

LICENSING

Considering the
2018 English
Licensing of
Activities involving
Animals Regulations

BREXIT LATEST

Is the UK ready to
recognise animal
sentience post-
Brexit?

REWILDING

What are the
practical and welfare
implications of
reintroduction?

TRANSPARENCY

The implications and
legality of conducting
VCI disciplinary
hearings in private



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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 Guidance² 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.