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

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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,
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> 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.'

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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—
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> (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
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> (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.

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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.