The welfare gap: the Dangerous Wild Animals Act 1976 and the application to primates

Jason Lowther, Senior Lecturer in Law, Plymouth Law School[1]

The Dangerous Wild Animals Act 1976[2] (the Act) is evocative of the exotic, the interesting - the edgy even. The reality is somewhat different as it is relatively ineffectual, serially overlooked and until recently has not even mustered any notable interest from those charged with its operation. With a legislative existence stated to be premised on tackling the potential threat to society from a passing trend for owning big cats[3] , the Act, in common with many enactments responding to an ill defined 'problem', has struggled to remain relevant. During the debate on amendments to the Act in 1984, the Under Secretary of State for the Environment reflected on its genesis, stating that 'there was an underlying reluctance to list species about which there might be scope for serious disagreement as to how dangerous they were, some comparatively harmless species were embraced within certain broad categories. Other more dangerous kinds were omitted'[4]. This short article will outline the Act, recent amendments to it, and offer a critique of its operational effectiveness when measured against its stated purposes, and its place in the overall scheme of protection of animal welfare for the species which are included in its Schedule. To add some context, a particular focus is placed upon primate species which, arguably, demonstrates that the way in which the Act as currently configured is unable to protect the welfare of wild animals wholly unsuitable for ownership by non-specialist keepers.

In force since October 1976, the Act performs a dual function of protecting the public and seeking to provide a baseline for welfare considerations. During its progress through the House of Lords Lord Chelwood stated that '*the general policy of the Bill is quite clear. It is that in future the keeping of dangerous wild animals by private individuals should be made a wholly exceptional circumstance*'[5]. It was also observed in the Committee stage that the welfare aspects of the Act were subordinate to the public safety aspect[6]. The long title offers no clues as to any wider purpose stating merely that it is 'an Act to regulate the keeping of certain kinds of dangerous wild animals'. The Act does not define what a dangerous wild animal actually is, although a working definition was adopted in the 1980s as discussed below. Instead the kinds of species subject to its provisions are listed on a Schedule.

The Dangerous Wild Animals Act 1976 (the Act) is evocative of the exotic, the interesting - the edgy even.

The regulation is achieved through an inspection and licensing scheme operated by local authorities in relation to animals included on the Schedule. In practice, due to the

[1] I would specifically like to thank Brooke Aldrich for her help and advice, and in permitting me access to local authority data collected by the Monkey Sanctuary Trust in Looe, Cornwall, a project delivered by Wild Futures www.wildfutures.org.

[2] Eliz. II c.38.

[3] See e.g. Defra website http://www.defra.gov.uk/wildlife-pets/wildlife/protect/dwaa/about.htm , for an account of a sale of a lion in a UK department store see e.g. http://www.bornfree.org.uk/campaigns/big-cats/about/christian-the-lion/ .

[4] HC Deb 02 July 1984 vol 63 c124, Rt. Hon William Waldegrave MP.

[5] Lord Chelmwood, Second reading, House of Lords Official Report, Fifth Series, vol 374, cited in A.G. Greenwood, P.A. Cusdin, M. Radford, Effectiveness Study of the Dangerous Wild Animals Act , Defra 2001, p .10.

[6] Ibid.

basic licensing considerations, this has meant that the Act has mainly focused on protecting the public from the risks of keeping, and escaping, wild animals. In the latter case a claim has been made that no serious indents have arisen since the Act was passed into law[7], thus appearing to evidence its success: a very clear success when measured against annual injuries, and even fatalities, caused by dog attacks. Ad hoc reports of specific instances of attacks[8], or high profile social concerns have in the past resulted in attempts to add to the Act's reach, as witnessed in 1991 when a Bill was introduced in order to add the Japanese Tosa and the Pit Bull Terrier to the Schedule: the attempt was ultimately unsuccessful and these two breeds were among those included in the Dangerous Dogs Act of the same year[9].

The Act is essentially aimed at private animal keepers. Section 5 of the Act is clear that it does not apply to dangerous wild animals kept in a licensed zoo[10], a circus[11], premises licensed as a pet shop[12] or a place designated as a scientific establishment[13]. The considerations and steps which must be undertaken permits a local authority to assess, pre-licensing , of both keeper and premises in order to determine the suitability (*suitability* is not defined however) of an individual to keep the animal(s) and ensure that premises are fit for purpose, including protecting public safety[14]. The local authority retains a discretion in the grant of a licence; and as is the case for most licensing regimes it is permitted to specify whatever conditions it considers appropriate, subject to the exception contained in s1(6) of certain minimum requirements. These minimum requirements relate, for example to matters such as location, movement and insurance requirements. Licences may be varied or revoked at any time.

Other than ensuring the premises housing an animal are secure, the Act is concerned with phytosanitary measures relating to disease control, although this aspect alone is not sufficient to require a licence under the Act[15]. Alongside the public safety and nuisance concerns, the Act also contains some limited welfare provisions: a vet authorised by a local authority must inspect premises where the animal is to be held pursuant to the licence. A licence may only be granted if the report is enough to enable the authority to determine that the animal concerned may suitably be housed there[16]. There is also provision in section 1(3) that the licence should not be granted unless the accommodation is suitable to the animal concerned; that that there is adequate food, water and bedding; and that the animal will be visited regularly. These minimal welfare provisions were the subject of a degree of controversy during the consultation for the most recent amendment to the Act. Defra took the view that there was no longer any need to require welfare conditions to be satisfied prior to the grant of a licence.[17] Defra have also previously stated that welfare is not a listing criterion for the purposes of the Act with the result that welfare considerations become solely, in practice, the ambit of other legislative mechanisms. This was despite the recognised welfare purpose of the Act itself, stated as recently as 2007 when the last significant change was made to the schedule[18]. As it transpired concerns raised through the consultation process ensured that this proposal was dropped. This means, in theory at least, that the Act retains some worth in the wider animal welfare toolkit, and that determinations made under it should continue to reflect that purpose.

> **The regulation is achieved through an inspection and licensing scheme operated by local authorities**

In addition to the somewhat resigned continuation of the welfare provisions by Defra, the decentralised nature of the workings of the Act has prompted concerns by interested parties over a number of years. The operation and administration, including enforcement, by local authorities is not subject to central influence or even a reporting requirement, so that practice is varied, even to the extent that there is no uniform

[7] Regulatory Reform Committee, Draft Legislative Reform (Dangerous Wild Animals) (Licensing) Order 2009, Seventh Report of Session 2008–09 HC 795, HMSO, London, p5.

[8] HC Deb 02 July 1984 vol 63 cc122, Rt Hon. Greg Knight MP, detailing attacks by squirrel monkeys used as photographers props.

[9] Eliz. II, c.65. That Act providing another example of hastily contrived legislation being accused of not adequately fulfilling its purpose.

[10] Pursuant to the Zoo licensing Act 1981.

[11] Defined in section 7(4) as 'any place where animals are kept or introduced wholly or mainly for the purpose of performing tricks or manoeuvres'. In the case of *South Kesteven DC v Mackie* [2000] 1 W.L.R. 1461,the Court of Appeal adopted a broad interpretation of the Parliamentary intention so far as the circus exempting was concerned holding that the owners of dangerous circus performing wild animals did not require a licence when they were kept in winter quarters

[12] Pursuant to the Pet Animals Act 1951.

[13] Pursuant to the Animals (Scientific Procedures) Act 1986.

[14] Section 1(2), section1 (3).

[15] Section1 (3) (e): although this is the remit of specialist legislation otherwise beyond the scope of this evaluation.

[16] Section 1(5).

[17] Op cit. note 7.

[18] See the Explanatory Memorandum to The Dangerous Wild Animals Act 1976 (Modification) (No.2) Order 2007 (SI 2007/2465) at para 7.2.

licence cost. The position has been confirmed through Parliamentary questions over a number of years[19] but there has been no concerted attempt at any point to gather data or to coordinate practice. Indeed *Greenwood* (et al) noted in 2001 that 'since the Act's inception in 1976 there has been little guidance to local authorities'. The position has not improved, although Defra's website makes claim to forthcoming 'comprehensive guidance for local authorities and keepers on the provisions of the Act… It is hoped the guidance it will promote a more consistent implementation of the legislation, assist with increasing support and compliance amongst animal keepers and, ultimately, in more effective operation of the Act'[20]. The shape of this guidance is unclear at the time of writing, but the description, which continues by reference to the needs of certain types of animals, might hopefully reflect the sort of guidance provided by way of the codes of practice made pursuant to the Animal Welfare Act 2006[21]. In any case whatever form the guidance takes will be an improvement on the current situation of nothing.

The maximum penalty for a person convicted under any provision of the Act is a level 5 fine[22]. Offences relate to the keeping of a specimen without a licence[23]; failure to comply with a condition of a licence[24], or obstructing a local authority inspector or vet[25]. Section 3 also contains a provision requiring a licences person to enable inspectors or vets to enter the premises for the purposes of determining whether an offence is being committed. Local authorities are also given the power to seize and dispose of animals without compensation by virtue of section 4: this power is parasitical on the commission of an offence, and is backed by a cost recovery mechanism, in that any expenditure incurred by the enforcing authority may be recovered as a civil debt from the keeper or licence holder of the specimen. A court may also revoke a licence and prevent a person from keeping a dangerous wild animal for any period which it may think fit, where an offence is committed under the Act, or under a range of other provisions as diverse as the Performing Animals (Regulation) Act 1925 through to certain sections of the Animal Welfare Act 2006[26].

The maximum penalty for a person convicted under any provision of the Act is a level 5 fine

On its face, subject to the general critique applicable to appropriateness of penalties which characterises animal welfare and environmental sentencing concerns, the enforcement provisions are probably what would be expected. The perception of the Act is of a regulatory system, containing, basically, administrative offences, of failure to posses, or breach of the conditions of, the appropriate permit. The system is undermined however by the less than adequate application and enforcement of the Act's provisions, and something noted by research and Defra itself[27]. When Defra's guidance sees the light of day it may generate a feeling that the sponsoring department is taking a greater role in ensuring that the purposes of the Act are being met; which might have a galvanising effect on the authorities tasked with its implementation. There is of course the risk that this historically low-priority area of local authority regulatory responsibility will be put firmly on the back burner in the climate of public sector rationalisation and deregulatory pressures following the UK's recent general election, and consequent change of government.

The Act itself though has not remained a constant throughout its history. It has evolved, as have the trends in species ownership, since the mid-1970s. The original Schedule for example listed nine kinds of 'dangerous' wild animals, the current Schedule lists fifty three. Certain additions have been in response to certain perceived problems, such as in the early 1980's, the scheduling of 'new world' monkey species. Notable amendments were made to the Schedule in 1981[28], 1984[29], 2007[30], and, most recently, a 2010 measure[31], which took effect on 18th March. The 1980's amendments saw a large increase in

[19]See for example *HC Deb 09 November 1976 vol 919 c147W HC Deb 21 November 1985 vol 87 c259W; HC Deb 17 November 1992 vol 214 c129W.*

[20]See http://www.defra.gov.uk/wildlife pets/wildlife/protect/dwaa/review.htm.

[21]Made for example in relation to dogs and non-human primates.

[22]Section 6(1), Currently £2000.

[23]Section 2(5).

[24]Section 2(6).

[25]Section 3(4).

[26]See in this regard s 6(2).

[27]Op Cit n18 at 7.3, and Greenwood et al, n5 at page 32.

[28]SI 1981/1173.

[29]SI 1984/1111.

[30]SI 2007/2465. There were in fact two modification orders made in 2007, the latter being passed to include certain additional species and to correct an oversight in the geographical application of its predecessor (SI 2007/1437). Separate provision was made for Scotland in the Dangerous Wild Animals Act 1976 (Modification) (Scotland) Order 2008 SSI 2008/302.

[31]The Legislative Reform (Dangerous Wild Animals) (Licensing) Order 2010, SI 2010/839

the number of scheduled animals. The first expansion saw some attempt to rationalise the determinants for classifying an animal as dangerous, including whether the animal's biting or scratching was worse than a feral tomcat; whether the animal's but or kick is worse than a domestic goat or horse; and whether the animal's sting is worse than two wasp stings[32]. This clearly reflected the public safety aspect. Interestingly the 1984 amendment was in part due to pressure by the RSPCA to include certain species, such as, and as were subsequently added this order, the new world monkeys. It was observed by Greenwood et al[33] that there was not really agreement on the inclusion of the new world monkeys as a result of a number of them having small canine teeth, and thus not meeting the test of 'dangerousness' - despite there not being a firm statutory criterion.

The 2007 amendment removed a number of the new world primates listed in 1984 from the Schedule. Tamarins, woolly lemurs, night monkeys, titis and squirrel monkeys were removed as not being considered to be dangerous. In relation to the squirrel monkey in particular there is a particular irony that the issue has gone full circle, as it was that species which received parliamentary attention, on the basis of its perceived threat, in the run up to the 1984 Order[34]. The explanatory memorandum to the 2007 modification order notes that a review of the Act prior to the measure highlighted that it was in need of updating and revision. The revisions were required because, it goes on to elaborate that it was poorly enforced and there was believed to be wide-spread non-compliance; and concludes that 'a number of the species listed in the 1980s were considered to be no more dangerous than domestic cats or dogs and this had further undermined the Act's credibility'[35].

The 2007 amendment removed a number of the new world primates listed in 1984 from the Schedule.

The obvious question however is how does the delisting of species, which it is generally acknowledged require specialist keeping, enable better enforcement or compliance? It must also be determined who is considering the Act as less credible because of its inclusion of certain species which may not be considered to be dangerous by contemporary standards, despite the fact that they have previously been considered to be so. The *actual* effect is to remove the need for an initial assessment of the suitability, whatever that means, of the person to 'keep' the animal; and the suitability of the situation in which it will be kept: hence the welfare 'gap'. What the keeper has is a 'wild' animal. Not an animal which has been domesticated over millennia of human contact and companionship; not an animal that is 'easy', predictable and undemanding. The risk to others may actually be created by the inability of the keeper to meet adequately the needs of the species held: the potential for detriment to the animal's welfare by the failure to meet its basic needs is very real.

The basic thrust of the 2010 amendment is premised on the Regulatory Reform Act 2006[36] which seeks to reduce administrative and regulatory burdens on both the regulated and regulators. Its effect is to modify section 2 of the Act to increase the length of licences to two years, and thus decrease the number of inspections, which has obvious welfare implications. It also regularises the position in relation to when licenses come into effect, basically now from the date of grant, rather than being either from the date of grant or the beginning of the next following year. During debate the concept of removing the requirement for inspections altogether was proposed, although on the basis of fears that this would permit licence renewals, where undertaken at all, without inspection, and would thus undermine necessary protections. This proposal was subsequently dropped. The issue in relation to the welfare implications is discussed in an accompanying statement and it is observed that 'the impact of that change, with respect to both public safety and animal welfare, has yet to be tested by experience… [in the view of] DEFRA, the answer lies in issuing guidance which is intended to

[32]Op cit n5 at page 16.

[33]Ibid, page 17

[34]See e.g. footnote 8.

[35]Wild Animals Act 1976 (Modification) (No.2) Order 2007/2465, Explanatory Memorandum, Defra, 2007, para 7.3.

[36]Eliz. II c.51, section 14.

promote a more consistent implementation of the legislation and they suggest that a cheaper regime will enhance compliance'[37]. The suggestion would thus seem to be that the best guess is that cheaper will mean more effective in terms of the 'existing background of variable enforcement and non-compliance'[38]. Without wishing to appear over critical or emotive, it is the kept animals which will bear the brunt of the uncertainty.

> **the potential for detriment to the animal's welfare by the failure to meet its basic needs is very real**

Application of the Act to primate species provides some context for the Act and its limited, and contracting, welfare provisions. While most primates[39] are listed on the Schedule, the issue of primate keeping generally has been considered by NGOs. They have unearthed evidence such as that within the International Fund for Animal Welfare (IFAW) sponsored report[40] that primates makes unsuitable pets for a variety of public safety and welfare reasons. Recent academic investigation[41] has concluded, similarly, that primates are not suitable to be kept as pets; and that the limitations of the Act, due to its incomplete regulatory oversight of keepers, ensure that the welfare picture is incomplete. In fact there is a definite underestimate of the actual level of the failure of welfare protection. The fact that most households were assessed to be unable to provide adequate husbandry conditions[42] means that the welfare of privately owned primates is likely to be poor - if those conditions are not subject to a minimum assessment of their suitability, such as that required under the Act, the likelihood is that even less will meet them.

Statistically, the RSPCA found that between 2000 and 2005 there were191 welfare complaints in relation to primates, most of which related to neglect[43]. The basic way to mitigate this neglect was found to be the need to enable 'normal' behaviour. The only certain way that can be ensured is through social conditions, adequate housing and enrichment. The implication is of specialist care, which demands specialist knowledge to assess its suitable provision. While a general provision such as the Animal Welfare Act 2006 certainly provides a valuable general tool to be deployed; and the recent Code of Practice[44] provides a good baseline, the removal of certain primates from the Schedule to the Act leaves a potential gap - particularly when

> **primates makes unsuitable pets for a variety of public safety and welfare reasons**

considering the initial acquisition and housing no longer being subject to veterinary assessment of suitability and the inability to require conditions to be applied. This would be the case despite the, admittedly sporadic, application of the Act, which it can only be hoped will become more formalised. The point was raised in the regulatory impact assessment of the primate code, which despite noting that there was no centrally collected data on primate ownership, seizure or prosecution, that local authority inspectors would be able to use the code in their inspections pursuant to the Act. This is perhaps a tacit admission that there is a lack of expertise in relation to primates, but, there remains the issue of the de-listed species which are now not subject to any inspection, irrespective of the criticisms that may be made of current practice.

Research undertaken by Wild Futures, a charity which operates the Monkey Sanctuary at Looe in Cornwall (UK), under the Freedom of Information Act 2000[45] (FOI) has confirmed the conclusions reached by Greenwood et al that the picture in relation to effective local authority oversight of the keeping of dangerous wild animals is operating

[37]The Legislative Reform (Dangerous Wild Animals) (Licensing) Order 2010. Accompanying statement by the Department for Environment, Food and Rural Affairs, March 2010, Defra, HMSO, at paragraph 4.

[38]Ibid.

[39]Most of the primates are also subject to the requirements of Regulation EC/338/1997 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein ,OJ L 61, 3.3.1997, p 1. This implements the Convention on the International Trade in Endangered Species, Washington, 1973 (CITES). Consideration of CITES is beyond the scope of this article however.

[40]Born to be Wild: Primates are not Pets, International Fund for Animal Welfare (Eds.) (2005), London, IFAW; see also Primates as Pets: Is there a case for regulation, RSPCA & Wild Futures (2008).

[41]Soulsbury, Carl D., Iossa, Graziella, Kennell, Sarah, Harris. Stephen(2009)'The Welfare and Suitability of Primates Kept as Pets'. Journal of Applied Animal Welfare science, 12:1, 1-20.

[42]Ibid, page 20.

[43]Ibid, page 19.

[44]Code of Practice for the Welfare of Privately Kept Non-Human Primates, Defra, January 2010, available at: www.defra.gov.uk/wildlife-pets/pets/cruelty/index.htm

[45]Eliz. II c.36.

at less than 20%. The research undertaken over the last 3 years has determined that there is in the region of 82% non-compliance with the Act so far as it relates to privately kept primates. The use of the FOI as a research tool in this situation has been very effective and netted an astonishing 100% response rate so a complete picture of UK local authority practice has been obtained. The figures show that 280 primates were licensed under the Act in February 2009 (2010 data is currently being collected). With Defra's own estimate of an 85%[46] non-compliance rate and RSPCA/Wild Futures' estimates approaching 82% non-compliance, this could equate to an actual figure of between 1447-4420 licensable, but unlicensed primates being held by private individuals. Crucially, this does not include the tamarins, marmosets, lemurs and squirrel monkeys - the most popular primate 'pets' according to research[47] - as these species have never, or are no longer listed.

The evidence of the Act's failure adequately to reflect the needs of the species, and potentially as a result of poor socialisation, the public at large is compelling. The failure of the welfare considerations is more likely to promote poor welfare and thus poor socialisation which would then pose a more significant threat. The review of the Act in 2001, the Soulsbury research and FOI requests outlined above revealing the ineffectiveness of the Act prompts the initial question as to the point of the 2010 amendment. This is, apparently, as with its 2007 predecessor measure, a remedial response to a legislative measure that is not functioning adequately. The change, it must be submitted is not likely to bring the missing 80% of keepers into the regulatory fold. To conclude this point, the Act must either be taken seriously by those tasked with its operation, or a different basis taken in the case of primates, which either attaches to the trade stage[48], or imposes an outright ban on private ownership as other European countries including Holland and Sweden have done.

The sensible and genuine commitment, and progress, towards animal welfare during the last decade is laudable. The Animal Welfare Act 2006 is undoubtedly a very important piece of legislation, as has been widely reported, although all of the codes of practice are as yet incomplete. The primate code is as great step forward, although if local authorities are not in a position to make inspection pursuant to it, it lacks the impact that might be hoped for. Thus other enactments as applied to wild, zoo kept and 'dangerous' wild animals all require a basic irreducible welfare component: to do so they must be seen to be of significant application; be working; and be able to reflect the needs of the species. There is also an obvious need to balance the regulatory system for those subject to it and those charged with operating it. Clearer and more joined-up laws which never lose sight of the fact that a kept animal must have suitable recognition taken of its welfare needs are imperative. Welfare should be an ever-present consideration. By all of these measures, at least when applied to the keeping of primates, it would appear that the Dangerous Wild Animals Act 1976 cannot offer the protection it should, having been tasked to do so at its inception and through its early evolutionary stages. The most recent changes unfortunately do not close this welfare gap. It is incontrovertible that poor standards of welfare actively promote turnover of animals kept, especially within the pet trade. This obviously has a resultant impact on wild populations, as well as the kept animal itself. The lucrative nature of the current fad for certain 'exotics', including, as outlined above, primates, will necessarily attract those with a profit as opposed to species interest.

The sensible and genuine commitment, and progress, towards animal welfare during the last decade is laudable

[46]This is also the lower end of the Defra estimate, which in the Greenwood (et al) paper was reported in a range of 85-95% non-compliance.

[47]RSPCA, Monkey Sanctuary Trust (2009) Primates as Pets: is there a case for regulation? Unpublished report. Available from info@wildfutures.org

[48]Ignoring for the purposes of this article the potential for the need for certification to comply with the requirements of the Regulation 338/1997.