting criteria – which is described in all the statutory guidance as "in scope" criteria and "out of scope" criteria. The application of the criteria to any given activity may give a definitive answer as to whether a licence is required or not, but failing that, it should be enough to allow the Licensing Authority through their officers to make a balanced and reasonable judgment call, which is an entirely legitimate exercise of discretion under the regulations.

The Regulations are not designed to catch small businesses and all guidance contains this "exemption":

"The Government announced in Budget 2016 a new allowance of £1,000 for trading income from April 2017. Anyone falling under this threshold would not need to be considered in the context of determining whether they are a business".

This has been explained by DEFRA as still being only a guideline, to be taken into account with other in and out of scope criteria, notwithstanding the apparent robustness of the words "would not need to be".

Breeding: genotype and phenotypes

Perhaps one of the most important new provisions of the Regulations is Schedule 6 (5), which states:

'No dog may be kept for breeding if it can reasonably be expected, on the basis of its genotype, phenotype or state of health that breeding from it could have a detrimental effect on its health or welfare or the health or welfare of its offspring.'

This does not necessarily mean an end to brachycephalic breeds such as Pugs and French Bulldogs, whose flat muzzles have been associated with a varying degree of problems including airway obstruction, respiratory complications, eye infection and injury, and skin complaints.[1] The application of the Regulations will need to proceed on a case by case basis. It is certainly intended that 'exaggerated conformations' at the severe end of the spectrum should be captured, with DEFRA Guidance[2] stating specifically that 'Dogs that have required surgery to rectify an exaggerated conformation that has caused adverse welfare, or require lifelong medication, must not be bred from.'

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DEFRA's Guidance also states that 'Licence holders must test all breeding stock for hereditary disease using the accepted and scientifically validated health screening schemes relevant to their breed or type, and must carefully evaluate any test results as well as follow any breeding advice issued under each scheme, prior to breeding. No mating must take place if the test results indicate that it would be inadvisable in the sense that it is likely to produce health or welfare

[1] Dog Breeding Reform Group, Policy Position Paper on the Animal Welfare Act 2006 and the protection of offspring, para 2.4

[2] DEFRA Guidance notes for conditions for breeding dogs November 2018

problems in the offspring and/or it is inadvisable in the context of a relevant breeding strategy.'

The Guidance specifically prohibits intentionally breeding when the 'Coefficient of Inbreeding of the puppies would exceed the breed average or 12.5% if no breed average exists as measured from a minimum five generation pedigree.'

Selling animals

Selling Animals as pets has proved particularly controversial and comprises an element of the regulations that is as yet unsettled. The controversy has centred around the campaign for 'Lucy's Law.' "Lucy's Law" was launched in December 2017 at a reception hosted by vet and campaigner, Marc Abraham, of PupAid, and supported by APDAWG, the All Party Parliamentary Group for dog welfare, chaired by MP Lisa Cameron. Lucy's Law has been championed by the Daily Mirror, and has received significant attention and support, from MPs across all parties, from the press and in social media.

Lucy was a cavalier King Charles spaniel; a victim of the puppy farm system, who had been used for breeding for many years with no regard for her health or welfare. She was rescued in 2013. Lucy became the symbol and mascot of anti-puppy farm campaigning. She died in December 2016.

The sale of puppies through commercial third-party dealers sustains and relies upon the existence of "puppy farms", which facilitate breeding for maximum profit and with minimal regard for animal welfare. Although very few high street pet shops sell puppies, the third-party trade remains significant, with dealers operating from a diverse array of premises including private homes and puppy superstores. As many as 80,000 puppies may be sold by licensed third party sellers each year. This can seriously harm animal welfare, from the trauma of transportation to the place of sale; the increased risk of exposure to disease; behavioural problems resulting from premature separation from the mother and lack of appropriate socialisation.

Lucy's Law comprises a ban on commercial third party sales, which would amount to a legal requirement that only licensed dog breeders would be able to sell puppies in the course of a business. It would not impact on non-commercial activities including dog charities and sanctuaries as they are not commercial or run for the primary purpose of profit.

On 21 May 2018, Lucy's Law was debated in Westminster Hall; triggered by an online petition that secured an astonishing 250,000 signatures. The campaign was well-received by the Government Ministers, and by 29 June, Environment Secretary Michael Gove confirmed that the Government's intention was to introduce new law to restrict puppy and kitten sales to licensed breeders only, effectively putting third-party dealers out of business.

'Although very few high street pet shops sell puppies, the third-party trade remains significant, with dealers operating from a diverse array of premises including private homes and puppy superstores.'

On 21 August, in a speech at Number 10, Downing Street, Mr Gove went further in announcing the ban. He confirmed:

"We will eliminate puppy farming. We will make sure third party sales of kittens and puppies ends….Far too many of the pets that people, with the best will in the world, bring into their homes we know have been brought up in squalid circumstances, in circumstances of pain and suffering and misery which should never be inflicted on any living thing."

Confirming the government's support for the prominent Lucy's Law campaign, DEFRA has published a consultation on an outright ban that will mean anyone looking to buy or adopt a puppy or kitten must either deal directly with the breeder or with one of the nation's many animal rehoming centres. The consultation will determine the precise mechanism for the ban, but it is expected that a blanket ban will be easier for authorities to enforce.

Lucy's Law is not currently reflected in the Animal Welfare (Licensing of Activities Involving Animals) (England) Regulations 2018. The only restriction in the regulations is that persons who sell pets must be licensed. Puppies must also be sold in the presence of the mother and the purchaser. This does not yet preclude third party sales, although the requirement for the presence of the puppy's mother makes third party sales harder. An outright ban on third party sales is expected to follow the current round of consultation, however, and that will make Lucy's Law explicit.

Conclusion

It is easy to criticise the new Regulatory regime in various particulars, but there is no doubt that the general overhaul will do a great deal to drive up standards in animal welfare in a wide range of activities. Many animals will be beneficially affected. There is also no doubt that the Regulations have presented a difficult challenge in drafting, which is reflected in the fact that the Guidance has had to be amended and clarified on more than one occasion, even in the short time since the Regulations were published. There is still a complexity in the detail of the licensing exercise that Councils are struggling to absorb, and it will take some time for a refinement of terms and an experience of operation to smooth out these issues. In time, it is to be hoped that this revised system will prove beneficial to Licensing Authorities and Licensees alike, as well as for the animals.

Regulating sanctuaries: You wait years then three Governments propose different laws simultaneously

David Bowles, Assistant Director at RSPCA

Abstract

After decades of unsuccessful lobbying to install regulation in this sector, three of the four devolved authorities in the UK are now drawing up standards and legislative mechanisms to manage sanctuaries and shelters, which will come into effect in 2019. It is vital that these are clear, transparent and enforced. Any regulatory system needs to prevent commercial vending and dealing enterprises using sanctuaries as a loophole for their business, raise the standards in sanctuaries and reduce the burden on local authorities and enforcements agents such as the RSPCA and SSPCA from failing or unregulated activities.

Background

Within the four devolved UK legislative systems, certain animal activities are licensable, others fall outside and are subject to voluntary or no regulation. The decision on where an activity falls, has been historical rather than strategically applied under a risk or animal welfare framework. Most activities around dogs are regulated, based on the human safety risk. So licensing to keep a dog has existed since 1878 in Northern Ireland and until 1987 for Wales, England and Scotland when it was abolished. Regulations making it mandatory to microchip a dog has existed in Northern Ireland since 2012 and in England, Wales and Scotland since 2016. Pet shop licensing has existed in Great Britain since 1951, and licensing of dog boarding in England and Wales since 1963. In October 2018 the Animal Welfare (Licensing of activities involving animals) (England) Regulations[1] extended licensing in England to four new areas such as doggy day care as well as bringing the standards under the animal welfare framework for the first time. However, these did not bring other activities under its ambit such as running a farm, rescue centre or animal sanctuary.

Previous attempts to licence animal sanctuaries, such as in England and Wales the 2001 Animal Sanctuaries (Licensing) Private Members Bill were unsuccessful. Any vertebrate animal kept in a sanctuary or rescue centre has their welfare regulated under the Animal Welfare Act 2006 in England and Wales and the Animal Health and Welfare Act 2006 in Scotland. But this protection together with the lack of mandatory standards and guidance has placed difficulties on those agencies enforcing animal sanctuaries particularly as it is mainly enforced by non-governmental organisations such as the RSPCA in England and Wales and the Scottish SPCA in Scotland. The lack of harmonised standards also meant that it was left to umbrella organisations such as the Association of Dogs and Cats Homes[2] to set baseline standards and apply these to their 132 member organisations in the British Isles.

[1] https://www.legislation.gov.uk/ukdsi/2018/9780111165485

[2] http://www.adch.org.uk/

This paper will look at the situation in each of the devolved regions for rescue centres and sanctuaries, examine the proposals and assess the consequences.

Regulatory framework in the UK

There are also different enforcement mechanisms in each of the countries. In Northern Ireland animal welfare is regulated under the Animal Welfare Act 2011[3] which provides for further Regulation on sanctuaries under Clause 11 but this has to date not been proposed. Enforcement on animal welfare is undertaken by the eleven local authorities and prosecution is undertaken by Belfast Council working with the Public Prosecution Service.

In England and Wales the Animal Welfare Act 2006[4] also provides for Regulation on sanctuaries under Clause 13 which establishes licensing regimes and Clause 12 which allows for further Regulations to be laid in either England or Wales. Animal licensing is managed by the local authorities in both countries, and prosecution undertaken on their investigations by the local authority or the Crown Prosecution Service. Enforcement of animal welfare is largely undertaken by the RSPCA in England and Wales which accounts for around 85% of prosecutions and enforcement activity under the Act.[5] In Wales the Government are looking at providing statutory powers to the RSPCA.[6] In Scotland the Animal Health and Welfare (Scotland) Act 2006[7] gives powers to license activities under Clause 27. The Scottish SPCA have statutory powers of entry and seizure under the Act and they hand over evidence of investigations to the Procurator Fiscal to prosecute. With these four different models it's preferable that there is consistency between all four countries in terms of how Animal Welfare Establishments (AWEs) are defined, and how the standards are enforced.

Following many years of no regulation, in 2018, three of the four Governments in the UK announced that

[3] https://www.legislation.gov.uk/nia/2011/16/contents
[4] https://www.legislation.gov.uk/ukpga/2006/45/section/13
[5] RSPCA. 2017 Prosecutions Annual Report
[6] https://gov.wales/newsroom/environmentandcountryside/2018/180619-steps-to-further-improve-animal-welfare-of-pets-unveiled/?lang=en
[7] https://www.legislation.gov.uk/asp/2006/11/contents

they were planning to put in a regulatory framework on sanctuaries and rescue centres, albeit for slightly different reasons. In Scotland the Government committed to licensing sanctuaries and rehoming centres in their 2017-8 programme primarily to ensure that the welfare of the animals in such centres are maintained, that rehoming centres are not operating to get around commercial pet vending legislation and to reduce the risk of disease from imported dogs. A consultation on licensing sanctuaries and rehoming centres opened in December 2017 and reported in 2018[8] that there was support for such a programme. The Government are now writing up the proposals. Once these are agreed under the Animal Health and Welfare Act, it is likely that they will be enforced by the SSPCA and local authorities who will also audit standards in sanctuaries and rehoming centres.

In Wales the Animal Welfare Network of Wales, (AWNW), the umbrella group that acts as advisors to Government, produced a report on Animal Welfare Establishments (sanctuaries) to the Government in 2012.[9] This was updated in 2016[10] following suggestions from the Welsh Government, a draft code for sanctuaries was developed and handed over in March 2018. The incentive for this work has largely been to address animal welfare concerns in Welsh sanctuaries. The Government has committed to supporting the voluntary code drawn up by the Animal Welfare Network of Wales (AWNW) by publishing it as a Welsh Government voluntary code[11] in the first instance and then monitor its impact.

In England the Government committed to a ban on sales of dogs and cats through third party dealers in August 2018[12] but realised that if they implemented such a ban they would have to shut down any potential loopholes at the same time. AWEs which encompass rescue centres and sanctuaries were deemed to be outside the legislation on licensing vending activities as rehoming an animal was seen as non commercial. However, this opened up the possibility that commercial dealers would fraudulently set themselves up as rescue centres to get around the ban and as rescue centres were unlicensed this would be an unregulated activity. To close this loophole Defra announced a consultation on both issues.[13] A formal response is due in late 2018 but as both proposals gained overwhelming support it is likely that Defra will legislate at some stage in 2019 and bring in legislation to address both issues simultaneously. The Canine and Feline Sector Council is already working on Guidance for the licensing of cat and dog shelters and sanctuaries.

'Sanctuaries and shelters have always been unregulated in the UK, unlike in certain other countries, including in the British Isles.'

What we are trying to solve

Sanctuaries and shelters have always been unregulated in the UK, unlike in certain other countries, including in the British Isles. Jersey has had legislation under the Animal Welfare (Jersey) Law since 2004 which mandates licensing for any sanctuary or shelter that has domestic and/or wild animals.[14] This Regulation has a Code of Practice which sets out how any centre should meet the five welfare needs.[15] This is regulated by the States Veterinary Service in Jersey and is now being reviewed and updated.

In Great Britain the lack of regulation has meant that anyone can set up a rescue centre or sanctuary. Applying to be a charity means that they are regulated

[8] https://consult.gov.scot/animal-welfare/animal-sanctuaries-and-rehoming-activities/

[9] https://awnwales.org/wp-content/uploads/2013/03/AWE-report-final.pdf

[10] https://awnwales.org/wp-content/uploads/2013/03/AWE-report-final.pdf

[11] In a similar status to their Code on Snares https://gov.wales/docs/desh/publications/150915-code-of-practice-snares-en.pdf

[12] https://www.gov.uk/government/news/government-backs-ban-on-third-party-sales-of-puppies-and-kittens

[13] https://www.gov.uk/government/consultations/banning-commercial-third-party-sales-of-puppies-and-kittens-in-england

[14] https://www.jerseylaw.je/laws/revised/Pages/02.050.aspx#_Toc504059711

[15] https://www.gov.je/Industry/FarmingFishing/AnimalWelfare/Pages/WelfareSanctuaries.aspx

by the relevant Charity Commission but this regulatory regime looks at how the charity is run particularly on finance and governance and not look at the standards under which the charity operates. If the AWE is not a charity the centre is not audited, and does not have to implement minimum welfare standards, other than to give animals the five needs as set out in the Animals Welfare Act 2006. The organisation is also not bound by any regulator which may increase its financial precariousness.

AWEs can play an essential service to improve animal welfare and the social and ethical needs of society. But the scale of the organisations range from very large organisations (the RSPCA has an annual budget of £140 million in 2016) to individuals operating out of their house[9]. There are four main issues that need to be addressed:

- The scale of the problem: numbers and types of animals varies widely although there are no data to show what AWEs are run for wild animals and what for domestic animals.
- Specialist knowledge is required to operate a sanctuary or rescue centre), both in terms of management and administrative skills as well as expertise in caring for animals (often of a variety of species and in significant numbers).
- Policies and records: an organization will need to keep accurate records and have policies on intake, euthanasia and rehoming or release. If an AWE has a reputation for taking in animals, this may encourage the public to dump animals on that centre. Unless the centre has an intake or a euthanasia policy soon the sanctuary will become overcrowded leading to welfare problems. As one rescue centre put it in 2012, "Compassion needs to be encouraged but compassion without a sense of responsibility can lead to cruelty."[16]
- Sustainability: AWEs are vulnerable to rapid declines or large fluctuations in standards which can put strain in turn on the financial and human resources. Good governance is essential to monitor, anticipate and respond to these.

Three of the four issues raised above, sustainability, policies and records and knowledge base, can be written into the Guidance. However before any new licensing or enforcement programme comes into place, it is important to get an understanding of the scale of the problem being addressed and what impact, if any a new regulatory regime will make. Unfortunately, the scale of the problem is only known in Wales, which uniquely of all countries in the UK, has undertaken a survey of sanctuaries. This found 88 sanctuaries and 54 collectors in 2009[17] although this may be an under representation.[18] It is not known what numbers of animals, or species of animals, these sanctuaries manage.

As there are no data for England and Scotland, a rough figure could be extrapolated from the numbers of members the Association of Cat and Dog Homes has as a ratio of all the sanctuaries in Wales. The umbrella body has over 103 members in England and eight in Wales. Using the ratio from Wales, that ADCH has about 10% of the actual numbers of rescue centres and sanctuaries, we could find there are between 800 and 1,000 sanctuaries in England. All of these are unlicensed and uninspected aside from ADCH members and those linked to larger organisations such as the RSPCA or Blue Cross, who already have a system of licensing and auditing. Indeed, it may be more as the Charity Commission's website search engine shows over 1400 charities in England and Wales that provide a service for animals.[19]

The RSPCA undertakes around 85% of the enforcement action deriving from the Animal Welfare Act 2006 by investigating complaints, educating owners through advice, warning notices and where it is appropriate, prosecuting owners and/or keepers. This includes

[16] https://awnwales.org/wp-content/uploads/2013/03/AWE-report-final.pdf

[17] The Welsh Government CAWES data can be found in the AWNW report: https://awnwales.org/wp-content/uploads/2013/03/AWE-report-final.pdf

[18] http://politicalanimal.org.uk/wp-content/uploads/2014/09/AWNW-Report-Case-for-the-Regulation-of-Animal-Welfare-Establishments-in-Wales-October-2012.pdf

[19] https://www.gov.uk/government/organisations/charity-commission

investigating complaints made against rescue centres and sanctuaries.[20] [21] In the past eight years the RSPCA has investigated some eleven individuals and obtained 80 convictions against five persons. A further two people received a caution. These cases involved a total of over 150 animals of different species including dogs, cats, horses, farm animals and birds. This enforcement effort seems to be a small ratio of the numbers of AWEs that could exist in England and Wales, suggesting that most are sustainable and operating under good welfare management.

'It is unknown what impact a regulatory regime on sanctuaries will have in England as this will partially be dependent on the level of enforcement effort.'

However, of more concern is the on-going assistance the RSPCA has to give to failing AWEs to ensure that they meet the needs of the animals under their care which can involve advice and education over many years to the same establishment.

When regulation of a new activity occurs for the first time, there will always be a period of the legislation bedding in and in some instances examples of where the activity shuts down as it is no longer deemed to be economically viable. For instance, the proposed ban in England on third party sellers of puppies has already prompted some dealers to advise they will be dumping dogs or disposing of breeding stock.[22] It is unknown what impact a regulatory regime on sanctuaries will have in England as this will partially be dependent on the level of enforcement effort.

Public support for better regulation seems to be evident. A YouGov poll in 2013 found that 69% of the public in Wales think the Welsh Government should regulate, against 8% who thought the Government shouldn't regulate.[23] However once sanctuaries and rescue centres start to close down and animals euthanized or dumped this public support may change. There will also need to be contingency plans in place for the animals from rescue centres and sanctuaries that close down.

Next steps

Legislators in Wales, Scotland and England are all are trying to solve the same issues:

1. Raising the level of poor welfare standards, by bringing in baseline standards to give clarity to both those that run AWEs and those that audit them. Such standards were agreed in 2016 by the Association of Dog and Cat Homes and by 2018 had been audited in all its members. Standards should cover:
2. Raising the level of trust and expectation the public has in these places, particularly as there is an assumption when the public donate their money or animals to AWEs that there is some level of knowledge, professionalism and accountability;
3. Ensuring that any system can be properly audited and enforced so easing the burden on local authorities;
4. Ensuring any unintended consequences from a ban on third party sellers of animals are negated by preventing commercial vendors setting up as non-commercial rescue centres.

Legislative proposals

Proposals to regulate AWEs are at different stages in each of the four devolved regions. Wales is proceeding down the voluntary non-legislative route based on Guidance produced by the Animal Welfare Network of Wales. However, there will be a Government consultation in early 2019 to look at regulation in anticipation of a ban on third party sales of dogs and cats. Scotland and England are due to legislate in the coming year. Northern Ireland has no current proposals as there is no legislative body in place.

[20] RSPCA 2017. Prosecutions Report. https://view.pagetiger.com/RSPCA2017PR/RSPCA2017prosecutionreport

[21] RSPCA 2014 Prosecution Annual Report

[22] https://www.bbc.co.uk/news/uk-wales-46144799

[23] https://awnwales.org/wp-content/uploads/2016/03/Addendum-to-AWE-report-February-2016.pdf

Defining an AWE is difficult in itself so a consistent definition is vital. In England and Wales the same definition is being used and it is hoped that this can also be used when proposals are announced in Scotland. England already has licensing legislation on animal activities which came into effect in October 1 2018[24]. Any standards and Guidance on AWEs would come under these Regulations. Wales does not have any similar Regulations so it is unclear where the Guidance would sit legislatively if indeed it is agreed to change their status from voluntary guidelines into mandatory Guidance. Scotland would likely make the legislation under the Animal Health and Welfare Act (Scotland) 2006.

It is better for enforcement and for those organisations with premises in multiple countries that the standards are consistent across the devolved administrations. There is consensus on the list of issues that must be considered as coming under the standards, such as accurate record keeping, staff training, hygiene and disease barrier controls, and rehoming and release protocols and policies on euthanasia and intake. The Guidance already drawn up by the Animal Welfare Network of Wales gives a good summary.

The impact on the rescue sector of any new regime is largely unknown. This is because the number of AWEs are unknown, the number and type of species that they handle unknown and the number that would stop functioning if licensing came into effect also unknown. However, the present system whereby anyone with no previous experience or auditing can set up an AWE is also unsustainable and may be encouraging more people to set up AWEs.

Regulation is needed, preferably mandatory licensing under the relevant animal welfare legislation, based on standards in a Guidance document. There will need to be contingency plans in place to deal with any animals that can no longer be kept in AWEs. There will also need to be as much harmonization as possible across the three devolved countries to stop people moving their activities to a country with a lower enforcement threshold. But the alignment of three administrations looking at this issue at the same time underlines the need and timeliness of the proposals which if implemented and enforced properly should drive up animal welfare standards in one of the more unknown and unregulated parts of animal activities.

[24] https://www.legislation.gov.uk/uksi/2018/486/contents/made

Brexit Report - Draft Animal Welfare (Sentencing and Recognition of Sentience) Bill: A legal perspective

Paula Sparks, Executive Chair at UK Centre for Animal Law (A-law) & Judith-Anne MacKenzie, Retired Barrister and Special Adviser to the Save Me Trust

Anyone who has been following the storm of controversy that whipped up around the Draft Animal Welfare (Sentencing and Recognition of Sentience) Bill, and its attempt to bring the effect of Article 13 of Treaty of Functioning of the European Union (TFEU) into UK law after Brexit, will be watching eagerly for the Government's next move. We have, accordingly, been giving much thought to the matter and have taken the following steps:

> A-law has sent a detailed letter to the Bill team at Defra setting out our concerns and views on how Article 13 may be 'carried across'; and,
>
> We have attended a meeting between the policy team (including their legal adviser) and a wide range of animal welfare groups.

Having received scathing criticism from the EFRA Select Committee for its 'cavalier' treatment of animal welfare in the Bill, the Government is in the unenviable position of attempting to meet the criticisms of the EFRA Committee while remaining true to the principles and duties imposed by Art 13, which will be lost after Brexit and which the Secretary of State has committed to carrying across into UK law.

How fair is the criticism by EFRA of the original wording of the Draft Animal Welfare (Sentencing and Recognition of Sentience) Bill? The crux of their criticism is that by imposing upon ministers a general duty to have regard to animal welfare in formulating and implementing policy in all areas of governance, Parliament could be opening-up Government decision making to judicial review by people seeking to challenge a particular policy on the basis that the Minister had failed to take into account animal welfare, even where there might be no animal interests involved. Our meeting with the Bill team confirmed that this is now a major concern to Government and that Defra is likely to be under pressure to ensure that departments do not face an increase in litigation.

We believe that in so far as this risk exists, the magnitude of it was over estimated by the Committee. It may be pertinent that the Committee did not hear evidence from legal experts practising in the field of public law, who may be more familiar with the very real counterbalances within the system, which are designed to weed out unmeritorious claims and even for meritorious claims, can put off the faint hearted. This includes, but is not limited to, the following factors.

1. Judicial review proceedings must, under the Rules of the Supreme Court, be brought "promptly". In some cases, this may require proceedings to be commenced even earlier than the usual 3 months' time limit for a JR.

2. An applicant must have a sufficient interest in the subject matter ('standing') to bring judicial review proceedings, thereby restricting those who are entitled

to bring a claim.

3. The legal costs of bringing a claim have to be met and can often be prohibitive. In addition, a claimant may also be ordered to meet some or all of the other side's costs, in the event that a claim is unsuccessful.

4. A claimant has to seek permission from the court in order to bring proceedings. This first hurdle is intended to weed out any unmeritorious claims at an early stage. Initially this can be done 'on the papers', without a hearing and the judiciary has shown no reluctance to use this power, not the least because doing so prevents a waste of court time. Even where there is a permission hearing, a high proportion of claims are ruled out at this early stage.

5. Perhaps most importantly, a court will not substitute its judgment in place of that of the policy maker. The most it will do is to remit a decision for further consideration, if a claim succeeds.

However, our meeting with Defra confirmed that a major concern of Government is the delay to decision-making that can occur when JR proceedings are started, even if the Government, in due course, actually wins.

It was concern about judicial review which the amendment tabled to the European Union (Withdrawal) Act 2018 attempted to address by including a sub-clause:

> '(3) It is for Parliament exclusively, in the exercise of absolute discretion, to hold Ministers of the Crown to account for the discharge of their duties under this section'

The amendment (a so-called 'ouster clause' which attempts to restrict recourse to the courts) was voted down. As has been acknowledged[1]:

> 'Lord Hope of Craighead (Crossbench), Lord Brown of Eaton-under-Heywood (Crossbench), respectively a former Deputy President and Justice of the Supreme Court, and Lord Mackay of Clashfern (Conservative), a former Lord Chancellor, all expressed concerns about the drafting of the amendment and what this would mean for the possibility of bringing judicial review claims.'

The objection is best summarised by Lord Hope, who said:[2]

> '…it was established as a convention that the Government would not seek to exclude judicial review. They might limit it in some respects, as they have done, by the length of time that can elapse before a petition is brought, and there have been other ways in which the opportunity for judicial review has been narrowed, but they have never excluded judicial review, because it is one of the essential protections of individuals against the state.'

'…our meeting with Defra confirmed that a major concern of Government is the delay to decision-making that can occur when JR proceedings are started, even if the Government, in due course, actually wins.'

Such concerns reflect the importance of judicial review as an important constitutional check and affirm our view that concerns about any potential misuse are capable of being addressed without taking a wholly different approach to that in the draft Bill.

We understand Defra's concern that JR can delay decision-making, even if the applicant loses. However, any delay problems largely arise from widespread issues in the current courts system. This is not something that we or the Bill team can resolve but is a wider matter for the Ministry of Justice and the Treasury. It is, however, highly undesirable that a

[1] House of Lords Library Briefing: European Union (Withdrawal) Bill: Lords Report Stage. HL Bills 79 and 102 od 2017-19, page 116.

[2] https://hansard.parliament.uk/Lords/2018-04-25/debates/A9F4CE42-D434-4DC4-8DAE-799A1265BB8A/EuropeanUnion(Withdrawal)Bill (column 1617)

commitment to proper decision-making in relation to animal welfare should be prevented by wider failings within Government.

Leaving this difficult concern aside, in addressing the commitment to carry across the effects of Article 13, we turn to a provision that is already addressing a similar issue in relation to BREXIT. Section 16 of the European Union (Withdrawal) Act 2018 ('the Act'), provides a legislative framework for transposing certain environmental protections after Brexit. Section 16(1) of the Act states:

> '(1) The Secretary of State must, within the period of six months beginning with the day on which this Act is passed, publish a draft Bill consisting of—
>
> (a) a set of environmental principles,
>
> (b) a duty on the Secretary of State to publish a statement of policy in relation to the application and interpretation of those principles in connection with the making and development of policies by Ministers of the Crown,
>
> (c) a duty which ensures that Ministers of the Crown must have regard, in circumstances provided for by or under the Bill, to the statement mentioned in paragraph (b),
>
> (d) provisions for the establishment of a public authority with functions for taking, in circumstances provided for by or under the Bill, proportionate enforcement action (including legal proceedings if necessary) where the authority considers that a Minister of the Crown is not complying with environmental law (as it is defined in the Bill), and
>
> (e) such other provisions as the Secretary of State considers appropriate.'

We believe that it would be possible to create an equivalent provision to bring across a duty to have regard to the welfare interests of animals.

There are also alternative legislative approaches that the Government could take. A new law could, in recognition of animal sentience, impose a series of specific duties upon public authorities giving effect to the need to have regard to animal welfare in public decision making.

'A new law could, in recognition of animal sentience, impose a series of specific duties upon public authorities giving effect to the need to have regard to animal welfare in public decision making.'

There is precedent for this from New Zealand, where the long title to the Animal Welfare Act 1999 was amended, [3] to formally recognise animal sentience. Although the long title is not an operative provision of an Act, it nonetheless is an aid to the construction of the operative provisions, as an important indication of the intention of Parliament in making the legislation. The amended long title therefore states that the purposes of the legislation, as amended, are:

> '(a) to reform the law relating to the welfare of animals and the prevention of their ill-treatment; and, in particular,—
>
> (i) to recognise that animals are sentient:
> (ia) to require owners of animals, and persons in charge of animals, to attend properly to the welfare of those animals:
> (ii) to specify conduct that is or is not permissible in relation to any animal or class of animals:

[3] https://www.independent.co.uk/news/world/australasia/animals-are-now-legally-recognised-as-sentient-beings-in-new-zealand-10256006.html https://www.mpi.govt.nz/protection-and-response/animal-welfare/national-animal-welfare-advisory-committee/

> (iii) to provide a process for approving the use of animals in research, testing, and teaching:
> (iv) to establish a National Animal Welfare Advisory Committee and a National Animal Ethics Advisory Committee:
> (v) to provide for the development and issue of codes of welfare and the approval of codes of ethical conduct.'

The amended Act then goes on to impose specific requirements on both the New Zealand Government and the people of that country, in fulfilment of these purposes. This approach is in line with the EU Article 13 which imposes requirements in relation to policy-making and animal welfare as a consequence of the recognition that animals are sentient.

A-law has suggested to the Bill team that the New Zealand approach may provide a useful precedent in constructing new UK obligations. We have also drawn attention to section 149 of the Equality Act 2010, which requires public authorities to have due regard to a number of equality considerations when exercising their functions, including the need to:

> '(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.'

Under the 2010 Act, Equality Impact Assessments are not legal requirements but can be used as a means of demonstrating that the duty has been discharged.

In the context of animal welfare, in order to achieve parity with the existing obligation under Article 13, in our view it is vital that the new provisions in UK law include a mechanism for public bodies to have regard

to animal interests in their decision-making process.

This might be achieved by imposing upon public bodies obligations similar to those under the Equality Act 2010. We consider that a similar duty to 'have regard' to animal welfare and the use of animal welfare impact assessments would be an effective way of carrying across the effects of Article 13 and provide an important protection for animals for the future.

A duty to have regard to animal welfare could also be supported by the creation of an Animal Protection Commission (either as a stand-alone organisation or as part of an Environmental Commission), independent of government and able to advice about the impact of policies upon animal interests. Although there are currently no plans on the table to establish an Animal Protection Commission (APC) for England, the Scottish Government has announced proposals to establish such a body to provide expert advice on the welfare of domesticated and wild animals in Scotland to ensure high standards of welfare are maintained after Brexit.

There are also proposals being developed for an Environment Commission, which will have significant powers, including holding the Government to account, if necessary, by taking legal action. We were pleased to discover that the Bill team were not averse to this approach, but it seems that they wish first to see how the Scottish experience develops before taking a view on the creation of a new body.

We are concerned that whilst steps are being taken to ensure robust environmental governance after leaving the EU (including the enshrinement of environmental principles in law, the imposition of a legal duty to have regard to certain environmental principles and the establishment of an Environment Commission), equivalent steps are not being taken to ensure the continued protection of animal interests.

We have set out our views to Defra in A-law's letter and reinforced this in our meeting with the Bill team. There is still time for the Government to strengthen provisions in the Draft Bill. It would be a massive disappointment if they fail to take this opportunity.

Case Materials and News

Jasmine Allen, Charlotte Hughes & others

R v Daniel Doherty; R v Simon O'donnell; R v Thomas Stokes; R v Edward Stokes (2018) [2018] Ewca Crim 1924

In a sentencing review on July 19, 2018, the Court of Appeal, Criminal Division increased sentences imposed upon four defendants who had been found guilty of involvement in a conspiracy to commit fraud by false representation and, in respect of two defendants, they had been convicted for summary offences relating to the welfare of animals.

The Crown Court at Isleworth imposed sentences on the men that did not meet the demands of the strict sentencing guidelines, but on review the Court of Appeal stated that these guidelines should have been followed.

The four defendants had spent years conspiring in the fraudulent sale of dogs born in puppy farms or 'mills', passing the dogs off to unsuspecting buyers as puppies borne of domestic pets living in family homes. One of the co-conspirators, Doherty, was a veterinarian who was able to provide vaccinations, proper documentation, and the semblance of propriety to aid the enterprise. They sold these puppies at an average of £500, a price none of the buyers would have considered paying for puppies that were actually farmed, not domestic. In fact, none of the buyers would have considered buying a farmed puppy in the first place. As farmed puppies are bred in poor conditions, the puppies had an extremely high rate of illness and untimely death, causing the buyers much emotional distress.

Fifty-eight individual buyers provided witness statements. Of those 58, they bought 66 puppies, and 24 of them had died. But that's a small slice of their actual business: Records show that they sold nearly 5,000 puppies, with similar casualty rates. There was also evidence that some purchasers who had approached one of the defendants about their inexplicably sick puppies, they had been threatened.

Despite their crimes falling within Category 1A of the sentencing guidelines, which command a sentence between 5 and 8 years custody, the Crown Court granted the men suspended sentences of imprisonment, which meant that they could avoid imprisonment if they kept within the law during the period of the suspension. The judge wrote of how imprisoning the men and imposing strict sentences would harm their families. He also took into account each of their efforts to hold down proper work since being arrested, and accepted into evidence many letters commending Doherty's professionalism as a veterinarian. The judge also made a joke of sorts about how UK citizens care more about animals than children.

However, on appeal, the Crown Court's sentencing was deemed in error. In a judgment from Lord Justice Holroyde, the justice stated that the sentencing guidelines should clearly be used. When considering the harm done by a conspiracy, the entirety of the enterprise must be considered. In this case, the entirety of their criminal enterprise meant nearly £2 million from the puppy sales. As the offenders "would not have received a penny of that money if they had told the truth," the court placed the offenders within Category 1 harm. The "unduly lenient" sentences of the Crown Court were increased to correspond with the guidelines.

The most glaring problem with the Crown Court judge's ruling was his failure to fully share his reasoning for his lenient sentencing. Lord Holyroyde wrote, *"When there are compelling circumstances which cause a judge to conclude that the application of a sentencing guideline would be contrary to the interests of justice, there should be no difficulty for the judge in articulating those*

reasons." Without that reasoning, the Court of Appeal could not begin to determine whether his reasoning was sound, and so it had no choice but to follow the strict sentencing guidelines required for Category 1 crimes. Each of the men was sentenced to between 3 years and 4 years, 8 months' imprisonment.

At the conclusion of the case the Solicitor General commented:[1]

'This group not only subjected thousands of puppies to atrocious living conditions, but also caused immense distress to families who had to watch their new pets suffer from serious illness. I am pleased that the Court of Appeal has today agreed to increase all 4 sentences, and hope this will bring some comfort to the victims of their crimes.'

Expert commentary by Sean Brunton QC:

Whilst this is a case primarily concerned with the way a Court should approach conspiracy, financial offending and reliance upon and reference to the Sentencing guidelines, it also shows us that the second highest court in the country do take the harm done to animals, and the effect of that harm on their owners, seriously. Clearly the harm done to the puppies in this case, and the effect of their illnesses and deaths on their owners, was a significant factor in the Court's mind when considering harm, culpability and aggravating factors. The Victim Impact Statements of the victims were clearly taken very seriously by the Court. In other words, rather than making 'clever' comments about the 'Great British Public', as the Judge at first instance felt entitled to do, the Court of Appeal clearly took the attitudes of the population to animal cruelty and that cruelty itself rather more seriously.

Fitzwilliam Land Co v Cheesman [2018] EWHC 3139 (QB)

The Claimant land owners and operators of the "Fitzwilliam (Milton) Hunt" made an application for an interim injunction against the Defendants until the pending trial is heard. The Claimants applied for an interim injunction restraining the Defendants from committing trespass to land and trespass to goods (including animals). The Defendants are 14 named persons who had allegedly taken part in protests against the hunt in addition to unknown persons. The Defendants maintained that they did not trespass on the Claimants' land where there was no right of way and it was argued that the hunting activities of the Claimants are illegal and infringe on the Hunting Act 2004 which was denied by the Claimants. The Judge reviewed photographs and video footage in respect to the allegations against both the Defendants and Claimants.

The application was granted in part and an injunction was ordered against 7 of the Defendants in respect of trespass until the hearing of the trial. The Judge held that there was sufficient evidence of trespass for 7 of the Defendants and persons unknown and the court found that there was a risk that those persons would, unless restrained, trespass on the Claimants' land. The Judge stated in the Judgment that the QC representing the Defendants *"made out a persuasive argument that the hunting was illegal"* and the judge also considered evidence of assault against two of the Defendants stating that *"there is a concern that such touching or assaults as have taken place appear to be from the Claimants' side against Defendants rather than the other way round".*

However, the judge considered the Claimants' property rights weighed heavily even when balanced with the Defendants' ECHR rights to freedom of speech and assembly. The court considered that the evidence of altercations between hunters and protestors raised concerns about injury to people and injury to animals (in terms of hounds and horses getting out of control). The judge found that there was sufficient evidence that could establish trespass at trial. The Judge ordered an injunction against 7 Defendants and unknown persons in respect of trespass to the Claimant's land until the trial.

The court did not grant an injunction in respect of trespass to goods as a real and imminent risk was not

[1] https://www.gov.uk/government/news/sentences-increased-for-gang-who-illegally-sold-thousands-of-farmed-puppies

shown and that in any event the touching of animals was prevented with the injunction relation to the land.

Highbury Poultry Farm Produce Ltd v Crown Prosecution Service; R. (on the application of Highbury Poultry Farm Produce Ltd) v Telford Magistrates' Court [2018] EWHC 3122 (Admin)

The Claimant slaughterhouse had been charged under the Welfare of Animals at the Time of Killing (England) Regulations 2015 reg.30 (1)(g) (the 2015 Regulations). The Claimants brought a Judicial Review and the court was asked to determine whether these offences were of strict liability (i.e. that the presumption of proof of *mens rea* was not required).

On three separate occasions in October 2016, a chicken had been put into a scalding tank whilst still alive because its neck had not been properly cut by a slaughterhouse certified operative.

The Claimant was charged with a failure to comply with regulation 30(1)(g) contravening (1) Regulation 1099/2009 art.3(1) which requires that animals should be *"spared avoidable pain"* during their killing, as a bird subject to stunning had not been bled out; (2) Article 15(1) of the EU Regulation which requires compliance with the operational rules for slaughterhouses laid down in Annex III, including complying with the requirements for the bleeding of animals, as there had been a failure to sever the main arteries. The EU regulation is directly applicable to all EU member states and is enforced in the UK through the 2015 Regulations mechanism.

The Judge dismissed the Claimants application and found that social concern regarding animal welfare meant that it was appropriate to displace the presumption that *mens rea* was required and subsequently neither proof of knowledge or culpability on the part of the slaughterhouse was required. The Judge stated found that in this case, *"there was a strict obligation to sever the main arteries systematically, and a concomitant strict obligation to spare these birds avoidable pain."*

Ivory Bill update

The world elephant population has decreased by nearly a third in just 10 years with over 20,000 elephants being poached every year for their tusks. In recognition of the need to protect elephants, the Ivory Bill aims to:

1. prohibit commercial activities concerning ivory in the UK; and
2. prohibit the import and re-export of ivory for commercial purposes, to and from the UK.

The Bill relates to the sale of all ivory but currently includes the following exemptions in relation to the *trading* of ivory:

1. items produced before 1947 that contain less than 10% ivory by volume;
2. musical instruments produced before 1975 that contain less than 20% ivory by volume;
3. portrait miniatures painted on ivory that are at least 100 years old;
4. ivory items assessed by recognised specialists to be of 'outstandingly high artistic, cultural or historical value' which must be over 100 years old; and
5. sales, loans and exchanges by individuals to accredited museums and between accredited museums.

The Bill sets out civil and criminal sanctions for breaking the law (including a sentence of up to 5 years in prison).

The Bill was introduced into the House of Commons on 23 May 2018. It has since gone through various stages of the parliamentary process (including consultation) and had its third reading in the Lords on 13 November 2018. The Bill was passed by the Lords and returned to the Commons with amendments.

The Bill is now in the "ping-pong" stage and has now returned to the Commons for consideration of Lords' amendments. The floor of the House of Commons will consider the amendments on 12 December 2018.
The Opposition argued for the extension of the ivory definition to include all threatened ivory-bearing species. The Government has confirmed that after the Bill is passed it will undertake a consultation on expanding the definition to include all ivory-bearing

species, whether threatened or not. The Bill has been amended to remove the restrictions on which species the ivory must come from and therefore enables the definition to be added to in the future by statutory instrument.

Seal Products Regulations Bill

The Seal Products (Amendments) (EU Exit) Regulations Bill 2018 came about as a response to the United Kingdom's impending departure from the European Union and ensures that the ban on the importation on seal products from commercial hunts will continue to operate effectively. Regulations on the control of seal products are set out in EU Regulation (Council Regulation (EC) No 1007/2009 and Regulation 2015/1850) and domestically in the Seal Products Regulations 2010. The regulations ban the importation and trade of seal products within the EU; providing limited exceptions for traditional hunts. The original regulations came about as a result of the inhumane nature of seal hunting practices which caused concern to many different organisations and members of the public.

The policy objective is to maintain the existing EU law and is essentially a technical exercise that does not amend the primary legislation. It includes the replacement of words such as "EU" and "the Commission" with "United Kingdom" and "Secretary of State". In addition, the 2018 Bill also removes references to ensuring free movement within the EU, protecting the fact that territorial application is limited to that of the United Kingdom.

The Bill transfers functions of the European Commission including the powers to prohibit and limit seal products and issue guidance. Nevertheless, the overarching objective of the policy is to main the existing laws and not substantively change the policy.

Live Animal Exports (Prohibition) Bill 2017 (HC Bill 177)

The Live Animal Exports (Prohibition) Bill, introduced by Theresa Villiers MP, had its first reading on October 25th 2017 and aims to prohibit the export of live farm animals for slaughter or fattening. Public concern surrounding the live export of animals dates back to the middle of the 20th Century, and is prompted by the risk that exported animals will be exposed to weaker animal welfare legislation in some European countries than the country of origin, and that EU transport and slaughter rules will not be enforced effectively once the animal leaves the UK. The Animal Plant and Health Agency figures show that each year 40,000 sheep are exported for slaughter in Europe, enduring long journeys, overcrowding, and high temperatures. Although animal welfare is a devolved matter, the Bill has been drafted to apply to the whole of the UK under the classification of a trade issue, with the proposed enforcement date of the Act being the day the UK leaves the European Union.

The introduction of a ban is supported by numerous animal welfare organisations including Compassion in World Farming, the RSPCA, the Conservative Animal Welfare Foundation and World Horse Welfare.

The penalties proposed by the Bill for non-compliance with the ban include a custodial sentence of up to 12 months, a fine, or both.

Animal Welfare (Service Animals) Bill 2017-19

The Animal Welfare (Service Animals) Bill, applicable to England and Wales, seeks to amend section 4 of the Animal Welfare Act 2006 (AWA) in order to increase protection for service animals. The AWA in its current form allows for a defendant accused of causing unnecessary suffering to a service animal to claim that the physical force used was necessary in the circumstances.

The Bill seeks to amend the AWA in order to require a court to disregard the consideration that suffering may have been necessary, in certain circumstances when assessing the suffering caused to a service animal. The Bill provides that in order for the relevant section of the AWA to be disregarded, the animal must be under the control of an officer who is using the animal, in a reasonable way, as part of their duties. This does not apply to officers who may need to use force against their animal in order to protect themselves or a

member of the public.

The Bill, tabled by Sir Oliver Heald MP, is the result of a campaign following the attack of a police dog while assisting a police officer. Although the attacker was convicted, the attack stimulated public concern surrounding the application of the relevant section of the AWA. The Bill is due to be scrutinised by the Public Bill Committee and the story has been well covered in the media, showing the public interest in the issue.

Pets (Theft) Bill 2017-19

The Pets (Theft) Bill 2017-19 seeks to amend the Animal Welfare Act 2006 and the Animal Health and Welfare (Scotland) Act 2006, in order to make an offence of the theft of pets.

The Bill was introduced on the 3rd July 2018 by Ross Thomson MP and is a result of a petition signed by over 100,000 members of the public, asking for the theft of pets to be made a criminal offence. The petition was started by Dr David Allen and the issue has been supported by the Stolen and Missing Pets Alliance and Pet Theft Awareness.

The Bill seeks to change the way the law treats the theft of pets, from being treated the same as the theft of an inanimate object, to recognising that victims of pet theft have lost much more than a mere possession.

The second reading of the Bill is due to take place on the 25th January 2019.

Cats Bill 2017-19

The Cats Bill 2017-19 seeks to require the drivers of vehicles involved in injuring or killing a cat to stop and report the incident to the police, and to require the keepers of certain cats to ensure they are microchipped. The Bill was introduced by Rehman Chishti MP on the 23rd July 2018.

The Bill is currently being prepared for publication.

Botox: An extended case study

Edie Bowles, Dr Katy Taylor and David Thomas on behalf of Cruelty Free International

Introduction

Mention botox and most people will immediately think of the increasingly popular aesthetic procedure that reduces the appearance of wrinkles. Others may know it as a medicine to treat such ailments as migraines and spasms. It is due to the dual use that regulating botox being tested on animals is so convoluted in the current legal framework in the UK.

'Botox' (with a capital B) is a specific brand and registered trade mark of botulinum toxin. However, the term 'botox' (with a small B) is used throughout the article to refer to all botulinum toxin products (think of Hoover and hoover or Biro and biro). The term 'aesthetic' is also used rather than 'cosmetic,' due to a rather limited EU definition of the latter as outlined below.

Botox testing

Firstly, it is worth explaining what the animal test entails. Botox is overwhelmingly tested on mice in the UK using what is known as the Lethal Dose 50 test (LD50), so-named because it aims to determine how much of substance is needed to kill half the group to which it is given. An alternative model has been developed, but this is product-specific and the extent to which it is being used to replace the mouse test is uncertain. The LD50 involves groups of mice being injected with differing dilutions of the product. After being injected, the mice are placed back into their cages in small groups for the duration of the test (usually 72 or 96 hours). The numbers of mice who have died by the end of the test period are counted. Approximately 90% of the mice in the highest concentration group are expected to die, 10% in the lowest.[1]

For those animals receiving a sufficient dose of toxin, signs of poisoning start to show within hours. The main effect is paralysis of the lower body; affected mice begin to stagger and those more severely affected are unable to walk. As the paralysis develops over the first 24 hours, it affects the ability to breathe. The cause of many deaths is asphyxiation. In addition, the more severely affected mice cannot reach food or water and may therefore die as a result of dehydration and weight loss and not the toxin per se.

Every batch released onto the market must be tested for potency and consistency (botox is a biological product and therefore very variable; it is also highly toxic). Compounded by the fact that the use of botox has continued to increase, the number of mice tested on per year is vast. The total number of mice used in batch potency tests in the UK was 144,957 in 2015 and 130,973 in 2016[2] and the vast majority of these will have been for botox.

The administering of botox

Botox cannot be lawfully given to individuals in the UK without a prescription. It is possible to divide its uses into three categories reflecting when medicines can be prescribed:

1. On-label uses: this is where the medical indication i.e. the particular purpose to which a medicine can be put, is expressly authorised by a medical licence called a 'marketing authorisation' granted by the Medicines and Health Regulatory products Agency

[1] (Adler et al. 2010)

[2] Statistics of scientific procedures on living animals https://www.gov.uk/government/collections/statistics-of-scientific-procedures-on-living-animals

('MHRA').[3] With botox, examples are spasticity and moderate to severe glabellar (frown) lines when this has 'an important psychological impact on the patient [under 65].' The latter, although it has an aesthetic element, is addressing a medical condition;

2. Off-label medicinal uses: this is where a doctor (or other prescribing medical professional e.g. dentist, nurse, pharmacist) lawfully prescribes botox to treat a medical condition, although that condition is not expressly authorised by the market authorisation e.g. squints, migraines and urinary bladder muscle relaxation. These are therefore 'off-label' medical uses;
3. Off-label non-medicinal uses: this is where botox is prescribed by a medical professional but for an aesthetic e.g. reducing the appearance of wrinkles to improve facial appearance. This regularly occurs in private beauty clinics, for example. The General Medical Council has confirmed to Cruelty Free International (CFI) that doctors can prescribe botox based on a patient's perceived need (e.g. cultural or aesthetic) without there being any diagnosed medical condition.

Legal framework

Testing cosmetics on animals is banned in the EU under Regulation (EC) No 1223/2009. Unfortunately, botox is not covered by this ban by virtue of the definition of 'cosmetic product' under Article 2(1)(a), which states:

'cosmetic product' means any substance or mixture intended to be placed in contact with the external parts of the human body (epidermis, hair system, nails, lips and external genital organs) or with the teeth and the mucous membranes of the oral cavity with a view exclusively or mainly to cleaning them, perfuming them, changing their appearance, protecting them, keeping them in good condition or correcting body odours

The definition refers to external application; as botox is

[3] There is an equivalent system for veterinary products

injected it is not caught by the definition.

The testing of botox on animals in the UK is subject to the general law that applies to all animal testing, the Animals (Scientific Procedures) Act 1986 (ASPA). The Secretary of State for the Home Department (Secretary of State/Home Office) is the regulator.

ASPA regulates experimental or other scientific procedures applied to living vertebrates (mammals, birds, reptiles, amphibians and fish) where the procedure may have the effect of causing the animal pain, suffering, distress or lasting harm over a certain threshold: ss. 1(1) and 2(1).

Before animal experiments can be carried out, there must be in place (*inter alia*) a project licence, which is granted by the Secretary of State under s 5(1):

> *(1) A project licence is a licence granted by the Secretary of State which specifies a programme of work and authorises the application, as part of that programme, of specified regulated procedures to animals of specified descriptions at a specified place or specified places.*

By s5B(1), a project licence cannot be granted unless the Secretary of State has carried out a favourable evaluation of the programme of work. Section 5B(3) then provides:

> *In carrying out the evaluation of a programme of work the Secretary of State must—*
>
> *(a) evaluate the objectives of the programme of work and its predicted scientific benefits or educational value;*
>
> *(b) assess the compliance of the programme of work with the principles of replacement, reduction and refinement;*
>
> *(c) classify as "non-recovery", "mild", "moderate" or "severe" the likely severity of each regulated procedure that would be applied as part of the programme of work;*
>
> *(d) carry out a harm-benefit analysis of the programme of work to assess whether the harm that would be caused to protected animals in terms of suffering, pain and distress is justified by the expected outcome, taking into account ethical considerations and the expected benefit to human beings, animals or the environment…*

Therefore, in assessing an application for a project licence, the Secretary of State must apply a 'harm:benefit' test and the Three Rs, namely reduction, refinement and replacement[4] (s5B(3)(b)), and classify the project according to its severity (non-recovery, mild, moderate and severe): s 5B(3).

The testing of botox in the UK has historically been carried out by Wickham Laboratories in Hampshire, which has had (and may well still have) a project licence classified as 'severe' in terms of s 5B(3)(c), the highest level of severity. Only a small handful of projects are given this classification. Section 10 of, and Schedule 2C to, ASPA make provision as to conditions to be imposed on licences. In addition to mandatory conditions, the Secretary of State may impose such other conditions as she thinks fit, a broad discretion: s 10(2). Breach of a condition does not invalidate a licence (s 10(3)).

Policy ban

In addition to the EU cosmetic ban, the UK Government has a long-standing policy that it does not license the testing of cosmetics on animals, reflecting its view that the 'benefits' from these products do not justify the 'harm' caused to animals. This extends to botox. In a Parliamentary answer on 12 November 2009, the Minister said:

> *…under [ASPA] the Home Office grants licences for the testing on live animals of [botox] for*
>
> *products licensed for clinical purposes as a prescription-only medicine. The Home Office does not license the use of animals for the testing of cosmetic ingredients or products.*

[4] Reduction being the use of less animals, refinement being less suffering, replacement being the use of non-animal models

It is presumably for these reasons why the Home Office included a condition in the project licence it granted Wickham in 2009 to test botox:

> *To undertake testing procedures to ensure the safety, efficacy, stability and overall quality of botulinum toxins and associated proteins used for medicinal products in accordance to registered marketing authorisations held with national and international regulators and in accordance with Good Manufacturing Practice.*

Cruelty Free International (CFI) Judicial Reviews

CFI (then BUAV) carried out two investigations at Wickham, one in 1992 and one in 2009. The investigations revealed not only the extent of the suffering endured by the mice, but also a variety of problems in the way Wickham was run.

As a result of these discoveries, the Home Office reviewed Wickham and published a report[5], which was supported by the UK Government. The report found a range of potential breaches of licence conditions, including, but not limited to:

- Mice routinely found to have died in extremis rather than euthanised at an earlier and more appropriate end point; this caused unnecessary suffering. The proportion of mice humanely killed was as low as 0% and was typically around 20%;

- Incompetent application of humane killing methods to mice leading to unnecessary suffering. Killing methods included conducting cervical dislocation on corridor floors and putting more mice than recommended in a CO2 chamber; and,

- A potential conflict of interest due to the Named Veterinary Surgeon (NVS), Managing Director, majority share owner and the reporting manager for the Holder of the Certificate of Designation all being the same individual. The 2009 investigation led to years of engagement with the Home Office and two judicial reviews.

2011- 2012[6]

The issue in the first judicial review when initiated was whether the Home Office was required to take steps to enforce the 'medicinal products [7] limitation in the Wickham licence.

'Cruelty Free International carried out two investigations at Wickham in 1992 and 2009, which led to years of engagement with the Home Office and two judicial reviews.'

During the course of the proceedings, the Home Office accepted what it had previously rejected, namely that it did. In doing so, the Home Office agreed with CFI that it:

> *(a) Has a duty to ensure that the terms and conditions of project licences are complied with;*
> *(b) Has a duty to take reasonable steps to satisfy herself that batches of [Botox] carry a marketing authorisation as a medicinal product and are used for medicinal purposes;*
> *And in pursuance of [this] the [Home Office] will:*
>
> *...*
>
> *(c) require licence holders to obtain and record information on the intended use of [botox] that is tested pursuant to the licence or clinical trial application*

[5] 'A review on the issues and concerns raised in the report The Ugly Truth - a BUAV investigation at Wickham Laboratories. Animals Scientific Procedures Inspectorate', November 2010 accessed at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/116820/wickham-laboratories.pdf

[6] There is no reference as the case did not reach a substantive hearing

[7] There was some confusion at this time with the licence condition. CFI was under the impression that the wording stated that the testing must be carried out for 'medicinal purposes' and was not corrected. The wording is in fact 'used for medicinal products.' However, the Home Office said it meant the same thing

The Home Office accordingly made a clear distinction between medical purposes (permitted) and aesthetic purposes (not permitted) and stated that licence holders had to obtain and record information about intended use, in order (it is assumed) to ensure that they could distinguish between batches.

2016-2017[8]

CFI and the Home Office entered into extensive correspondence after the 2011/2012 judicial review discussing how the Home Office actually enforced the licence condition. CFI successfully used the Freedom of Information Act request to ascertain what the department was (and, more relevantly, was not) doing. It was common ground throughout that the purpose of the limitation of the licence was to prevent laboratories testing batches of botox on animals intended for aesthetic purposes.

CFI was concerned that steps the Home Office claimed it was taking were not legally capable of enforcing the limitation. One example was the department's assertion that it checked that each batch of botox tested on animals was covered by a marketing authorisation. But since, all botox products have a marketing authorisation, even those destined for aesthetic use, this proves nothing. Similarly, the fact that botox could only be administered against a prescription is irrelevant, because that applies to beauty treatments as much as medical uses.

CFI was confident of its position and suggested to the Home Office that the organisations commission a joint opinion from a senior public law counsel, as part of the duty which all parties have, even in public law, to try to resolve disputes without litigation. The Home Office refused (though took a long time to do so). CFI therefore obtained its own opinion, which confirmed that the Home Office was doing nothing legally capable of enforcing the limitation.

The common understanding that animal-testing for aesthetic end-use was not permitted suddenly disappeared at a meeting between CFI and the Home Office on 4 May 2016 arranged to discuss enforcement. The Home Office claimed for the first time that laboratories could test for aesthetic end use only. This would this render the limitation pointless, as it could never apply. All the department could suggest, clutching at straws, was that animal testing was not permitted when the botox was destined for illegal back-street sale (in fact, testing for illegal purposes would never be permitted in any event). This was a complete shift in the Home Office's position. It seemed to represent recognition that CFI had demonstrated that the steps the department claimed to be taking to enforce the limitation were legally ineffective.

CFI subsequently gave the department the opportunity of reconsidering its *volte-face,* but it refused. CFI therefore issued fresh proceedings.

The main grounds for judicial review were:

a. Ground 1: the Home Office had misinterpreted the meaning of the prohibition in the licence which, properly construed, prohibited testing where the end use was cosmetic;
b. Ground 2: if the licence condition did not have this meaning, the Home Office had failed to undertake a lawful harm:benefit test under s 5B(3)(d) of ASPA in failing to impose such a limitation and complying with its own published policy about cosmetics testing (including botox). Although the department had a broad discretion when applying the test, CFI argued that causing severe suffering to tens of thousands of animals, year on year, for a purpose the Government accepted was trivial (aesthetic end-use) had on any basis to fail it: otherwise, an animal experiment could never fail. Importantly, because this was post-market testing, it was possible to differentiate between types of end-use, as indeed the Home Office accepted by imposing the licence limitation.

[8] *Cruelty Free International V Secretary of State for the Home Department* [2017] Case No: CO/4124/2016

We were granted permission for judicial review, with Mr Justice Edis recognising that there did seem to be a material change in the Home Office's position. Not untypically, the department then changed its position again and reverted to accepting that botox testing on animals was indeed not allowed for aesthetic end use (this made Ground 2 redundant). However, it then placed an interpretation on the limitation which would mean that it would hardly ever apply.

For example, it argued that the ban on animal testing only applied where it was 'clear' that the 'only' end-use of the botox batch being tested was for aesthetic purposes. This would mean 99% of the batch could be intended for aesthetic purposes, but due to the 1% intended for medicinal use, the batch could be tested on animals.

The Home Office also still maintained that all it had to do was check that there was market authorisation in place for every territory where botox animal-tested in this country was sold. Throughout all pre-hearing correspondence, the hearing itself and post-hearing submissions, the Home Office provided no credible evidence that it required any more proof from the testers as to the end use. Indeed, the head of the relevant department, Mr Will Reynolds, explicitly said in his post-hearing witness statement that everyone concerned – the department, the licence-holders and the botox companies – understood that a market authorisation was all that was required: 'This is because so far as we (and they) are concerned, a product which is covered by a marketing authorisation as a medicinal product is intended for use as a medicinal product'.

Mrs Justice Cheema- Grubb had made it clear at the hearing that that was not enough. Inexplicably given what Mr Reynolds said, however, she found that the Home Office was doing more than checking for marketing authorisations.

The judge did agree that no part of a batch destined for aesthetic end use could be tested on animals[9]and with CFI's arguments on other issues of construction. However, she said that CFI had not produced any evidence that botox tested at Wickham ended up being used for aesthetics purposes.[10] But this was to ask for the impossible – CFI did not have access to the commercially secretive botox distribution network. It had, however, provided evidence of extensive aesthetic use in UK beauty clinics of botox of the type tested at Wickham, supported by Home Office acknowledgment that over 50% of botox use was for aesthetic purposes (in fact a conservative estimate).

The judge recognised that 'there is an important public interest, consistent with government policy, in ensuring that the suffering of animals at any, but certainly the most severe level, does not occur except where necessary under a rational and enforceable regulatory scheme'[11]. Whether her decision satisfied that public interest is open to serious doubt.

As frustrating as the regulatory framework is, the good news is that alternatives to the mouse model are being developed and it is not unreasonable to assume that at some point in the not too distant future botox will no longer be tested on animals. Not capable of proof, but the likelihood is that it is undercover investigations, campaigning and use of the law which have provided the impetus, sadly previously lacking, to develop alternatives.

[9] Para 74
[10] Para 64
[11] Para 62

Seen to be done

A brief analysis of the legality of the Veterinary Council of Ireland and the Office of the Information Commissioner's decisions to allow the conduct of the VCI's disciplinary proceedings to be in private, and the implications of these decisions

Michelle Strauss, Solicitor (New Zealand qualified)

Introduction

There is no question that vets occupy a very trusted position in our society. But the reality is that the public do not blindly hand their animals over to complete strangers simply out of a sense of faith that they will do what is in the animal's best interest. The trust that is engendered is done so in large part because we have confidence in the institutions that surround the profession; the universities, the regulatory bodies, the legislators, the courts, the media. These institutions allow scrutiny of the profession to ensure that standards are met that ultimately foster a sense of trust and confidence in the abilities of those who work in it. Where there are failings by any of these bodies to allow transparency and ensure accountability of those in the profession, this undermines the integrity of the profession and erodes the trust of the public.

This article focuses on two institutions in the Republic of Ireland, the Veterinary Council of Ireland (VCI), and the Office of the Information Commissioner (OIC), as they relate to the functioning of the veterinary profession. The contention is that by refusing to allow scrutiny of the disciplinary functions of the VCI these two institutions undermine the integrity of the profession. In considering this issue, this article explores whether the refusals to allow the public to access disciplinary decisions is legal, and whether it may be a breach of the Irish Constitution and the European Convention on Human Rights Act 2003 ("ECHRA"). Finally, consideration will be given to the implications of these decisions to the veterinary profession and the public, in the United Kingdom.

Background

Much of this article is based on information that I have obtained from the VCI and decisions that I have appealed to the OIC. My involvement in this area arose out of work that I was doing as part of wider activist movement to oppose puppy farming in the Republic of Ireland. I started working on this issue in 2016 after viewing a BBC Panorama expose that revealed the conditions in puppy farms in the UK and Ireland[1]. This programme considered not only the conditions that the puppy farmers had subjected dogs to, but also how the local authorities who were responsible for oversight of these farms had failed to enforce the legislation that protected the welfare of dogs[2].

The failure to enforce legislation that would ensure better conditions for the dogs was not isolated to the one Irish puppy farm in the expose. Rather, various newspaper articles[3], dog breeding registers[4] and

[1] "Britain's Puppy Dealers Exposed" BBC Panorama, 16 May 2016

[2] For example, the Irish puppy farm run by Ray Cullivan in Cavan County had been inspected multiple times by the County vet and no action had been taken in respect of the portable wooden crates in which whelping bitches were kept that were illegal under 2.3.2 of the Dog Breeding Establishment Guidelines 2012

[3] Karlin Lillington, 5 August 2016 < https://www.irishtimes.com/news/crime-and-law/sad-realities-of-our-domestic-puppy-farming-industry-1.2745436>, accessed 22 July 2018; 3 October 2016 < http://www.thejournal.ie/dog-breeding-ireland-3007298-Oct2016/>, accessed 30 July 2018; Daire Courtney, 11 October 2016 < https://www.independent.ie/irish-news/puppy-farm-protests-continue-after-dogs-filmed-in-whelping-boxes-35122257.html>, accessed 30 July 2018

[4] Cork County Council Dog Breeding Establishment Register for 2016, for example see conditions attaching to the licence for

inspection reports of puppy farms[5] (when they could be obtained) detailed numerous instances where local authority vets identified welfare issues, but elected not to take any enforcement action to address the breaches.

'…various newspaper articles[1], dog breeding registers[1] and inspection reports of puppy farms[1] (when they could be obtained) detailed numerous instances where local authority vets identified welfare issues, but elected not to take any enforcement action…'

In or around December 2015 the ISPCA CEO, Andrew Kelly, wrote to the VCI about this issue. The CEO outlined the problems relating to the inspection of the farms and provided photos of dogs being kept in conditions that should not be allowed under the legislation[6]. The letter noted, "*The ISPCA have visited several licensed and registered dog breeding establishments around the country in the last 12 months and have been shocked that these establishments have passed inspections and been issued licenses"*. The ISPCA asked the VCI to, "*issue guidelines to all Local Authority and DAFM veterinary inspectors to apply the DBE Guidelines effectively and to take appropriate enforcement action if the owner of the establishment fails to comply*". Despite having statutory powers to investigate the conduct of these vets, the VCI requested the Minister for Environment to provide local authority vets with more resources[7] The VCI ended their involvement with this matter on the issuing of this letter. The VCI's actions largely ignored the substance of the request of the ISPCA which was to address the failure by the local authority vets to tackle welfare issues on puppy farms. There was no suggestion from the ISPCA that a lack of resources was to blame for the poor conditions, hence the request for more resources indicated a reluctance by the VCI to consider the core issue – that vets were sanctioning poor standards, potentially in breach of legislation and professional standards.

The repeated reports about the reluctance of the local authority vets to take enforcement action, and also the failure by the local authorities as employers of the vets, and the VCI as the regulatory body to investigate these issues suggested a more widespread failure to enforce standards within the veterinary profession. Therefore, to understand the issue better I sought copies of a sample of the VCI's disciplinary decisions. It transpired that VCI refuses to publish copies of these decisions and requires the public to make Freedom of Information requests for them. Five decisions were requested under the Freedom of Information Act 2014 ("FOIA") and all were refused by the VCI at both the initial and internal review stage[8]. The refusals were appealed to the OIC who upheld the VCI's decision[9]. The sections below consider why these refusals are evidence of a disciplinary process that is not only procedurally flawed, but is likely also in breach of the Constitution and the ECHRA.

The VCI disciplinary process

The primary role of the VCI is to regulate the profession[10] and it has authority to do this both through investigations undertaken of its own volition,[11] or by way of complaints referred to it[12]. The VCI

Michael Harding that required him to ensure clean water and shelter was provided to dogs.

[5] Redacted inspection reports obtained through Freedom of Information Act requests from Cavan County Council, Limerick County Council and Monaghan County Council for the years 2012 - 2016

[6] Undated letter from Andrew Kelly, CEO ISPCA to the VCI obtained by the author through a FOI request, this included photos of dogs being kept in wooden whelping boxes that were illegal under the Dog Breeding Establishment Act 2010 Guidelines

[7] Letter from Aideen Neylon, VCI Solicitor and Professional Standards Manager, dated 16 December 2015 to DAFM and the Department for Environment, Community and Local Government

[8] Letter from VCI Freedom of Information Officer Aideen Neylon to Michelle Strauss dated 4 August 2017; Letter from VCI Registrar to Michelle Strauss dated 4 September 2017

[9] *Ms Y and The Veterinary Council of Ireland*, 14 May 2018, Case Number 170454

[10] Section 13(1) Veterinary Practice Act 2005

[11] Section 75 and 125 Veterinary Practice Act2005

[12] Section 76(2) Veterinary Practice Act 2005

operates a two-stage disciplinary process: (1) the Preliminary Investigation Committee; and (2) the Fitness to Practise Committee.

Preliminary Investigation Committee (PIC)

The PIC comprises of a panel who consider all complaints made to the VCI. The PIC can decide that an inquiry should not proceed on the basis of any of the following[13]:

- The complaint does not satisfy certain requirements, for example it must be made in writing, must be signed by the complainant and must contain certain information and documentation;
- It is frivolous, vexatious or made in bad faith;
- It does not refer to any of the grounds for making a complaint as set out in the VPA;
- There is insufficient evidence to warrant an inquiry.

If the PIC considers there is sufficient evidence to warrant it, the complaint will then be referred to the Fitness to Practise Committee[14].

'Transparency in relation to this process is important because over the last 5 years only 16% of complaints made to the PIC have been passed to the FTP.'

Despite the broad details above there is very little information about how the PIC stage of the disciplinary proceedings works in practice. Transparency in relation to this process is important because over the last 5 years only 16% of complaints made to the PIC have been passed to the FTP.[15] Of the complaints dismissed by the PIC at this initial stage over 90% of these are dismissed because of "insufficient evidence". Whilst a low referral rate to the FTP is not in and of itself a concern, with respect to the VCI's PIC process the following has to be considered:

(a) It is not clear what standard of proof is applied;
(b) The PIC does not appear to allow complainants access to all of the evidence upon which its decisions are made[16];
(c) It is not clear how the PIC handles, or indeed allows, requests for discovery made by the complainant;
(d) Where there are factual disputes it does not appear as if the PIC either cross examines, or allows cross examination of witnesses. It is therefore uncertain how the PIC determines such disputes; and
(e) The PIC stage of the disciplinary process is always held in private and the decisions of the PIC are never published, even in redacted or summary form[17].

Deficiencies in the PIC process

It is impossible to consider the adequacy of the procedures or decision making of the PIC when the only publicly available information is that furnished in the VCI's annual reports that simply notes the number of complaints made and the type of animal it related to. However, one OIC decision provides insight into the procedures of this stage of the disciplinary process, *Ms X and the Veterinary Council of Ireland*[18]. Ms X had made a complaint to the VCI about the conduct of a vet in treating her pet. The complaint had been referred to the PIC who had obtained information from Ms X and the vet concerned. The PIC had also sought the opinion of an expert about the conduct of the veterinary professional complained of. The expert's report was not provided to Ms X and the PIC dismissed her complaint on the basis of insufficient evidence. Subsequently, Ms X made an application under the FOIA for the expert's report. This request was refused

[13] 18 September 2014, VCI Memorandum for the Applicant <http://www.vci.ie/Services-for-the-Public/Complaints-Procedures/Page-2>, accessed 29 July 2018
[14] Section 70 and 77 Veterinary Practice Act 2005, and letter from the VCI Registrar to Michelle Strauss dated 29 November 2016
[15] VCI Annual Reports 2013 – 2017, < http://www.vci.ie/Reports> , accessed 22 July 2018
[16] The author was provided by a member of the public with a decision by the PIC (PI-01-15, 16 March 2015) in which the PIC refused to provide the complainant a copy of the Premises Accreditation Scheme (PAS) for the premises at which the vet in question practised.
[17] Letter from Aideen Neylon to Michelle Strauss dated 4 August 2017
[18] Case 170029

at all stages by the VCI. An appeal was made by Ms X to the OIC, where the VCI's decision to refuse access to the report was upheld. The OIC refused the complainant access to the substance of the report and the name of the expert. The reason given was that to release the report would infringe s37 of the FOIA that protects against the release of personal information.

The OIC held that releasing the report would be a breach of this section by (a) revealing that the vet had been the subject of a complaint and (b) by finding that the expert's name, education and work history was personal information for the purposes of the FOIA and therefore not subject to release. The OIC rejected the argument that the information provided related to the conduct of these two individuals in their professional, and not their personal capacity and therefore was not subject to section 37 considerations. Additionally, the OIC rejected the argument that the public interest in the release of this information outweighed the entitlement to privacy.

The first point of note in respect of the *Ms X* decision is that it is evident that the complainant could not have had the opportunity to review the adequacy of the report provided by the expert, nor to cross examine the expert on his/her findings. The second related point is that the withholding of the expert's name and qualifications flies in the face of established procedure to ensure that a person making pronouncements on the professional conduct of another, is qualified and independent enough to do so.

The adequacy of the OIC's reasoning must also be considered. The OIC's interpretation of "personal information" verges on the absurd for the simple reason that most people acting in professional capacities advertise themselves, their expertise and qualifications to the public. But even if the OIC's argument in this respect is sound, its refusal to release the report on public interest grounds is highly questionable. The OIC reasoned that the report "*would not disclose anything about the VCI's actual decision making… [or] how it carried out its functions in this case*". The OIC said the focus of the report was only concerned with the registrant's actions. The difficulty with the OIC's argument is that it misses a fundamental point, which is that whilst the report will clearly only deal with the vet's actions, it is how the PIC used that information to justify its findings that will shed light on the adequacy or otherwise of its decision-making process. A consistent refusal to release this information does not allow the public to understand whether this process functions as it should.

The Fitness to Practise Committee and Council (FTP)

The Fitness to Practise Committee (FTP) comprises of the second limb of the disciplinary section of the VCI. The FTP conducts hearings, following which a report is compiled that contains the finding of the Committee. The report may also contain recommendations as to sanctions which is then referred to the Fitness to Practise Council. Where findings have been made by the Committee, it is for the Council to decide whether to impose a sanction and what those sanctions will be.[19]

The Veterinary Practice Act 2005 establishes the broad procedures of the disciplinary process.[20] It details who should preside over the hearing, who can give evidence at the hearing, what the hearing can determine and how evidence can be given. The VPA is silent as to whether the FTP hearings should be held in private and is silent about whether the decisions can or cannot be published.

The VCI has elected to impose the following evidential and procedural requirements in respect of FTP hearings:

(a) The standard of proof is that of the criminal standard.[21] [22]
(b) All hearings must be held in private unless an application is made and granted for the hearing to be held in public, and the

[19] Sections 78 and 79 Veterinary Practice Act 2005, and letter from the VCI Registrar to Michelle Strauss dated 29 November 2016
[20] Section 78
[21] This in is contrast to the RCVS who impose the civil standard of proof
[22] Email from Aideen Neylon, VCI Professional Standards Manager to Michelle Strauss dated 1 November 2016

Committee is satisfied that it is in order to conduct the Inquiry in public.[23]

(c) The VCI does not have any guidelines or rules to determine how such requests should be handled. Additionally, the VCI advises there is no right to appeal any decisions on this point.

(d) The VCI does not advise parties of the ability to make an application to have a public hearing.[24]

(e) The VCI does not publish any of the decisions of the FTP.[25] The only information provided to the public is that contained in the VCI's annual reports.

The position of the VCI as regard the FTP procedures is at odds with other professional bodies in Ireland such as the Solicitors Disciplinary Tribunal[26] and the Medical Council.[27] It is also at odds with the procedures of the Royal College of Veterinary Surgeons[28] in the UK.

'The position of the VCI as regard the FTP procedures is at odds with other professional bodies in Ireland such as the Solicitors Disciplinary Tribunal and the Medical Council.'

In the course of my work, this inconsistency gave rise to the consideration of two issues (1) what status does the VCI's disciplinary body have; and (2) what obligations does this confer on that body to make its hearings and decision-making public?

The VCI's disciplinary arm is a Court for the purposes of the Irish Constitution

The Articles of the Irish Constitution that relate to the administration of justice apply to Courts that exercise judicial power. Therefore, in considering whether a body is a Tribunal or a Court, for the purposes of determining whether the Constitution applies to the exercise of their functions, one must have regard to the nature and extent of the power exercised by that body.

The Irish Supreme Court's decision in *Re the Solicitors Act, 1954*[29] considered this very issue. In deciding that the Law Society's Disciplinary Committee was in fact exercising judicial power, the Court had regard to the nature and effect of the powers conferred on the Disciplinary Committee, specifically:

- The Committee had the authority to remove a solicitor from the roll;
- The Committee's decisions had wide implications for a solicitor because a solicitor cannot practice without being on the roll;
- That Committee can require a party pay a contribution to the applicant or council following the disciplinary process.

On this basis the Court held that the Law Society's Committee was exercising judicial power.

In this respect the powers that the VPA confer on the FTP are analogous:

- It is a legal requirement that a license to practice is obtained prior to engaging in any type of veterinary work in Ireland, this entails being placed on the VCI Register (section 54 VPA);
- The Council has the power to remove a registered person from the Register (section 80 VPA); and
- The Council has the power to require a party to make an order to pay a contribution to the applicant and/or to the Council following a disciplinary process (section 82 VPA).

[23] Letter from Aideen Neylon to Michelle Strauss dated 4 August 2017

[24] No such applications have ever been made to the VCI

[25] Letter from Aideen Neylon to Michelle Strauss dated 12 September 2017

[26] Rule 59(a) and (b) of the Solicitors Disciplinary Tribunal Rules 2017 as regards publication of decisions. The SDT hearings are open to the public, "*Where the Tribunal decides that a complaint discloses a 'prima facie' (i.e. apparent) case of misconduct by a solicitor, there will be an inquiry, with oral evidence, conducted by the Tribunal in public"* http://www.distrib.ie/, accessed 30 July 2018

[27] The Medical Council has a presumption in favour of hearings in public, although given the personal nature of the hearings, will consider applications for it to be held in private or part-private see *Fitness to Practise Inquiries* https://www.medicalcouncil.ie/Public-Information/Making-a-Complaint-/Fitness-to-Practise-Inquiries/, accessed 30 July 2018

[28] "The hearings are generally conducted in public" https://www.rcvs.org.uk/concerns/disciplinary-hearings/, accessed 30 July 2018, and decisions are published on the website noted above, as well as decisions on applications to hold hearings in private.

[29] [1960] IR 239

It therefore follows that it is very likely that the FTP exercises judicial power and is a Court for the purposes of the Irish Constitution. The FTP would therefore be bound by Article 34.1 that requires the administration of justice to be carried out in public. The VCI's presumption of a private hearing would as such be unconstitutional. In fact, in order to be legal, the VCIs presumption would need to be reversed whereby public hearings were standard unless the very limited circumstances prescribed in the Courts and Civil Law (Miscellaneous Provisions) Act 2013 were met. The threshold that has to be met is high and every case has to be determined on its facts.[30] It is notable that proceedings from which the public are generally excluded are those of a distinctly personal nature and include family law and sexual assault matters, not those relating to alleged professional misconduct.

In the alternative, the VCI's disciplinary arm is a Tribunal for the purposes of the ECHRA

Throughout the FOI process the VCI maintained the questionable argument that the VPA prevented it from having public hearings and publishing its disciplinary decisions. The VCI continued to effectively say that to provide an open disciplinary process would therefore be *ultra vires*.

The response that was advanced to both the VCI and OIC was that even if one proceeded on the basis that the VCI were correct about the interpretation of the

[30] *MD v The Clinical Director of St Brendan's Hospital [2007]* IESC 37 regarding the detention of a person on mental health grounds. The hearing and the decision strayed into matters of a deeply personal nature and yet the Court held, as set out at the start of the judgement, *"On the hearing of this appeal the Court was requested on both sides of the case to take such steps as were possible to prevent the publication of the applicant's name or at of any detail which might identify him. This was requested on the basis that he was, undisputedly, a person under a disability. The Court did not consider that it had, in these proceedings, any power to make an order in that regard. However, the Court agreed to, and did, request any representatives of the media who might be present not to publish his name and said that it would not itself do so. The Court now repeats this request to any person who may wish to report this case either for the ordinary media or for the purposes of law reporting."*

VPA[31], there would therefore be a conflict between the VPA and the ECHRA. The basis on which the ECHRA applied to the matter in issue was as follows:

- The ECHRA transposed a European Union Law into Irish law. EU law has primacy as against domestic legislation. Therefore, where there is an apparent conflict between the ECHRA and another statute, the law should be interpreted insofar as is possible to ensure compliance with EU Law.
- The disciplinary body of the VCI is a "Tribunal" for the purposes of Article 6[32] of the ECHRA.
- Article 6 provides for the right to a fair hearing.
- The right to a fair hearing requires that justice be administered in public save in very prescribed circumstances[33]. The decision of *Diennet v France*[34] was highlighted as being of particular relevance because it considered this issue in the context of the proceedings of a professional regulatory body:

  "The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of Article 6... The public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6, paragraph 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society within the meaning of the Convention."

On the basis of the above the contention is that the VCI's disciplinary hearings should always have been open to public, save in very limited circumstances. The only measure that can now be taken to address this wrong is to make public the FTPs disciplinary decisions.

The response to the argument that the VCI was either a Court or Tribunal

(i) Court

A FOI request was made by the author to the VCI for 5 FTP decisions. The request was refused on the basis of S29(1), s30(1)(a), s35(1)(a) and s37 of the Freedom of Information Act 2014. The appeal of this initial decision to another FOI officer with the VCI was premised on the argument that the VCI had no basis on which to consider whether or not to provide information under the FOIA as the FTP was a Court and was therefore subject to s34(1) of the Constitution[35]. The decisions should be available as of right unless at the time of the hearing an application had been made to withhold the decision from the public.

In a 15 page letter, the VCI refused access to all FTP decisions but did not once engage with the constitutional issue.[36] The decision was therefore appealed to the OIC.[37] The primary argument to the OIC was that the FTP was a Court and in accordance with section 42(a)(i) of the FOIA, the OIC did not have jurisdiction to consider whether or not to release the documents. It was requested that the OIC refer the matter to the High Court under s24(6) of the FOIA for determination of the issue. Section 24(6) allows the OIC to refer questions of law arising under review to the High Court for determination.

In its decision[38] the OIC upheld the VCI's refusal to allow access to the FTP decisions. The OIC's brief consideration of the constitutional points betrayed a fundamental misunderstanding of the matters in issue. When refusing to refer the matter to the High Court, the decision maker set out:

[31] The VCI's assertion that the VPA prevented it from publishing disciplinary decisions was disputed by the applicant
[32] *Sramek v Austria* no 8790/79, ECHR, 22 October 1984, para 36;, *Rolf Gustafson v Sweden* no 23196/94, ECHR, 1 July 1997, para 38
[33] Of interest in respect to how the RCVS dealt with a request for a private hearing is the recent RCVS decisions in respect of the Application by Simon Peter Woods to hold a hearing in private, 31 May 2018
[34] *Diennet v France* no 18160/91, ECHR, 26 September 1995
[35] Letter from Michelle Strauss to Valerie Beatty, Registrar of the VCI, dated 13 August 2017
[36] Letter from Valerie Beatty, Registrar of the VCI, to Michelle Strauss dated 4 September 2017
[37] Letter from Michelle Strauss to the OIC dated 18 September 2017
[38] *Ms Y and The Veterinary Council of Ireland*, 14 May 2018, Case Number 170454

> *"With regard to section 42 of the FOI Act, the wording of that section is, in my view, perfectly clear. It states that the Act shall not apply to a record held by the courts. I believe that the use of the word the provides clarity on the extent of the application of this section. It is not intended to extend the application of the section to all bodies with a quasi judicial function. The Courts are defined in Article 34 of the Constitution as comprising Courts of First Instance, a Court of Appeal and a Court of Final Appeal. I do not think that a committee of the VCI could be classified as coming within any of those categories. Consequently I find that section 42 of the FOI Act does not apply".*

Significantly the Supreme Court decision of *Re Solicitors Act* was not referred to, considered, or distinguished, in the OIC's decision.

(ii) Tribunal

The VCI briefly considered the points advanced in relation to the FTPs status as a Tribunal for the purposes of the ECHRA and noted the following,[39]

> *"In my view the Requester has unfortunately elided and overlapped the question of public access to the proceedings themselves with the question of access by a requester to records for the purposes of the FOI Act. There is no functional or legal relationship between the two considerations and only the latter arises in relation to this Request… I note the three considerations identified by the Requester all relate to the Requester's interpretation of the European Convention of Human Rights and a number of alleged breaches in relation thereto. All of these breaches identify the fact that the FTP Committee does not meet in public as the basis for a consequential finding that the Reports must be released pursuant to the FOI process. That is not the basis upon which the FOI process in general or section 30 in particular operates."*

The only consideration that the OIC gave to the Tribunal argument was to note the following:

> *"I do not propose to address the applicant's submissions regarding the holding of the disciplinary proceedings in private, save insofar as it relates to the application of section 42 of the FOI Act. It is important to note that this Office has no role or jurisdiction to address how public bodies perform their functions generally. It is my function to address whether or not they have justified any claims for exemption under the FOI Act and so I will not comment on the practices of the VCI with regard to their disciplinary functions"*.

With respect to the VCI's argument it should be noted that it is the VCI who created the system whereby requests for FTP decisions would only be considered if made under the FOIA, and only because the VCI has statutory obligation to respond to such requests. There is no doubt that this is plainly the incorrect procedure and that is why in the covering letter, attaching the FOI request, the VCI was asked to first consider release of the information on the basis the decisions sought were Court/Tribunal documents[40]. In response the VCI said, "*The Council does not… propose to engage with those legal points with the exception of entirely reserving its position in relation to each and all points raised therein"*. Therefore, the only way to force the VCI to engage with the issue was to frame it in the context of an FOIA request, which was done.

That said, the VCIs point is refuted on the basis that there still remains a strong argument under the FOIA for why the decisions should be released. The point that was being made to the VCI was that when addressing whether the VCI should release information under the FOIA, the consideration does not stop with the FOIA and must extend further to the ECHRA. If public bodies could ignore the requirements of the ECHRA when making FOI decisions, it would entirely undermine the primacy of EU Law. Therefore, if at the time of the hearing the FTP should have held the

[39] Letter from VCI Registrar to Michelle Strauss dated 4 September 2017, page 9, second paragraph

[40] Email from Michelle Strauss to Valerie Beatty, Registrar of the VCI, 13 August 2017

hearing in public, then it would follow that the decision that was made after that hearing should also be public.

Quasi-judicial bodies such as the VCI and OIC do not appear to be cognizant of, or maybe do not wish to turn their minds to, the implications of the requirement to interpret domestic law to give effect to EU law. Indeed this problem is not isolated to the OIC[41].

Conclusion – the implications for the UK

This article started by considering what allows professions to maintain the trust and confidence of the public it is there to serve. Much of this trust is fostered by two interrelated functions, that of openness and transparency of the profession itself, together with rigorous oversight provided by the institutions that surround and regulate the profession. The decisions of the VCI and OIC to keep the disciplinary functions of the PIC and FTP from scrutiny may cause irreparable damage to perception that the public have of the veterinary profession in Ireland. Indeed, questions have already been asked in the mainstream media about the functioning of the VCI[42].

The reasons advanced by the VCI for withholding information that relate to the preservation of professional reputation and the protection of the integrity of VCI's disciplinary process do not hold water when one simply considers that many other regulatory bodies manage to function perfectly well with a transparent disciplinary system. The VCIs strong objection to allow any scrutiny of its disciplinary process inevitably leads to questions about why such a position has been taken. That the VCI insists that its statutory framework does not allow an open disciplinary process, but then fails to engage with the legal arguments relating to the Constitution and the ECHRA, causes one to question the ability of the VCI to be self-critical. The capacity of any regulatory body to be able to step away from the culture of the profession, and indeed the body's own conventions, is essential in maintaining an effective regulatory system. The failures by the VCI in this regard lend credence to the criticisms raised about the ability of professions to properly self-regulate[43].

'In the longer term the VCI's position may be self-defeating as it may render the body obsolete as society may react to a perceived lack of effective regulation by implementing a far more rigorous and constraining regulatory regime.'

In the short term the VCIs failings in this respect, may, as noted, have a negative effect on the public's perception of the profession. In the longer term the VCI's position may be self-defeating as it may render the body obsolete as society may react to a perceived lack of effective regulation by implementing a far more rigorous and constraining regulatory regime[44]. This may in turn have unintended, but very serious consequences for the profession and public. As an example of this Rollin notes how in the United States, there was such concern around the irresponsible use and dispensing of pharmaceuticals by vets that the profession almost lost their ability to prescribe drugs in an "extralabel" fashion (extralabel meaning prescribing a drug in a manner that is not consistent with what is set out on the label). As so few drugs are approved for animal use, this move would likely have had significant negative consequences for both the profession, the public, animals[45] and animal-based industry.

Furthermore, the VCIs actions have implications for the United Kingdom, the EU and any other nations with which Ireland have reciprocal agreements to allow vets

[41] *Cooke and Strauss v Bank of Ireland*, Workplace Relations Commission DEC-S2016-016, 3 March 2016, paragraph 4.6

[42] John Mooney, 'Vet to be struck off for role in exporting cattle fraud', *The Sunday Times*, 15 July 2018, *"The VCI has been criticised for failing to take prompt action against vets who engage in malpractice or activities that contravene their professional standards or code of ethics. It declined to comment"*

[43] Blass, E. (2014). *The Failure of Self-Regulation: The example of the UK Veterinary Profession*. Journal of Business Systems, Governance & Ethics, Vol 5 No 4.

[44] Rollin, B.E. (2006) *An Introduction to Veterinary Medical Ethics: Theory and Cases*. Wiley-Blackwell

[45] ibid

to practise in different jurisdictions without undergoing further training. Irish vets who have been registered for more than 3 months after their date of graduation can apply to the RCVS to practise in the UK[46]. As part of this application process vets must provide a letter from the VCI that includes, amongst other things, confirmation that the applicant is of good professional standing, that there is no charge of unprofessional conduct against him/her and where relevant details of any disciplinary proceedings or findings against the applicant. Whilst there is no suggestion that the VCI is or will be dishonest in its drafting of these letters of standing, the concern extends to whether the VCIs disciplinary proceedings are sufficiently robust to allow the RCVS to have confidence in the assertions made by the VCI about a vet's professional abilities and complaints history. On the basis of the information currently available, my contention is that it is not.

[46] RCVS Applications for Registration https://www.rcvs.org.uk/registration/applications-veterinary-surgeons/ireland/, accessed 29 July 2018

Reintroducing wildlife into the United Kingdom: Practical and welfare perspectives

Rob Espin, The Lifescape Project Limited[1]

Abstract

This article analyses the economic, social and ecological case for the reintroduction of certain species of wildlife back into the United Kingdom ("UK") before setting out the complex legal regime to be satisfied for fauna to be introduced into the UK. Attention will then shift to the animal welfare considerations faced by reintroduction projects stemming from both domestic and international law and whether the welfare protection provided to wild animals is sufficient.

Background and the case for reintroduction of wildlife

The Great British Isles are undoubtedly blessed and personified by a rich heritage of wildlife, with the Department for Environment, Food and Rural Affairs' ("DEFRA") 25 Year Plan recognising that there are significant benefits flowing from natural heritage following increased implementation of the contemporary "*natural capital*" approach[2]. Pursuant to such an approach, under which natural environments are recognised by economists as critical to human wellbeing by virtue of their production of essential resources, proper protection and increases in levels of wildlife can lead to a boost in long term human prosperity[3].

Despite such a rich heritage, like so many other regions around the world, wild species of fauna habitual to the UK are increasingly threatened by factors including climate change and the impacts of human development. Such a danger is recognised by DEFRA in their declaration that "[*We*] *are in danger of presiding over massive human-induced extinctions when we should instead be recognising the intrinsic value of the wildlife and plants that are our fellow inhabitants of this planet*"[4]. This risk has already materialised for too many species of wildlife which have historically populated the UK, with the Eurasian Lynx (*Lynx lynx)*, brown bears (*Ursus arctos)* and the White Stork (*Ciconoia ciconia)* being recognised as species once native which have already been driven to local extinction due to human activities[5].

Fortunately, the damage caused by the loss of wildlife species in the UK is not irreversible where the species in question populate other ecosystems around the globe, primarily thanks to the increasingly prevalent "Rewilding" movement, which is viewed by various groups as involving the restoration of lost species back

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[2] "*A Green Future: Our 25 Year Plan to Improve the Environment*" DEFRA, UK Government (2018), p.16

[3] Ibid, page 19

[4] Ibid, p.17

[5] J Martin "*The UK's Extinct animals: can we bring them back?*" (2018) the Woodland Trust (https://www.woodlandtrust.org.uk/blog/2018/02/the-uks-extinct-animals-can-we-bring-them-back/)

to areas they once inhabited. The reintroduction of native species can have a multitude of benefits for an array of stakeholders, and these benefits have recently been formally recognised by governmental organisations including DEFRA[6]. Reintroduced species brought back into ecosystems are able to fulfil their natural roles, which helps in turn to restore the surrounding habitat to something closer to its true natural state. Moreover, local communities can look forward to tangible social and economic benefits, as reintroductions which have already taken place in the UK have readily demonstrated the benefits to local populations. Examples include the educational programmes delivered by the Cairngorms Wildcat Project[7] or the economic boost provided by wildlife tourism to Cornwall following the reintroduction of the Red-billed Chough (*Pyrrhocorax pyrrhocorax)*[8].

Set against such a background of opportunity to promote and replenish the biodiversity which is so critically important to the conservation of UK's natural habitats, this article considers the formidable practical and legal challenges faced by proposed reintroductions of wildlife.

The Practical and Administrative Legal Regime Faced by Reintroductions

England and Wales has a legal framework regulating the reintroduction of wild animals consisting of various pieces of primary, delegated and EU legislation which interact to present a multifaceted "checklist" of requirements which any project seeking to reintroduce a wild animal must satisfy before any release can properly begin. The regime is founded upon a series of licenses, approvals and permits that must be acquired

[6] Above (No.2), p.61

[7] Hetherington D., and Campbell, R "*The Cairngorms Wildcat Project Final Report"* (2012) Cairngorms National Park Authority (CNPA), Scottish Natural Heritage (SNH), The Royal Zoological Society of Scotland (RZSS), the Scottish Gamekeepers Association (SGA) and Forestry Commission Scotland (FCS), [2.3] p.13 and Appendix 3

[8] I Johnstone, C Mucklow, L Lock, T Cross and I Carter *"The return of the Red-billed chough to Cornwall: The first ten years and prospects for the future"* (2011) for the RSPB and British Birds

from the relevant authorities and government bodies prior to any release. The aim of some of this raft of legislation is to prevent poorly planned reintroductions having determinantal effects on the participating species and the habitat surrounding the release site. In relation to some legislation that impacts on such projects, the rules were designed and enacted into law long before the idea of species reintroduction became prevalent in the wildlife conservation and rewilding sector and were designed for separate (perfectly legitimate) purposes entirely. Overall, however, the regime does serve a useful purpose in practice, as it forces those involved in species-reintroduction projects to carefully consider every aspect of the planned reintroduction, including what impacts the project might have on the surrounding habitat, wildlife, human populations and even the animals to be released themselves.

'...the checklist of permissions required presents a considerable administrative and legal challenge to any reintroduction project, as multiple, sometimes long, applications must be completed with supporting expert evidence...'

Notwithstanding the above mentioned good intentions of the legislation, the checklist of permissions required presents a considerable administrative and legal challenge to any reintroduction project, as multiple, sometimes long, applications must be completed with supporting expert evidence to different parts of the UK government or its delegated authorities. Whilst the thrust of this article is the welfare considerations surrounding wildlife, the following paragraphs aim provide a brief insight into some of the legal hurdles involved.

The prohibition under the Wildlife and Countryside Act 1981 (the "WCA")

Section 14(1) of the WCA creates a blanket criminal offence of "Introduction of a new species" which is triggered when "any person releases or allows to escape into the wild any animal which – (a) is a kind which is not ordinarily resident in and is not a regular visitor to Great Britain in a wild state or (b) is included in Part 1 of Schedule 9". This section is supplemented by guidance produced by DEFRA[9] which when analysed and considered in depth acts to criminalise the act of releasing a wild animal covered by limb (a) or (b) of section 14(1) in England and Wales as a part of any reintroduction exercise[10]. Part 1 of Schedule 9 expands the scope of the section, as this includes several species which, whilst already "ordinarily resident" in some parts the UK, a conservation project might seek to introduce other localities, such as the Capercaillie (Tetrao urogallus).

For the prohibition under Section 14 WCA to be avoided, a license is required pursuant to Section 16(4)(c). Under this section an "appropriate authority" is permitted to grant a licence (which can be made subject to a wide range of conditions)[11] to a project seeking to reintroduce a prohibited species. Current practice means that Natural England ("NE") is the organisation responsible for issuing licenses in such a scenario[12]. Whilst the legislation omits to stipulate criteria an application would need to satisfy, it is recognised by NE that an application would be considered against the appropriate guidelines issued by the International Union for the Conservation of Nature ("IUCN")[13]. In the future, pursuant to the commitment on page 61 of DEFRA's 25 Year Plan,

[9] "*Guidance on Section 14 of the Wildlife and Countryside Act, 1981"* (2010) Department for Environment, Food and Rural Affairs

[10] Consider for example paragraphs 8, 9, and 16 which together suggest that even a release into a large wild "enclosure" in the countryside would be caught by the section

[11] Section 16(5) WCA

[12] There is currently a "Part 8 Agreement" under Section 78 of the Natural Environment and Rural Communities Act 2006 delegating power from the Secretary of State to NE. The Secretary of State may still issue a licence under Section 78(2)(b) however, widening the spectrum of bodies that could be applied to

[13] IUCN/SSC Guidelines for Reintroductions and Other Conservation Translocations (2013) (v.1) Gland, Switzerland: IUCN Species Survival Commission, viii + 57 pp

applications will be measured against more specific guidelines produced by DEFRA and/or NE.

These sections of the WCA represent the only legislation in England & Wales that specifically addresses the release of a wild animal in a reintroduction project. The sections therefore make up the core statutory obligations to be considered when approaching a potential species reintroduction project. However, as can be seen below, a raft of other legislation, not specifically designed for the governance of reintroduction projects, may also apply.

Potential quarantine requirements pursuant to the Rabies (Importation of Dogs, Cats and Other Mammals) Order 1974 ("RIO")

Reintroduction of certain wildlife could engage the legal regime for ensuring that England and Wales remains a "rabies free" jurisdiction. RIO provides for a general prohibition of "*the landing in Great Britain of*" an animal from outside Great Britain apart from when in accordance to the terms of a licence (a "Landing Licence")[14]. In accordance with a Landing Licence granted by APHA, the specimens to be reintroduced would prima facie be subject to a quarantine period of four months, where they would be kept in isolation at the expense of the project seeking to translocate the animals[15]. This author notes that, whilst the grounds for the imposition of the such quarantine period are understandable, this could present significant concerns to the physical and behavioural wellbeing of the translocated animals whilst also disrupting the successful and timely execution of a project.

Notwithstanding such stringent conditions, there are several grounds on which the need for a quarantine period can be avoided. Firstly, where an animal is introduced from another EU state pursuant to the Balai Directive (defined and discussed further below) the need for a quarantine period can be completely waived[16]. Furthermore, under the RMO1A Guidance Note, APHA may waive the requirement for animals from certain biological orders to be quarantined. An example of this could be a potential Landing Licence application for reintroduction of the Eurasian Beaver (*Castor fiber*) could be waived under the ROM1A Guidance Note[17].

If DEFRA, APHA and NE together sought to adapt the existing legal regime to make the logistics of species reintroduction projects less time consuming and costly for those seeking to implement projects, this is an area where a simple policy change could greatly reduce the onerousness of the process. APHA could produce updated guidance that they will waive quarantine periods where a licence has already been issued under the WCA and where certain applicant specific certain conditions have been satisfied.

The Balai Directive[18] regime for cross-border movement of animals within the EU

Rewilding projects in the UK also face the obligation of complying with international legal regimes of which England and Wales is a member. The Balai Directive is a piece of delegated EU legislation which establishes conditions for the import and export of various species of animals within the EU which are not caught by other legislation[19].

The Balai Directive would therefore apply in a scenario where likeminded conservation projects and authorities in different EU member states collaborated to found a population of a species in the UK through the translocation of some members of a population in the relevant EU member state. A good example of this could be a project to re-establish a population of European Elk (*Alces alces,* known a Moose in North America) from another EU state where populations are reasonably abundant[20].

For such an intra-European rewilding to take effect in this way, Regulation 5(1) requires the relevant projects to acquire a "*health certificate*" for the specimens being translocated, such health certificate ordinarily

[14] Sections 4(1) and (3) of RIO, the relevant authority in this case would be the Animal and Plant Health Agency ("APHA")
[15] Section 5(1) of RIO
[16] Paragraph 2 of the Notes for Guidance for the Application for a Licence to Import Live Animals other than Pet Dogs, Cats and Ferrets ("RMO1A Guidance Note")
[17] Category 2, Appendix 1 of the RMO1A
[18] Council Directive 92/65/EEC of 13 July 1992 (the "Balai Directive")
[19] The Balai Directive is implemented locally pursuant to the Trade in Animals and Other Related Products Regulations 2011
[20] Such as Sweden, Poland, Finland, Latvia or Estonia

being issued by a qualified veterinary physician in the state of origin of the species.

The Balai Directive contains further requirements which would require groups to coordinate the international cooperation of vets as animals can only be moved into premises which are approved by a vet in the state of receipt if the location from which they are sourced is approved by a vet in the state of origin[21]. Considering this, it is clear that even movement of wildlife for purposes of rewilding between EU member states, where legal regimes are harmonised to a greater extent than would be the case between third party nation states, requires a high level of planning and organisation.

'...it is clear that even movement of wildlife for purposes of rewilding between EU member states, where legal regimes are harmonised... requires a high level of planning and organisation.'

This section has attempted to provide a snapshot of the administrative challenges which must be surmounted by rewilding groups to comply with more procedural legal requirements imposed by the applicable national and international legislation[22]. This procedural regime is a "living tapestry" and therefore the hurdles faced by conservationists can and do change and may also be completely upended by developments in international law and politics[23].

Reintroductions and Welfare: Transportation of Wildlife

Welfare considerations are of course of the upmost importance to those involved in rewilding projects, as the specimens being relocated form the centrepiece of the conservation efforts, and the success of the project depends upon the animals being treated with the respect and care required to ensure their physical and behavioural health is not detrimentally affected. It can safely be assumed that the vast majority of those involved in rewilding efforts have animal welfare as their utmost priority in all operations, not just in context of the relevant project objectives being achieved, but also to ensure that both the intrinsic and inherent value of animals is properly respected for the duration of their lives.

Returning to the scenario set out above when a "conservation translocation"[24] of wildlife is planned between two EU member states, one significant concern for all involved is the welfare of the specimens translocated during their journey. This is regulated at an EU level, with direct effect in the UK through Council Regulation (EC) No 1/2005 of 22 December 2004 (the "Transportation Regulations"). The regime, nuances and legal issues presented by the Transportation Regulations could be the subject of an entire separate article, however for this article the focus concerns the following points: (i) moving animals for purposes of reintroduction and the interaction with "economic activities"; (ii) the conditions required for the transportation of species being translocated; and (iii) general welfare conditions for any dealings with wildlife specimens being reintroduced.

Moving animals for purposes of reintroduction and the interaction with "economic activities"

The legal protections provided by the Transportation Regulations only apply where animals are being transported "in connection with an economic activity" pursuant to Regulation 1(5). Some guidance is provided as to how and when the necessary connection will be established by paragraph 13 of the preamble which

[21] Article 13 of the Balai Directive

[22] Readers of this article who remain interested in further requirements should see the licensing framework set out under the Dangerous Wild Animals Act 1976 and also the applicable articles of the Convention on International Trade in Endangered Species of Wild Fauna and Flora

[23] A contemporary example being the United Kingdom's impending departure from the European Union

[24] A "Conservation Translocation" is an umbrella term defined by the IUCN as meaning "*is the deliberate movement of organisms from one site for release in another. It must be intended to yield a measurable conservation benefit at the levels of a population, species or ecosystem, and not only provide benefit to translocated individuals*." (Above (No.13) p.viii) such a term is broken down into: *"(i) reinforcement and reintroduction within a species indigenous range, and (ii) conservation introductions, comprising assisted colonisation and ecological replacement, outside indigenous range*". Readers with further interest in rewilding more generally are encouraged to read the IUCN guidelines.

provides a wide interpretation of such connection stating that it will be met for "*transport which directly or indirectly involves or aims at a financial gain*". Transporting animals for the purposes of a conservation translocation does not per se constitute an economic activity, as those involved in the project do not have as their intention of achieving any financial gain, unless unusual circumstances cause this to be the case[25].

Practically, however, many projects will engage Article 1(1) of the Transportation Regulations as those involved will seek to engage specialist haulers to translocate the wildlife to be released to their new destination. The motivation behind involvement of hauliers is to benefit from their professional experience, as the right operator will undoubtedly have the expertise, personnel and equipment required to transport the animals in the way least disruptive to the specimens involved, as well as providing logistical assistance with all steps of the translocation. This considered, conservation projects that engage hauliers will pay for their services in almost all cases. The financial remuneration by the chosen haulier therefore provides the connection to the requisite "economic activity", meaning that the protections of the Transportation Regulations become applicable to the activities of the haulier.

Welfare conditions during transport

The overall objective of the Transportation Regulations is demonstrated well by the general rule contained in Article 3 that "*No person shall transport animals or cause animals to be transported in a way likely to cause injury or undue suffering to them*". Using such a rule as a theme the Transportation Regulations then provide an array of requirements that must be satisfied during the transportation of animals. A non-exhaustive list of these requirements includes that the transporter confirms that the specimens in question are fit for travel[26], the means, method and execution of transport meet minimum prescribed standards[27] and that the animals being transported are properly watered and fed during the duration of the transportation[28].

'Whilst providing some security as to the welfare of the animals being relocated, it is questionable whether the provisions of the Transportation Regulations are in reality providing satisfactory protection against non-compliance by hauliers.'

The Transportation Regulations go on to provide further stipulations that a haulier would be legally obliged to meet concerning documentation detailing the animals being transported[29], the qualifications of those effecting the transportation[30] and requirements for longer journey transportation[31]. For journeys with a duration of more than 8 hours, the haulier in question is obliged to maintain a detailed and comprehensive "journey log"[32] which is broken down into sections including a detailed table for which the haulier is required to complete in advance to demonstrate the transportation of the animals has been appropriately planned. Whilst more administrative in nature, these requirements are no less important, as failure to properly comply may trigger the infringement and penalty provisions[33] of the Transportation Regulations.

Whilst providing some security as to the welfare of the animals being relocated, it is questionable whether the provisions of the Transportation Regulations are in reality providing satisfactory protection against non-compliance by hauliers. In the UK, noncompliance with

[25] It is beyond the scope of this article to consider in detail the different circumstances in which transportation for the purposes of a species translocation by the rewilding organisation itself might be deemed to trigger the Transport Regulations.
[26] Article 3(b) of the Transportation Regulations, elaborated in more detail in Chapter I of Annex 1
[27] Article 3(c) Transportation Regulations, Chapters II-IV of Annex 1 then provide further technical detail, with additional requirements applicable regarding specific modes of transport (see for example Chapter IV on further requirements relevant to transportation of animals by sea)
[28] Article 2.7 of Chapter III of Annex 1 to the Transportation Regulations
[29] Article 4(1) Transportation Regulations
[30] Article 6 Transportation Regulations
[31] Articles 11 and 15 Transportation Regulations
[32] The details of which are set out in Annex II of the Transportation Regulations
[33] Articles 25 and 26 Transportation Regulations

the implementing regulations of Transportation Regulations is determined to be a summary offence under the Section 73 of the Animal Health Act 1981 (the "AHA"), for which the maximum punishment is 6 months imprisonment[34].

Despite this reasonably strong deterrent, concerns have been raised about the enforcement of the Transportation Regulations at a European level, albeit regarding livestock transportation[35]. Whilst the more acute scale of relocating animals for the purposes of conservation translocation presents less of a threat to welfare than commercial cattle movements, risks still exist and will need to be eliminated or at least significantly mitigated through careful selection and vetting of a transportation provider along with a keen appraisal of and adjustment to each individual specie's specific needs whilst being transported.

There are also arguments that other more general animal welfare protections would protect specimens whilst in transit, for example the offences contained within Section 4 of the Animal Welfare Act 2006 ("AWA") of intentionally or negligently causing suffering to a wild animal or an animal in captivity. It is noted however that such a provision does not apply save to suffering occurring in England and Wales.

Reintroductions and welfare: Protections of released species

The work of rewilding organisations does not cease once animals have been successfully chosen, transported and relocated into their new habitats as many trial and project periods will continue over a period of several years to gather as much evidence as possible regarding the adaption of the wildlife to their new surroundings, the reaction of the surrounding habitat to the translocated species and the benefits received by the surrounding ecosystem and communities. Considering the long-term duration of any project (and lifespan of the animals in question) the sustained protection of the welfare of the translocated specimen is of fundamental importance to many of the stakeholders involved. For animals released into the UK, a mosaic of domestic and European legislation attempts to provide adequate protection for wild animals.

Protection under the Wildlife and Countryside Act 1981

Principal among the legislation described above is the WCA, Section 11, which creates a criminal offence where a person sets in position forms of traps calculated to cause grievous bodily harm to any animal[36] or the use of bows, crossbows or decoys to kill wild animals[37]. Whilst such protection is welcome, the WCA provides significant additional layers of protection for animals which are specifically designated within Schedules 5 and 6 of that Act. Examples include making it an offence to set in place poisonous or stupefying substances for the purposes of killing or stunning or the use of automatic weapons, smoke, artificial light or illumination targeting devices[38]. The result is that where the released species are listed in the schedules of the WCA, the scope of protection they are afforded is considerably widened.

The other, perhaps even more important, protection afforded to wildlife listed in the schedules to WCA is that comprehensive protection is also provided to the habitat in which the animal in question lives. Section 9 makes it an offence to intentionally or recklessly damage or destroy structures or places used by wildlife specified in Schedule 5 for shelter or protection, or to disturb or obstruct any such animal occupying a place of shelter or protection[39]. This is exceptionally relevant for reintroduced animals, as the local ecosystem they are translocated into will often have been specifically chosen following a painstakingly detailed and scientific site identification process and any changes to such a habitat could cause unpredictable levels distress and disruption to the specimens[40]. Several species which

[34] Section 75(2) AHA

[35] *The widespread failure to enforce EU law on animal transport: An analysis of reports by the Food and Veterinary Office of the European Commission* (2011) Compassion in World Farming the Food and Veterinary Office of the European Commission

[36] Namely, self-locking snares section 11(1)(a) WCA

[37] Sections 11(1)(b)-(d) WCA

[38] Section 5 of the Wildlife and Countryside Act 1981

[39] Section 9(4)(a)-(c) WCA

[40] See for example the publication "*Reintroduction of the Eurasian Lynx to the United Kingdom: Trial Site Selection*" (2016) AECOM (on commission for the Lynx Trust UK) which sets out the pragmatic and ecological considerations that feed

have already been subject or may in future be subject to species translocation activities, such as the Eurasian Red Squirrel (*Sciurus vulgaris*)[41] and the Eurasian Wildcat (*Felis silvestris silvestris*), have already been listed in Schedule 5 to WCA, and it is vital that conservation organisations work together with the Secretary of State to ensure that all further species forming the subject to rewilding activities are designated in the Schedules to WCA in order to properly protect their welfare.

Protection under the Wild Mammals (Protection) Act 1996 ("WMA")

More general protection is made available to wild mammals pursuant to Section 1 WMA, as this section criminalises activity in which a person attacks (including by way of beating, burning or stabbing) a wild animal with intent to inflict unnecessary suffering. Whilst the penalty upon conviction for contravention of Section 1 can amount to a prison sentence of up to 6 months[42], there are substantial limitations to the protection afforded by Section 1. The first is the nature of the species covered, as the act expressly only covers mammals, meaning that birds, reptiles and other classes of animals would not be protected. By way of example, this would mean that a reintroduced population of Red-billed Chough[43] would not be protected under this legislation.

In addition to the inherent limitations of the species focused legislation, an exception is also provided by Section 2(d) of the WMA. This exempts liability under Section 1 where the attack is executed by means of any "*snare, trap, dog, or bird lawfully used for the purpose of killing or taking any wild mammal*". Such a derogation presents a risk to transolcated wildlife that can be legally hunted through specific methods. Taking the use of traps as a case in point, an example could be how attempts to reintroduce the water vole (*Arvicola amphibious*) into certain UK waterways could be thwarted through the use of spring traps (some of which are permitted under the Spring Traps Approval (England) Order 2012) targeted at "rodents"[44].

Protections under the Conservation of Habitats and Species Regulations 2010 ("CHSR")

EU legislation is also a potential source of protection for reintroduced animals. Regulation 41 of the CHSR makes it an offence to deliberately disturb, injure or kill a "European Protected Species"[45]. Whilst the breadth of the conduct covered by this regulation is welcomed, attention must be paid to the definition of European Protected Species, which is limited to those species set out in Schedule 2 to CHSR and Annex IV(a) of the Habitats Directive" *whose natural range includes any area in Great Britain*" [46]. Notable inclusions in these lists for the purposes of rewilding in the UK include the Eurasian Wildcat and the Hazel Dormouse (*Muscardinus avellanarius*)[47].

Questions may arise as to what amounts to reintroduced animals' "natural range", as it could be argued that since the specimens have been translocated in a reintroduction project, their new habitats in the UK do not constitute their natural range, meaning they are therefore deprived of the protection they would otherwise receive. Such arguments can be dismissed however when the intention of the EU legislative organs is examined, as an official guidance document to the Habitats Directive reveals that "*…when a Species has been re-introduced into its former natural range… this territory should be*

sets out the pragmatic and ecological considerations that feed into the site selection process, including human density of the surrounding area (p.3).

[41] See for example the Mid Wales Red Squirrel Project (https://www.welshwildlife.org/living-landscapes/the-mid-wales-red-squirrel-project/)

[42] Section 5(1) WMA

[43] The case for the reestablishment of populations of the red-billed chough in the UK is brilliantly made by Richard Meyer in his seminal article R. Meyer *"The Return of the Red-billed Chough to England"* (2000) British Birds 93: 249-252

[44] The water vole already faces significant risk from human activities that threaten their fragile riverside habitat, along with bad publicity due to commonly being mistaken for brown rats. The plight faced by water voles is well documented by the Wildlife Trusts (https://www.wildlifetrusts.org/wildlife-explorer/mammals/water-vole)

[45] Which implements Council Directive 92/43/EEC on the Conservation of natural habitats and of wild fauna and flora (as the "Habitats Directive")

[46] Regulation 40(1) CHSR

[47] The latter being highly threatened and already locally extinct in many areas throughout the UK. The challenges facing hazel dormice and the results of attempts to reintroduce them is carefully considered and explained by the Peoples' Trust for Endangered Species (https://ptes.org/campaigns/dormice/).

considered part of its natural range."[48]. Such clear an expression of intent should be sufficient to ensure that the protections offered by the CSHR also extend to reintroduced animals. This expansive interpretation notwithstanding, it is noted that not every species which could be the deserving subject of a conservation project is listed in the Schedules and Appendixes to the CSHR and the Habitats Directive, which should serve as a motivation for conservationist groups to engage in productive dialogues with the relevant authorities to ensure that those species are included in the appropriate lists.

'...it would be an afront to the very purpose of conservation generally, and the rights of the animals being reintroduced, if hunters were again permitted to disturb, shoot and kill released animals...'

Protections under the Hunting Act 2004 ("HA")

The final piece of legislation considered by this article is the Hunting Act 2004[49]. The focus of the HA is to criminalise the activity of hunting any wild animal with a dog or group of dogs[50]. Positively, the HA adopts a wide definition of what constitutes a "wild animal" for the purposes of the legislation which is sufficiently wide to encompass almost any conceivable translocated specimens[51].

Notwithstanding the protection against hunting by dogs, Section 2 goes on to provide that the use of hunting methods set out in Schedule 1 will not amount to an offence in contravention of Section 1[52]. Schedule 1 notably includes hunting in order to "flush out" a wild animal or to "recapture a wild mammal" released from captivity[53]. As the HA does not contain an explicit definition of what amounts to a "release from captivity", it is at least arguable that this includes reintroduced specimens, as such animals may have been sourced from captivity and in any event will have been kept in captivity during their transportation as a matter of necessity. This is a clear example of legislation which was designed without species translocation and reintroduction projects in mind, which as such does is not fit for purpose in the context of a release of species in such a project, leaving open a potential loop hole.

Whilst it is noted that such hunting needs to be subject to stipulated conditions in order to be permitted, on a prima facie interpretation these provisions would permit hunters to disturb animals which have been translocated. Moreover, one of the conditions to the hunting of animals under these provisions is that "*reasonable steps are taken for the purpose of ensuring that as soon as possible……wild mammal is shot dead by a competent person*"[54]. This considered, it would be an afront to the very purpose of conservation generally, and the rights of the animals being reintroduced, if hunters were again permitted to disturb, shoot and kill released animals, one of the very causes of their extinction on British shores in the past.

Conclusion

This article has tried to set out the scale of some of the practical and legal challenges facing species conservation translocation projects operating in the UK and discussion of how such challenges should be approached and resolved. Attention was then turned to the legal protections of reintroduced animals released into the wild with a focus on welfare protections. It has been demonstrated that despite several pieces of both national and international legislation offering protection, as is frequently the case with piecemeal legal frameworks, lacunas and holes

[48] Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC (2007)

[49] This author notes the vast volume of commentary which, whilst praising the Hunting Act, also highlights its limitations and suggests areas where it could be strengthened, see for example "*Strengthen the Hunting Act"* The League Against Cruel Sports (2018) (https://www.league.org.uk/hunting-act) or M Wellsmith "*Wildlife Crime: The Problems of Enforcement*" European Journal on Criminal Policy and Research (2011) Volume 17, Issue 2, pp 125-148. This article intends to focus on some of the limitations specific to rewilded animals therefore other parts of Hunting Act which may merit discussion in other contexts are not considered here

[50] Section 1 HA

[51] Section 11(1)(d) HA means this includes "any mammal which is living wild"

[52] Section 2(1)

[53] Paragraphs 1 and 7 of Schedule 1 to the HA respectively

[54] Paragraphs 1(7)(a) and 7(3)(a) of Schedule 1 to the HA

exist in the protection granted and exploitation of such deficiencies to the detriment of conservation efforts and animal welfare should not be permitted. There is work to be done before we can say that English and Welsh law is fit for purpose in the context of species translocations and in facilitating the broader aims of rewilding.

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