

## EUROPE

Dr Simon Brooman & Dr Deborah Legge consider whether European protections from cruelty are improving or not

## WILD ANIMALS

Experts from Born Free compare the varying legal protections afforded captive wild animals under different regulatory regimes in England

## DOGS

Dr Helena Howe & Tamara Katamine ask whether banning breeds with harmful conformation from breeding is the answer to extreme breeding trends



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## EDITOR'S NOTE

Hello readers, it is a pleasure to start this edition of the journal by introducing myself as the newly appointed Contributing Editor of the UK Journal of Animal Law. My name is Carley Lightfoot, and I am thrilled to be a part of this fantastic journal. Before we delve into the exciting content of this edition, allow me to share a bit about my background and passion for animal law.

I am a Lecturer in Law at Birmingham City University nearing the completion of my PhD. My research delves into the area of animal experimentation laws in the UK, analysing the effectiveness of this legislation with the aim of trying to find practical solutions for its shortcomings in pursuit of the betterment of the welfare of research animals.

As a lifelong animal lover, I have long had an interest in animal law. Sadly, my undergraduate studies did not offer an animal law module and it was only during my Master's degree that I was finally able to explore this area, choosing to write my dissertation on the Dangerous Dogs Act 1991. This was a bit of an odd mix, as I was actually studying an International Business Law LLM at the time, but I quickly realised that simply writing a dissertation would not be enough and so I decided to devote my career to specialising in this area.

As your new Contributing Editor, I am dedicated to upholding the high standards of A-LAW. I made the decision to specialise in animal law because I wanted to contribute another much-needed voice advocating for animal interests, and I am committed to lending my expertise and passion to their cause. Your continued support, engagement, and contributions are vital in ensuring the journal remains a vibrant and thought-provoking platform for animal law scholarship. Together, we can make a lasting impact and further the cause of animal protection.

Carley Lightfoot

**Contributing Editor**

# Protection from Cruelty for Animals in Europe: An improving picture?

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## Abstract

This article examines laws relating to animal cruelty in Europe in the context of evidence of new approaches in eastern Europe. These are contrasted with existing provision in other jurisdictions including the European Union. Different definitions of animal cruelty are examined considering the increasing influence of legislation framed to provide care based on animal sentience. We examine how this draws legislators into areas of psychological as well as physical abuse. Positive developments are contrasted with areas of provision that are significantly in need of reform such as fur-farming. We suggest that although there is evidence of progress in relation to protecting animals from cruelty across Europe, there remains much to be done to improve the clarity and consistency of laws aimed at preventing poor animal treatment, enhanced investigative provision and appropriate sentencing powers. We argue that there is much to be gained from working alongside environmentalists, highlighting areas of good practice to campaigners and focussing campaigns on proper investigation and sentencing, as well as introducing new legislation.

## Keywords

Animal cruelty, animal sentience, sentencing, punishment for cruelty, animal welfare

## Introduction

This article examines some of the steps that

have been taken in various countries in Europe<sup>1</sup> in relation to animal cruelty. It considers the various legal frameworks, drawing on examples from some specific countries and the European Union. In recent years, Europe has seen a significant increase in national and international legislation aimed at preventing acts of cruelty and improving the welfare of animals.<sup>2</sup> Defining animal cruelty is complex as the line between protecting 'welfare' and protecting against 'cruelty' is often very thin. However, this article focusses on the development of the law relating to cruelty in European countries, whilst recognising that this is a narrow term intrinsically connected to the wider goal of animal welfare and the two may sometimes overlap.

Animal cruelty laws tend to focus on neglect<sup>3</sup> or intentional cruelty,<sup>4</sup> but what is deemed 'cruel' depends on the type of animal and where the cruelty takes place. The issue is whether legal provision and their enforcement in the countries of Europe has adequately advanced the overall protection of animals against cruel practices. It also involves asking whether those laws have kept pace with debates around animal sentience and the philosophical issues this gives rise to. It concludes by highlighting areas of best practice and suggests areas for reform.

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1 A good overview is provided by Laws Around the World ([advocates-for-animals.com](http://advocates-for-animals.com))

2 See the Animal Protection Index at <https://api.worldanimalprotection.org/> for a full European summary. Also <https://www.globalanimallaw.org/database/national/index.html> for a worldwide summary; United Kingdom details are given at [www.gov.uk/guidance/animal-welfare#legislation](http://www.gov.uk/guidance/animal-welfare#legislation)

3 For example, hoarding see [www.peta.org.uk/issues/animals-not-abuse/cruelty-to-animals/](http://www.peta.org.uk/issues/animals-not-abuse/cruelty-to-animals/)

4 Hussain, G (2021) Animal Cruelty: What you can do right now to prevent it. Available at Animal Cruelty: What Is Animal Cruelty and How to Recognize It ([sentientmedia.org](http://sentientmedia.org)) (Accessed 7May 2022)



## Anti-cruelty laws in Europe

The introduction of laws to protect animals is crucial in protection terms but in terms of satisfying moral claims for animals it has only gone so far.<sup>5</sup> The UK has, traditionally, been regarded, rightly or wrongly, as a leader in animal welfare<sup>6</sup> and has a relatively long history of legislation covering offences of cruelty to animals, beginning with 'Martin's Act' in 1822.<sup>7</sup> Most anti-cruelty provision is now covered in the Animal Welfare Act 2006, which defines several cruelty offences. Animal cruelty, which applies to all vertebrate animals, is defined in the Act including:

- Causing unnecessary suffering (section 4).
- Carrying out a non-exempted mutilation

5 Kotzmann, J. and Pendergrast, N., 2019. Animal rights: time to start unpacking what rights and for whom. *Mitchell Hamline L. Rev.*, 46, p.157, at p.196.

6 Wills, J., 2018. A nation of animal lovers? The case for a general animal killing offence in UK law. *King's Law Journal*, 29(3), pp.407-436.

7 An Act to Prevent the Cruel and Improper Treatment of Cattle, D (1822), 3 Geo 4, C70.

(section 5).

- Docking the tail of a dog except where permitted (sections 6(1) and 6(2)).
- Administering a poison to an animal (section 7); and
- Involvement in an animal fight (section 8).<sup>8</sup>

In addition, additional protection is given to specific animals in other legislation such as those that are commonly hunted in the United Kingdom. The Hunting Act (2004) makes it an offence to hunt any wild mammal with dogs, except within limited circumstances that are defined in the Act, and it is allowed only in limited circumstances.<sup>9</sup> However, those that have followed the

8 Smith, R. (2011) 'Investigating financial aspects of dog-fighting in the UK', *Journal of Financial Crime*, 18(4), pp. 336–346. doi: 10.1108/13590791111173687.

Greenberg, D (2021) 'Animal welfare'. Available at: <https://uk.westlaw.com/Document/ID294ABF03F9211E-2824AEFB7D8791C65/View/FullText.html> (Accessed: 29 January 2022).

9 Hunting Act 2004 c 37; Report of Committee of Inquiry into Hunting with Dogs in England & Wales 9th June 2000, The Burns report at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/>

passage of this legislation into practice since 2004 will be aware of the continuing controversy caused by hunting. Evidence suggests that the hunting community continues to break the law as shown by the relatively high number of prosecutions under the Act, and continued confrontations with anti-hunt protestors who have concerns for the cruelty known to exist in hunting.<sup>10</sup> There is also legislation that has been passed in response to public campaigns. The Animal Welfare (Service Animals) Act 1999<sup>11</sup> means that those who attack or injure service animals cannot claim self-defence. There are other areas of the human-animal relationship where acts that would be considered cruelty in normal circumstances are specifically exempt from prosecution such as animal experimentation and badger culling.

Many European countries have laws protecting animals from cruelty, which prohibit mistreating animals, as well as a failure to act in case of animal abuse. Denmark has legislation prohibiting specific forms of animal cruelty and creates a duty of care which covers failures to act as well as deliberate acts of abuse. It covers physical and psychological well-being, as does the law in Sweden which has similar provisions that cover both animals in captivity and wild animals. Austria's Animal Welfare Act (2004) goes beyond EU requirements and covers all animals in relation to cruelty but there are exceptions in relation to wild animals that are hunted or fished and for non-stunning in religious slaughter.

Switzerland appears to have gone further than most other countries in Europe: Article 4(2) of the Animal Welfare Act (2005) prohibits inflicting pain, suffering or harm on an animal, inducing anxiety in an animal or disregarding its dignity in any other way without justification. The mishandling, neglect or unnecessary overworking of animals is also prohibited. Article 26 of the Animal Welfare Act (2005) and the Animal Welfare Ordinance (2020) give more detail on which

specific conducts are prohibited. Strictly prohibited acts include abandonment, neglect, bestiality, organising animal fights and the killing of animals in a manner involving agonising pain. The slaughter of animals without prior stunning is also prohibited. The legislation is wide reaching in its scope and covers all vertebrates as well as cephalopods and decapods".<sup>12</sup> Switzerland is notable because the Act covers all animals and goes a step towards linking much more closely both physical and psychological harm. This is not unique, but it does take the law closer to recognising more clearly the effect of psychological harm as a form of cruelty.

It has often been the case in protecting animals that such harm has fallen under the banner of 'welfare' and therefore not been treated as seriously as direct physical harm. An issue in the Swiss law is that draft animals and stray cats are not as well protected which leaves Switzerland with some underlying anomalies in coverage. The Swiss constitution provides for referenda to be held in certain circumstances such as constitutional change or following successful campaigns by initiative committees that are supported by 100,000 signatures. In February 2022 the nation voted on banning animal experimentation which failed 20.9: 79.1% so maintaining the status quo on animal experiments, and the Basel Canton (area) was able to vote on whether non-human primates should have their rights enshrined in the Basel constitution which failed by 25.3: 74.7%.<sup>13</sup>

In most European countries coverage is much more conservative and restricted in nature. In Spain, for example, animal cruelty offences exclude hunting and fishing, wildlife, bullfighting shows and regulated sports-competitions, (which have their own regulatory regulations).<sup>14</sup> However, as of 5th January 2022, Spain has introduced new protection for domestic animals are classified as 'sentient beings' instead of merely property as they were previously. This applies to all animals kept as pets so extends beyond mammalian companion animals to reptiles, birds and fish. To keep a pet, potential owners must undergo training in how to care for

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attachment\_data/file/265552/4763.pdf

10 See, for example, Morris, S, 2022. 'Wiltshire hunt supporters fined after admitting clashing with saboteurs', The Guardian 6th April 2022. At <https://www.theguardian.com/uk-news/2022/apr/06/wiltshire-hunt-supporters-fined-after-admitting-clashing-with-saboteurs> Accessed 14th June 2022.

11 Animal Welfare (Service Animals) Act 1999 c 15.

12 Switzerland | World Animal Protection

13 See <https://www.swissinfo.ch/eng/> for details.

14 Law 32/2007 Article 14 Spain | World Animal Protection

them.<sup>15</sup> Whilst this is a welcome development and certainly places Spain amongst those countries considering animal welfare more seriously as a legislative issue, there is the anomaly of the lack of similar considerations being applied to other animals. More still needs to be done and Spanish animal welfare organisations are calling for Spain to alter its position relating to, for example, the infamous bull-fighting cruelty exemption, and their lack of protection for working animals generally.

France provides protection against cruelty through animal welfare provisions in the Rural and Maritime Fishing Code, as Chapter IV is dedicated to animal protection. The French Ministry of Agriculture and Food's website explains that animal abuse may be characterised by physical beatings and by situations of deprivation or neglect, and that the law covers both. For instance, under Articles L-214 to L-217 of the Rural and Maritime Fishing Code, animal abuse includes depriving companion animals of food and water, or failure to provide a suitable environment. However, the practice of force-feeding ducks and geese to produce foie gras is exempted from anti-cruelty legislation".<sup>16</sup>

France also has limited categories of animals that are covered so only those that are owned have protection from deliberate acts of cruelty and neglect.<sup>17</sup> The Penal Code makes it an offence to seriously physically abuse or sexually abuse, to commit an act of cruelty to, or to abandon a domesticated animal, or a tamed animal, or an animal held in captivity. There are exemptions for bullfighting where an uninterrupted local tradition can be invoked, and for cockfighting in localities where an uninterrupted tradition can be established.<sup>18</sup> This shows how extensive coverage of animal cruelty is often restricted in countries according to local custom, practice, and perceived human benefits. The fact that cruelty is defined differently in terms of these criteria acts as a significant barrier to establishing a coherent set of international principles

regarding definitions and provisions to cover animal cruelty. This is illustrated by the French provision in that the law concerning deliberate and intentional cruelty does not apply to wild animals, although conservation measures are in place for mutilation, destruction, capture and poaching of endangered or protected species in the Environment Code and Ministerial Orders list protected species".<sup>19</sup>

In the east of Europe, in Russia, legislation provides that animals should be protected from abuse and prohibits various practices, namely: procedures that cause pain without the use of anaesthetic; organised animal fighting, and the feeding of live prey to predators (with an exception for the cultural and entertainment purposes). Article 11 of the Federal Law places enhanced responsibility on owners in cases of animal cruelty,<sup>20</sup> and provides for penalties in some other cases when there is a failure to act. Article 245 of the Penal Code of the Russian Federation contains a provision addressing cruelty to animals. Cruelty is not defined, but rather refers to two potential outcomes, namely injury or death of the animal, and such cases are addressed by law in observance of one of three cases, namely: i) when cruelty is caused with malicious or mercenary motives; ii) with the use of sadistic methods or iii) in the presence of minors.<sup>21</sup> However, despite these provisions, the World Animal Protection Index raises concerns about the coverage of animal welfare in Russia, some of which could amount to cruelty in other jurisdictions. These include, for example, inadequate protection for animals raised in fur-farming, which also continues to raise concerns elsewhere, allowing excessive journeys for animals and its failure to deal with close confinement farm methods such as the use of battery cages for hens and farrowing crates for pigs. Depending on how one defines 'cruelty' the continuance of these practices, and similar such practices elsewhere in Europe, lay a challenge to the development of improved anti-cruelty provision across Europe.

In other areas of Europe, the situation seems to be worse in terms of direct regulation against cruelty to animals. In Romania, for example, the

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15 See <https://rightcasa.com/new-animal-rights-laws-introduced-for-pets-in-spain/>

16 France | World Animal Protection

17 Under the Rural and Maritime Fishing Code and the Penal Code. France | World Animal Protection

18 Article 521-1 France | World Animal Protection

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19 France | World Animal Protection

20 Article 11 of Federal Law No. 498-Φ3 Russia | World Animal Protection

21 Russia | World Animal Protection

Law on the Protection of Animals (2014) provides basic protection to animals, but the legislation does not define which animals are covered leaving the legislation somewhat weak in effect. However, there is some specific protection for other species such as those used in circuses and draft animal, but concerns remain that Romania has made relatively little progress in relation to animal cruelty. Problems have been encountered in relation to stray animals, particularly dogs which have been subject to very harsh treatment such as poisoning in mass culling.<sup>22</sup>

Although most countries have some anti-cruelty legislation, Belarus is a notable exception having no laws preventing animal cruelty, leading to issues with the slaughter of animals, culling of stray animals and the overall care of farm animals.<sup>23</sup> It is highly likely that some of these practices would amount to cruelty under other jurisdictions. In Azerbaijan the brutal treatments of animals, which is defined as resulting in their death or severe injury, is prohibited by the Code of the Azerbaijan Republic on Administrative Violations (Article 129). At present, the application of this Code is limited since the term 'animal' is not defined. There is no indication given as to which animal species are concerned by Article 129, or what are the authorities responsible for monitoring the treatment of animals. As a result, the ability to implement this law is severely restricted".<sup>24</sup>

As far as other countries in eastern Europe are concerned there is emerging anecdotal evidence from some groups operating there that there may be a shift of attitudes underway which could result in tighter restrictions on animal cruelty. Public support is important as it will drive legislative change and could lead to better chances of compliance with anti-cruelty law. This is supported by research which suggests that consumer attitudes to animal cruelty are changing in these countries.<sup>25</sup> This research

covering Bosnia Herzegovina, Bulgaria, Czech Republic, Croatia, North Macedonia, Hungary, Moldova, Poland, Romania, Serbia, Slovakia, Slovenia, and Ukraine, was conducted in relation to animals reared for food but it does reveal potentially changing attitudes towards animal welfare. However, the research suggests that this is not consistent amongst all those countries surveyed and revealed significant differences in public attitudes towards such animals.

In Moldova, from July 2022 animal abuse will be included as a crime in the criminal code which means that it will become an imprisonable offence rather than one attracting just a fine. Animal fighting will be outlawed. They have also included the 'Ukrainian' addition to animal crimes committed in front of children being an aggravating factor in sentencing.

In Ukraine, Law 2351 came into effect in November 2021,<sup>26</sup> and introduced the second highest term of imprisonment in Europe. Animal cruelty cases committed in front of children will be an aggravating factor when considering sentencing.<sup>27</sup> The impact of war in Ukraine and its ability to develop and implement law relating to animals are uncertain, but it is likely to have been significant in terms of the impact on animals as well as the plight of humans.

In Hungary the law on animal cruelty has been improved. The penal code has been expanded to cover cases of damage to nature, animal cruelty, and the organization of illegal animal fighting. Sentences have been increased to one to five years imprisonment and may be imposed for the offenses of cruelty to animals by using poison or baiting to kill more than one animal. The preparation of placing of poison or bait is also now punishable.<sup>28</sup>

Therefore, there appears to be hope for the future in relation to developing animal cruelty laws in eastern Europe. However, there is still a long way to go before that provision allows for the protection found elsewhere to the west. Many

22 <https://api.worldanimalprotection.org/country/romania>

23 Belarus | World Animal Protection

24 Azerbaijan | World Animal Protection

25 Tomasevic, I., Bahelka, I., Čitek, J., Čandek-Potokar, M., Djekić, I., Getya, A., Guerrero, L., Ivanova, S., Kušec, G., Nakov, D. and Sołowiej, B., 2020. Attitudes and beliefs of eastern European consumers towards animal welfare. *Animals*, 10(7), p.1220.

26 Official portal of the Verkhovna Rada of Ukraine

27 Law 2351 Has Come Into Force - What Does This Mean For Ukraine Animal Welfare Moving Forward? | Naturewatch Foundation

28 Animal Welfare Laws Being Tightened in Hungary - Hungary Today

countries in the EU such as Switzerland, Germany, Luxembourg and Austria go beyond EU requirements by incorporating reference to animal protection at a constitutional level. Others such as Norway, Belgium and Sweden have adopted higher standards of protection for livestock.<sup>29</sup>

It is useful to look at the case-study of fur-farming cruelty to gauge the development of European approaches to animal cruelty, particularly in eastern Europe. Fur-farmed animals – most often mink, but also including foxes and other species, are of particular interest to animal cruelty campaigners because they are wild animals. This makes them uniquely unsuited to farming in cages, despite industry claims to the contrary. Europe remains at the centre of fur farming because of its involvement in both production and the market for fur, although the full effects of Covid restrictions have yet to work through the system. Even relatively developed countries such as Denmark and the Netherlands have a recent history of fur farming although this may have been ended by Covid19. In Denmark concerns about covid infection being spread by mink led to mass culling's and a temporary ban until 2023. Only a small number of farmers have expressed an interest to start up again if restrictions are lifted in 2023.<sup>30</sup> But the order to close until 2023 at the very least, may have ended fur-farming of Mink in Denmark. The Dutch government ordered the permanent closure of all mink farms in March 2021.<sup>31</sup> Despite banning fur-farming in 2000, the United Kingdom remains at the heart of the industry because of its connections with the fashion industry. Although the UK government consulted on a ban in 2021, it finally abandoned the Animals Abroad Bill in May 2022 which might have included a ban on the importation of fur.<sup>32</sup>

The fur industry is one of the great shaming

<sup>29</sup> Falaise, M., 2019. Legal Standards and Animal Welfare in European Countries. *Animal Welfare: From Science to Law*; Hild, S., Schweitzer, L., Eds.

<sup>30</sup> <https://www.theguardian.com/environment/2022/may/13/danish-farmers-turn-their-backs-on-mink-after-covid-mutation-cull>

<sup>31</sup> <https://www.hsi.org/news-media/dutch-mink-fur-farms-to-be-permanently-closed/>

<sup>32</sup> <https://www.worldanimalprotection.org.uk/news/qs-animals-abroad-bill#:~:text=The%20Animals%20Abroad%20Bill,of%20fur%20and%20foie%20gras>

spectacles of animal cruelty in Europe. Although it is classified officially as 'farming' there can be little doubt that it involves the most serious types of cruelty through psychological harm to wild species in the name of human vanity. It is unlike other types of farming in that those species have not been bred for captivity and retain their wild attributes. The scientific case is very strong in showing the suffering caused to animals in fur farming.<sup>33</sup> The scientific jury is no longer out on cruelty in fur-farming – it is firmly established.

In this context it is interesting to witness the fast-moving development of this area of animal cruelty.<sup>34</sup> The campaign group Fur Free Alliance<sup>35</sup> monitors the apparent rush to ban fur-farming across Europe (dates of implementation of each ban may be later than these decision dates) including recently, Bulgaria (June 2022), Ireland (March 2022) and Italy (December 2021). The list of European Countries banning fur-farming is growing and adding to those of Austria, Belgium, Croatia, Czechia, Estonia, Germany, Luxembourg, the Netherlands, Norway, Serbia, Slovakia, Slovenia, Switzerland, and the United Kingdom.<sup>36</sup> However, fur-farming seems to be persisting in some countries such as in Poland, Finland, Sweden, Latvia and Russia, although Covid 19 has imposed limits on mink farming. Even here there may be changes soon - Latvia is now proposing to ban fur farming by 2026.<sup>37</sup>

For some time since 2000, European fur production was particularly resistant to ending in the Scandinavian countries mentioned above and in parts of eastern Europe. In 2021 it was reported that Denmark was seeking to move it fur production to pre-war Ukraine – probably to avoid the temporary ban on mink farming in

<sup>33</sup> <https://www.furfreealliance.com/wp-content/uploads/2015/11/Case-against-fur-farming.pdf>

<sup>34</sup> Gorbach, R., 2021. Fur farming. *Skin for skin?*. *Animal Ethics Review*, 1(1), pp.45-52.

<sup>35</sup> <https://www.furfreealliance.com/> Accessed 16th June 2022.

<sup>36</sup> Additional Information, fur Free Europe at file:///C:/Users/lawsbroo/Downloads/Fur%20Free%20Europe-%20additional%20info.pdf Accessed 16th June 2022.

<sup>37</sup> <https://eng.lsm.lv/article/society/environment/latvia-discusses-ban-on-fur-farming.a437279/#:~:text=There%20are%20currently%20five%20fur,greatly%20to%20the%20Latvian%20economy>





Denmark itself.<sup>38</sup> However, the picture does appear to be changing with the number of European countries, including those in Scandinavia and eastern Europe now looking to ban fur-farming. This is evidence that public sentiment against fur-farming is now resulting in anti-cruelty legislation even in areas of eastern Europe that were most resistant in previous years. Taken as a barometer of concern for animal welfare across Europe, the case of the fur industry signals that the momentum against cruelty is moving in the right direction.

For the purposes of this article, we can provide only a brief snapshot of the law covering animal cruelty across the numerous jurisdictions of Europe. The specific situation with the European Union will be dealt with later. However, it is useful to summarise the law that has been covered so far. The ways in which animal cruelty is dealt with in Europe is at different stages of evolution in different countries. Implementation of effective control through legislation and en-

forcement is complicated by differing notions of what constitutes cruelty according to the history and traditions of the different nations. There is no over-arching definition which reaches across jurisdictional boundaries. There is evidence that most countries in Europe have at least begun to recognise that animal cruelty legislation is desirable this is a step forward, but it is also important to ensure that the law is also enforced as is examined in the next section.

### **The need for effective enforcement – sentencing and punishment**

The introduction of animal cruelty laws is an important step towards better treatment of animals. In many cases this is done through criminal law or codes and so for it to be effective there needs to be adequate sentencing and punishment for such offences. This is important not just for animals themselves, but this may also have significant gains for society as well. For example, there has been concern about the link between cruelty to animals and other violence against human

<sup>38</sup> Gorbach, R., 2021. Fur farming. Skin for skin? *Animal Ethics Review*, 1(1), pp.45-52.

family members<sup>39</sup> as well as a discussion about how cruelty to animals fits in with other issues of violence.<sup>40</sup> This is not just a recent concern as philosophers have raised similar concerns over the centuries.<sup>41</sup>

These concerns can have an impact at a legislative level. As recently as December 2021 the Spanish Government updated the Spanish Civil Code to provide that animals will no longer be considered as 'objects', but sentient beings. This change was made in consideration of domestic violence against humans and pets which was arising in divorce cases and proving to be difficult for lawyers to raise. There was no provision relating to the sentencing of animals in the Spanish Civil Code and the animals involved were being dealt with only as property even if there was evidence that they had been abused by one of the parties.<sup>42</sup>

The link between animal and domestic human violence is so well established that it has led to calls by, for example, the campaign group People for the Ethical Treatment of Animals (PETA), that it adds extra impetus to ensuring that abusers of animals should be adequately prosecuted and sentenced.<sup>43</sup> This leaves the anomaly that the cause of reducing animal cruelty may be improved as a secondary concern to human cruelty and suffering. This will satisfy those who advocate that any gain is worthwhile and is also likely to be welcomed by those who advocate from a stronger animal rights or personhood perspective – even if they are not satisfied that

the route taken for this outcome recognises the inherent value of animal life. However, the use of the link between human and animal suffering as a way of seeking change in reporting practices has given rise to a useful consequence in relation to reducing overall animal cruelty, as well as benefitting humans.

In terms of deterrence in many countries there has been pressure to increase the sentences given in cases of animal cruelty.<sup>44</sup> In the UK the Animal Welfare (Sentencing) Act (2021), increased the maximum sentence for specific offences under the Animal Welfare Act 2006 Act from six months to five years in custody offenders can also receive an unlimited fine. These are also now made either way offences, meaning they can be heard in either in a Magistrates Court, or a Crown Court where sentencing powers are greater. There is consultation until August 2022<sup>45</sup> to revise and update the sentencing guideline for animal cruelty.<sup>46</sup> At present there are different guidelines for domestic and captive animals<sup>47</sup> and wildlife offences.<sup>48</sup> The changes to maximum penalties enable courts to take a firmer approach to cases such as dog fighting, abuse of puppies and kittens, illegally cropping a dog's ears and gross neglect of farm animals.<sup>49</sup> However, this will not affect wildlife crimes.

In Ireland, punishment for the most serious cases of cruelty is also five years.<sup>50</sup> This is also the case in Poland where the Penal Code imposes fines, forfeiture of animals, bans on animal ownership, and sentences of imprisonment from

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39 Lockwood, R., and Hodge, G.R., 1986. The tangled web of animal abuse: The links between cruelty to animals and human violence. *Humane Society News*, Summer, pp.10-15; *The Link between Animal Abuse and Human Violence* Edited by Andrew Linzey. Brighton and Portland: Sussex Academic Press, 2009. 346 pages. ISBN: 978-1-84519-324-9.

40 Nurse, A. (2020) 'Masculinities and Animal Harm', *Men and masculinities*, 23(5), pp. 908–926. doi: 10.1177/1097184X20965458.

41 Regan, Tom & Singer, Peter (eds.) (1989). *Animal Rights and Human Obligations*. Cambridge University Press. Available on PhilArchive: <https://philarchive.org/archive/REGARA>

42 See: <https://english.elpais.com/sociedad/2021-12-03/spain-approves-new-law-recognizing-animals-as-sentient-beings.html>

43 [www.peta.org.uk/issues/animals-not-abuse/cruelty-to-animals/](http://www.peta.org.uk/issues/animals-not-abuse/cruelty-to-animals/)

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44 The UK Centre for Animal Law (2019) Submission to the House of Commons Public Bill Committee on the Animal Welfare (Sentencing) Bill. Available at: <https://online.fliphtml5.com/pfupa/mzst/#p=2> (Accessed: 8 May 2022)

45 For an interesting discussion about this see [www.advocates-for-animals.com/post/will-new-sentencing-guidelines-for-animal-welfare-offences-result-in-more-prison-sentences](http://www.advocates-for-animals.com/post/will-new-sentencing-guidelines-for-animal-welfare-offences-result-in-more-prison-sentences)

46 *Animal cruelty: Consultation – Sentencing* ([sentencingcouncil.org.uk](http://sentencingcouncil.org.uk)) (Accessed 8 May 2022)

47 [www.cps.gov.uk/legal-guidance/offences-involving-domestic-and-captive-animals](http://www.cps.gov.uk/legal-guidance/offences-involving-domestic-and-captive-animals)

48 [www.cps.gov.uk/legal-guidance/wildlife-offences](http://www.cps.gov.uk/legal-guidance/wildlife-offences)

49 [www.gov.uk/government/news/maximum-prison-sentence-for-animal-cruelty-raised-to-five-years](http://www.gov.uk/government/news/maximum-prison-sentence-for-animal-cruelty-raised-to-five-years)

50 *Animal Health and Welfare Act, 2013*

3 months up to 3 years, or 5 years in cases of extreme cruelty<sup>51</sup>. However, the longest term of imprisonment is found in Greece which has recently increased maximum punishment to ten years for serious animal abuse with a minimum of one year.<sup>52</sup> However, the definition of abuse is quite extreme in that this maximum applies to poisoning, hanging, burning and mutilating animals.<sup>53</sup>

Some Western European countries impose comparatively short terms of imprisonment. In the Netherlands<sup>54</sup> enforcement of animal cruelty is punishable<sup>55</sup> by fines or imprisonment of up to six months. Austria imposes a maximum of one year imprisonment for curtly offences,<sup>56</sup> whereas in Denmark this is increased for two years if it involves reckless or gross negligence.<sup>57</sup> In Spain, mistreatment of any animal, with the exception of non-captive wild animals, is punishable by up to two years imprisonment,<sup>58</sup> warnings and fines.<sup>59</sup> Animals can also be seized, offending establishments closed and activities stopped.<sup>60</sup> Article 337 of the Spanish Penal Code provides that those who cruelly mistreat pets and unjustifiably cause death or injuries causing serious physical impairment are liable to imprisonment sentences of between three months and one year. Article 632(2) provides that those who those who cruelly mistreat pets without amounting to an offence under Article 337 are liable to between 20 and 60 days imprisonment or between 20

and 30 days community service.<sup>61</sup> France also has a sliding scale of offences relating to cruelty on domestic, tamed, and captive animals some of which are also unlikely to have a deterrence effect. However, the most serious cruelty issues, including abandonment of animals, can lead to two years imprisonment and/or a fine.<sup>62</sup> Germany has a longer three-year maximum term of imprisonment for offences relating to cruel or long-lasting infliction of pain or suffering on vertebrates.<sup>63</sup>

Switzerland provides an interesting example as the law covers a wide definition of activities that can lead to imprisonment and the tariffs are higher than elsewhere.<sup>64</sup> Anyone who wilfully mistreats or neglects an animal, unnecessarily overworks it or in any other way disregards its dignity is liable to a fine or imprisonment of up to three years. Anyone who does so through negligence is liable to a fine or imprisonment of up to 180 days. The Animal Welfare Act (2005) also imposes imprisonment or a fine for general maltreatment of animals.<sup>65</sup>

Other sanctions imposed by various countries include removal of the animal from the owner and the person convicted of such an offence may be banned from keeping animals. This is the case in Austria,<sup>66</sup> Denmark, Germany<sup>67</sup>, Poland<sup>68</sup> and Switzerland.<sup>69</sup> On the face of it this appears to be a progressive step for animal in moving them out of harm's way. However, one should be mindful of the destination for these animals in terms of this being the in the best interests of the animal.

Another relatively unusual step is shown in Poland where fines gathered by the state used for

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51 [www.advocates-for-animals.com/post/poland](http://www.advocates-for-animals.com/post/poland)

52 Kokkinidis T, 2021. Greece introduces new regulations for pets, Stricter penalties for abuse. Available at: [Greece Introduces New Regulations for Pets; Stricter Penalties for Abuse \(greekreporter.com\)](http://greekreporter.com) (Accessed 16 September 2021).

53 Animal Cruelty in Greece Now Punishable by Up to 10 Years in Prison ([greekreporter.com](http://greekreporter.com)) (6 nov 2020)

54 Animal welfare regulations | Animal welfare | Government.nl

55 Article 8.12(3) and 8.12(4) of the Netherlands' Animals Act 2011 provide that infringement of the anti-cruelty provisions of Article 2.1(1).

56 Article 222 of the Penal Code.

57 (Article 29). Denmark | World Animal Protection

58 The Penal Code (2015) Spain | World Animal Protection

59 Law 32/2007 Spain | World Animal Protection

60 Spain | World Animal Protection

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61 Article 337 of the Penal Code Spain | World Animal Protection

62 (Article 521-1) France | World Animal Protection

63 Article 17 of the Animal Protection Act (TierSchG) Germany | World Animal Protection

64 Article 26 of the Animal Welfare Act (2005).

65 Switzerland | World Animal Protection

66 Austria | World Animal Protection

67 (Articles 19 and 20).Germany | World Animal Protection

68 Poland | World Animal Protection

69 Switzerland | World Animal Protection

the benefit of animal protection, for example, for the benefit of the Society for the Prevention of Cruelty to Animals in Poland<sup>70</sup> under Article 35 of the Polish Animal Protection Act 1998. This is quite progressive to see fines for animal cruelty being applied to related issues in animal protection. This example of good practice could be used elsewhere. However, for the penalties to be effective it is important that enforcement action is taken for example in Poland: "According to research conducted by two NGOs, over 70% of all animal cruelty cases are discontinued, and only 19% end up in court".<sup>71</sup>

In Russia the Penal Code of the Russian Federation (2012) imposes penalties for cruelty to animals involving their death or injury which has occurred in connection with malicious or mercenary motives, the use of sadistic methods or in the presence of minors. Offenders are potentially subject to fines, compulsory or corrective labour and imprisonment, the tariffs for which are increased if those acts were committed by a group of persons or by an organised group.<sup>72</sup> Some countries have enforcement provisions, but they are likewise only for serious cruelty and attract only small fines. In Azerbaijan a fine is imposed for "causing brutal treatments to animals," but the fine is very small.<sup>73</sup> In Belarus, as mentioned previously, there is no anti-cruelty legislation and, therefore, no corresponding mechanisms for enforcement or corrective justice by fines, imprisonment or otherwise.<sup>74</sup>

In terms of enforcement and sentencing reform, it is ethically and philosophically desirable that any animal cruelty law should apply to all animals and at the least those defined as sentient, it should cover both physical and psychological wellbeing and cover a failure to act as well as deliberate acts of abuse. This is ethically desirable because it would ensure that humans have an incentive to live their lives according to moral standards. It is philosophically desirable as it accords with growing evidence of our fundamental knowledge about animal sentience and the impact of cruelty on animals. But in terms of sanc-

tions there does need to be some thought about what sanctions provide the best deterrence and whether imprisonment should be the focus of penal policy.<sup>75</sup> We suggest that education and working with both authorities and potential perpetrators might provide a longer lasting solution because it creates knowledge and encourages compliance.

### Who Should enforce the law?

In the UK investigation and prosecution of most animal cruelty cases<sup>76</sup> is undertaken by the RSPCA<sup>77</sup> and their work practices follow those of the Code for Crown Prosecutors.<sup>78</sup> Other enforcement routes exist through local authorities in relation to, for example, dog breeding, and the police in relation to, for example, wildlife crime. It is an anomaly in the criminal justice system to have the chief responsibility for enforcing laws in the hands of, in this case, a non-governmental charity using private prosecutions. This has an impact in resources available and affects the links to educational and preventative actions at governmental level. It is very doubtful whether this kind of structure would be acceptable in relation to crimes against human beings and it could be viewed as being vulnerable to lack of capacity, despite the obviously hard work and professionalism of those involved.<sup>79</sup>

In most other countries in Europe, the police are responsible for enforcement, sometimes in conjunction with other governmental bodies. In the Netherlands and Finland, for example, police resources are dedicated to the enforcement

70 Article 35 Poland | World Animal Protection

71 [www.advocates-for-animals.com/post/poland](http://www.advocates-for-animals.com/post/poland)

72 Russia | World Animal Protection

73 Azerbaijan | World Animal Protection

74 Belarus | World Animal Protection

75 Marceau, J. (2019). *Beyond Cages*. In *Beyond Cages: Animal Law and Criminal Punishment* (pp. 1-11). Cambridge: Cambridge University Press. Also Marceau, J and Gruen, L (2022) 'Carceral Logics', Cambridge: Cambridge University Press.

76 RSPCA, Prosecuting animal cruelty and neglect. Available at: <https://www.rspca.org.uk/whatwedo/end-cruelty/prosecution> URL (Accessed: 8 June 2022). And RSPCA Getting justice for animals. Available at: <https://www.rspca.org.uk/whatwedo/strategy/prosecution> URL (Accessed: 8 June 2022).

77 [www.rspca.org.uk/whatwedo/endcruelty/prosecution](http://www.rspca.org.uk/whatwedo/endcruelty/prosecution)

78 [www.cps.gov.uk/publication/code-crown-prosecutors](http://www.cps.gov.uk/publication/code-crown-prosecutors)

79 Nurse, A., 2013. Privatising the green police: The role of NGOs in wildlife law enforcement. *Crime, law and social change*, 59(3), pp.305-318.

of animal cruelty law. Austria maintains an Animal Protection Ombudsperson for each state, a country-wide Animal Protection Council<sup>80</sup> and an Animal Protection Enforcement Council which includes the heads of various enforcement bodies, government officials and the animal welfare ombudsmen. It is a multi-layered approach showing a commitment to preventing animal cruelty but as is the case elsewhere, Austria is criticised in relation to other areas such as hunting, stunning at slaughter techniques and other issues.<sup>81</sup> This shows that even with significant political involvement, apparently secure routes to investigation and prosecution, and appropriate sentences as the constituent parts of a country's overall response to animal cruelty, it may still have important moral questions to answer. There is often a sting in the tail in relation to the overall picture.

## Conclusion

There does appear to be some movement on issues of animal cruelty in areas of Europe where legislation and control was previously very weak as seen with Moldova in 2022 and Ukraine in 2021, and the response of several countries over concerns about fur-farming. However, some of these may be attributed to concerns about human health arising from Covid 19. It has been shown that animal 'cruelty' means different things in different countries. It is no surprise, therefore, that aspects of cruelty are dealt with differently in European states, or not dealt with at all. It is possible to draw some observations about the development of the law in Europe regarding animal cruelty and abuse, but it is by no means a clear or uniform picture.

The first issue relates to problems associated with definitions of cruelty in Europe in different jurisdictions, even in those countries which are members of the European Union. This is particularly relevant because there is growing recognition of the need to regulate in accordance with animal 'sentience', led by science, as way of redefining what is acceptable in human use of animals in law. Sentience has long been recognised in the European Union in Article 13 of the

TFEU,<sup>82</sup> but there has been doubts as to its effectiveness.<sup>83</sup> This development may redraw the lines defining cruelty as certain forms of practice previously accepted in for example farming, animal experimentation, control of wildlife or regulating domestically kept animals, may be drawn into sharper focus as they involve significant psychological cruelty which is currently accepted in law. The case-study of fur farming discussed above is a good example of changing definitions of cruelty extending into psychological abuse which results in persuasive arguments to change legislation. Europe appears to be a leader in this field but there are anomalies and gaps in the overall control of cruel practices. Article 13 has been underused and of comparatively low effect as it has not heralded a coherent set of regulations on a pan-European scale. There are doubts, for example, regarding its wording such as a requirement to 'pay full regard' to animal welfare in devising legislation, and the fact that farming and experimentation continue although these practices clearly make animals pay a very heavy price.<sup>84</sup>

Amongst several countries legislating along sentience lines, the UK was embroiled in a four-year debate on how to legislate in this area following its exit from the EU.<sup>85</sup> This led to the Animal Welfare (Sentience Act) 2022 which covers vertebrates, any cephalopod, mollusc and decapod crustacean. In terms of other invertebrates these can be added using delegated legislation.<sup>86</sup> The introduction of this specific legislation was the result of a concerted campaign by animal welfare groups and members of parlia-

80 Articles 38 to 48 of the Animal Welfare Act 2004.

81 Austria | World Animal Protection

82 Consolidated version of the Treaty on the Functioning of the European Union. Official Journal of the European Union art.13, October 26, 2012, 2012 O.J. (C326) 47.

83 Nurse, A., 2018. A question of sentience: Brexit, animal welfare and animal protection law. *J. Animal & Env'tl. L.*, 10, p.32.

84 See Compassion in World Farming, 2017, Separating fact from fiction on animal sentience, at <https://www.ciwf.org.uk/news/2017/11/separating-fact-from-fiction-on-animal-sentience> accessed 30 June 2022; see also House of Commons Briefing paper Number 8155, 8 August 2018 at <https://researchbriefings.files.parliament.uk/documents/CBP-8155/CBP-8155.pdf>.

85 Brooman, S., 2018. Animal Sentience in UK Law: Does the new clause need claws? *United Kingdom Journal of Animal Law* 2: 1, 21-31.

86 See section 5 for the full definition.

ment to avoid losing Article 13 from English law in the post Brexit era. It was a defining moment in that the specific recognition of sentience in English law was seen both as an important symbolic moment, and potentially one that could lead to improved animal welfare by improving the situation of animals in relation to cruelty and abuse. How this new provision affects existing law through the new Animal Sentience committee will be observed very closely to establish whether it is purely symbolic or leads to tangible improvements in animal welfare. However, whilst these developments regarding sentience are welcome, cultural differences in attitudes to animals across Europe mean that a satisfactory general approach which includes protecting animals' sentient requirements is a long way off.

The lack of consistency across Europe is highlighted by the fact that what is considered cruel in one jurisdiction may be allowed in another.<sup>87</sup> Some specific protection for farm animals is almost universal, but some persisting practices such as the force feeding of ducks and geese to produce foie gras are scientifically proven to be cruel. The same applies religious slaughter of animals<sup>88</sup> and there is an argument that the use of farmed animals is inherently cruel.<sup>89</sup> This can also be argued in relation to many other uses of animals<sup>90</sup> such as those animals used in experimentation.<sup>91</sup>

Although a universal definition of cruelty is lacking, this could be developed through reference to the World Animal Health Organisation animal welfare standards<sup>92</sup> and the European Convention on animal welfare. There are also some very

persuasive templates in circulation such as the Universal Declaration on Animal Welfare suggested by the World Society for the Protection of Animals.<sup>93</sup> Whilst there have been improvements and many organisations work tirelessly to improve this situation, there is a need for a generally accepted set of standards for animals akin to the Universal Declaration of Human Rights.<sup>94</sup>

Developments in Europe appear to be outpacing many other areas of the globe such as parts of America, Asia and Africa, but linking environmental concerns with those for animals could enhance the pace of change for both. This appears to have more appeal in public attitudes than is evident in legislation. However, if change comes too quickly it may lead to cruelty being exported to countries where legislation is weak or absent and welfare gains will be lost unless markets adjust accordingly to prevent cruelty-fuelled undercutting. On balance though, the leading legislator-protectors amongst the countries of Europe are probably amongst the most qualified to show the way.

In conclusion, despite recent developments in eastern Europe discussed here, and significant steps to deal with cases of animal cruelty that appear to be emerging right across Europe there is still a great deal of inconsistency and work to be done. Even in countries with comparatively good record in this area, there are concerns that economic human interests trump animal welfare concerns almost at every turn. Millions of wild animals, such as monkeys, tigers, and lions, are kept as pets, traded illegally, or used in circuses and other forms of entertainment. Farm practices expose millions of animals to cruel practices and there is evidence of unimaginable animal suffering in other areas such as the keeping of exotic pets, trafficking wild animals and their use in the entertainment industry such as zoos and circuses.<sup>95</sup> In some European countries 'sporting' practices such as hunting, and bullfighting continue to cause concern. There is much to do to

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87 [www.ciwf.org.uk/factory-farming/animal-cruelty/](http://www.ciwf.org.uk/factory-farming/animal-cruelty/); Leone, L., 2020. Farm animal welfare under scrutiny: issues unsolved by the EU legislator. *Eur. J. Legal Stud.*, 12, p.47.

88 Brooman, S., 2016. In Search of the Missing Ingredient: Religious Slaughter, Incremental Failure and the Quest for the Right to Know. *Journal of Animal Ethics* 6(2): 153-163.

89 [www.euronews.com/my-europe/2016/07/22/animal-cruelty-is-violence-inherent-to-abattoirs](http://www.euronews.com/my-europe/2016/07/22/animal-cruelty-is-violence-inherent-to-abattoirs)

90 See for example FAACE - Fight Against Animal Cruelty in Europe

91 EU science report highlights recent progress in use of non-animal methods | Cruelty Free Europe

92 See <https://www.woah.org/app/uploads/2021/03/en-oie-aw-strategy.pdf>

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93 [https://www.worldanimalprotection.ca/sites/default/files/media/ca\\_-\\_en\\_files/case\\_for\\_a\\_udaw\\_tcm22-8305.pdf](https://www.worldanimalprotection.ca/sites/default/files/media/ca_-_en_files/case_for_a_udaw_tcm22-8305.pdf)

94 Assembly, U.G., 1948. Universal declaration of human rights. UN General Assembly, 302(2), pp.14-25.

95 See the website of the Europe-based animal welfare group, Animal Advocacy and Protection at Our approach - AAP English



protect animals and much of this is linked with efforts to stem the damage caused by global warming – there is no doubt that environmentalists and animal welfare campaigners should work together for the betterment of humans and animals alike.

However, despite the challenges evident in Europe hope can be found in continuing work to improve local approaches to animal cruelty and to recognise animal sentience. This runs contrary to such wide-spread cruel practices highlighted by the Eurogroup on Animal Welfare and many others and discussed here. There is progress but it should not be pretended that this involves rapid change. The answer lies in a combination of approaches in supporting those who place pressure on law makers, continuing to educate those who might perpetrate cruel practices and ensuring that those who do are subject to sufficient and appropriate punishment. Developing the wider international approach to animal welfare will also be important.<sup>96</sup> Some of the most

notable scientists and philosophers across the centuries drew attention to the fact that animals are deserving of protection because they possess sentient qualities. Across Europe and elsewhere, humankind is still trying to put into law the logical and emergent consequences of their observations.

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96 Legge, D., Brooman, S. Reflecting on 25 Years of Teaching Animal Law: Is it Time for an International Crime

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of Animal Ecocide? *Liverpool Law Rev* 41, 201–218 (2020).

# A Comparison of the Welfare Standards Afforded to Wild Animals Kept Under Three Different Legislative Regimes in England

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## **Abstract**

In England, wild animals may be kept under licence for exhibition and human entertainment by businesses under the Animal Welfare (Licensing of Activities Involving Animals) (England) Regulations (2018), by zoos under the Zoo Licensing Act 1981 (Amendment) (England and Wales) Regulations 2002 and, for certain species, by private individuals under the Dangerous Wild Animals Act 1976.

Licences are issued by local authorities in England and the licence conditions are set out in the legislation and accompanying guidance documents (if applicable). The Animal Welfare (Licensing of Activities Involving Animals) (England) Regulations (2018), the Keeping or Training Animals for Exhibition Licensing: Statutory Guidance for Local Authorities, the Zoo Licensing Act 1981 (Amendment) (England and Wales) Regulations 2002, the Secretary of State's Standards of Modern Zoo Practice, and the Dangerous Wild Animals Act 1976, were reviewed to compare the welfare protections afforded to wild animals kept by licensed exhibition businesses, licensed zoos and private individuals licensed to keep dangerous wild animals. We found that the guidance material for exhibition businesses has more provisions for demonstrating and transporting animals, but concerningly there is no duration, distance or frequency limitations for performances, no requirement to have closure provisions in place and animals may spend a significant amount of time in an environment

which is not currently inspected. The guidance material for zoos contains more species-specific provisions and more comprehensive requirements for veterinary care in the home environment, but lacks detail relating to performances, both at the zoo and off-site. Animals kept by private individuals under the Dangerous Wild Animals Act 1976 are afforded the least protection, with consideration for each welfare aspect either being rudimentary or absent.

Each piece of legislation and supporting guidance material lacks detailed information on how animal welfare should be assessed by inspectors and still permit animals to be subject to stressful situations and out-dated practices for the purpose of human entertainment. The UK has some of the highest animal welfare standards in the world, but this is undermined by inconsistencies between relevant legislation and failures to provide inspectors and operators with sufficient detailed guidance.

We recommend that if wild animals are to continue to be kept in captivity and used as entertaining or educational exhibitions, then they need to be afforded better legal protection through the introduction of stricter and consistent inspection processes, consistent and comprehensive requirements for veterinary care, consistent species-specific management guidelines and performance restrictions across all relevant legislation.

## **Introduction**

Wild animals have varied, complex needs which can be challenging to meet when they are kept



in captivity.<sup>1</sup> The keeping and training of wild animals for exhibition purposes, which may involve transport, temporary housing, handling and exposure to unfamiliar environments and people, presents further challenges to the welfare of the captive wild animals concerned.

The exhibition of wild animals in travelling circuses has been widely acknowledged as ethically unacceptable, resulting in the recent prohibition on the use of wild animals in travelling circuses in England, enforced from January 2020 under the Wild Animals in Circuses Act 2019.<sup>2</sup> However, wild animals may still be kept and trained for exhibition in England by businesses licensed under The Animal Welfare (Licensing of Activities Involving Animals) (England) Regulations 2018 (hereafter referred to as the LAIAR) and by zoos licensed under the Zoo Licensing Act 1981 (Amendment) (England and Wales) Regulations 2002 (hereafter referred to as the ZLA). Operators may also keep or train wild animals for exhibition in England without a LAIAR or ZLA licence if they fall out of the scope of these two pieces of legislation. Zoos may fall out of the scope of the ZLA if they are: open to the public for fewer than seven days in a twelve-month period; are a traditional deer park; or are determined to be too small for the ZLA to apply in terms of the number or the kinds of animals kept.<sup>3</sup> Registered charities which exhibit wild animals as part of their charitable work for non-commercial purposes, operators which train or exhibit wild animals for sporting purposes, and operators which do not meet the Business Test of the LAIAR (e.g., if their trading income is less than £1000) fall out of the scope of the LAIAR.<sup>4</sup>

The LAIAR came into force in England on 1st Oc-

tober 2018. One of the five licensable activities introduced by the Regulations is the keeping or training of animals for exhibition in the course of a business for educational or entertainment purposes, (a) to any audience attending in person, and/or (b) by the recording of visual images of them by any form of technology that enables the display of such images.<sup>5</sup> It is widely believed that the introduction of the LAIAR has raised the animal welfare standards for performing animals kept by businesses in England<sup>6</sup>, with the inclusion of a clear definition of in-scope and out of scope activities offering a great improvement on the previous Performing Animals (Regulation) Act 1925 (an Act which is still enforced in Scotland and Wales). Prior to the LAIAR's introduction, any person that exhibited and trained performing animals in England was required to register with their local authority under the Performing Animals (Regulation) Act 1925. This involved a one-off registration, with no inspection or registration renewal process. The registration could only be prohibited or restricted where it was proved to the satisfaction of a court following a complaint by a constable or local authority officer that the training or exhibition of any performing animal had been accompanied by cruelty.<sup>7</sup>

By contrast, operators licensed to keep or train animals for exhibition under the LAIAR must comply with the conditions set out in Schedules 2 (General conditions) and 7 (Specific conditions: keeping or training animals for exhibition) of the Regulations. Explanatory guidance notes for these conditions have been produced for local authority inspectors. These were originally in the form of The Animal Welfare (Licensing of Activities Involving Animals) (England) Regulations 2018: Guidance Notes for Conditions for Keeping or Training Animals for Exhibition October 2018 but have since been replaced by the Keeping or Training Animals for Exhibition Licensing: Statutory Guidance for Local Authorities (hereafter

1 RSPCA, 'Welfare of wild animals in captivity' <[www.rspca.org.uk/adviceandwelfare/wildlife/captivity](http://www.rspca.org.uk/adviceandwelfare/wildlife/captivity)>.

2 Born Free and RSPCA, 'It's time parliament changed its Act' (2006) <[www.bornfree.org.uk/publications/time-parliament-changed-its-act](http://www.bornfree.org.uk/publications/time-parliament-changed-its-act)>; Stephen Harris, Graziella Iossa and Carl D Soulsbury, 'A review of the welfare of wild animals in circuses' (2006) <[www.rspca.org.uk/adviceandwelfare/wildlife/captivity/circuses](http://www.rspca.org.uk/adviceandwelfare/wildlife/captivity/circuses)>.

3 Zoo Licensing Act 1981 (ZLA 1981) s 1(2A); ZLA 1981, s 14(1)(a); Defra, 'Zoo Licensing Act 1981 Guide to the Act's provisions' (2012).

4 Defra, 'Keeping or training animals for exhibition licensing: statutory guidance for local authorities September 2022'.

5 The Animal Welfare (Licensing of Activities Involving Animals) (England) Regulations 2018, sch 1 pt 6.

6 Freedom for Animals, 'A Step Forward for Animals: Mobile Zoos Must Be Licensed' (2018) <[www.freedomforanimals.org.uk/news/new-mobile-zoo-licences](http://www.freedomforanimals.org.uk/news/new-mobile-zoo-licences)>; Warners Solicitors, 'Animal Activities Licensing: The New Regime' (2018) <[www.warners-solicitors.co.uk/animal-activities-licensing-new-regime/](http://www.warners-solicitors.co.uk/animal-activities-licensing-new-regime/)>.

7 Performing Animals (Regulation) Act 1925, s 2(1).

referred to as the LAIAR Guidance) with very few changes. Licences to keep or train animals for exhibition under the LAIAR are issued by local authorities and last for a period of three years. Before granting a licence, the local authority must consider whether the conduct displayed by the applicant indicates that they are a fit and proper person to carry out the licensable activity, ensure that the appropriate fees have been paid, and a suitably qualified inspector must inspect the site of the licensable activity to assess if it is likely to meet the licence conditions. The inspector must prepare a report and state whether or not they consider that the licence conditions will be met.<sup>8</sup>

Zoos licensed under the ZLA in England, by definition, keep wild animals for exhibition to the public.<sup>9</sup> Zoos may train wild animals to participate in educational talks and demonstrations which should be designed to raise awareness in relation to conservation of biodiversity and provide accurate species information to the public.<sup>10</sup> Examples include: sea lion presentations or shows (including training); animals in action or encounter demonstrations; falconry and bird flying shows; reptile shows; and aquarium presentations, e.g. shark encounters.<sup>11</sup> Zoos may also take wild animals off-site for demonstrations.<sup>12</sup> Licensed zoos must comply with the conservation measures outlined in Section 1A of the ZLA, and in pursuance of Section 9 of the Act, with the Secretary of State's Standards of Modern Zoo Practice (hereafter referred to as the Zoo Standards). The guidance in the Zoo Standards is supplemented by the Zoos Expert Committee Handbook (2012), although this is non-statutory.<sup>13</sup> Zoos are licensed by local authorities and a guidance document (Zoo Licensing Act 1981 Guide to the Act's provisions) was published in 2012 and deals with measures that fall to the local authority in their role as the zoo licensing au-

thority. New zoo licences are valid for four years, after which they must be renewed; renewed licences are valid for six years.<sup>14</sup> Previously, all trainers and those responsible for conducting animal demonstrations in zoos were also required to be registered under the Performing Animals (Regulation) Act 1925.<sup>15</sup> However, licensed zoos, and any activity permitted under a zoo licence under the ZLA, are exempt from the LAIAR.<sup>16</sup>

If a private individual wishes to keep a wild animal that is listed on the Schedule of the Dangerous Wild Animals Act 1976 (hereafter referred to as the DWAA), they need to apply for a DWAA licence. Facilities licensed under the ZLA are exempt from the requirement for a DWAA licence, but individuals or businesses licensed under the LAIAR to keep or train animals for exhibition will need a DWAA licence if they house any of the species on the DWAA Schedule. Although animal welfare should be considered during inspections, the primary intention of the Act is to ensure that the animal is securely contained.

When keeping vertebrates, licensees under all three pieces of legislation (ZLA, LAIAR and DWAA) must also adhere to the requirements set out in the Animal Welfare Act 2006, including taking reasonable steps to ensure that the needs of the animals for which they are responsible are met to the extent required by good practice. The LAIAR were made by the Secretary of State under powers conferred by the Animal Welfare Act 2006. The accompanying legislative material of both the LAIAR and ZLA contain measures designed to meet the needs of the animals kept.

Given the complex needs of wild animals and potential negative welfare impacts of keeping and training these animals, this review aims to compare the welfare provisions afforded to wild animals kept by zoos and exhibition businesses, and dangerous wild animals kept by private individuals in England. We aim to highlight discrepancies between the legal protection afforded to wild animals in these three settings and suggest areas for improvement to better protect the welfare of captive wild animals.

8 Defra (n 4).

9 ZLA 1981, s 1(2).

10 Defra, 'Secretary of State's Standards of Modern Zoo Practice' (2012); Defra, 'Zoo Licensing Act 1981 Guide to the Act's provisions'.

11 Defra, 'Zoo Licensing Act 1981 Guide to the Act's provisions' (2012).

12 Defra, 'Secretary of State's Standards of Modern Zoo Practice' (2012).

13 Defra, 'Zoos Expert Committee Handbook November 2012' (2012).

14 ZLA 1981, s 5(1) and 5(2).

15 Defra (n 11).

16 Defra (n 4).



### **Legislation, guidance, standards, codes and guidelines**

Each piece of legislation discussed has material which either directly or indirectly accompanies it. These supporting materials take many forms including: statutory guidance and standards which directly relate to the legislation it supports; statutory codes of practice which do not relate to one particular Act but provide additional detail on the care of particular taxa; non-statutory guidelines which have been produced by industry bodies. As such, there is a plethora of documentation relating to these different areas of animal law and it may be unclear what is compulsory, what requires a relative level of compliance and what is considered to be best practice. Statutory guidance, standards and codes have been produced by the relevant government department with the consent of the Secretary of State. These materials provide practical advice on how to comply with the law and how inspectors should interpret the law. Commonly, licensees that follow the advice within these accompanying documents will be doing enough

to comply with the law in respect of those specific matters on which the material gives advice. "Where the enabling power permits, guidance can be expressly referred to in legislation to provide elucidation on meaning".<sup>17</sup> Such information within the accompanying guidance must directly correspond with the legislation. Content within guidance that is outside the content of the legislation, or does not tightly correspond, cannot be used to provide additional weight to the law itself.<sup>18</sup> These supporting materials are given special legal status in that if licence holders are prosecuted for not complying with the law due to not adhering to the guidance, they must be able to demonstrate how they have complied in an alternative way.

The LAIAR Guidance directly reflects and elaborates on the content found within the LAIAR and results in tight correspondence between leg-

<sup>17</sup> Joint Committee on Statutory Instruments, 'Rule of Law Themes from COVID-19 Regulations' (2021) <<https://publications.parliament.uk/pa/jt5802/jtselect/jtstatin/57/5707.htm>>.

<sup>18</sup> *ibid.*

isolation and guidance. In contrast, Section 5 (4) of the ZLA states, “a local authority shall have regard to any standards specified by the Secretary of State under section 9 and sent by him to the authority”.<sup>19</sup> This enables significant clarification on the Act’s requirements, although the duty holder’s exact compliance is not explicitly stated. An amendment of this language is contained within the Animal Welfare (Kept Animals) Bill, currently progressing through Parliament, which would change the text to make it “a condition requiring the zoo to meet the standards specified under section 9.”<sup>20</sup>

Non-statutory guidance such as best practice guidelines written by an industry body can be used to determine how far a duty holder fell below a particular standard as long as a court of law is satisfied that the stipulated guidelines relate to a section of the legislation. As such, there could be scenarios where a breach of the guidelines breaches legislation, and other occasions where breaches of the guidelines do not breach the legislation. This ultimately comes down to the content of the legislation in question.

The below comparison is written with a view that full compliance with laws and their accompanying guidance are adhered to by all licence holders. It is acknowledged that there is likely to be varying degrees of difference in the welfare that an animal experiences between licence holders under the same Act. However, the implementation and enforcement of each Act is beyond the remit of this paper.

## Comparison of the legislation and their accompanying guidance

### Scope

Examination of the relevant legislation and associated guidance reveals inconsistencies in which species are protected and what constitutes a “dangerous wild animal”. The ZLA applies to all wild animals (defined as “any animal not normally domesticated in Great Britain”) kept in zoos. The LAIAR applies to all vertebrate animals kept or trained for exhibition. The DWAA only applies to the species listed in its Schedule, which can be

amended. Only vertebrate animals are included within the scope of the LAIAR, whereas the ZLA and DWAA also cover invertebrates. This means that thousands<sup>21</sup> of exhibited invertebrates currently do not have their welfare legally protected by the LAIAR. This is particularly concerning considering that certain invertebrates, namely decapod crustaceans and cephalopods, are now legally recognised as sentient.<sup>22</sup>

Animals are categorised into three risk levels in the Zoo Standards, from highest risk (Category ‘1’ (greater risk)) to lowest risk (Category ‘3’ (least risk)), based on the animal’s ferocity and ability to harm people and the resulting scale of the harm.<sup>23</sup> The species listed on the Schedule of the DWAA do not completely align with the species included in the highest risk category in the Zoo Standards. The presence of outdated taxonomic names in the Zoo Standards and the DWAA Schedule creates difficulty in identifying the exact number of species considered to be dangerous by both the ZLA and the DWAA. Regardless, there are many species and species groups which are either considered a dangerous wild animal under the DWAA or the Zoo Standards, but not both. For example, many birds of prey species, amphibians, fish and cetaceans are considered to be in Category ‘1’ in the Zoo Standards, but these taxa are not covered by the DWAA, and therefore may be able to be privately owned without needing a licence, despite the risk they may pose to their owners and the wider public. There are also several species, such as the red panda (*Ailurus fulgens*) and the okapi (*Okapia johnstoni*) which are listed on the DWAA Schedule but are only considered to be in Category ‘2’ under zoo legislation. The Zoo Standards also assign different levels of risk depending on individual characteristics. For example, only adult males of some deer species are designated Category ‘1’. Differences between legislation in the way species are categorised could result in different management practices and enclosure designs being used for the same species, factors which have the potential to impact the welfare of the animals concerned.

21 Born Free, ‘Exhibition or Exploitation’ (2021) <[www.bornfree.org.uk/publications/exhibition-or-exploitation-report](http://www.bornfree.org.uk/publications/exhibition-or-exploitation-report)>.

22 Animal Welfare (Sentience) Act 2022.

23 Defra (n 12).

19 ZLA 1981, s 5.

20 Animal Welfare (Kept Animals) Bill 2021, sch 5, s 7(2).

## Inspection process

Zoos are subject to four types of inspection under the ZLA: 1) Licence inspection; 2) Periodical inspection; 3) Special inspection; and 4) Informal inspection.<sup>24</sup> Therefore, licensed zoos are inspected at least annually.<sup>25</sup> Licence inspections conducted prior to the granting or refusal of a new licence, or renewal of a licence, must be undertaken by inspector(s) nominated by the Secretary of State from the Secretary of State's list of inspectors.<sup>26</sup> When a licence inspection is to consider a significant change to a licence, it must be conducted by inspectors considered competent and authorised by the local authority.<sup>27</sup> Periodical inspections are carried out by a team of inspectors, consisting of up to three local authority appointed inspectors who must appear to the authority to be competent for the purpose and at least one must be a veterinary surgeon or practitioner. There must also be two Secretary of State nominated inspectors from the Secretary of State's list of inspectors, one of which must be a competent veterinary surgeon or practitioner and one competent to inspect animals and advise, amongst other things, on the management of zoos generally.<sup>28</sup> Special inspections can be carried out by any inspector that the local authority considers competent for the purpose of the inspection.<sup>29</sup> However, where the purpose of the inspection relates to the health of animals, a veterinary surgeon or practitioner with experience of the species kept in the zoo must be appointed.<sup>30</sup> Informal inspections must be carried out by a single inspector whom the local authority considers to be competent for the purpose – this is often a member of the local authorities licensing team.<sup>31</sup> To be appointed as a Secretary of State zoo inspector, veterinary surgeons must demonstrate appropriate up-to-date experience in the zoo/wild/exotic animal field and evidence of continued professional

development in zoo and exotic animal issues, while inspectors appointed to advise on the management of zoos must have considerable up-to-date experience in the management of zoos in Britain at a senior level.<sup>32</sup> Since 2018, the Department for Environment, Food and Rural Affairs (Defra) Zoo Expert Committee has also approved a certified City & Guilds training course in zoo licensing inspection for zoo inspectors and local government officers.<sup>33</sup>

The inspection of operators licensed to keep or train animals for exhibition under the LAIAR is less rigorous. Inspections are required less frequently (only prior to granting and renewal of a licence which is every three years), although in the case of complaints or other information that suggests licence conditions are not being complied with or that the welfare of the animals involved in a licensed activity is at risk, unannounced inspections may also be carried out.<sup>34</sup> Similarly, DWAA premises are only inspected upon the granting or renewal of the licence, which is every two years.

A further concern with the LAIAR is that animals may be regularly subjected to situations and environments which compromise their welfare off-site and these locations and conditions are not currently inspected. There is also no requirement for inspections to take place during exhibition activities, whether on- or off-site.

For comparison, an individual lion (*Panthera leo*) could be seen by inspectors annually when kept in a zoo, but only biennially when kept by a private individual (DWAA) or every three years when kept by an exhibition business operator (LAIAR), and inspectors do not have to see the lion at all when it is being used for the performance that the exhibition business operator is licensed for. This is based on the assumption that every individual animal in a zoo is inspected at every inspection, which seems unlikely considering the size of some zoos and the number of animals they house.

24 ZLA 1981, s 9A, 10, 11 and 12.

25 ZLA 1981, s 9A, 10(3)(a) and (b), 11(1)(a),(b),(c) and (d), and 12(1).

26 ZLA 1981, s 9A(7).

27 ZLA 1981, s 9A(8).

28 ZLA 1981, s 10(4)(a).

29 ZLA 1981, s 11(2).

30 ZLA 1981, s 11(3).

31 ZLA 1981, s 12(2).

32 Animal and Plant Health Agency, 'Zoo inspectors required: Help to keep high standards in British zoos' (2017).

33 Sparsholt, 'National Zoo Academy Launch at Sparsholt' (2018) <[www.sparsholt.ac.uk/college/news/national-zoo-academy-launch](http://www.sparsholt.ac.uk/college/news/national-zoo-academy-launch)>.

34 Defra (n 4).

Unlike the ZLA, the LAIAR and DWAA do not require certain inspections to be carried out by Secretary of State nominated inspectors. The DWAA requires inspections to be carried out by a veterinary surgeon or practitioner, but there is no requirement for the inspector to have relevant experience with the species under consideration, while the LAIAR do not even require the inspection to be completed by a veterinary surgeon or practitioner. LAIAR inspectors are also not required to demonstrate appropriate up-to-date experience in the wild/exotic animal field nor evidence of continued professional development in wild/exotic animal issues. Inspections under the LAIAR are carried out by a "suitably qualified inspector", defined as a person that: (a) has a Level 3 certificate (or equivalent) granted by a body recognised and regulated by the Office of Qualifications and Examinations Regulation (Ofqual) (their certificate must apply to the particular type of activity they will be inspecting. The training must cover the application of the licensing conditions for all licensable activities and must contain a practical element.); (b) has a formal veterinary qualification recognised by the Royal College of Veterinary Surgeons (RCVS), together with a relevant RCVS continuing professional development record; or (c) can show evidence of at least one year of experience in licensing and inspecting animal activities businesses - this person needs to be enrolled on a course leading to a Level 3 certificate qualification or equivalent and granted by a body recognised and regulated by Ofqual.<sup>35</sup>

Whilst there is no compulsory method of completing an inspection report, the ZOO2 form devised by Defra is most often used by zoo inspectors.<sup>36</sup> The form is designed to offer the inspector a choice of selecting 'Yes', 'No' or 'N/A' as a response to 100 questions related to zoo management, 48 of which directly relate to animal welfare criteria. Inspectors are also given the opportunity to recommend that the local authority attaches additional conditions to the zoo's licence if the inspector has deemed the zoo to be substandard. The zoo will be given a set time period to make any compulsory improvements. By contrast, inspectors for es-

tablishments licensed under the LAIAR are not given the opportunity to attach conditions to a licence and can only recommend whether the local authority should issue a licence or not.

There is no standard form devised by Defra for inspecting Dangerous Wild Animal or animal activities premises. However, the British Veterinary Association (BVA) and British Veterinary Zoological Society (BVZS) produced an inspection form template for DWAA premises in 2014 which aimed to "ensure conformity in DWA licence inspections".<sup>37</sup>

The LAIAR provides the licence requirements as bullet points which can be directly referred to during inspections, with local authorities adopting inspection forms to reflect this.<sup>38</sup> The inspection form consists of 67 questions, of which approximately two thirds directly relate to animal welfare criteria.

The importance of using animal-based outcomes for assessing the welfare of individual zoo animals has been demonstrated throughout scientific literature.<sup>39</sup> The ZOO2 form has been criticised for focussing on welfare inputs rather than outcomes.<sup>40</sup> The LAIAR and DWAA (and their corresponding inspection forms) also focus on the provision of resources rather than animal-based assessments. The forms do not require the inspector to detail the method of assessment used.

### Provision of a suitable environment

Section 2 of the Zoo Standards and General Condition 5.0 of the LAIAR Guidance outline several similar requirements for a suitable environment

<sup>37</sup> BVA and BVZS, 'BVA/BVZS Template for a Veterinary Inspection under the Dangerous Wild Animals Act 1976' (2014) <[www.bva.co.uk/media/3037/bzvs\\_inspection\\_under\\_dangerous\\_wild\\_animals\\_act\\_template\\_2014.pdf](http://www.bva.co.uk/media/3037/bzvs_inspection_under_dangerous_wild_animals_act_template_2014.pdf)>.

<sup>38</sup> Plymouth City Council, 'Inspection proforma keeping or training animals for exhibition' (2018) <[www.plymouth.gov.uk/sites/default/files/Inspection%20proforma%20keeping%20or%20training%20animals%20for%20exhibition.pdf](http://www.plymouth.gov.uk/sites/default/files/Inspection%20proforma%20keeping%20or%20training%20animals%20for%20exhibition.pdf)>.

<sup>39</sup> Isabella Clegg, 'Cognitive Bias in Zoo Animals: An Optimistic Outlook for Welfare Assessment' (2018) 8 Animals 104; Sally Sherwen and others, 'An Animal Welfare Risk Assessment Process for Zoos' (2018) 8 Animals 130.

<sup>40</sup> Draper (n 36).

<sup>35</sup> *ibid.*

<sup>36</sup> Chris Draper and Stephen Harris, 'The Assessment of Animal Welfare in British Zoos by Government-Appointed Inspectors' (2012) 2 Animals 507.

that are applicable to all taxa, for example, suitable temperature, ventilation, lighting and noise levels must be provided for the species. Section 1 (3) (c) of the DWAA contains a very general description of environmental considerations, simply stating, "any animal concerned will at all times...be held in accommodation which secures that the animal will not escape, which is suitable as regards construction, size, temperature, lighting, ventilation, drainage and cleanliness and which is suitable for the number of animals proposed to be held in the accommodation".<sup>41</sup> One of the requirements for all taxa included in the LAIAR Guidance, which is not mentioned in the Zoo Standards or DWAA, is that all housing must allow an animal to lie stretched out fully.

However, the LAIAR Guidance also states that, "whilst being temporarily exhibited, enclosure sizes that are smaller than that considered best practice for long term husbandry can be used." This is particularly concerning considering that animals could be exhibited for up to 12 hours per day<sup>42</sup> and no guidance on the minimum size of these enclosures is provided.

The Zoo Standards, the LAIAR Guidance and the DWAA all lack detailed, evidence-based, species-specific guidance for a suitable environment to varying degrees. The Zoo Standards (Appendix 8 – Specialist exhibits) contain taxon-specific guidance for a limited number of taxonomic groups, namely invertebrates, reptiles, amphibians, pinnipeds, marine birds, waterfowl, birds of prey and elephants. This guidance is both broad and limited. For example, the reptile section states that ultraviolet (UV) light from full spectrum sources is essential for many species when not available naturally. However, no information is included regarding the range of UV index (UVI) levels or the photoperiod recommended for different reptile species, nor that UVI levels within enclosures should be monitored. Broad information is provided for humidity, temperature and water temperature, but it is acknowledged that "details vary according to species", while only the Zoo Standards reference the need for some species to be able to fully submerge themselves in water. The Zoo Standards encourage inspectors to make full

use of the latest Taxon Advisory Group or the British and Irish Association of Zoos and Aquariums (BIAZA) Guidelines when assessing exhibits, but these guidelines are also limited. In January 2023, Taxon Advisory Groups had only published European Association of Zoos and Aquaria (EAZA) Best Practice Guidelines for five reptile species and one genus. The LAIAR Guidance has minimal taxon-specific guidance; birds and fish are the only taxa which are specifically mentioned in any of the subsections of General Condition 5.0 (Suitable environment).

The DWAA includes no species-specific guidance in relation to England. The Scottish Government provides some guidance on keeping the animals listed on the DWAA Schedule<sup>43</sup>, but no such guidance has been produced for elsewhere in the UK, despite recommendations for this being included in a report commissioned by Defra over two decades ago.<sup>44</sup> In 2010, Defra released the Code of Practice for the Welfare of Privately Kept Non-Human Primates (hereafter referred to as the Code), the scope of which covered all primates in private ownership, including those listed under the DWAA Schedule.<sup>45</sup> However, it does not cover primates kept in zoos licensed under the ZLA and no further revisions have been released since the establishment of the LAIAR. Indeed, businesses licensed under LAIAR fall outside the scope of the Code. The Code contains primate-specific guidance to a level of specificity that is greater than that in either the Zoo Standards or LAIAR Guidance.

The DWAA, Zoo Standards and LAIAR Guidance reference leaving animals unattended. Whereas the DWAA only states that the animals will "be visited at suitable intervals"<sup>46</sup>, the LAIAR Guidance and Zoo Standards provides more specific guidelines on this. The LAIAR Guidance states

41 Dangerous Wild Animals Act 1976 (DWAA 1976) s 1(3)(c).

42 Born Free (n 21).

43 Scottish Government, 'Dangerous wild animals: species guidance' (2019) <[www.gov.scot/publications/dangerous-wild-animals-species-guidance/](http://www.gov.scot/publications/dangerous-wild-animals-species-guidance/)>.

44 Andrew G Greenwood, Penny A Cusdin and Michael J Radford 'Effectiveness Study of the Dangerous Wild Animals Act 1976' (Defra 2001).

45 Defra, 'Code of Practice for the Welfare of Privately Kept Non-Human Primates' (2010) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/218679/primate-cop.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/218679/primate-cop.pdf)>.

46 DWAA 1976, s 1(3)(c).



that animals should not be left unattended for a period likely to cause distress, with staff either visiting the animals every 4 to 6 hours during the day or as necessary for the individual according to its species. It is important that time periods are specified within guidelines, providing both the operators and inspectors with a better idea of what is considered an appropriate length of time animals can be left unattended. Similarly, the Zoo Standards state that animals should be checked at least twice daily.<sup>47</sup>

Animal welfare provisions within the DWAA, such as environmental factors, are at best rudimentary, with the Act primarily focussing on public safety.<sup>48</sup> Some animals held under a DWAA licence are afforded welfare protection under other legislation, such as the Animal Welfare Act 2006 in England, but this legislation does not protect invertebrates and lacks specific guidance in relation to the species listed on

the DWAA Schedule.

#### Provision of food and water

As with the provision of a suitable environment, the Zoo Standards, LAIAR Guidance and the DWAA all lack detailed, evidence-based, species-specific dietary guidance. While the Zoo Standards (Appendix 8 – Specialist exhibits) contain some taxon-specific guidance on the design of diets, this only exists for waterfowl, birds of prey and elephants. The Zoo Standards state that a veterinary surgeon should be responsible for, or actively involved in, nutrition and the design of diets. However, there is no requirement for those veterinary surgeons to have relevant and detailed nutritional knowledge and/or qualifications relating to the species involved.

The LAIAR Guidance does not offer any specific recommendations for the design of diets beyond mentioning the consideration of quality, quantity, frequency, method and adjustment. This is particularly concerning as the LAIAR Guidance does not specify veterinary responsibility for diet

<sup>47</sup> Defra (n 12).

<sup>48</sup> Elizabeth Tyson, *Licensing Laws and Animal Welfare: The Legal Protection of Wild Animals* (Palgrave Macmillan 2020).



design. Diets for LAIAR-licensed animals might only be reviewed by a veterinary surgeon if the operator had a particular concern and wanted a veterinary opinion.

Similarly, the DWAA simply states that the animals will “be supplied with adequate and suitable food [and] drink”.<sup>49</sup> Although no further guidance is provided, the veterinary surgeon or practitioner inspecting the premises will need to be satisfied with the provision of food and water to grant or renew the licence. Therefore, the same species may be provided with completely different diets depending on whether they are licensed under the ZLA, the LAIAR or the DWAA, with varying degrees of veterinary scrutiny to identify and correct any nutritional issues.

Section 1 of the Zoo Standards and General Condition 6.0 of the LAIAR Guidance express the need for animals to have constant access to clean drinking water. However, only the Zoo Standards provides some species-specific guidance. For example, in ‘Appendix 8 – specialist exhibits’, it specifies that cloud and rainforest reptiles may only drink water droplets on plants and desert species may drink by licking surface condensation. It also suggests that de-chlorination of drinking water may improve palatability. Such guidance is absent from the LAIAR Guidance, despite reptiles being the most common vertebrate taxa licensed under the LAIAR.<sup>50</sup>

One advantage of the LAIAR Guidance is that it mentions that food and water (as well as other relevant resources) should be provided in a way which minimises competitive behaviour or the dominance of individual animals.

### Veterinary care

The Zoo Standards require much more stringent veterinary involvement compared to the LAIAR Guidance and the DWAA. In addition to veterinary input into the design of diets as part of a required comprehensive programme of care, veterinary surgeons must also advise on post-mortem examinations. By contrast, there is no mention of post-mortem examinations in the LAIAR Guidance or DWAA. Instead of regular visits as part of a programme of veterinary care,

veterinary surgeons are only required to visit establishments licensed under the LAIAR when the operator deems it necessary. The operator also determines whether there is a need to have veterinary presence on locations such as film sets. Both the LAIAR Guidance and Zoo Standards require the establishments to be registered with a local veterinary surgeon, but only the Zoo Standards requires registration with a specialist veterinary surgeon in addition. The DWAA does not mention any requirement for veterinary visits beyond having a veterinary surgeon or veterinary practitioner inspect the premise.

### Enrichment

Both the LAIAR Guidance and the Zoo Standards state that species-appropriate enrichment should be provided in both inside and outside environments. Various substrates and physical materials are suggested as possible enrichment considerations but neither guidelines provide any species-specific examples. A recent survey showed that enrichment in zoos can be overlooked in some taxa such as reptiles.<sup>51</sup> Neither the DWAA nor its BVA inspection form mention enrichment provision, nor the need for any type of mental stimulation.

The Zoo Standards state the need to provide extensive and varied enrichment in both inside and outside environments and that records of this must be kept. However, only the LAIAR Guidance specifically mentions the need to regularly change the enrichment. The importance of diversifying enrichment for captive wild animals has been clearly identified in the scientific literature.<sup>52</sup>

<sup>49</sup> DWAA 1976, s 1(3)(c).

<sup>50</sup> Born Free (n 21).

<sup>51</sup> Belinda Hall and others, ‘Cognitive Enrichment in Practice: A Survey of Factors Affecting Its Implementation in Zoos Globally’ (2021) 11 *Animals* 1721.

<sup>52</sup> Kathy Carlstead and David Shepherdson, ‘Alleviating stress in zoo animals with environmental enrichment’ in Gary P Moberg and Joy A Mench (eds), *The Biology of Animal Stress: Basic Principles and Implications for Animal Welfare* (CABI Publications 2000); Rebecca K Meagher, Dana L M Campbell and Georgia J Mason, ‘Boredom-like states in mink and their behavioural correlates: A replicate study’ (2017) 197 *Applied Animal Behaviour Science* 112; Sitendu Goswami and others, ‘Effects of a combined enrichment intervention on the behavioural and physiological welfare of captive Asiatic lions (*Panthera leo persica*)’ (2021) 236 *Applied Animal Behaviour Science*.

## Normal behaviour

The Zoo Standards state that animals should be granted the opportunity to express most normal behaviour, although they provide no specific guidance on what this normal behaviour includes or excludes. Similarly, the LAIAR Guidance states that animals must be able to express natural behaviours in their living environment, and the DWAA states, “while any animal concerned is at the premises where it will normally be held, its accommodation is such that it can take adequate exercise”.<sup>53</sup> Neither the LAIAR Guidance nor the DWAA make any reference to behavioural provisions for when animals are away from their “home environment”. This is particularly concerning for animals licensed under the LAIAR as they may be away from their home environment for a significant period of time<sup>54</sup> and their off-site performance locations are not subject to inspections. The DWAA only makes reference to the need for “adequate exercise” and does not mention any species-specific natural behaviour of any kind such as socialising or burrowing. It is clear that none of the guidelines strive to encourage provision for animals to express all natural behaviours.

Despite more than 2,400 birds of prey being exhibited in England under the LAIAR,<sup>55</sup> the LAIAR Guidance does little to prevent tethering, a practice which restricts natural flight behaviour and risks tibiotarsal fracture.<sup>56</sup> Section 7.2 of the LAIAR Guidance only states that birds must not be tethered permanently, and if animals are unable to move fully (i.e. use their natural full range of movements, such as running and flying) in any temporary enclosure, they must be given the chance to do so at least once each day and a record kept. Although neither the Zoo Standards nor the LAIAR Guidance currently prohibit tethering, Section 8.7.4 of the Zoo Standards offers more detailed guidance. For example, they recommend that owls and vultures should not be tethered and flying areas should not be in view of tethered birds. Despite this, an investigation

commissioned by the organisation Freedom for Animals revealed that three quarters of the zoos they surveyed still practise tethering, with 27% of the tethered birds being owls.<sup>57</sup> Tethering may not be applicable to the DWAA as no birds of prey are currently listed on the Schedule.

At the time of writing, revisions to the Zoo Standards are under consideration, with the draft revised Standards proposing to phase out tethering.<sup>58</sup> Although a phase-out of this unethical practice in zoos would, of course, be welcome, it is important that birds of prey held under all other relevant legislation are afforded the same welfare standards.

Similarly, although neither guidelines specifically prohibit surgical modifications, ‘Appendix 6 - Animal contact areas’ and ‘Appendix 8 - Specialist exhibits’ of the Zoo Standards provides some very limited guidance in this regard. For example, they recommend that stings should not be removed from rays and that any pinioning of birds should be justified by a pinioning policy. By contrast, body modifications are not mentioned in the LAIAR Guidance at all. Given the significant welfare implications of surgical interventions aimed at modifying behaviour, and the consequential prevention of natural behaviour expression, future guidance should seek to eliminate such practices.

## Transportation

The advice on transportation is more specific in the LAIAR Guidance compared to the Zoo Standards and DWAA, given the likelihood that animals licensed for exhibition under the LAIAR will be frequently transported. However, none of the guidelines provide maximum journey distances or frequency of travel. Despite the LAIAR Guidance stating that travel time “should be as small as possible”, there are multiple licensed animal exhibition establishments that claim to

53 DWAA, s 1(3)(f).

54 Born Free (n 21).

55 *ibid.*

56 Alberto Rodriguez Barbon and Marie Kubiak, ‘Birds of Prey’ in Marie Kubiak (ed), *Handbook of Exotic Pet Medicine* (Wiley-Blackwell 2020).

57 Laura Tomlinson, ‘Examination of the licensing, welfare and other issues relating to bird of prey zoos in the UK 2018’ (2018) <[www.freedomforanimals.org.uk/Handlers/Download.ashx?IDM-F=a8age5bd-efb2-4fe1-a163-b3e5aeb9511d](http://www.freedomforanimals.org.uk/Handlers/Download.ashx?IDM-F=a8age5bd-efb2-4fe1-a163-b3e5aeb9511d)>.

58 Born Free, ‘Giraffes Simply Don’t Belong in Zoos – No Wild Animals Do!’ (2022) <[www.bornfree.org.uk/articles/giraffe-day-2022](http://www.bornfree.org.uk/articles/giraffe-day-2022)>.

travel across the UK.<sup>59</sup>

Transportation guidance is completely lacking in the DWAA, although local authorities may specify conditions on the licence regarding whether and in what circumstances the animal can be moved from the premises. For example, a DWAA licence holder may require permission to transport an animal into another local authority area.<sup>60</sup> However, transportation conditions in relation to animal welfare may not be specified on the licence.

Similarly, a common licence condition applied to zoos is that the licensee must notify the local licensing authority prior to the temporary removal of any Category '1' listed animal other than for veterinary attention or inter-zoo transfer.<sup>61</sup> The notification commonly requires the licence holder to specify the method of transportation, public safety arrangements and provisions to ensure the animal's welfare is maintained. The Zoo Standards also stipulate that transport methods for the species must conform with the provisions of the International Air Transport Association (IATA).<sup>62</sup> The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) have produced guidelines for the non-air transport of live, wild animals and plants.<sup>63</sup> Although these guidelines only relate to international travel and are limited to the taxa protected by the convention, its animal welfare considerations could also be applied to species held under relevant UK legislation. Domestic transport of any vertebrate animal, excluding certain species of livestock, that is "part of an economic activity" requires a United Kingdom Animal Transport Certificate to be completed to

59 Born Free (n 21).

60 Eg East Riding of Yorkshire Council, 'Dangerous wild animal (DWA) licences' <[www.eastriding.gov.uk/business/licences-and-registrations/available-licences/animals/dangerous-wild-animals/](http://www.eastriding.gov.uk/business/licences-and-registrations/available-licences/animals/dangerous-wild-animals/)>; Erewash Borough Council, 'Dangerous Animals' <[www.erewash.gov.uk/animal-welfare-section/dangerous-animals.html](http://www.erewash.gov.uk/animal-welfare-section/dangerous-animals.html)>; Tendring District Council, 'Dangerous Wild Animals' (2022) <[www.tendringdc.gov.uk/business/licensing-legislation/animal-licensing/dangerous-wild-animals](http://www.tendringdc.gov.uk/business/licensing-legislation/animal-licensing/dangerous-wild-animals)>.

61 Defra (n 11).

62 Defra (n 12).

63 CITES, 'CITES Guidelines for the Non-Air Transport of Live Wild Animals and Plants' (2022) <[https://cites.org/sites/default/files/eng/resources/transport/E-FINAL\\_CITES\\_Non-air\\_transport\\_Guidelines.pdf](https://cites.org/sites/default/files/eng/resources/transport/E-FINAL_CITES_Non-air_transport_Guidelines.pdf)>.

comply with Article 4 of Council Regulation (EC) 1/2005 (as retained).<sup>64</sup> The form contains compulsory and optional fields. Section 13 requests details on times and places where rest stops were taken and if animals were fed or watered, but the completion of this section is not compulsory. Journeys exceeding eight hours require a Journey Log to be completed which requires more thorough declarations by the transporter.<sup>65</sup>

### Training

In terms of animal training, whereas the LAIAR Guidance only permits the use of positive reinforcement, positive punishment can still be used to train zoo animals. The DWAA does not mention any guidance on animal training.

Although the LAIAR Guidance allows animals to be trained for both educational and entertaining performances, the Zoo Standards only mentions training for educational demonstrations. However, this attitude towards education is not reflected in the Zoo Standards' guidance for performances. This is because 'Appendix 7 - Training of animals' in the Zoo Standards mentions taking animals to film studios as an example of a demonstration outside a zoo. The section also states how zoo operators can take animals to locations "for commercial or other purposes". Training, for any purposes, is not mentioned in the DWAA.

### Performances

The LAIAR Guidance includes conditions which aim to limit stress, fear, pain and anxiety during public demonstrations. By contrast, the Zoo Standards are less specific as the zoo operator has "the absolute right to say for how long and for what purposes the animals may be used" and is responsible for ensuring that "appropriate guidelines for the use of animals are followed".<sup>66</sup> Similarly, the DWAA does not mention any guidance regarding public demonstrations. This suggests that animal welfare standards are at

64 APHA, 'United Kingdom Animal Transport Certificate' (2021) <<http://apha.defra.gov.uk/external-operations-admin/library/documents/exports/WIT06.pdf>>.

65 APHA, 'Journey Log' (2021) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/948576/wit7.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948576/wit7.pdf)>.

66 *ibid.*

the discretion of zoo representatives and DWAA licence holders when animals are taken to other locations for commercial purposes.

By way of example, the LAIAR Guidance includes conditions in relation to props, animal costumes, make-up and special effects. It states that these components should not "cause any unnecessary pain, suffering, distress or discomfort. They must be used for the shortest time possible".<sup>67</sup> However, the wording suggests that animals can be subjected to some pain, suffering, distress and discomfort if it is deemed necessary for the purpose of the demonstration. The use of wild animals for public entertainment should not be considered "necessary" under legislation. This is particularly concerning as the guidelines do not provide any detail on what is considered to be acceptable. The only provision is that "the exhibited animals must be suitable for the actions involved in the exhibition".<sup>68</sup> This guidance is not specific enough for inspectors to be able to determine what kind of performance should be considered 'suitable' for a wild animal.

Crucially, there are also no specific limitations on the duration of demonstrations or interactions in the LAIAR Guidance, Zoo Standards or DWAA. The only reference to duration is provided by the LAIAR Guidance, which states that animals "must have clear breaks from exhibits... and must have sufficient breaks".<sup>69</sup> Although details of demonstrations should be recorded, there is no clear guidance for inspectors to determine whether animals are being exhibited or required to perform for too long. The duration of animal performances are highly variable, and have been found to range from two minutes to 12 hours.<sup>70</sup>

A small but concerning difference is that the Zoo Standards state that animals must not be provoked for the benefit of a public demonstration, whereas the LAIAR Guidance states that animals must not be used to provoke or annoy another animal for this purpose. Therefore, animals under a LAIAR licence may be continually goaded by handlers and objects during exhibitions. Ani-

imals may be incited to demonstrate a defensive act. For example, snakes might be goaded to strike or armadillos to roll into a ball, a provocation which would naturally distress the animal.

The DWAA does not mention any performance requirements. Although such requirements may be less applicable to the animals held under this Act, a licence holder could still use their animals for exhibition and performance and not require either a LAIAR or ZLA licence if they fall out of scope of either of these pieces of legislation. For example, a DWAA licence holder may not meet the business requirements for a LAIAR licence, and may not open their doors to the public for a sufficient number of days to require a zoo licence. Therefore, there is potential for animals licensed under the DWAA to be used for performance without there being any related provisions in the associated licence.

### Handling

Handling is known to induce anxiety and stress in wild animals.<sup>71</sup> The Zoo Standards and LAIAR Guidance provide similar guidance for handling by non-staff, despite public handling being the most common type of exhibition under the LAIAR,<sup>72</sup> and therefore may be more likely to occur under this licence. Under the LAIAR, staff are responsible for stopping interactions if the animal shows signs of fear, suffering or fatigue, and facilities for washing hands must be offered to handlers. Although the LAIAR Guidance states that animals should not be handled by people who appear under the influence of alcohol or psychoactive substances, there is no further advice given in relation to non-staff handlers. For example, there is no mention of a re-

67 Defra (n 4).

68 *ibid.*

69 *ibid.*

70 Born Free (n 21).

71 Eg Yvon Le Maho and others, 'Stress in birds due to routine handling and a technique to avoid it' (1992) 263 *The American journal of physiology*; Erin M French, 'Response of White's treefrog (*Litoria caerulea*) to common household captivity stressors [Senior Study]' [2007]; Trevor T Zachariah and others, 'Acute Corticosterone Stress Response to Handling in Four Captive Gopher Tortoises (*Gopherus polyphemus*)' (2009) 19 *Journal of Herpetological Medicine and Surgery*; Clifford Warwick, Phillip Arena and Catrina Steedman, 'Spatial considerations for captive snakes' (2019) 30 *Journal of Veterinary Behavior*; Victoria R Stockley, Anna Wilkinson and Oliver H P Burman, 'How to Handle Your Dragon: Does Handling Duration Affect the Behaviour of Bearded Dragons (*Pogona vitticeps*)?' (2020) 10 *Animals*.

72 Born Free (n 21).

quired age or emotional state of handlers. The DWAA does not provide any guidance regarding handling beyond the licence holder requiring insurance for any death or injury caused by the animal, despite how dangerous the implications of mishandling a dangerous wild animal could be. When considering the intent of the DWAA, it seems contradictory that animals of species that are listed on its Schedule are permitted to be used for interactive experiences under LAIAR and zoo licences.

### Establishment closure

Under the Zoo Standards, provisions must be in place if the zoo were to close, whereas there is no mention of this in the LAIAR Guidance. This is particularly concerning as animal exhibits are subject to less frequent inspections and their “business risk” is not determined like other licensed activities under the LAIAR, such as the selling of animals as pets.<sup>73</sup> As DWAA licence holders are private individuals rather than business operators, this aspect is less applicable. However, local authorities are able to seize the animal and “retain it in the authority’s possession or destroy or otherwise dispose of it”.<sup>74</sup> This is concerning as there is no requirement for local authorities or licensees to attempt to find suitable homes for seized animals. As international guidelines on live animal confiscations already exist<sup>75</sup>, elements of this guidance could be applied to domestic legislation to maximise the individual welfare of the animals.

## Conclusions

Animal welfare considerations differ considerably between the three different pieces of legislation regulating the keeping of wild animals for human entertainment in England (see Appendix 1 for a summary comparison of the three licences). Species which could be covered by all three licences, such as camels and lemurs, are therefore afforded different standards of environment, diet, healthcare and behavioural opportunities, depending on the particular licence

<sup>73</sup> Defra, ‘Animal activity licensing process: statutory guidance for local authorities’ (2022).

<sup>74</sup> DWAA 1976, s 4(1)(b).

<sup>75</sup> IUCN, ‘Guidelines for the management of confiscated, live organisms’ (2019) <<https://portals.iucn.org/library/node/48352>>.

held by their owner.

The ZLA and accompanying Zoo Standards afford greater welfare protection to captive wild animals than the LAIAR and accompanying LAIAR Guidance and the DWAA in many aspects. For example, they provide more species-specific care guidance; require more frequent routine inspections; and require a more comprehensive programme of veterinary care. However, the Zoo Standards still fall short in protecting captive wild animal welfare. For example, the care guidance provided lacks detail and only covers a limited number of taxonomic groups. Detailed guidance is not provided for animal performances, either at the zoo or any off-site locations, and zoo inspections are based on assessment of welfare inputs rather than welfare outcomes.

The LAIAR Guidance has more specific and relevant standards than the original performing animals legislation which the LAIAR replaced, and includes more provisions for demonstrating animals than the Zoo Standards or DWAA. However, these provisions are lacking in detail. For example: there is no guidance on the nature of demonstrations that are appropriate for different taxonomic groups; no limitations on the duration and frequency of demonstrations, nor the distance travelled to off-site locations; and no guidance on minimum enclosure sizes for animals being temporarily exhibited. The LAIAR and accompanying Guidance also fall short in other areas. For example: detailed species-specific care guidance is not provided; veterinary care requirements are less comprehensive than in the Zoo Standards; there is no requirement to have provisions in place to secure the welfare of licensed animals were the establishment to close; and, unlike the ZLA and DWAA, the LAIAR affords no welfare protection to invertebrates, which are used for exhibition in large numbers. Routine inspections are infrequent (once every three years), do not require a veterinary surgeon to be present, and only take place at the home site. Therefore, animals exhibited off-site may spend a significant amount of time in environments which are not currently inspected. Furthermore, inspectors are not required to have up-to-date experience or continuing professional development in captive wild animal welfare.

The DWAA only includes rudimentary animal



welfare considerations, affording captive wild animals with the least welfare protection of all three pieces of legislation. Although the DWAA does require a veterinary surgeon or practitioner to carry out inspections and includes invertebrates within the scope of the legislation, it fails to protect captive wild animal welfare in many areas. For example: the DWAA has no provisions for any species-specific natural behaviour of any kind, such as socialising; no detailed animal care guidance; inspections are infrequent (once every two years); inspectors are not required to have relevant experience with captive wild animals; and veterinary involvement is not mentioned, other than for inspections.

All of the guidance, Acts and Regulations lack detailed, evidence-based, species-specific animal welfare guidance and detailed information on how animal welfare should be assessed by inspectors. Inspections for all three licences are currently based on the assessment of welfare inputs, rather than welfare outcomes. All three pieces of legislation permit captive wild animals to be involved in stressful situations for the pur-

pose of entertainment or education, and currently allow out-dated practices such as tethering and pinioning.

We recommend that if wild animals are to continue to be kept in captivity and used as entertaining or educational exhibits, then they need to be afforded better legal protection through the introduction of stricter and consistent inspection processes, veterinary care, species-specific management guidelines and performance restrictions across all relevant legislation.

### **Recommendations**

Develop a single set of detailed, evidence-based species-specific welfare guidance, based primarily on animal welfare outcomes as well as inputs, compliance with which should be a licencing requirement for each of the relevant legislative instruments.

Where animals are used for exhibition, the relevant legislation should specify the exhibition activities which are suitable and therefore per-

mitted for different taxonomic groups, and provide species-relevant maximum limits on the duration and frequency of demonstrations, and transportation, to help ensure the welfare of performing and travelling animals.

The inspection of all licensed individuals and operators keeping wild animals should be carried out at least annually and LAIAR licence holders should also be subject to regular inspections at locations that are typical of those they visit for exhibition activities, to ensure that all licence conditions are being complied with.

Given the wide variety and large number of wild animals being kept and trained for exhibition by businesses in England under LAIAR licences, and the varied and complex needs of wild animals in captivity, all inspectors of businesses keeping or training wild animals under a LAIAR licence should be required to demonstrate appropriate experience in captive wild animal welfare. They should also demonstrate evidence of continued professional development in captive wild animal welfare issues. As a minimum, they should also hold a Level 3 certificate or equivalent granted by a body, recognised and regulated by Ofqual which oversees the training and assessment of persons in inspecting and licensing animal activities businesses that keep or train animals for exhibition. As well as meeting these criteria, we also recommend that at least one of the inspectors at each inspection should hold a formal, RCVS-recognised, veterinary qualification in order to ensure competency in evaluating compliance with conditions relating to animal health.

**Appendix 1. A summary comparison of the scope and welfare considerations for each licence.**

	DWAA	ZLA and Zoo Standards	LAIAR and LAIAR Guidance
<b>Scope</b>			
<i>Animals covered</i>	Wild animals listed on the Schedule (vertebrates and invertebrates).	Wild animals (vertebrates and invertebrates).	All vertebrate animals (exact definition not given).
<i>Criteria for licence</i>	Private individual or business (excluding zoos and pet shops) keeping a species listed on the Schedule.	Accessible to the public for seven or more days in a calendar year (regardless of fees) and exhibits a significant number of wild animals or species.	Viewed by a public audience (either in-person or via electronic media) by a business that charges a fee.
<b>General welfare</b>			
<i>General environment</i>	Suitable temperature, lighting and ventilation.	Suitable temperature, lighting (both levels of spectral distribution), ventilation and noise levels, with consideration given to the needs of pregnant and newly-born animals. Details species-specific requirements for some taxa.	Suitable temperature, light levels, ventilation, noise levels, air quality and water quality, with consideration given to health status and age.
<i>Housing</i>	Suitable bedding materials, construction, size, drainage and cleanliness.  Suitable for the number of animals proposed.	Suitable bedding materials, design, size, drainage, cleanliness and shelter. Refuge areas must be provided for nervous animals to escape the permanent gaze of the public. Details species-specific requirements for some taxa.	Suitable housing and bedding materials, size, cleanliness, resting areas and have separate areas for sleeping, toileting and exercising. Housing must allow an animal to lie fully stretched out, rest comfortably, stand in their natural posture, move around freely and hide from human view and other potentially frightening stimuli, where appropriate.
<i>Food and water provision</i>	Supplied with adequate and suitable food and drink.	Details species-specific requirements for some taxa. Diet must be approved by vet. Constant access to clean drinking water from appropriate receptacles.	Mentions diet quality, quantity, frequency, method and adjustment. Diet only reviewed by vet if there are concerns. Constant access to clean drinking water from appropriate receptacles.
<i>Normal behaviour</i>	Able to take adequate exercise in its usual accommodation.	Allowed the opportunity to express most normal behaviour.	Able to express natural behaviours in their living environment.



<i>Enrichment</i>	Not mentioned.	Species-specific enrichment available.	Species-specific enrichment available and regularly changed.
<i>Isolation</i>	Not mentioned.	Isolation facilities available for new and sick animals.	Isolation facilities available for sick animals.
<i>Breeding</i>	Not mentioned.	Captive breeding encouraged, if appropriate.	Sexed or housed in single sex groups, if appropriate.
<i>Grooming</i>	Not mentioned.	Not mentioned.	Routinely groomed, if appropriate.
<i>Veterinary care</i>	Not mentioned	Registered with both a local veterinary practice and a specialist and receive regular veterinary visits as part of a programme of preventive and curative veterinary care. Must have at least a dedicated treatment room on the premises. Post-mortem examinations should be carried out in accordance with veterinary advice.	Registered with suitable local vet, but veterinary visits only when deemed necessary. Should consider need for veterinary presence when taken to a film set. No mention of post-mortem examinations.
<i>Attendance</i>	Must be visited at suitable intervals.	All animals should be checked at least twice daily.	Not left unattended for a period likely to cause distress, with staff visiting animals at regular intervals of between 4 to 6 hours during the day, if appropriate.
<i>Body modifications</i>	Not mentioned.	Should not remove stings from rays to make them safe for open touch exhibits and should have a justifiable pinioning policy.	Not mentioned.
<i>Smoking</i>	Not mentioned.	Smoking must be prohibited where the health and welfare of animals will be compromised.	Not mentioned.
<b>Demonstrations</b>			
<i>Animal training</i>	Not mentioned.	Should use positive reinforcement, with negative reinforcement never compromising welfare. Training should provide a net welfare benefit to the animal, with records kept of behavioural irregularities during training.	Must use positive reinforcement, never using punishment and physical force.  Must not use restraining equipment on animals not trained to wear them.

<i>Performances</i>	Not mentioned.	For education purposes. Animals must not be provoked. The zoo operator or representative must be satisfied that the animal is not likely to suffer distress or contract disease and is responsible for deciding the performance duration and purpose. Feeding by the public must be controlled and bird flying areas should not be in view of tethered birds. Considers impact of removal from social group.	For education or entertainment purposes. Animals must not be used to provoke other animals, have clear breaks, be in good physical and mental health and be able to avoid people. Records kept of when and for how long animals are exhibited. Everyone present must be briefed how to behave and equipment and chemicals used must not compromise welfare. Considers predator and prey proximity, compatible social groups and impact of removal from social group, with female animals not being separated from their dependent offspring.
<i>Handling</i>	Not mentioned.	Under staff supervision only and consistent with welfare interests. Done for restricted periods and with care to avoid unnecessary discomfort, stress or physical harm.	Under staff supervision only and consistent with welfare interests. Stopped if welfare compromised and must not be handled by those under the influence of drugs.
<i>Transportation</i>	Must not be moved from those premises or shall only be moved in such circumstances as are specified in the licence.	Removal of animals from zoos discouraged.	Should consider housing, temperature, ventilation, frequency and proximity of predator and prey animals. Journey distance should be as small as possible.
<b>Other</b>			
<i>Inspection frequency</i>	At least every two years (licence grant and renewal).	At least every year.	At least every three years (licence grant and renewal).
<i>Staff</i>	Not applicable.	Suitably competent and no convictions under relevant legislation, with a suitable amount present.	Suitably competent with a suitable amount present.
<i>Signs</i>	Not applicable.	Only public safety and animal information signs mentioned.	Signs displayed on enclosures which deter members of the public from disturbing the animals.
<i>Closure of establishment</i>	Not applicable.	Partial or full closure provisions in place.	Not mentioned.

# Cases, Updates & Materials

## **Babusia and Bonnie – Hope in Ukraine**

My policing career began with patrolling the streets of Hastings and ended managing a joint agency counter terrorism and serious crime team covering international ports in the UK. My first interaction with Ukraine was via a serious crime operation in partnership with Interpol in 2008. From 2015, I'd been working mostly with the Greek Police when the opportunity arose to work with Naturewatch Foundation on its Ukraine projects. This saw me embark on a series of journeys via planes, trains (wonderfully cheap and reliable), and automobiles (all with broken windscreens) around this captivating country.

Naturewatch Foundation, based in Cheltenham UK, started advancing animal welfare thirty years ago and, from 1994, began helping animals across Ukraine. The charity's projects initially covered helping stray and shelter companion animals, as well as wild animals in captivity. In 2018, I began training police officers and animal groups about the relevance of animal welfare and cruelty within domestic relationships, families, and communities. I had reached thirteen cities before war broke out on 24th February 2022.

## **Police training in Ukraine**

There are as many patrol police officers in Ukraine as there are in the whole of the UK, but with two thirds of the population. The country still operates with school police officers who engage not just with children, but with the wider community. These were the obvious teams to aim our training at. Normally when training, I'd work with a lawyer who specialises in animal law, and we'd cover what the legislation said plus why enforcement mattered, not just for the animals but also for the human victims affected.

I would discuss animal crime scenes, forensics and then create some exercises for the officers to talk them through how to deal with an ani-

mal crime case. I found there was a positive engagement from so many and they took away the message that when you protect animals, you protect people.

## **New laws**

As well as the training work, I quickly realised there was a need to progress new laws. There are various codes to Ukrainian legislation, including the administrative code covering the responsibility of animal ownership and the criminal code covering criminal abuse. Article 299 allows for sentencing of offenders for up to eight years, with higher sentences of between five and eight reserved for those who kill more than one animal or commit the crime in front of children. As far as I know, this is the only criminal code that recognises the impact of children being exposed to animal violence. Following our training, we saw a large increase in offences under Article 299 being recorded and then prosecuted.

Article 300 of the criminal code covers any conduct that is likely to incite or encourage animal abuse. One such case in Volnyansk concerned a gang operating on the Russian VKontakte (ВКонтакте) social media platform. The gang were killing and torturing animals online where viewers paid to watch the abuse for sexual motivation. The cyber-crime unit of Zaporizhzhya Police gathered the evidence necessary to prosecute those involved and they were sent to jail. In November 2021, President Zelenskyy signed off a new law, 2351, that filled some of the animal welfare gaps and, with Naturewatch Foundation, we were proud to contribute to the content and the campaign to pass this legislation.

## **Law 2351**

This act criminalises sexual abuse against animals due to the link with violent behaviour. It also lowers the age of criminal responsibility to 16 and bans euthanasia as a means of population control.

The law covers additional requirements for handling agricultural animals, prohibits the use of sick, injured, weak equids, and extends legislation relating to wild animals and plants listed in the Red Book of Ukraine and CITES.

## The war year

On 24th February 2022 so much changed for the animals of Ukraine. Initially, companion animals were bundled into any carrier that was available and evacuated, or sadly abandoned as human owners fled. Many, of course, tragically perished under bombardment or because food and water supplies were cut off.

At Naturewatch Foundation we used our knowledge of the country to brief the international animal aid effort and run our own missions to the Polish and Romanian borders. We also continued the spay/neuter project started in 2013, as we knew that without effective population control, we would be shoring up problems for the future.

Every week, every month seemed exhausting, but we knew it was far worse for those whose home is Ukraine. We were reminded of this regularly when we talked to Natalie, our representative in Kharkiv who had to leave her home with a small child and rescue animals for a safer location.

## Hope

What we are seeing now, though, is some hope. For so many years the lives of animals in Ukraine were unseen outside of the country. Now, images of the love and compassion held for animal companions from Kharkiv to Kyiv have been transmitted across media channels and the world has witnessed the animal-human bond in the most extreme of circumstances.

One elderly lady, or babusia (бабуся)<sup>1</sup>, made a

<sup>1</sup> <https://gbr01.safelinks.protection.outlook.com/?url=https%3A%2F%2F1plus1.ua%2Fru%2Ftsn%2Fnovyny%2Fbabusa-hustkou-obmotala-golovu-so-backi-sob-ta-ne-lakalasa-postriliv-istoria-marii-uhim-ivni-z-gorenki-foto-akoi-obletilo-socmerezii&data=05%7C01%7C%7C705286a3aed04a5bc9c608db1995089f%7C84df9e7fe9f640afb435aaaaaaaaaaaa%7C1%7C0%7C638131900113857568%7CUnknown%7CTWFpbGZsb3d8eyJWljiMC4wL->

headscarf that matched her own to wrap around her dog Bonnie's head as she was terrified of the bombing. For me, it's one of the most iconic images of the first year of war (for photo click on the link footnote 1).

What also offers hope is how so many now work collaboratively, with excellent projects at Eurogroup for Animals, across the UPAW network that provides food aid, with Animal ID that tags dogs and UAnimals which stepped up to new levels of care. There's also so many volunteer organisations that deserve mention, such as Tailed Banda, who rescued the dogs from Borodyanka, and Antares, which work with rescue dogs to find people and animals trapped under rubble.

When the war ends, I believe the animals of Ukraine will finally be in a better place because people cared.

**Mark Randell, Campaign Manager Naturewatch Foundation, and retired Detective Inspector (Special Branch), UK Police.**

## Hunting Trophy (Import Prohibition) Bill

The Hunting Trophy (Import Prohibition) Bill was introduced to the House of Commons in 2022 and aims to prohibit the import of hunting trophies into Great Britain. It underwent the First Reading at the House of Lords and was approved for passage to second reading in March 2023. No date has been set as of this article as to when the second reading will commence, however the Government has confirmed that they will continue to support the Bill in the Lords.

This Bill was introduced to help protect animals listed by the internationally agreed Convention on International Trade in Endangered Species (CITES). The list is also enacted into UK law via the Wildlife Trade Regulations, where the list can be found at Annexes A and B. The Bill will ban the import of trophies hunted from around 6,000 species including many big cats, elephants, rhinos, various species of bears, and sea mammals. Many of these animals are en-

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dangered species and this Bill comes along at the same time as other Bills which aim to improve the international treatment of animals. For example, the Animals (Low-Welfare Activities Abroad) Bill is currently in the Lords for the second reading, which will provide the ability for our government to ban the sale and advertising of activities abroad which involve low standards of welfare for animals.

The Bill defines a hunting trophy as the body of an animal or any recognisable part or derivative of an animal that has been obtained by the person through hunting the animal and is being obtained for personal use. Personal use is not to include consumption of the animal. The aim of a hunting trophy is for the person to have the body and/or body part as a souvenir of the hunt itself, with the main aim being to display it. It also states that it does not matter whether or not the body, part or derivative has been processed in any way.

This Bill is therefore likely to have an effect on current legislation, most notably the Ivory Act

which prohibits dealing in ivory products within the UK. The current act relates to commercial trade of ivory products, yet The Hunting Trophy (Import Prohibition) Bill will likely impact the import and export of any ivory products for personal use. No clear definitions have been agreed yet, so it is unknown how this Bill will impact on current legislation, however it is interesting to consider just how far reaching the definition of a 'hunting trophy' could be.

This Bill also sets out that an Advisory Board should be set up to advise the Secretary of State on any questions that relate to the Bill once it is enacted. They should also be able to provide advice on any matter relating to the hunting trophies which are derived from animals that are endangered, or are likely to become, endangered. This would therefore suggest that the Bill aims to protect species that are not only classified as endangered, but also protect species that are near threatened or vulnerable. It is up to the Secretary of State to decide who should be appointed. The Advisory Board should consist of up to 3 people and the Secretary of State must

consider what expertise these people have when it comes to the import of hunting trophies.

We shall continue to monitor this Bill as it progresses through the Lords and provide you with updates. If you wish to follow along yourself, then you can find a link to the Bill at the government website here <https://bills.parliament.uk/bills/3202/stages>.

### **MBR Acres Ltd and others v Free the MBR Beagles (formerly Stop Animal Cruelty Huntingdon) and others [2022] EWHC 3338 (KB)**

In 2021, the court granted an injunction to MBR Acres Limited to impose restrictions on the activities of Free the MBR Beagles and other protesters. The matter was returned to court in 2022 as the Claimants wished to add further restrictions to the injunction order. The injunction was put in place to prevent protestors from obstructing or otherwise interfering with vehicles which were traveling to and from the MBR Acres premises. However the Claimants argued that further restrictions were needed to stop protestors from personally targeting 'protected persons', which included employees of MBR Acres, suppliers, and contractors that attended the MBR property. There were allegations of harassment from protestors, which included shouting at staff as they entered or left the MBR property, shouting expletives, throwing items over the boundary fences and attempting to break into the personal home of one of the managing directors of a contractor company, Impex.

His Honorable Justice Nicklin dismissed the application to vary the injunction order, stating that the evidence provided by the claimants was not sufficient enough to warrant further restrictions on the protestors' right to protest. The Claimant's did not have enough evidence to prove exactly which named Defendant did which alleged act, and while the Judge agreed that some of the acts were very serious (such as attempting to break into someone's private home), the Claimant's could not prove who in the protest group actually did this. A number of arrests had been made by the police for unlawful activity by some of the protestors, but this evidence had not been provided to the court and therefore the Judge could not comment on which of the de-

fendants acted unlawfully and which protestors were simply exercising their right to a peaceful assembly. His decision was largely supported by the evidence of the Superintendent who dealt with the protestors of Camp Beagle and others, who stated in his evidence that many of the protestors were very cooperative and respectful of the current injunction, and that it was only a small select few who wished to take their actions further. The Judge therefore decided that the unlawful acts of a few individuals should not be used to punish the larger collective of peaceful protestors who were exercising their right to a lawful and peaceful protest. The Judge also made it clear that any unlawful activities should be dealt with by the police, so that injunctions could be imposed against specific individuals as a direct consequence of their unlawful activity.

The Judge stated that to grant the amended injunction as requested by the Claimant's would risk bringing into force an injunction that would limit the activities of anyone who came near the property, whether they were a protestor or not. The Judge felt that this would not only be a step too far given the weak evidence provided by the Claimants, it was an injunction that had not been sought by the Claimant's application and so could not be considered at this hearing.

**Taylor Mcleod is a qualified solicitor based in Hertfordshire, where she lives with her husband and house rabbit. She has been an advocate for animal welfare and animal rights throughout her life, and is now using her new found love of long-distance running to raise funds and awareness for multiple animal welfare organisations.**

### **Hunting with Dogs (Scotland) Act 2023**

The Hunting with Dogs (Scotland) Act 2023 ("the Act") repeals and replaces the Protection of Wild Mammals (Scotland) Act 2002 ("2002 Act"), which makes it an offence to hunt a wild mammal using a dog in Scotland except in limited specified circumstances<sup>2</sup>.

<sup>2</sup> THE SCOTTISH GOVERNMENT, 2023. Explanatory Notes. [online]. Edinburgh: The Scottish Government. Available from <https://www.legislation.gov.uk/asp/2023/1/notes/contents> [Accessed 4 May 2023].



Many will be more familiar with reference to the hunting of wild mammals with dogs in the context of 'fox hunting'; large en masse organised hunts with foxes, hares, and other wild mammals being chased and killed by packs of dogs.

Such traditional 'countryside pursuits' or 'sports' are generally no longer viewed as acceptable in Scotland. Indeed, the former Minister for Environment, Biodiversity and Land Reform Mairi McAllan, stated when she introduced the Hunting with Dogs (Scotland) Bill to the Scottish Parliament in February 2022, "I want to make it clear that chasing and killing a mammal with a dog, for sport or otherwise, has no place in modern Scotland – indeed it has been illegal for twenty years."<sup>3</sup>

The Act broadly replicates the provisions of the 2002 Act but makes certain modifications to fur-

ther limit the circumstances in which it is permitted to hunt a wild mammal using a dog and to prohibit trail hunting (the practice of directing a dog to find and follow an animal-based scent laid for that purpose) except under limited circumstances. It also aims to address deficiencies of the 2002 Act, in particular with regard to the inconsistencies and ambiguities in the wording of the 2002 Act.<sup>4</sup>

A person commits an offence under the Act if they hunt a wild mammal using a dog or knowingly cause or permit such an offence to be committed, and none of the exceptions set out in the Act apply. For the purposes of the Act, a wild mammal is defined as any mammal (other than human) which is living in a wild state, is of a species recognised as living in a wild state in the British Isles or has been deliberately released from temporary or permanent human control and is not a rat, mouse, or living under

<sup>3</sup> THE SCOTTISH GOVERNMENT, 2022. Hunting with Dogs Bill introduced to parliament. [online]. Edinburgh: The Scottish Government. Available from: <https://www.gov.scot/news/hunting-with-dogs-bill-introduced-to-parliament/> [Accessed 1 March 2023].

<sup>4</sup> THE SCOTTISH GOVERNMENT, 2023. Explanatory Notes. [online]. Edinburgh: The Scottish Government. Available from <https://www.legislation.gov.uk/asp/2023/1/notes/contents> [Accessed 4 May 2023].

temporary or permanent human control.<sup>5</sup> This appears to demonstrate a shift in attitude from the 2002 Act which defined foxes, hares, minks, stoats, and weasels as “pest species”. The definition from the new Act, however, means that it remains lawful to hunt rats and mice using as many dogs as the person so wishes.

The exceptions referred to relate to the management of wild mammals above ground (section 3), the management of foxes below ground (section 5), for falconry, game shooting, and deer stalking purposes (section 6), relieving the suffering of injured wild mammals (section 7), searching for dead wild mammals (section 8), and for environmental benefit (section 9). Some of the exceptions drew criticism during Bill discussions, particularly those set out in sections 6 and 9 of the Act.

Sections 3, 6, 7, 8, 9 of the Act restrict the number of dogs that can be used under the exemptions to a maximum of two, although licences to use more than two dogs for the management of wild mammals above ground (section 3) and for environmental benefit (section 9) can be applied for under sections 4 and 10 of the Act.

Only one dog is permitted for the management of foxes below ground under section 5 of the Act.

The licensing process requires an application to be submitted to the “relevant authority”<sup>6</sup> which is the Scottish Ministers in terms of the Act or NatureScot if functions are delegated by the Ministers to them, which is likely.

Any licence granted under sections 3 or 9 must be granted to a particular person or category of persons, must relate to a particular species of wild mammal, and the relevant authority may only permit the use of the minimum number of dogs it is satisfied will be effective in achieving the intended purpose.

Importantly, licenses for activities using more than two dogs under sections 3 and 9 must not be granted unless the relevant authority is satisfied, for section 3, that there is no other solu-

tion which would be effective in achieving the intended purpose<sup>7</sup>, or for section 10, that killing, capturing or observing the wild mammal will contribute towards a significant or long-term environmental benefit and there is no other solution which would be effective in achieving the intended purpose<sup>8</sup>.

A licence for section 3 activity may be granted for a maximum period of 14 days which must fall within a period of 6 consecutive months<sup>9</sup>, and a licence for section 9 activity for a maximum period of two years, which must fall within a period of two consecutive years<sup>10</sup>.

In terms of trail hunting, the Act makes it an offence for a person to engage or participate in trail hunting unless the dog is being trained for a lawful purpose and where such training involves no more than two dogs<sup>11</sup>.

The penalty for unlawfully hunting a wild mammal using a dog where none of the exceptions apply (section 1) is up to 12 months imprisonment or a fine not exceeding £40,000 (or both) on summary conviction, or up to 5 years imprisonment or a fine (or both) on conviction on indictment<sup>12</sup>. The same summary penalties apply to the cause or permit offence under section 2 of the Act<sup>13</sup> and to the offence of trail hunting under section 14 of the Act.

The Act has not yet been rolled out but is expected to be later in 2023.

The new Act has prompted calls in England to follow suit and strengthen the Hunting Act 2004 to overcome loopholes identified in that legisla-

<sup>5</sup> Hunting with Dogs (Scotland) Act 2023 Act a.s.p. 1, section 1(3)

<sup>6</sup> Hunting with Dogs (Scotland) Act 2023 Act a.s.p. 1, sections 4(6) and 10(6).

<sup>7</sup> Hunting with Dogs (Scotland) Act 2023 Act a.s.p. 1, section 4(4)(c)

<sup>8</sup> Hunting with Dogs (Scotland) Act 2023 Act a.s.p. 1, section 10(4)(c)

<sup>9</sup> Hunting with Dogs (Scotland) Act 2023 Act a.s.p. 1, section 4(4)(g)

<sup>10</sup> Hunting with Dogs (Scotland) Act 2023 Act a.s.p. 1, section 10(4)(g)

<sup>11</sup> Hunting with Dogs (Scotland) Act 2023 Act a.s.p. 1, sections 14 and 16

<sup>12</sup> Hunting with Dogs (Scotland) Act 2023 Act a.s.p. 1, section 1(2)

<sup>13</sup> Hunting with Dogs (Scotland) Act 2023 Act a.s.p. 1, section 2(3)



tion<sup>14</sup> which allow organised hunts to continue. Foxhunting, hare hunting, and stag hunting by both mounted hunts and foot packs remain legal in Northern Ireland<sup>15</sup>, despite calls by animal welfare charities for a complete ban.

**Hannah L Moneagle, Director & Solicitor – Grampian Community Law Centre, Member of A-Law Scottish Steering Group & Wildlife Working Group**

## **Recent activities of the Scottish Animal Welfare Commission**

The Scottish Animal Welfare Commission ("SAWC") was created to provide scientific and ethical advice to government, focusing particularly on the protection of wild and companion animals.<sup>16</sup> The SAWC has had a busy year so far, publishing reports on the welfare of greyhounds used for racing in Scotland (28 February 2023), acoustic deterrent devices in salmon farming (6 March 2023), and handheld remote-controlled training devices (e-collars) for dog training (11 April 2023). These reports are publicly available on the SAWC's website.<sup>17</sup>

SAWC's report into greyhound racing in Scotland acknowledges the welfare issues which can affect greyhounds, including the conditions for rearing puppies, the risk of injury or death during racing, limited social interactions in kennels, and the risk of neglect and poor veterinary care at the end of their racing career.<sup>18</sup> The re-

port makes various recommendations, such as the need for veterinary oversight at independent tracks and the collection of data on injuries and fatalities, as well as the introduction of an independent regulatory scheme to ensure greyhound welfare.<sup>19</sup>

Acoustic deterrent devices are devices which transmit loud, mid-frequency sound from a fish farm into the surrounding seawater.<sup>20</sup> They are used to deter predators such as seals which could pose a threat to farmed fish welfare. SAWC's report examining these devices concludes that they may be justifiable in circumstances where there is no satisfactory alternative, however the use of such devices should be targeted to minimise harm to cetaceans.<sup>21</sup> SAWC recommends that alternative strategies to deter seals should be used wherever possible, such as strengthened netting, altered sea-pen designs, and the exploration of new technology.<sup>22</sup>

E-collars can be defined as training devices used for dogs, cats and other companion ani-

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on the welfare of greyhounds used for racing in Scotland, (The Scottish Government, March 2023), <<https://www.gov.scot/binaries/content/documents/gov-scot/publications/independent-report/2023/03/report-welfare-greyhounds-used-racing-scotland-scottish-animal-welfare-commission/documents/report-welfare-greyhounds-used-racing-scotland/report-welfare-greyhounds-used-racing-scotland/govscot%3Adocument/report-welfare-greyhounds-used-racing-scotland.pdf>> last accessed 1 May 2023. 23

19        *ibid* 24

20        Scottish Animal Welfare Commission, Report on the use of acoustic deterrent devices (ADDs) in salmon farming to control predation by seals and their wider effects on wildlife, (The Scottish Government, March 2023), <<https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2023/03/report-use-acoustic-deterrent-devices-adds-salmon-farming-control-predation-seals-wider-effects-wildlife-scottish-animal-welfare-commission/documents/report-use-acoustic-deterrent-devices-adds-salmon-farming-control-predation-seals-wider-effects-wildlife-scottish-animal-welfare-commission/govscot%3Adocument/report-use-acoustic-deterrent-devices-adds-salmon-farming-control-predation-seals-wider-effects-wildlife-scottish-animal-welfare-commission.pdf>> last accessed 1 May 2023, 6

21        *ibid* 20

22        *ibid*

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14        LEAGUE AGAINST CRUEL SPORTS (LACS), 2023. Tell the Environment Secretary to act now and ban hunting. [online]. LACS: Godalming. Available from: [https://takeaction.league.org.uk/page/122282/action/1?utm\\_source=twitter&utm\\_medium=organic&utm\\_campaign=-defra\\_action&utm\\_id=defra\\_ban\\_hunting&utm\\_content=Media+](https://takeaction.league.org.uk/page/122282/action/1?utm_source=twitter&utm_medium=organic&utm_campaign=-defra_action&utm_id=defra_ban_hunting&utm_content=Media+) [Accessed: 4 May 2023].

15        LEAGUE AGAINST CRUEL SPORTS (LACS), 2023. It's time to ban hunting with dogs. [online]. LACS: Godalming. Available from: <https://www.league.org.uk/what-we-do/northern-ireland-campaigns/nihunting-shame/its-time-to-ban-hunting-with-dogs/> [Accessed 4 May 2023].

16        Scottish Government, 'Scottish Animal Welfare Commission' < <https://www.gov.scot/groups/scottish-animal-welfare-commission/>> last accessed 1 May 2023

17        *ibid*

18        Scottish Animal Welfare Commission, Report



mals, which involve the application of an electric current to the skin (also known as 'shock collars').<sup>23</sup> Currently, e-collars are widely available for purchase and use, and there is evidence that they can cause pain and distress to companion animals, as well as long-term adverse behavioural and welfare effects.<sup>24</sup> SAWC's report concludes that maintaining the status quo presents a significant and unacceptable risk to dog

welfare.<sup>25</sup> Various options could be pursued to address this, such as restricting the use of e-collars to trainers only, or for the purpose of preventing particular behaviour (such as livestock worrying), or a complete ban.<sup>26</sup> On the basis of the available evidence, SAWC recommends a ban on e-collars in Scotland.<sup>27</sup>

### **Wildlife Management and Muirburn (Scotland) Bill**

The Wildlife Management and Muirburn (Scotland) Bill<sup>28</sup> (the "Bill") was introduced in the Scottish Parliament on 21 March 2023.<sup>29</sup> It pro-

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23 Scottish Animal Welfare Commission, Report on the use of handheld remote-controlled training devices (e-collars) in dog training, (The Scottish Government, April 2023), <<https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2023/04/report-use-handheld-remote-controlled-training-devices-e-collars-dog-training-scottish-animal-welfare-commission/documents/report-use-handheld-remote-controlled-training-devices-e-collars-dog-training-scottish-animal-welfare-commission/report-use-handheld-remote-controlled-training-devices-e-collars-dog-training-scottish-animal-welfare-commission/govscot%3Adocument/report-use-handheld-remote-controlled-training-devices-e-collars-dog-training-scottish-animal-welfare-commission.pdf>> last accessed 1 May 2023, 4

24 *ibid* 43

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25 *ibid*

26 *ibid* 43-45

27 *ibid* 45

28 SP Bill 24 Wildlife Management and Muirburn (Scotland) Bill [as introduced] session 6 (2023)

29 The Scottish Parliament, Bills and Laws: Wildlife Management and Muirburn (Scotland) Bill, <<https://www.parliament.scot/bills-and-laws/bills/wildlife-management-and-muirburn-scotland-bill/introduced>> last accessed 1 May 2023

vides for the licensing of activities such as the use of certain wildlife traps, the killing or taking of wild birds and mammals on grouse moors, and muirburn, which is the intentional setting fire to heather or vegetation as a land management practice.<sup>30</sup> The Bill is designed to create a stronger regulatory scheme for the management of Scottish grouse moors.

As set out in the Policy Memorandum, one of the main aims of the Bill is to implement the recommendations of the Grouse Moor Management Review Group, known as “the Werritty review,” by licensing grouse moors to ensure they are managed in an environmentally-sustainable way.<sup>31</sup> There continues to be issues with the illegal use of wildlife traps on grouse moors, affecting protected birds of prey.<sup>32</sup> The new licensing requirements are intended to address raptor persecution in Scotland. The Bill makes various amendments to the Wildlife and Countryside Act 1981 to introduce requirements for trap users to be licensed (ss 12A and 12B), have undertaken an approved training course (s 12C), and for a wildlife trap license number to be displayed or fitted onto the trap (s 12A).

Significantly, the Bill seeks to ban glue traps for rodents by making the purchase and use of such traps (without reasonable excuse) separate offences.<sup>33</sup> The maximum proposed penalties on conviction are up to 12 months imprisonment or a £40,000 fine, or both for lower-level offences and up to 5 years or an unlimited fine for offenc-

30 SP Bill 24 Wildlife Management and Muirburn (Scotland) Bill [as introduced] session 6 (2023), <<https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/wildlife-management-and-muirburn-scotland-bill/introduced/bill-as-introduced.pdf>> last accessed 1 May 2023, 1

31 Scottish Parliamentary Corporate Body, Wildlife Management and Muirburn (Scotland) Bill Policy Memorandum, <<https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/wildlife-management-and-muirburn-scotland-bill/introduced/accessible-policy-memorandum.pdf>> last accessed 1 May 2023, 2

32 Ibid 12

33 SP Bill 24 Wildlife Management and Muirburn (Scotland) Bill [as introduced] session 6 (2023), <<https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/wildlife-management-and-muirburn-scotland-bill/introduced/bill-as-introduced.pdf>> last accessed 1 May 2023, ss 1 and 2

es on indictment.<sup>34</sup> Glue traps can result in prolonged suffering and are indiscriminate, meaning they are capable of catching non-target species.<sup>35</sup> In putting forward legislation to ban glue traps, the Scottish Government is acting on the recommendation of the Scottish Animal Welfare Commission.<sup>36</sup>

The Bill is currently at stage 1 in the Scottish Parliament, during which time committees will examine the Bill and gather views from the public and interested stakeholders.<sup>37</sup> Stage 1 is expected to be completed by early October this year.<sup>38</sup>

**Charlotte Edgar, A-LAW Legal Correspondent (Scotland).**

### **Animal testing of substances used in cosmetics - the decision in Cruelty Free International v Secretary of State for the Home Department explained**

In this briefing note, we explain – and provide a short analysis of – the decision in *R on the application of Cruelty Free International v Secretary of State for the Home Department* [2023] EWHC 1064 (Admin), handed down by Linden J. on Friday 5 May 2023.

#### **Legal and regulatory framework**

As the judgment explains, the Home Secretary is responsible for the regulation of animal experimentation in Great Britain. She carries out her relevant functions through the Home Office’s Animals in Science Regulation Unit (“ASRU”), which determines licence applications under the Animals (Scientific Procedures) Act 1986

34 Ibid, s 1(3)

35 Scottish Parliamentary Corporate Body, Wildlife Management and Muirburn (Scotland) Bill Policy Memorandum, <<https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/wildlife-management-and-muirburn-scotland-bill/introduced/accessible-policy-memorandum.pdf>> last accessed 1 May 2023, 4

36 Ibid 5

37 The Scottish Parliament, Bills and Laws: Wildlife Management and Muirburn (Scotland) Bill Stage 1 – General Principles, <<https://www.parliament.scot/bills-and-laws/bills/wildlife-management-and-muirburn-scotland-bill/stage-1#topOfNav>> last accessed 1 May 2023

38 Ibid

("ASPA"). ASRU also advised on policy until 2022 when a new Animals in Science Policy and Co-ordination Function unit was established within the Home Office.

The ASPA requires that scientific procedures using animals should only be carried out if the appropriate licences have been granted (these being a personal licence held by a responsible individual, an establishment licence for the relevant laboratory, and a project licence authorising the programme of experimentation or testing). In determining whether to grant a project licence the Secretary of State must carry out a harm/benefit analysis and be satisfied that the proposed project is carried out in accordance with the established principles of replacement, reduction, and refinement, known as the "3Rs".

### **Cosmetics testing ban in the UK**

In 1998, the UK Government announced a de facto ban on the testing of substances used wholly or predominantly as ingredients in cosmetic products by adopting a policy of not granting project licences for such testing. In the previous year, the UK Government had announced a similar de facto ban in respect of animal testing of finished cosmetic products.

Linden J. explained this (at para. 2) as follows:

'From 1998, government policy was that applications for licences for animal testing of cosmetics, or ingredients which are "wholly or primarily" used in such products, would be refused ("the Policy")'. He went on to observe (at para. 67) that: 'In 2010 the then Home Secretary told the House of Commons, in response to a public petition seeking a statutory ban on the testing of cosmetics on animals:

"In 1997-98, the Government secured a voluntary ban on the testing of cosmetic finished products and ingredients on animals in the United Kingdom. We did this because we believed that there was inadequate justification for using animals given the benefits of these products and the alternative tests available. ... We cannot foresee any circumstances under which we would be prepared to issue licenses under the Animals (Scientific Procedures) Act 1986 for testing on cosmetic finished products and ingredients.'

(Our emphasis).

### **Cosmetics testing ban in the EU**

In the meantime, attempts were being made to secure a legislative ban across the EU on using live animals to test finished cosmetic products and cosmetic ingredients, reflecting opposition across civil society to the use of animals for these types of experiments.

It seemed that civil society was being listened to and Council Directive 93/35/EEC was adopted in 1993 setting out a timetable for a ban by 1 January 1998. However, responding to industry concern that manufacturers were not yet ready for a ban, the deadline for implementation was delayed on successive occasions until March 2009 when the EU brought in a ban on animal testing for cosmetic ingredients and the marketing of cosmetic products containing ingredients which have been tested on animals. From March 2013 the ban was extended to the sale of cosmetic products and ingredients tested on animals after that date anywhere in the world.

The Cosmetics Regulation was the legislative vehicle that purported to end the sale and marketing of cosmetic products tested on animals and Article 18 sets out the bans on animal testing of cosmetic products and ingredients, and on the marketing within the EU of cosmetic products and ingredients that have been tested on animals, "in order to meet the requirements of this Regulation."

As Linden J. points out (at para. 3):

'However, there was a question at EU level as to how the bans under Article 18 of the Cosmetics Regulation interacted with the more permissive regime, at least in relation to animal testing, under Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals ("REACH").'

In 2014, the European Commission and the European Chemicals Agency issued a Joint Statement clarifying their position that substances used exclusively in cosmetics could not be tested on animals to meet the 'information requirements of the REACH human health endpoints' but could still be tested on animals to estab-

lish worker and environmental safety under the REACH. For substances that had a mixed use, i.e., for cosmetic and non-cosmetic purposes, animal testing would be permitted as before (see judgment, at para. 4).

## UK policy change

Following the Joint Statement, the Home Secretary confirmed (in July 2015) that the UK's policy bans on cosmetics testing would remain in place.

However, the tide began to turn and Linden J. points out (at para. 94) that:

'From the beginning of 2018, establishment licence holders also began to question the Policy. Concerns were expressed that the testing work would be conducted abroad instead, including in other EU countries whose approach was aligned with the EU position, and there were concerns raised about the lack of level playing field across Europe for contract research organisations.'

In response to these concerns, in February 2019 there was a change of policy and ASRU started to issue licences again for animal testing of substances used exclusively or predominantly as ingredients in cosmetic products where such testing was for complying with requirements under the REACH Regulation.

This change of policy was not communicated publicly, (aside from informal discussions with certain establishment license holders) and the public remained unaware that licences were now being granted for animal testing of cosmetics and cosmetic ingredients in Great Britain.

In fact, Cruelty Free International ("CFI") had written to the defendant on 19 November 2020 for clarification of the policy, but there was no reply to this letter (despite chasers) until 3 August 2021 and it was not until this time that the change of policy came to light. The letter to Cruelty Free International stated (as set out at para. 108 of the judgment):

"The Home Office can confirm it has reconsidered its policy, from the approach that was stated in the 2015 Summary Grounds and has sub-

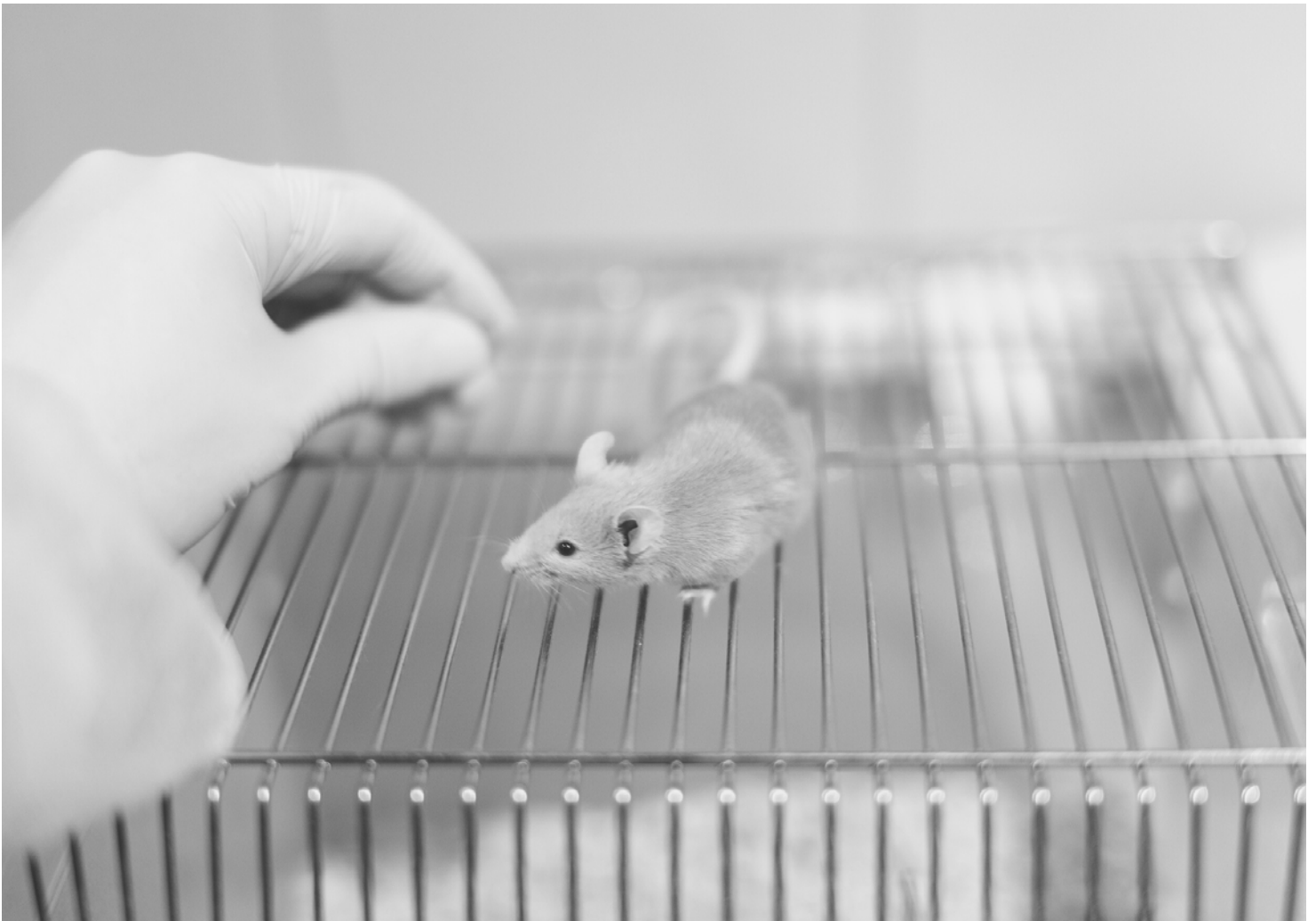
sequently aligned its approach to the Board of Appeal of the European Chemicals Agency in the Symrise case.

The Home Office aims to publicly clarify its position now with the formal publication of an updated policy and regulatory guidance on the regulation of animal testing for regulatory purposes."

The reference in the letter to the Symrise case (above) related to a number of decisions of the Board of Appeal of the European Chemicals Agency, which issued decisions on 18 August 2020 in cases involving substances manufactured or distributed by the chemicals company Symrise. The Board of Appeal decided that the testing and marketing bans in the Cosmetics Regulation did not apply to animal testing carried out for the purpose of satisfying requirements arising under the REACH Regulation. The REACH Regulation requires manufacturers and distributors of chemical substances in the EU to register those substances with the European Chemicals Agency and ensure that data, obtained from animal or other studies, is obtained with respect to the 'intrinsic properties' of the substance, including safety for human health (including workers manufacturing it) and potential effects on the environment. In that regard, the Board of Appeal stated that, although the REACH Regulation is not concerned with the safety of cosmetic substances for 'end-users' (i.e. people wearing the cosmetics or service providers such as hairdressers), data regarding human health effects is required in order to ensure the safety of manufacturing workers.

In the Symrise cases, the chemicals producer Symrise AG had challenged decisions of the European Chemicals Agency requiring that data be obtained using animal testing with respect to certain cosmetic ingredients. Symrise argued that these requirements were contrary to the bans in the Cosmetics Regulation. This Board of Appeal's decisions have been appealed to the EU General Court, which heard the appeals in November 2022. The General Court's judgment is awaited.

It is worthwhile setting out the comments of the judge in full in respect of the Home Secretary's conduct. He states (at para. 204):



'Although the circular was issued to stakeholders on 22 July 2022, this was 3.5 years after the change of policy. Even then, submitted Mr Bates, the fact that the original Policy was being withdrawn was not made clear. It was only in September 2022 that there was wider notification of the policy change but it was still the case that no general public announcement had been made and, astonishingly, the Defendant has not published its revised position pursuant to section 21 of the ASPA.'

'There is a good deal of force in Mr Bates' criticisms of the way in which the ASRU has gone about changing the Policy and it is plausible that the reasons for this approach included the ones which he suggested (para. 205).

The reasons suggested on behalf by the claimant for this approach included that it was 'politically advantageous to the Home Office given that it enabled Home Office Ministers to avoid public criticism and scrutiny with respect to licensing animal testing of cosmetic ingredients.' (para. 176).

The lack of a public announcement about the change of policy was described by the judge (at para. 219) as 'regrettable.'

### **The legal issues**

#### Ground 4 – Relationship between the REACH Regulation and the testing and marketing bans in the Cosmetics Regulation

The Court's judgment first assessed judicial review ground 4, by which CFI had argued that the testing bans in the Cosmetics Regulation took precedence over any requirement arising under REACH to generate data regarding a registered substance. In that regard, CFI relied on the inclusion in the REACH Regulation of a provision stating that the Regulation was "without prejudice to: ... [the Cosmetics Regulation] as regards testing involving vertebrate animals within the scope of that [Regulation]". CFI noted that the same animal tests for assessing the safe level of human exposure to a substance were relevant both to the safety of the substance for end-users and its safety for manufacturing workers. If

the approach favoured by the European Chemical Agency Board of Appeal and the Home Office were correct, then the testing and marketing bans in the Cosmetics Regulation would be largely deprived of utility, since essentially the same animal tests as were prohibited by the bans would still need to be carried out.

The Judge rejected that argument. In the Judge's view, the testing and marketing bans applied only to testing carried out for demonstrating safety within product safety reports prepared pursuant to the Cosmetics Regulation. Therefore, animal testing carried out for satisfying requirements arising under the REACH Regulation were outside the scope of the bans. Such animal testing could therefore lawfully be licensed within the EU and UK, albeit that the data generated by such testing could not then be relied on in cosmetic product safety reports.

In relation to this, Linden J. states (at para. 150): 'I agree with the Board of Appeal in Symrise that animal testing which is required by REACH is not carried out in order to meet the requirements of the Cosmetics Regulation. This is so even where the ingredient in question is exclusively for use in cosmetics. And I agree with the reasoning of the Board of Appeal which led it to this conclusion.'

Essentially, the judge found that while the Cosmetics Regulation is concerned with the safety of the end product for the user, REACH is concerned with the safety of each chemical substance and its impact on workers and the environment, who are potentially exposed to chemicals in greater concentrations and/or for longer periods of time. The court determined that the Cosmetics Regulation only bans cosmetics testing for the purpose of that regulation and is not intended to ban the testing of cosmetics or their ingredients for other purposes, principally under the REACH Regulation.

#### Grounds 2 and 3 – Lack of consultation and transparency

In relation to judicial review ground 2 (the Home Secretary's failure to consult stakeholders about the prospective change to the policy ban) and judicial review ground 3 (the failure to notify stakeholders and the public of the abandonment or weakening of the policy ban), the

Home Secretary's primary case was that she was legally obliged to abandon any policy of not licensing animal testing of cosmetic ingredients where such testing was for satisfying requirements arising under the REACH Regulation. As discussed further below, the Judge rejected that argument, instead finding that the Home Secretary retained a discretion to refuse to grant licences for animal testing, even where such testing was said to be necessary for satisfying requirements under the REACH Regulation.

Further, the Judge criticised the Home Secretary for a lack of transparency, noting that it was unsatisfactory that the Home Office had allowed the public to remain under a misunderstanding, for a considerable period of time, that animal testing of cosmetic ingredients was not taking place in Great Britain, whereas in fact licences were being granted for such testing since 2019. The Court also found that a letter sent by the Home Office to CFI in August 2021 had been "misleading" in that it suggested that the change in the policy had been made in response to the Symrise decisions in August 2020, whereas in fact the Home Secretary had already effectively decided to cease applying the policy bans from February 2019.

The Court nevertheless dismissed the challenges to the Home Secretary under grounds 2 and 3, finding that her failures to afford transparency, whilst regrettable, were not unlawful. The Judge's reason for that conclusion arose from his analysis of the case law concerning the legitimate expectation of citizens and stakeholders to be consulted and/or notified by a public body about a change in policy. The Court found that, since there had been no express promise to CFI or the public to inform them of changes to the policy, there was no public law 'legitimate expectation' of being informed.

The Court so found even though: (a) ASPA places the Home Secretary under a statutory duty to publish information, to be used as guidance, with regard to how she will determine applications for licences; and (b) the information published by the Home Office, which had still not been modified or withdrawn, stated that the Home Office would not grant project licences for the testing of cosmetics. The Judge found that the relevant text in the published information

applied to animal testing of ingredients as well as finished products. The Judge therefore recognised that the Home Office was not applying its own published guidance, but nevertheless held that the absence of a 'legitimate expectation' on the part of CFI or the public of being informed of any change meant that the failure to modify that published information prior to ceasing to follow it was not in itself unlawful.

### Ground 1

Judicial review ground 1 concerned the application of the harm/benefit analysis. CFI argued that the Home Office was determining applications for project licences to test cosmetic substances on animals by considering the harm/benefit balance in a way that effectively assumed that the substance had to be subjected to testing in order to satisfy the requirements of REACH, without considering the alternative possibility that the substance would no longer be marketed within the EU/UK. CFI's case was essentially that, on a proper application of the harm/benefit test, the Home Office has to consider whether the suffering of the animals could be morally justified by the potential benefits to humans, taking account of the nature of the intended uses of the substance (i.e. cosmetics uses rather than, say, finding a cure for a disease). This ground of challenge was ultimately decided on the factual evidence, the judge accepting witness evidence from Home Office officials that they did consider, as part of the harm/benefit test, whether the suffering of the animals could be justified having regard to the intended human uses of the substance in question.

### **Permission to appeal to the Court of Appeal**

The High Court has itself granted CFI permission to appeal in respect of the dismissal of judicial review ground 4 (i.e. concerning the Home Secretary's interpretation of the interface between the Cosmetics Regulation and REACH, that is the same approach as adopted by the European Chemicals Agency Board of Appeal in the Symrise cases). CFI may apply to the Court of Appeal for permission to appeal on the other grounds of challenge.

### **Resumption of animal testing not the only policy option**

As noted above, the judge rejected the Home Secretary's argument that she had no choice but to cease applying the policy ban, as she was legally required to do so on the basis of her understanding of the legal requirements of the REACH Regulation and its legal relationship with the testing and marketing bans in the Cosmetics Regulation. In relation to this he stated (at para. 117):

'I accept Mr Bates' submission that it would in principle be open to the Defendant to adopt a policy that, whether or not animal testing of ingredients for use in cosmetics is required if they are to be placed on the market and/or is permissible in law, applications for licences to test them on animals will generally not be granted under the ASPA. The consequence would be that where, for example, REACH required animal testing of such ingredients they could not be registered and placed on the market here, but it would be open to the Defendant to take this position as a matter of policy, for example in relation to the question whether, under section 5B(2)(b) "the purposes of the programme of work justify the use of protected animals". The reality is that the Defendant has modified her policy position for pragmatic reasons rather than being driven to do so by Symrise or any legal requirement.'

### **Conclusion**

While the claimant was not successful in this legal challenge, it is nevertheless an important and significant case. It brings to light certain key facts. Firstly, that animal testing for cosmetic purposes is, and has been carried, out in the UK since 2019, with consumers of cosmetic products unaware of the policy change. Secondly, that the reason for the change of policy was not for legal reasons, but political expediency to enable British producers to continue selling their products on the EU market. Thirdly, and perhaps, the most astonishing revelation, is the Home Secretary's lack of transparency about the change of policy. The government appeared to 'want to have their cake and eat it', enabling producers to continue accessing EU markets, while avoiding a public backlash about a roll back on a commitment that had been reiterated publicly over past years, to not issue licences testing of chemicals used wholly or primarily for



ingredients and finished cosmetic products.

This case also raises important questions about our democratic process. Civil society clearly feels strongly about this issue, as evidenced by the huge public support for a ban on the use of animals to test cosmetic ingredients. Whatever the legal position regarding the interface between the Cosmetic Regulation and REACH Regulation (which is still to be determined), the public expectation is likely to be that the 'not tested on animals' label on their cosmetics products, means just that. The lack of transparency and misleading messaging is certainly 'regrettable' and potentially undermines public confidence in the Home Office and policy making process more generally.

The Court has effectively moved the question of whether animal testing for cosmetics related purposes should be licensed in Great Britain back to the political arena. In that regard, as noted above, the Court decided that it is legally open to the Home Secretary to revert to applying the policy ban, including so as to refuse to licence animal testing of cosmetic ingredients which is said to be required for satisfying requirements arising under the REACH Regulation. Equally, the Court has decided that the Cosmetics Regulation does not prohibit the Home Secretary from licensing such testing. It now remains to be seen whether the Home Secretary will revert to applying the policy ban. If she does not do so, this will clearly be a political decision, as she cannot say she is legally required to stop applying the policy ban.

## Chronology

1993	EC adopts Council Directive 93/35/EEC setting out a timetable for a ban on cosmetics testing by 1 January 1998 (in fact not achieved until 2009).
1998	UK policy decision not to grant licences for animal testing of chemicals to be used in cosmetics.
2009	EU legislation banning testing of cosmetics and ingredients banned.
2013	EU ban extended to marketing anywhere in the world of cosmetic products tested on animals.

2014	EU Commission clarify the ban does not include testing for worker and environmental safety under REACH or for chemicals with a mixed use.
2015	Home Secretary confirms that the UK's policy ban on cosmetics testing would remain in place, regardless of the EU position.
2017	European Ombudsman rejected a challenge to the 2014 Joint Statement.
2018	In the UK licence holders raise concern with the Home Office about competitiveness with EU counterparts, in light of the UK policy and divergence with the EU approach.
2019	The EU Commission confirms its' interpretation of the REACH and Cosmetics Regulation interface in a letter to the Claimant. Home Secretary changes the policy in line with the EU approach and grants a licence for testing of chemicals used for cosmetics. There is no public announcement and decision is not communicated to the claimant.
2020	The Board of Appeal of the European Chemicals Agency decides two appeals from a chemicals producer (Symrise AG) against their decisions requiring chemicals testing on ingredients used for cosmetics, required under REACH to satisfy requirements for environmental and worker safety.
2021	Cruelty Free International become aware of the change of policy by a letter citing the Symrise case and compliance with EU law as the reason for the change
2022	Circular about the change in policy issued to stakeholders, 3.5 years after the change of policy had been made.

**Paula Sparks, Blanche Koenig, Simon Brooman of the UK Centre for Animal Law (A-LAW)'s Animal Experimentation Law Working Group.**

# A-LAW Student Essay Competition winner 2023

**Question: William Windham MP, debating the Cruelty to Animals Bill [HC Deb, 13 June 1809, vol 14, col 1030]**

**'...his first and general objection to the Bill was, that the object of it, however commendable, was not such as to become a fit subject of legislation.'**

**Discuss the relevance of this statement to modern society.**

## **Winning entry by Elena Casale**

As the first attempt to regulate the treatment of animals, it is not surprising that the Cruelty to Animals Bill of 1809 was extremely limited in scope. Covering a small set of animals (horse, mare, ass, ox, sheep, or swine), it sought to ban specific malicious actions such as wounding, beating, or abusing.<sup>1</sup> Despite the specificity of this Bill, it was fervently opposed by William Windham MP, who objected to it on four main grounds: that because no country had yet legislated on the subject, it should be done very cautiously; that to obligate someone to act morally towards animals was to paradoxically strip the act of morality; that the unclear boundaries as to what constitutes cruelty would render the Bill unenforceable; and finally, that to legislate for animal welfare was fundamentally anti-working class.<sup>2</sup> Underlying these claims, Mr Windham's sentiment was that the treatment of animals was, however brutal, the prerogative of private morality rather than an appropriate subject for law.

To what extent is Windham's view reflected in contemporary British society? Fortunately, the treatment of animals has not remained entirely

confined to the sphere of private morality, and since Windham's speech a number of critical animal welfare laws have been successfully passed. The UK was the first country in the world to pass legislation to protect animals in 1822 with the Cruel Treatment of Cattle Act, which was expanded to cover a broader set of animals including bulls, dogs, bears and sheep through the 1835 Cruelty to Animal Act. The landmark Protection of Animals Act was passed in 1911, and then, around a century later, the Animal Welfare Act 2006, which introduced protections for all kept animals in England and Wales. The last year has seen a flurry of new legislation: The Glue Traps (Offences) Act,<sup>3</sup> which bans the use of inhumane glue traps, which are a widely available method of rodent control but can cause immense suffering; the Animals (Penalty Notices) Act,<sup>4</sup> which imposes fines of up to £5,000 for those who fail to properly care for their pets, zoo animals and livestock, and finally, the Government's Animal Welfare (Sentience) Act,<sup>5</sup> which established a committee to deliver a report on "whether, or to what extent, the government is having, or has had, all due regard to the ways in which the policy might have an adverse effect on the welfare of animals as sentient beings."<sup>6</sup>

Progress has certainly been made, but contemporary debates on animal protection have found a new faultline in the bifurcation between animal welfare and animal rights.<sup>7</sup> While an animal welfare perspective seeks to guarantee that animals are not subject to "unnecessary" suffering,<sup>8</sup>

3 The Glue Traps (Offences) Act 2022

4 Animals (Penalty Notices) Act 2022

5 Animal Welfare (Sentience) Act 2022

6 Animal Welfare (Sentience) Act 2022, s 2(2)

7 Saskia Stucki, "Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights" 40 *Oxford Journal of Legal Studies* 3, 534

8 Gary Francione, "Animal Rights and Animal Welfare" (1995) 48 *Rutgers LR* 397

1 Cruelty To Animals Bill 1809

2 HC Deb 3 June 1809, vol 14, cols 1029-32



animal rights activists seek to develop a positive set of animal rights which form the basis for demanding the end of institutionalised animal exploitation. In law, this represents the difference between 'interests' and 'rights': interests ensure the interest holder is able to benefit in some way from protective action, whereas rights are "moral notions that grow out of respect for the individual", which "establish areas where the individual is entitled to be protected against the state and the majority even where a price is paid by the general welfare."<sup>9</sup> Rights arguably offer more substantial protection, in that they impose a burden that human beings must accept, regardless of the cost or disadvantage, and therefore evade the balancing exercise currently undertaken between human interests and animal welfare.

Though the notion of animal rights is prevalent in activist discourse, animals do not formally have rights in UK law.<sup>10</sup> Even the idea that they

should have so far been resisted in the political sphere. Throughout the debate stages of the recently passed Animal Welfare (Sentience) Bill, for example, lawmakers were quick to affirm the distinction between animal welfare and animal rights, and promote only the former. Lord Herbert concluded that while "we should treat animals humanely, compassionately and properly", "the doctrine of animal rights is unhelpful in guiding us as to how we should treat animals". He consequently criticised the Bill for giving "leverage and power" to the animal rights agenda.<sup>11</sup> Finally, Lord Moylan criticised the Bill for being "profoundly anti-human",<sup>12</sup> a phrase that belies the view that animal welfare rights should only be developed insofar as they do not infringe on human interests. Mr Windham's resistance to regulating cruelty to animals in 1809 thus finds its parallel in contemporary resistance to the animal rights movement.

9 Bernard Rollin, "The Legal and Moral Bases of Animal Rights", in Gary Francione, "Animal Rights and Animal Welfare" (1995) 48 Rutgers LR 398

10 Steven Wise, 'Legal Rights for Nonhuman Ani-

mals: The Case for Chimpanzees and Bonobos' (1996) 2 Animal Law Review 179, 179

11 HL Deb 16 June 2022, vol 812, col 1909

12 HL Deb 7 April 2022, vol 820, col 2202

And yet, animal rights are 'fit for legislation': a closer look at existing welfare legislation would indicate that, arguably, animal rights are already indirectly codified in law, and that the incremental positive establishment of animal rights is not so radical as these lawmakers would believe. Saskia Stucki interprets existing animal welfare legislation as encompassing certain "simple" and "fundamental" rights. "Simple" animal rights are characterised as "current, imperfect, weak animal rights" in contrast to "fundamental animal rights" which are "potential, ideal, strong animal rights".<sup>13</sup> Stucki states that some animal welfare duties can be read as direct duties owed to the protected animals themselves, which makes animals beneficiaries. It is possible to read such "simple rights" into existing animal welfare legislation. For example, the Animal Welfare Act predominantly legislates against unnecessary harm towards animals, which can be read, as Stucki reads it, as the right not to suffer unnecessarily.<sup>14</sup> Hutcheson goes even further to interpret this duty as providing a "right to happiness"<sup>15</sup>. The Animal Welfare Act also imposes some positive obligations on animal owners to ensure animal well being: five welfare "needs" that people must provide their animals; namely, a suitable environment, a suitable diet, the ability to exhibit normal behaviour, being housed with, or apart, from other animals, and the being protected from pain, suffering, injury and disease.<sup>16</sup> Stucki characterises "simple rights: "at best imperfect and weak rights that do not provide animals with the sort of robust normative protection that is generally associated with legal rights",<sup>17</sup> but these positive obligations go quite a long way in ensuring animal wellbeing.

The Animal Sentience Act also arguably creates "simple rights". The Act was intended to replace Article 13 of the Treaty on the Functioning of the European Union's statement that "animals are sentient beings" and therefore Mem-

ber States must "pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States".<sup>18</sup> In practice, the Animal Sentience Act describes certain sets of animals (any non-human vertebrate, any cephalopod mollusc and any decapod crustacean) as sentient,<sup>19</sup> but its main purpose is to establish a committee to deliver a report on "whether, or to what extent, the government is having, or has had, all due regard to the ways in which the policy might have an adverse effect on the welfare of animals as sentient beings."<sup>20</sup> Many have criticised the limited nature of this provision, as reports will not bind Ministers to any particular course of action, instead leaving them with full agency to judge the right balance between animal welfare and other considerations. The Bill is also unlikely to create a cause of action for judicial review. However, arguably the recognition of sentience is a step towards a rights based protection of animals in law, as the acknowledgement of sentience, argues Kramer, is a prerequisite for viewing an organism as a potential rights-holder.<sup>21</sup> This potential is what led lawmakers such as Sir Geoffrey Clifton-Brown to be concerned that "sentience confers rights".<sup>22</sup> This is a promising first step to creating positive legal rights for animals.

Thus we can see that the animal rights/welfare dualism has begun to collapse in recent legislation, and it is not, as some believe, constituted of mutually exclusive paradigms. Not only are animal rights a fit subject for future legislation; but they are arguably already present, and hopefully further positive animal rights will incrementally be legislated for. As such, and fortunately, Mr Windham's view that the treatment of animals falls solely within the sphere of private morality has been steadily chipped away. But more is still to be done to shift from the prevention of cruelty to guaranteeing a good quality of life for animals. The question is, in the famous words of

13 Saskia Stucki, "Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights" 40 *Oxford Journal of Legal Studies* 3, 544

14 Section 4 AW A

15 Tom L. Beauchamp and R. G. Frey, *The Oxford Handbook of Animal Ethics* (OUP, 2011)

16 Animal Welfare Act 2006, s 9(2)

17 Saskia Stucki, "Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights" 40 *Oxford Journal of Legal Studies* 3, 544

18 Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012, OJ L 326/47-326/390; 26.10.2012, Article 13

19 Animal Welfare (Sentience) Act 2022, s 5(1)

20 S 2(2)

21 Matthew H. Kramer, "Do Animals and Dead People Have Legal Rights?" (2001) 14 *CJLJ* 36

22 HC Deb 18 January 2022, vol 707, col 250

Bentham “ Can they suffer?”<sup>23</sup> Perhaps the solution is now not just animal welfare, but animal rights.

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<sup>23</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (New York: Prometheus 1789/2012), 311

# Using the law to address harmful conformation in dogs: Is a breed-specific breeding ban the answer?

**Dr Helena Howe, Senior Lecturer in Law, University of Sussex**

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## Introduction

The case brought by the Norwegian Society for the Protection of Animals (NSPA) seeking to have future breeding of English Bulldogs (Bulldogs) and Cavalier King Charles Spaniels (Cavaliers) banned in Norway has generated significant publicity.<sup>1</sup> The NSPA argues that the high risk of offspring suffering ill-health due to their conformation means any further breeding of Cavaliers and Bulldogs should be prohibited under Norwegian animal welfare legislation. Whilst the Norwegian Court of Appeal agreed that this was the position for Cavaliers, it overturned the ban in respect of English Bulldogs. Regardless of its eventual outcome, the case has highlighted the plight of these dogs and the potential role for the law in tackling it. Norway is not alone in exploring robust legal measures to address breed health. Other European countries have placed severe restrictions on breeding dogs that suffer poor health and welfare due to their conformation.

Particular cause for concern are the brachycephalic (short-muzzled) breeds, like the English Bulldog, the French Bulldog and the Pug. Although the health issues are well-known, the popularity of these breeds in the UK continues to rise at a staggering rate,<sup>2</sup> leading vets and

welfare organisations to call for more effective legal intervention including, if necessary, a potential breed ban.<sup>3</sup> Various views have been expressed on the state of current UK law and the need for change. Some insist that further legislation is needed to protect offspring,<sup>4</sup> whilst others argue that the UK already has the legislation to prohibit breeding of individual dogs with harmful conformations, it just needs to be better enforced.<sup>5</sup> Legal analysis, however, is scarce.<sup>6</sup> This article aims to contribute to this discussion by assessing the scope of the current law and some possible options for future action.

We start by identifying the welfare issues associated with brachycephalic breeds and the rationale for legal intervention. Part two addresses the current law in the UK. We argue that existing rules could – and should – be used much more effectively to protect the health and welfare of dogs but are unlikely to provide the foundation for a ban on breeding specific breeds. Ideally, new legislation will be developed in co-operation with relevant stakeholders to create a workable regime applicable to all breeders. The third part outlines the approaches taken by selected European jurisdictions, which feeds into an assessment – in part four – of the pros and cons of

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dog have risen from 4,782 in 2012 to 15, 403 in 2021 <https://www.thekennelclub.org.uk/media/2400/10yr-statsutility.pdf>

3 [vetsagainstbrachycephalism.com](https://vetsagainstbrachycephalism.com)

4 Dog Breeding Reform Group (DBRG) Policy Position Paper on the Animal Welfare Act 2006 and the protection of offspring (undated), 3.1.7, 3.2.3

5 UK Brachycephalic Working Group, press release 4th Feb 2022

6 DBRG Position Paper (n.4), is a rare example.

1 Case: 043798ASD-BORG/01

2 Kennel Club registrations for the English Bull-



a breed ban versus alternative approaches. The fifth part concludes with some suggestions for future steps in the UK.

## **Part 1: Why is legal intervention needed?**

### 1.1 The health and welfare situation of brachycephalic dogs

The flat face of brachycephalic breeds is highly distinctive and – for many – hugely attractive. Yet, a substantial body of evidence shows that brachycephalic breeds are at high risk of suffering a range of disorders intrinsically linked to their distinctive conformation, including respiratory disease, eye disease, dystocia, spinal disease, heat stroke and pneumonia.<sup>7</sup> Many of these diseases are extremely distressing for the dogs, as well as being upsetting and expensive for their owners. One key concern is Brachycephalic Obstructive Airways Syndrome (BOAS) which can induce feelings of suffocation and

<sup>7</sup> D. O'Neill and others, 'Unravelling the health status of brachycephalic dogs in the UK using multivariable analysis' (2020) *Scientific Reports* 1, 1

even loss of consciousness.<sup>8</sup> The precise genetic and environmental factors causing a dog to develop these disorders are complex.<sup>9</sup> Nevertheless, because the disorders are inextricably linked to the conformation of these breeds, the likelihood of those problems being passed to offspring is very high.<sup>10</sup>

Dogs have been placed in this position through our selective breeding practices that have prioritised human aesthetic preferences over their health and welfare. We have made them more and more extreme because they are perceived as, amongst other things, being cuter or more appealing like that, as well as being more companionable and more compatible with our - in-

<sup>8</sup> Kennel Club and Cambridge University Press, *Respiratory Function Grading Scheme Protocol for Assessors*: <https://www.vet.cam.ac.uk/system/files/documents/FrenchbulldogandbulldoggradingschemeKC.pdf>

<sup>9</sup> L. Farrell and others, 'The challenges of pedigree dog health: approaches to combating inherited disease' (2015) *Canine Genetics and Epidemiology* 2

<sup>10</sup> O'Neill (n.7)

creasingly sedentary - lifestyles.<sup>11</sup> The preference for these exaggerated morphologies has largely been generated by breed standards created and enforced by the Kennel Club, breed clubs and show judges over the last 100 or more years.<sup>12</sup> It is now reinforced amongst the public through social media and celebrity endorsement.

The English Bulldog is a striking example. Formerly a breed capable of bringing down a bull, its physical features have been so exaggerated by selective breeding that it is subject to a host of ailments.<sup>13</sup> Even the healthiest English Bulldog will experience reduced exercise tolerance compared to non-English Bulldogs.<sup>14</sup> But many will suffer more than this. During a relatively short life<sup>15</sup> they face a predisposition more than four times higher than non-English Bulldogs to BOAS, as well as other disorders of the skin, eyes and jaw.<sup>16</sup> Yet in 2022 they are one of the most sought-after breeds by consumers.<sup>17</sup> A recent study from the Royal Veterinary College called for 'urgent action to redefine the English Bulldog away from its current extreme conformation and instead to move the breed rapidly towards a moderate conformation on welfare grounds.'<sup>18</sup>

## 1.2 What can we do?

Despite widespread agreement amongst stakeholders that the health status of certain breeds

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11 R. Packer, 'Flat-Faced Fandom: Why do people love brachycephalic dogs and keep coming back for more?' in R. Packer and D. O'Neill (eds), *Health and Welfare of Brachycephalic (Flat-Faced) Companion Animals: A Complete Guide for Veterinary and Animal Professionals* (Taylor & Francis Group 2021)

12 A. Skipper, 'A Historical Perspective on Brachycephalic Breed Health and the Role of the Veterinary Profession' in Packer and O'Neill (n. 11)

13 D. O'Neill and others, 'English Bulldogs in the UK: a VetCompass study of their disorder predispositions and protections' (2022) *Canine Medicine and Genetics* 5

14 L. Lilja-Maula and others, 'Comparison of sub-maximal exercise test results and severity of brachycephalic obstructive airway syndrome in English bulldogs' (2016) *The Veterinary Journal* 219

15 O'Neill (n.13)

16 Ibid. (With true levels of these disorders likely to be much higher, 10, 12)

17 Kennel Club (n.2)

18 O'Neill (n.13) 8

is undeniably poor and requires action, opinion varies over the necessary steps to improve breed health.<sup>19</sup> One proposed approach is to use screening and selective breeding within the breed to reduce the prevalence of these disorders. Some argue that if not all dogs of each breed are affected by BOAS or other likely health issues, there may be potential to breed healthy individuals of even the highest risk breeds if potential parents are evaluated prior to mating. The Respiratory Function Grading Scheme created by the University of Cambridge in partnership with the Kennel Club to grade English Bulldogs is one such assessment.<sup>20</sup> Only dogs showing no, or relatively low, levels of BOAS following testing are considered suitable for breeding.

Whilst screening for disorders may be part of the toolkit to improve brachycephalic breed health, it is unlikely to make a significant difference to future health if extreme conformation is maintained. It is also very difficult to develop an effective testing regime because the causal factors involved in the disorders of brachycephalic dogs are complex and uncertain. To have a real impact, tests would need to target the multiple disorders affecting these dogs, not just BOAS. If such tests are developed, a high proportion of breeders would need to use them to exclude dogs with a predisposition to disease, whilst moving to a more moderate conformation overall. A one-off function test, such as the Respiratory Function Grading assessment on a potential parent is a positive step. But it is not designed to capture the overall health risk to future offspring, linked to its conformation. It is also only set as a recommendation by the Kennel Club, and not a mandatory measure,<sup>21</sup> thus ultimately leaving this decision at the discretion of the breeder.

Moreover, breeding programmes based on screening presuppose that there is sufficient genetic diversity to change morphology. Yet the extremely low genetic diversity within some

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19 D. O'Neill and others, 'Moving from information and collaboration to action: report from the 3rd International Dog Health Workshop' (2017) *Canine Genetics and Epidemiology* 4

20 Kennel Club, 2022. Respiratory Function Grading Scheme: <https://www.thekennelclub.org.uk/health-and-dog-care/health/getting-started-with-health-testing-and-screening/respiratory-function-grading-scheme/>

21 Ibid.



breeds, such as the English Bulldog, makes it virtually impossible to breed out the problems whilst maintaining the breed purity desired by breeders.<sup>22</sup> As such, improving the health of breeds with high disease burden and low genetic diversity is only possible by careful outcrossing with breeds possessing healthier conformations. It follows that a ban on breeding these breeds, unless outcrossing, may not just be the fastest way to improve health and welfare but the only way to ensure the sustainability of these well-loved breeds. Even where breeds do have a healthy population, it can still be considered proportionate to take robust action to reduce the ill-health of the subpopulation who suffer.

A slightly less drastic alternative to an outright ban would restrict breeding from dogs with extreme physical features. Certain conformational traits have been shown to correlate with a high risk of suffering health disorders associated with brachycephaly (and thus posing a risk to offspring). A low cranio-facial ratio (i.e. short muzzle length comparative to head length) has been identified as a key determinant of the risk of BOAS,<sup>23</sup> as have abnormal breathing at rest (stridor); narrow nostrils (stenosis) and presence of a nasal skin fold.<sup>24</sup> Whilst not perfect, these traits give a strong indication of health risks.<sup>25</sup> As such, we could prohibit breeding from dogs that score poorly when assessed on these traits.<sup>26</sup> Permitting breeding from dogs only at the least risky end of the conformation spectrum would move the breeds towards a healthier morphology, albeit potentially more slowly than an outright ban. However, where breeds have no mem-

bers which have moderately healthy standards of these traits, this approach will still require outcrossing with another breed.

### 1.3 The failure of self-regulation

Ideally regulation of a potentially harmful activity is undertaken voluntarily by those involved, supported by other stakeholders with specialist knowledge. Steps have been taken by the Kennel Club and other influential bodies to change breed standards and highlight health,<sup>27</sup> particularly in the wake of reports highlighting the plight of these dogs.<sup>28</sup> These include the Breed Watch initiative to enable breeders and show judges to report concerning changes affecting breeds and the Assured Breeder Scheme to incentivise responsible breeders and provide a recognised standard for the public.<sup>29</sup> A code of good practice has also been issued by stakeholders, in the absence of a statutory code.<sup>30</sup> Numerous attempts have been made to reduce demand for these dogs.<sup>31</sup> However, despite mounting evidence of welfare concerns, decades of campaigning by vets, welfare organisations and members of the breeding world, voluntary measures for changing breeder and consumer behaviour have achieved little.<sup>32</sup>

22 N. C. Pedersen, 'A genetic assessment of the English bulldog' (2016) *Canine Genetics and Epidemiology* 6

23 R. Packer and others, 'Impact of Facial Conformation on Canine Health: Brachycephalic Obstructive Airway Syndrome' (2015) *PLOS ONE* 10

24 M. van Hagen, 'Breeding Short-Muzzled Dogs: Criteria for the Enforcement of Article 3.4 of the Animal Keepers Decree (Besluit Houders can dieren) – Breeding Companion Animals' (2019) : [https://www.uu.nl/sites/default/files/eng\\_breeding\\_short-muzzled\\_dogs\\_in\\_the\\_netherlands\\_expertisecentre\\_genetics\\_of\\_companionanimals\\_2019\\_translation\\_from\\_dutch.pdf](https://www.uu.nl/sites/default/files/eng_breeding_short-muzzled_dogs_in_the_netherlands_expertisecentre_genetics_of_companionanimals_2019_translation_from_dutch.pdf)

25 Cf. R. Gill, 'Relationship between incidence of breathing obstruction and degree of muzzle shortness in pedigree dogs' (2022) <https://doi.org/10.48550/arXiv.2209.08934>

26 van Hagen (n. 24)

27 Kennel Club, 'Breed Health Improvement Strategy: a step-by-step guide' : <https://www.thekennelclub.org.uk/health-and-dog-care/health/breed-health-co-ordinators/breed-health-improvement-strategy-toolkit/#:~:text=What%20is%20a%20breed%20health,be%20present%20in%20their%20breed.> Although only approximately one third of dogs are KC registered: L. Asher et al, 'Estimation of the number and demographics of companions dogs in the UK' (2011) *BMC Veterinary Research* 7

28 D. Sargan and N. Rooney, 'Pedigree Dog Breeding in the UK: a major welfare concern?' RSPCA, 2008; P. Bateson, 'An Independent Enquiry into Dog Breeding' (2010); APGAW, 'A Healthier Future for Pedigree Dogs' 2009, 2012, 2014; EFRA Committee, *Progeny of Dogs*, 2016

29 Kennel Club, 2022. Breed Watch: <https://www.thekennelclub.org.uk/events-and-activities/dog-showing/judging-dog-shows/breed-watch/>

30 Dog Breeding Reform Group, *Code of Practice for Dog Breeding*, 2020

31 For a recent example see the UK Brachycephalic Working Group campaign, 'Stop and think before buying a flat-faced dog': <http://www.ukbwg.org.uk/wp-content/uploads/2021/03/210321-BWG-Concensus-Stop-and-think-before-buying-a-flat-faced-dog.pdf>

32 Skipper, (n.12) It is notable that the Irish Kennel

A complex range of factors have made non-binding measures hard to agree and implement.<sup>33</sup> The space is populated by a large, diverse body of stakeholders with a variety of competing interests with no one body having the authority to mandate and oversee changes. For the Kennel Club, imposing tough rules that are not accepted by members risks alienating its registered breeders and losing its influence. Success of initiatives to improve within breed have been hampered by a lack of metrics by which they can be measured and enforced.<sup>34</sup> Added to which, some owners and breeders remain sceptical of the need for substantial change in practice and others will supply whatever the public demands. Variations in scientific views about the potential to improve health within the breed, coupled with a failure to acknowledge ill-health in their own dogs<sup>35</sup> contributes a perceived lack of urgency. This is also demonstrated through the high breed loyalty among brachycephalic dog owners, with Packer et al suggesting that there is a high likelihood that current brachycephalic dog owners will want to reacquire the same breed in the future.<sup>36</sup> Strong attachment to their dogs, who are part of the family for many, makes this a particularly emotive issue.<sup>37</sup>

Vets have also played a part in normalising the disorders and associated medical care required by some breeds, leading to a perception that

a degree of disorder is 'normal for the breed'.<sup>38</sup> Vets have a professional and moral obligation to prevent or minimise negative health and welfare issues of the animals in their care. However, this must also be balanced with the risk of alienating clients if they raise concerns about the severity of the clinical symptoms of an animal. There is also a risk of a conflict of interest where veterinary clinics make an income from treating BOAS.<sup>39</sup> Failing to adequately educate owners, is further perpetuating poor welfare in this industry, and 'simply facilitating the status quo'.<sup>40</sup> It may be suggested that by providing treatments, such as surgery to alleviate BOAS, this is feeding into the perception that such surgeries are normal for even the most affected breeds.

As a result, there appears to be a clear need for statutory regulation to help protect the welfare interests of these dogs. There is evidence to suggest the public may welcome legal intervention to address this issue, despite the reluctance of some stakeholders.<sup>41</sup> Nevertheless, attempts to strengthen the law in this area must be undertaken in collaboration with as many stakeholders as possible. Bonnett and others caution against 'unilaterally' enacted legislation that does not consider all the consequences.<sup>42</sup> This is a warning that must be heeded if we do not want to make the situation worse for dogs. It will not be easy to construct effective and workable rules that are accepted by all stakeholders. The complexity that has bedevilled voluntary approaches will also challenge the development of statutory measures, perhaps more so. It may take

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Club have recently announced that from 2024 puppies of brachycephalic breeds will be endorsed 'not to be bred from', until required health tests have been completed. This appears to have been a response to proposals to take legislative action: [https://www.ourdogs.co.uk/News/newsa.php?title=IKC\\_takes\\_decision\\_on\\_brachycephalic\\_breeds#:~:text=The%20Irish%20Kennel%20Club%20\(IKC,and%20exhibition%20of%20brachycephalic%20breeds.](https://www.ourdogs.co.uk/News/newsa.php?title=IKC_takes_decision_on_brachycephalic_breeds#:~:text=The%20Irish%20Kennel%20Club%20(IKC,and%20exhibition%20of%20brachycephalic%20breeds.)

33 B. Bonnett and others, 'International and National Approaches to Brachycephalic Breed Health Reforms in Dogs' in Packer and O'Neill (n.11)

34 Ibid., 131,133

35 R. Packer and others, 'Do Dog Owners Perceive the Clinical Signs Related to Conformational Inherited Disorders as 'Normal' for the Breed? A Potential Constraint to Improving Canine Welfare'(2012) *Animal Welfare* 81-93

36 R. Packer and others, 'Come for the Looks, Stay for the Personality? A Mixed Methods Investigation of Reacquisition and Owner Recommendation of Bulldogs, French Bulldogs and Pugs' (2020) *PLoS ONE* 15

37 Ibid.

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38 Packer (n.35)

39 A. Fawcett and others, *Consequences and Management of Canine Brachycephaly in Veterinary Practice: perspectives from Australian Veterinarians and Veterinary Specialists'* (2019) *Animals* 3

40 BVA, *Vets Speaking up For Animal Welfare: BVA Animal Welfare Strategy* (2016), 1.4

41 K. Steinert and others, 'People's perception of brachycephalic breeds and breed-related welfare problems in Germany' (2019) 33 *Journal of Veterinary Behaviour* 96

42 Bonnett (n.33) 134 citing DogWellNet, "International Working Group on Extremes of Conformation in Dogs (IWGECD)." IPFD DogWellNet: <https://dogwellnet.com/content/international-actions/extremes-of-conformation-brachycephalics/international-working-group-on-extremes-of-conformation-in-dogs-iwg-eecd-r695/>

time to generate the political will and resources to implement proposals and the outcomes will not satisfy everyone. However, clearly voluntary approaches have not been able, by themselves, to improve welfare sufficiently quickly. Whilst the precise shape of legal intervention for the UK should come from close consultation with relevant parties, much can be learnt from the experiences of other jurisdictions with more advanced regimes. To that end, we outline some possible options for intervention after a consideration of the scope of existing UK law.

## Part 2: The current scope of UK law

### 2.1 Legislation applying to all breeders

There is currently no statutory provision in any of the countries of the UK that is aimed at restricting the breeding of dogs with harmful conformation by all breeders within that jurisdiction. The Animal Welfare Act (AWA) 2006, which covers England and Wales, has two sections that could potentially be interpreted as imposing a duty of care when breeding dogs with exaggerated conformations. The first of these makes it an offence to cause 'unnecessary suffering' to an animal<sup>43</sup> and the second makes it an offence not to take reasonable steps to meet the needs of an animal for which a person is responsible. This includes protection from 'pain, suffering, injury or disease.'<sup>44</sup> Similar provisions exist in the equivalent Acts of Scotland and Northern Ireland.<sup>45</sup> DEFRA have indicated that an offence could be committed under the AWA 2006 where a breeder 'knowingly selects and breeds animals with genetics leading to extreme conformations that cause pain, suffering or distress'.<sup>46</sup>

However, the option of using these general welfare provisions faces significant difficulties. A successful prosecution would have to show a causal relationship between the breeding decision and the defect which gives rise to the

pain, suffering, injury or disease of the offspring. The Act excludes animals in foetal or embryonic form from its coverage,<sup>47</sup> which may be seen to break that chain of causation.<sup>48</sup> It must also be shown that the breeder could have reasonably foreseen that the defect – and the suffering – would be the outcome of that breeding decision.<sup>49</sup> All of which would have to be proven beyond reasonable doubt, as required by criminal law, rather than on a balance of probabilities. Prosecuting bodies have, perhaps unsurprisingly, been resistant to testing the possibilities of the Act.<sup>50</sup>

Nevertheless, it may be argued that a causal link can be established between a breeding decision and the suffering of live offspring. It is arguable that the decision to breed from certain breeds involves a risk of suffering of offspring that is so high that a causal link – and the knowledge or foresight – could be established.<sup>51</sup> Such a case might be made for the English Bulldog.<sup>52</sup>

A further hurdle, however, lies in establishing when the relevant criminal act takes place by the breeder for the purpose of ss4 or 9. It has been argued that this must be the moment of conception, yet at this moment the offspring are explicitly excluded from the protection of the 2006 Act.<sup>53</sup> However, it is the act of mating of the selected dogs over which the breeder has greatest control. The birth of the offspring being the intended result of that act. As such, mating would seem to be more appropriate as the legally relevant act.

This interpretation may not be workable because the liability under ss.4 and 9 requires harm caused to an animal by the 'person responsible' for it.<sup>54</sup> Here that animal is the offspring. Yet the offspring do not exist at the time of the mat-

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43 s.4 Animal Welfare Act 2006

44 s. 9 England

45 ss. 19 and 24 Animal Health and Welfare (Scotland) Act 2006; ss. 4 and 6 Animal Welfare Act (Northern Ireland) 2011

46 Secretary of State for the Environment, Food and Rural Affairs, George Eustice, 6.11. 2017 available at: <https://questions-statements.parliament.uk/written-questions/detail/2017-10-27/110078>

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47 s.1(2)

48 DBRG (n.4) 3.1.2

49 Ibid.

50 DBRG (n.4) 3.1.7

51 DBRG (n.4) 3.1.3

52 On the basis of findings of, for example, O'Neill (n. 7)

53 M. Radford, 'Can irresponsible breeders be made criminally liable?' (Letter) Vet Record (2017)

54 This is not explicit in the wording of s.4 but see R (on the Application of Gray) [2013] EWHC 500 (Admin)

ing. It is therefore difficult to argue that they are harmed by the act or that, before they exist, the breeder is 'responsible' for them. Yet the birth of live offspring is the intended and likely result of such mating. As such, the overall process of breeding could be seen to include all the stages flowing from the mating and ending in birth, thus avoiding the exclusion of the embryonic stage of development. However, the need for such convolution supports the view that Parliament intended to exclude offspring from protection under these provisions, whilst providing the power to extend coverage via s.12 if desired.<sup>55</sup>

In short, the 2006 Act, as it stands, is not the perfect vehicle to prohibit breeding of even individual dogs with poor conformation, let alone entire breeds. Targeted legislation to properly address irresponsible breeding practices would be preferable, as discussed in part 4. Nevertheless, the potential of the current AWA 2006 – and its national equivalents – to make irresponsible breeding of brachycephalic dogs unlawful should be exploited fully. The same is true of the more specific rules aimed at licensed breeders, that we turn to now.

## 2.2. Rules applying to licensed breeders only

The only provision directly aimed at addressing the breeding of dogs with harmful conformation is found in the licensing regimes in England and Scotland. In England Sch. 6, 6(5) of the Animal Welfare (Licensing of Activities Involving Animals) Regulations (LAIAR) 2018 states that: '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.'

The provision captures inheritable disorders resulting from conformation by the reference to 'phenotype'. The equivalent legislation in Scotland is identical, except it uses the word 'conformation' instead of 'phenotype'.<sup>56</sup> Northern Ireland lacks equivalent legislation but there is a recommendation that a similar provision be in-

roduced in Wales.<sup>57</sup> The Regulations only apply to breeders who require a licence. This includes commercial dog breeders or breeders who have had three or more litters of puppies in any one year.<sup>58</sup>

## *England*

All licensees in England must meet the minimum standards for Sch. 6, 6(5) set out in the DEFRA guidance. This includes taking 'all reasonable steps' only to breed from dogs that are in 'good physical and genetic health' and 'fit for function.'<sup>59</sup> The latter explicitly includes being able to 'see, breathe normally', be 'physically fit' and be 'able to exercise freely'.<sup>60</sup>

Licence holders must 'be aware' of any health risks that may be specific to that type or breed and veterinary advice on the suitability of an animal for breeding must be sought 'where appropriate'.<sup>61</sup> Dogs that have required surgery to rectify an exaggerated conformation, or who require lifelong medication, must not be bred from.<sup>62</sup> Nor must bitches that have had two litters delivered by caesarean section.<sup>63</sup> Breeders must supply purchasers with written guidance on any conformation issues and how to manage them.<sup>64</sup>

Notably, breeders are only required to use health screening for hereditary diseases in their breed or type if they wish to meet higher standards.<sup>65</sup> Breeders are guided to 'test all breeding

<sup>55</sup> Explanatory Notes to the Animal Welfare Act 2006 para. 63

<sup>56</sup> The Animal Welfare (Licensing of Activities Involving Animals) (Scotland) Regulations 2021 Sch. 6 8(5)

<sup>57</sup> Review of the Animal Welfare (Breeding of Dogs) (Wales) Regulations 2014 (2019) 34

<sup>58</sup> Sch. 1 para. 8. The Animal Welfare (Licensing of Activities Involving Animals) (Scotland) Regulations 2021, Sch. 1 Part 4

<sup>59</sup> DEFRA, 'The Animal Welfare (Licensing of Activities Involving Animals) (England) Regulations 2018 Guidance notes for conditions for breeding dogs (updated 2020) 31

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> And obtain a longer licence. *Ibid.* 31-32. The only optional higher standard related to Sch. 6, 6(5) regards the Coefficient of Inbreeding: "No bitch will be intentionally mated when the Coefficient of Inbreeding of the puppies would exceed the breed average or 12.5% if no

stock for hereditary disease using the accepted and scientifically validated health screening schemes relevant to their breed or type'.<sup>66</sup> However, the guidance does not explicitly list what schemes are relevant to each breed or type, leaving heavy reliance on breeders' knowledge and experience as to the accepted and validated health screenings for their breed or type of dog. They must not mate a dog if the results of those tests and/or the relevant breeding strategy indicate that it would be 'likely to produce health or welfare problems in the offspring and/or it is inadvisable in the context of a relevant breeding strategy'.<sup>67</sup> Breeders are only required to report surgery to correct exaggerated conformation to the appropriate body under the higher standard.<sup>68</sup>

### *Scotland*

Whilst the legislation is drafted in similar terms, minimum duties on breeders under the Scottish Regulations appears to be on a par with the higher standards expected in England.<sup>69</sup> For example, all Scottish licensed breeders are required to undertake screening, compared to only those seeking to meet the higher standard in England.<sup>70</sup> Moreover, the standard of care expected of a licensed breeder in Scotland is explicitly higher where they are seeking to breed a Kennel Club Breed Watch Category 3 breed.<sup>71</sup> These breeds are judged to have the highest susceptibility to inherited health and welfare disorders and include several popular brachycephalic breeds, such as the English Bulldog and Pug. In Scotland, breeders of these breeds must demonstrate knowledge and experience of breeding the breed concerned and satisfy the inspector that they undertake 'robust' selection and screening procedures that are 'sufficient to minimise the risk of extreme conformations in

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breed average exists as measured from a minimum five generation pedigree.'

66 Ibid. 32

67 Ibid. 31-32

68 Ibid. 32

69 The Animal Welfare (Licensing of Activities Involving Animals) (Scotland) Regulations 2021 Sch. 6 8(5)

70 The Animal Welfare (Licensing of Activities Involving Animals) (Scotland) Regulations 2021 Guidance for Local Authorities, 77

71 Ibid. 77

any offspring.<sup>72</sup> This provides welcome recognition that health outcomes are a concern at the level of the breed and not simply the individual.

Significantly, the guidance raises a presumption that breeding 'teacup' dogs will not meet the licence conditions (i.e., it suggests a failure to take 'all reasonable steps' to ensure the offspring will be of good physical and genetic health and fit for function).<sup>73</sup> This is due to the likelihood of negative health and welfare impacts of breeding from the runt of litters.<sup>74</sup> Anyone seeking to breed these dogs should be treated as unlikely to be sufficiently prioritising the interests of dogs.<sup>75</sup> This use of a presumption that selection for certain problematic traits will fail to meet the duty of care is a potentially useful device to alert inspectors to key issues with brachycephalic breeds and shift the onus to the breeder to show why a breeding decision was lawful.

### *Weaknesses of the licensing regulations*

The limited application to breeders within the licensing regime is a major weakness of relying on Sch. 6 6(5) to address the issue of breeding brachycephalic dogs. Whilst an improvement on the previous licensing regime under the 1991 Dog Breeding legislation,<sup>76</sup> the majority of puppies bred in the UK will still not be covered.<sup>77</sup> Nevertheless, it is a step in the right direction and should be employed to its fullest extent.

Unfortunately, the scope of both English and Scottish provisions is unclear and substantial work is needed to make them truly functional. The English guidance is particularly underdeveloped, and the minimum standards are weak by comparison to Scotland. Breeding from dogs with extreme conformation is only prohibited on the grounds of conformation-related surgery or lifelong medication, or two previous caesareans. Currently, screening for defects is only re-

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72 Ibid.

73 Ibid. 78

74 Ibid.

75 Ibid.

76 EFRA Committee - Animal welfare in England: domestic pets Third Report of Session 2016-17 (2/11/2016) para. 30

77 DBRG (n. 4), 3.3.10 and CFSG/DBRG, Guidance on Dog Conformation, 2020, 20



quired under the higher standards. Accordingly, all a breeder needs to show to establish they took 'all reasonable steps' in selecting a dog for breeding is that they avoided any dog who is demonstrably suffering from a conformation-related disorder or possesses an unusually extreme conformation.

This narrow interpretation of 'all reasonable steps' fails to properly address the risk to offspring posed by some breeds and does not fully exploit the capacity of the provision.<sup>78</sup> It may be even weaker than it first appears, given the findings of Packer et al that owners do not recognise or accept the presence of common disorders in their own dogs.<sup>79</sup> If this is the case, then breeders may not be best placed to accurately assess the health risks posed by their own dog as a sire

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78 See DBRG analysis, that breach of duty could occur under this section 'where a disease is not evident (i.e. visible or palpable) in a dog selected for breeding. However, prevalence of the disease is known to be high in a breed such that offspring are likely to be affected.' This is not developed further. DBRG (n.4) 4.3

79 Packer (n.35)

or dam.

As noted above, current screening regimes have serious limitations. But if effective screening becomes available it should be required for all breeders. Where screening is not sufficient to address the problems of extreme conformation, some other objective measures should be required under both the English and Scottish rules by which breeding decisions can be assessed. This should involve indicative guidelines on when a harmful result to offspring could 'reasonably be expected' to result from mating, developed in conjunction with vets and other stakeholders. For brachycephalic dogs, this might include reference to a range of indicative traits associated with high risk of conformation-related disease. This could also be useful for establishing when breeders have satisfied the 'robust' selection procedure required for Category 3 breeds in Scotland; a requirement that could usefully be adopted in England.

More attention should also be given in both England and Scotland to establishing what level

of risk should make breeders particularly careful in their selection of parents. Ideally, the guidance would take a precautionary approach and require extra care due to the severe impact on a significant proportion of dogs, even where evidence of the degree of risk is not complete and some members of the breed remain healthy.

Enforcement of Sch. 6, 6(5) is almost certainly a problem. Licence conditions are monitored and enforced by the local authority inspectors.<sup>80</sup> It is extremely difficult for inspectors to assess whether breach of duty has occurred given the 'technical and complex' range of factors used by the breeder in deciding whether to breed from a dog.<sup>81</sup> These challenges are exacerbated by inadequate training and lack of resources resulting in weak and ineffective enforcement of animal welfare laws, including the 2018 Regulations.<sup>82</sup> A review of these Regulations is due in 2023.<sup>83</sup> Local authorities' failure to fulfil reporting duties<sup>84</sup> will impact the accuracy and validity of any report.<sup>85</sup>

### 2.3 Could we ban the breeding of entire breeds currently?

It is not impossible to argue that either the 2006 Animal Welfare Act (and its equivalents) or Sch. 6 6(5) and 6 8(5) could be used to ban future breeding of certain breeds. However, it seems unlikely that either the 2006 Act or the Regulations would be interpreted by the courts as having this effect. Nor may such an approach be the most effective for improving welfare.

Sch. 6 6 (5) was included in the 2018 Regulations following detailed reports on the welfare impacts of extreme conformations. These reports highlight the extremely low genetic diversity in breeds, such as the English Bulldog, and the virtual impossibility of breeding out disorders without cross breeding. Whilst one influential report specifically recommended restricting the breeding of individuals with exaggerated con-

formations,<sup>86</sup> this is not made explicit in Sch. 6, 6(5) or 6 8(5). There is nothing in the wording of Sch. 6, 6(5) or the Scottish equivalent limiting it to individuals; it simply prohibits the use of a dog in breeding where it can 'reasonably be expected' that health or welfare harms could result.

Thus, if it can reasonably be expected that any breeding of a certain breed will result in a health or welfare detriment to the offspring due to parental conformation then, arguably, any breeding from a dog of that breed is a breach of the licence. This could apply, for example, to the English Bulldog. Given the genetic predisposition to disorders of this breed, it is surely plausible that any further breeding of pure English Bulldogs gives rise to a reasonable expectation – even likelihood – that many offspring would suffer negative health and welfare impacts, contrary to Sch. 6, 6(5). It is also difficult to see how a breed with such high disease burden and low genetic diversity can be said to possess members in good 'genetic health', even if some are accepted to be in good 'physical' health currently.

Moreover, the guidance requires all dogs kept for breeding to be 'fit for function' – able to see and breathe 'normally' and exercise 'freely'. The scope of this rule clearly depends on the definition given to these words. If the reference standard is the breed, then the provision is self-limiting and can never truly move the breed towards real health.<sup>87</sup> In breeds like the English Bulldog, only the animals with the most extreme conformation will be caught as poor respiratory function and mobility are considered 'normal for the breed'. The better view is that 'normally' and 'freely' should be judged by reference to the sight, respiratory function and exercise tolerance of other members of the species with average conformation. This accords better with the 'fit for function' requirement and the aim of the legislation to promote welfare. There is substantial evidence to suggest that no member of certain breeds can breathe or exercise 'normally' by

80 s.15

81 DBRG (n.4) 3.3.8

82 APGAW, *Improving the Enforcement of Animal Welfare Law*, 2022, 8. 9

83 s.28(2) LAIAR 2018

84 s.29 LAIAR 2018

85 APGAW (n.90) 9

86 Advisory Council on Welfare Issues in Dog Breeding Summary of the progress since the Bateson Report of 2010, 2014, 76

87 I. Seath, 'Sound in Wind and Limb – what do we mean by 'sound?'' available at: <https://dogeduk.wordpress.com/2022/09/25/sound-in-wind-and-limb-what-do-we-mean-by-sound/>

this standard. On this basis, any further breeding could breach the provision.

Despite this, it is virtually certain that Sch. 6 6(5) and 6 8(5) are to be interpreted as applying only to individual dogs by local authorities and breeders. There are good reasons to believe that a court is unlikely to accept that the provision could ban any future breeding of entire breeds. Significantly, it is unlikely – and undesirable – that a court would accept that a breed ban should be applicable to licensed breeders, leaving unlicensed breeders free to breed with impunity. It would have a substantial and immediate impact on a number of businesses and result in the potential destruction of many dogs, without evidence that this was the legislative intent.<sup>88</sup>

On this basis, the way forward may be to accept that these provisions apply only to individual dogs but can require a higher emphasis on breed level problems in their application. Drawing on the approach in Scotland, the guidance could be developed to impose higher standards when breeding certain higher-risk breeds. This might cover a wider range of dogs than the KC category 3 breeds already highlighted in the Scottish guidance and include more detailed requirements as to selection. The indicative requirements could include certain features that suggest a high predisposition to poor health and welfare, such as a low cranio-facial ratio, eye shape or exaggerated skin folds. The options for this type of trait-based restriction, and the question of whether this approach is preferable to banning breeding of certain breeds, will be discussed in part 4. But it would appear to be more easily accommodated within the existing licensing regulations than a breed ban.

Moreover, the Scottish guidance indicates that there can be a presumption that the standard of care will not be met where a breeder breeds from dogs possessing certain traits. Whilst 'teacup' dogs are not a breed or even a defined genetic group, they have a common set of physical features (size) caused by their genetics (being bred from the runt of litters). This suggests that further presumptions against selecting for certain traits that are known to involve negative welfare impacts can be covered within the reg-

ulations. The targeted traits would need to be evidence-based and established in conjunction with stakeholders.

The upshot is that there is real potential in the licensing regulations in England and Scotland to restrict breeding of many dogs with a substantial risk of passing harmful conformation to offspring. Whilst it appears to be very difficult to ban the breeding of entire breeds using current laws, there is more scope to restrict breeding of collections of individuals with high-risk characteristics. Nevertheless, all nations of the UK would benefit from legislation targeted at this issue that makes application clear and covers all breeders. The form this should take is explored more in part 4 after a brief look at the approach in several other nations that are seeking to take robust action on this issue.

### Part 3: Approaches in other European countries

#### 3.1 Norway

The Norwegian Animal Welfare Act (NAWA) 2009 places a positive obligation on breeders and breed organisations to produce animals which function well.<sup>89</sup> Breeding will be prohibited where it passes on genes which negatively impact physical or mental functions, reduces the ability to engage in natural behaviour or raises ethical concerns.<sup>90</sup> These provisions are capable of applying at breed level and not just to individual animals.<sup>91</sup> The Oslo District Court found that the prevalence of genes resulting in serious health conditions in the population of Cavaliers King Charles Spaniels and English Bulldogs meant that any further breeding of these breeds would be unlawful.<sup>92</sup> Whilst the Court of Appeal agreed that any further breeding of purebred Cavalier King Charles Spaniels was contrary to s.25 of NAWA 2009, this did not apply to English Bulldogs.<sup>93</sup> The court placed significant weight on the existence of screening for BOAS in Bulldogs prior to mating.<sup>94</sup> An appeal is due to be

89 s.25(1)

90 s.25(2)(3)

91 Case:043798ASD-BORG/01

92 Case:20-169475TVI-TOSL/04

93 Case:043798ASD-BORG/01

94 *Ibid.* 51

88 M. Radford, personal correspondence.



heard in the Supreme Court in August 2023.

### 3.2 The Netherlands

In 2014, the Netherlands brought in legislation prohibiting the breeding of companion animals where that would be detrimental to the health or welfare of the parent or offspring.<sup>95</sup> This includes breeding of dogs with conformational features that cause health and welfare issues. A regime to implement this obligation in relation to certain breeds of brachycephalic dogs came into force in 2020 following a commissioned report.<sup>96</sup> The approach aims to prevent the long-term breeding of any dog which falls below an 'ideal type' of morphology. This is based on a set of conformational traits, such as cranio-facial ratio (CFR), identified to be the main indicators of Brachycephalic Ocular Syndrome and BOAS; the two key pathologies addressed in the report.

A traffic light system is used to move breeders towards the ideal standard by prohibiting breeding of those animals with the most extreme set (red) of problematic conformational characteristics. A moderate level (amber) is acceptable during the transitional phase. It is anticipated that it will take 2-3 generations for breeders to move to a green set of outcomes. If this proves impossible, then a mandatory breeding programme involving outcrossing is likely. Enforcement inspectors use a functional set of indicators, with additional tests outlined for further assessment.

Unlike the Norwegian approach, this does not directly ban the future breeding of a specific breed. It provides a set of six criteria which the individual dog must meet. However, if all members of a breed fail to meet the amber standard for one of the criteria, no breeding can take place. For example, no Pugs can meet the amber CFR standard and to avoid a ban on future breeding of Pugs, a temporary relaxation of this standard for one parent has had to be introduced.<sup>97</sup> However, the Dutch government have just announced that they are considering the introduction of keeping ban and a showing ban on companion animals with harmful physical characteristics, which would also require a ban on

<sup>95</sup> Article 3.4 of the Animal Keepers Decree 2014

<sup>96</sup> van Hagen (n.24)

<sup>97</sup> Bonnett (n.33) 143

their trade and import.<sup>98</sup>

### 3.3 Finland

Finland is replacing the existing Animal Welfare Act which prohibits breeding that causes harm to parent or offspring,<sup>99</sup> with new legislation that will address harmful conformation more rigorously.<sup>100</sup> The proposed law prevents the use in breeding of animals with exaggerated features unless it can be shown via testing that harm will not be transmitted to the offspring.<sup>101</sup> Brachycephaly is identified as the primary welfare concern and the proposed law uses a detailed range of factors to assess health, which will become stricter after the 5 year transitional period.<sup>102</sup> These include physical traits, such as CFR, eye function and nostril stenosis, in combination with respiratory testing and veterinary evaluation. It differs from the approach in The Netherlands because none of the criteria will independently prohibit breeding but will be part of an overall assessment of sire and dam. Although this will be tightened following the transitional period. The criteria will also apply to all dogs, rather than those of specified breeds. However, where a breed cannot improve conformational health due to low genetic diversity, outcrossing will be required.<sup>103</sup>

## **Part 4: The benefits and drawbacks of different legal approaches**

### 4.1 A ban on breeding from certain breeds

A breed ban involves a prohibition on any further breeding of certain specified breeds, unless outcrossing with a dog of another breed possessing

<sup>98</sup> <https://www.rijksoverheid.nl/actueel/nieuws/2023/01/20/naar-een-verbod-voor-dieren-die-lidjen-onder-hun-uiteerlijk>

<sup>99</sup> s.8(2) Animal Welfare Act 247/1996

<sup>100</sup> Government Proposal HE 154/2018 vp 'The government's proposal to parliament for a law on animal welfare and some related laws', Section 25, 3rd November 2021: [https://www.eduskunta.fi/FI/vaski/HallitukseenEsitys/Sivut/HE\\_154+2018.aspx](https://www.eduskunta.fi/FI/vaski/HallitukseenEsitys/Sivut/HE_154+2018.aspx).

<sup>101</sup> Animal Welfare Bill s.25(1) and Government Proposal (n.103)

<sup>102</sup> Finnish Food Authority, 'Improving the implementation of animal welfare legislation in animal breeding', 2020 Ch. 9.2

<sup>103</sup> *Ibid.* 60

more species-average conformation. This approach could have benefits for dog welfare by substantially reducing the numbers of certain high-risk breeds born in the UK, whilst sending a very clear message about the harms involved in breeding and purchasing such dogs. The law reflects changes in social attitudes, but it is also capable of driving those changes.<sup>104</sup> Ideally a breed ban would reduce the acceptability and fashion-status of such dogs, as well as making acquiring them more difficult. Fundamentally, it would reinforce that dogs are not commodities designed to meet our needs but sentient beings with their own intrinsic interests in health and wellbeing.

Prohibiting future breeding of pure-bred dogs with a high disease burden would emphasise that health should be the priority in breeding. It may also have the advantage of speed. The introduction of a ban on future breeding of the English Bulldog, for example, may encourage breed organisations to adopt new breed standards and monitored outcrossing programmes more quickly. To some extent, a breed ban could make enforcement easier for inspectors as any advertisement for such a breed could be investigated.

However, a breed ban may not produce an overall rise in dog welfare. First, a breed ban in the UK would simply prevent domestic breeding of these dogs but not impact the importation of such dogs. It has potential to target the most responsible breeders affiliated with the organisations like the Kennel Club, leaving these breeds to be imported from abroad or bred in contravention of the law by less scrupulous breeders. To have the most impact, the breed ban should be enforced on all UK breeders, not just those that are licensed. For a breed ban to work for dogs – and be fair to breeders – additional measures would be needed to address these likely consequences. Such a ban may also result in higher numbers of these dogs being abandoned as breeders and owners either cannot make use of them commercially or feel stigmatised.

Secondly, a breed ban is the approach most likely to antagonise and alienate the breeding community. In a field where tensions run ex-

tremely high, legal action which targets specific breeds is likely to receive intense opposition from breeders and breed organisations. This is particularly challenging as the evidence base for a breed ban remains contested.<sup>105</sup> Arguably we should not wait for watertight evidence given the high risk of negative welfare outcomes and the better approach is to take a precautionary stance. As such, we should take action to mitigate the risks to dogs despite the lack of complete knowledge or consensus. Nevertheless, breeders can legitimately point to expert evidence that a breed ban is not necessary.

An outright ban is also less likely to gain public support than other options, especially where the target breeds are iconic. An attempt to ban the English Bulldog in Britain is likely to be framed as an attack on the country's heritage and personal freedom, overshadowing the welfare basis for action and potentially making such dogs even more attractive to some. This will make getting such a law in place and enforcing it extremely difficult and thus may make this the least pragmatic approach.

On the other hand, if a breed ban is shown to be necessary because in-breed improvement is virtually impossible, then this should be pursued despite opposition. Explanation of an outcrossing programme and its benefit for the health and sustainability of the breed might alleviate public concerns about the loss of much-loved breeds and even gain support from attempts to return a breed such as the English Bulldog to its perceived former glory. In this way, taking a breed ban head-on – rather than indirectly banning the breeding by restricting breeding of dogs with certain traits – might have more success, rather than less.

However, monitoring and enforcing the law could be extremely difficult, with breeders denying dogs are pure-bred examples of a banned breed. Although in a different context, the enforcement of the breed ban under the Dangerous Dogs Act highlighted difficulties in determining specific dog breeds.<sup>106</sup> There may be similar difficulties if the UK was to enforce a breed ban

<sup>104</sup> As shown, for example, in post-legislative attitudinal shifts around smoking and equalities.

<sup>105</sup> Evident, for example, in Case:043798ASD-BORG/01

<sup>106</sup> C. Hood, *Assessing the Dangerous Dogs Act: when does a regulatory law fail?* (2000) Public Law 282

within the breeding industry. However, this problem would seem to be less likely in this context than under the Dangerous Dogs legislation as breeders would then be unable to advertise and sell the dogs as examples of a particular breed. It may also encourage breeders to engage in minor and unskilled outcrossing that, at best, does not reduce the problematic conformational features of the breed and, at worst, introduces other genetic problems. Such a ban would reduce further the oversight and engagement of the Kennel Club in respect of those breeds, as crossbreeding would not produce the pedigree dogs which the Kennel Club registers. Although, this need not be the outcome. If the Kennel Club did support a breed ban and oversaw an outcrossing programme, this could have a positive impact on the success of such a ban.

Finally, the ban would also have to be policed. Sufficient resources will need to be directed to the responsible body to enable the action to be effective. Crucially, this would include sufficient enforcement personnel who were adequately trained for the task. This is not a problem particular to a breed ban. However, a breed ban may be more difficult and thus expensive to operate because of the issues identified.

#### 4.2 Breed restrictions based on physical traits

There appear to be advantages to restricting breeding based on certain physical criteria associated with disorders of brachycephalic dogs, rather than focusing solely on breed. This approach – seen in The Netherlands – may obtain similar welfare benefits for dogs associated with a breed ban, particularly a reduction in numbers of unhealthy dogs being born in the UK. Whilst the rules are limited to certain breeds in The Netherlands, this would not need to be the case. This approach may not send such an explicit message about the harm associated with breeding and owning certain breeds, but it does recognise dogs' interest in being healthy. Importantly, it may have a greater chance of stakeholder support than a breed ban.

One advantage of this approach is that breeders are more likely to accept the regulations and co-operate in drafting workable rules because they can continue breeding their breed. However, this only works if the standards set do not de facto preclude some breeds, because they have

no members whose conformation fits within the acceptable range. Buy-in by breeders is also more likely if physical traits chosen are generally agreed to correlate closely with high risk of disease. One objection to the rules in the Netherlands is that CFR requirement is an absolute standard; if it is not met then no breeding can take place even if the other traits are within an acceptable range. Moreover, there is disagreement about whether CFR is a reliable indicator of BOAS across all relevant breeds.<sup>107</sup> There is also concern that there can be undue focus on traits associated with muzzle length and ignoring the other problematic features of brachycephalic conformation.<sup>108</sup> In this respect, there may be advantages to the Finnish approach, where a variety of indicators are assessed together to establish whether breeding can take place.

Another benefit of restricting breeding where dogs fail to meet the criteria for identified physical traits is that it provides some time for breeders to improve. Whereas a ban is once and for all. In this respect, the Dutch traffic light system which moves breeders towards offspring with an improved set of physical criteria over five years appears to be a pragmatic approach. This may help reduce the number of dogs being destroyed or abandoned because they do not meet the legal requirements, as well as provide time for breed organisations and breeders to plan adapted breeding programmes.

Whilst monitoring and enforcement will not be simple, it is potentially easier than the current position in England and Scotland, where the breeding decision must be evaluated with very little guidance. The Netherlands shows that it is possible to enforce using a set of basic indicators as provided to the inspectors, with further detailed guidance for breeders and vets available where needed.

#### 4.3. Multi-factor approach

Given the drawbacks of both these approaches, there is much to be said for a framework that utilises aspects of each of these approaches

<sup>107</sup> <https://dogwellnet.com/content/international-actions/extremes-of-conformation-brachycephalics/challenges-for-pedigree-dogs-regulatory-enforcement-of-brachycephalic-dogs-in-the-netherlands-r686/>

<sup>108</sup> Bonnett (n.33) 140

in combination with others. This multi-pronged approach could require the use of screening procedures where these are available, as well as an assessment based on the physical characteristics of the dog to exclude those with extreme features. Such a combined assessment could avoid the exclusion of a dog based on a single element of the assessment, at least in the short term. Moreover, initially at least, the physical trait assessment could be set at a point to avoid prohibiting all members of a breed, even if that standard is tightened up in time. These requirements could be complemented by others to address wider inherited health disorders, such as using Estimated Breeding Values – which employ a formula to calculate the risk each dog poses of passing on certain genetic disorders – and addressing the popular sire problem by restricting the number of litters each male can be responsible for over a certain period.<sup>109</sup>

These measures might be further strengthened by ensuring that information about the breeder can be retained on the microchip to assist monitoring and enforcement. Additional information on the bloodlines of both sire and dam, and any health tests undertaken might also be included. This framework may need to include the option of a ban on future breeding of certain breeds, unless outcrossing to improve conformation, where the disease burden remains high despite breeders pursuing the measures outlined.

## **Part 5: Conclusion - next steps for the UK?**

### 5.1 Options that don't need new legislation

#### *Developing the existing Regulations in England and Scotland*

The first step in the UK should be making more robust use of the provisions of the licensing regulations in England and Scotland. Care needs to be taken not to make these rules too restrictive until all breeders – including those outside the licensing regime – are legally required to meet minimum standards of conformational health. At the same time, licensing regulations made to promote welfare should reflect current welfare science and licensed breeders should meet obligations that accord with this evidence. At a

minimum, the mandatory standard of care expected under Sch. 6 6(5) in England should be brought up to match the standard in Scotland. This would require breeders to use screening or testing where appropriate and, as discussed above, for Category 3 breeds show the inspector that their selection process was 'robust' and able to minimise the risk of extreme conformations in any offspring.

Further developments of the guidance should be sought in conjunction with vets, local authorities, welfare and breed organisations. This should explain more clearly what a 'robust' process involves. It should also outline when a breeder should 'reasonably expect' a harmful outcome to result from breeding a dog with a brachycephalic conformation and what taking 'all reasonable steps' to avoid this situation looks like. This could include a range of indicative physical characteristics that suggest a breeder should not be using a dog in breeding, with the prospect that these will be further tightened in future. This could be on a points system to avoid total reliance on CFR. There could be a presumption that breeding dogs that score poorly on key traits will fail to meet the standard of care unless they can show that they mitigated the risk through other selection procedures.

A higher standard could be used to encourage further endeavours to improve health. This might include, for example, extending the standard of care expected of breeders of Kennel Club Category 3 breeds to all brachycephalic breeds. It could even be framed as a presumption that breeding any brachycephalic dog is unlikely to meet this higher level – and thus be granted a licence – unless the breeder satisfies the inspector that they are using animals with the least exaggerated conformational features.

Further resources need to be devoted to supporting local authorities to monitor and enforce the regulations, with particular attention paid to training sufficient inspectors to assess breed decisions with confidence. In Wales and Northern Ireland enacting a similar provision for licensed dog breeders would be a step in the right direction but ideally, these jurisdictions would move straight to creating a duty on all breeders to avoid breeding dogs with harmful conformations.

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<sup>109</sup> Welfare in Pet Trade, Responsible Dog Breeding Guidelines, 2020, 9

## Create a statutory Code of Good Practice on Dog Breeding

It is desirable that a statutory code of good practice covering all breeders be issued by DEFRA under s.14 of the Animal Welfare Act 2006.<sup>110</sup> Whether this option can be adopted without new legislation or not depends on the interpretation of the 2006 Act. If ss. 4 and 9 place a duty on breeders to take reasonable care when making breeding decisions, then DEFRA could create a statutory code of practice (COP), which would help establish liability under those sections (s.14(4)). If ss.4 and 9 are found not to cover breeding decisions, then a statutory COP would have to be part of new legislation under s.12, as outlined below.

Whilst not a breeding-related measure, highlighting the obligations on owners regarding health and welfare of dogs under the AWA 2006 may also help reduce demand. A more explicit description in the existing COP on the welfare of dogs<sup>111</sup> of the obligation to avoid 'pain, suffering, injury and disease' and ensure 'normal behaviour' as applied to brachycephalic dogs, might encourage prospective owners to reflect on their ability to lawfully meet the needs of a such a dog.

A non-statutory COP was issued by the Dog Breeding Reform Group (DBRG) in 2020.<sup>112</sup> Whilst it highlights issues of inherited diseases associated with certain breeds, the wording on conformation issues appears relatively weak. It requires that breeders 'be aware of the potential health and welfare implications of breeding dogs with extreme conformations.'<sup>113</sup> Some guidance is given but this is limited. It would be helpful if this COP could be more ambitious. Wording such as breeders 'should take all reasonable steps to avoid breeding dogs with extreme conformations due to the health and welfare implications' would provide a stronger message. A robust COP may help raise the standard of breeding and – if used effectively – reduce the need for

further legal intervention.

## 5.2 Options requiring new legislation

### *New rules aimed at all breeders under the AWA 2006*

Additional secondary legislation to protect progeny as anticipated under s. 12 of AWA 2006 is recommended as the most effective way of addressing the issue of inheritable disorders.<sup>114</sup> The DBRG suggest that this should impose a duty '... on breeders when selecting [dogs] for breeding to have regard to the anatomical, physiological and behavioural characteristics which are likely to put at risk the health or welfare of the progeny or the female parent' with failure to comply being an offence.<sup>115</sup> Such a legal duty on all those breeding dogs within the jurisdiction would be a huge step forward. However, the obligation to 'have regard' is relatively weak language. It would be preferable if any legislative duty stated that breeders must 'take all reasonable care' to avoid breeding dogs with harmful physical characteristics. Or, at least, require breeders to have 'all due regard' to relevant factors. Ideally the legislation would apply to all those involved in breeding, not just breeders themselves, so as to cover decision-making by breed organisations<sup>116</sup> as well as the growing number of fertility clinics used to produce these dogs.<sup>117</sup>

Drafting the legislative duty broadly is advisable so that it remains able to meet emerging scientific evidence. The legislation could make reference to a code of good practice which would provide a more detailed explanation of the obligation placed on breeders to avoid breeding harmful, exaggerated conformations. This COP should replicate the requirements expected of licensed breeders in the associated guidance, which we have argued should be further developed.

All of these approaches only target the breeding of dogs in the jurisdiction enacting the leg-

110 Recommended by Bateson (n.28) 8.9

111 DEFRA, Code of practice for the welfare of dogs, 2018

112 CFSG/DBRG, Code of Practice for Dog Breeding, 2020

113 Ibid. 8

114 E.g. Bateson (n.28); APGAW (n.28); Advisory Council on Dog Breeding (n.86)

115 DBRG (n.4) 3.2.3; Recommendation 8 of Bateson (n.28)

116 As in Norway, s.25(1)

117 NatureWatch Foundation, Canine Fertility Clinics A new frontier in the fight against puppy farms, 2022

isolation. Further measures will undoubtedly be needed to avoid simply shifting the breeding further out of the UK. If secondary legislation is enacted which follows Environmental Food and Rural Affairs Committee's recommendations of increasing the minimum age in which dogs can be commercially or non-commercially imported into the UK from 15 weeks to 6 months, this would also aid in reducing this issue.<sup>118</sup> Yet it may still be a problem if tightening up on conformational traits means that demand for a breed outstrips supply in the UK. Ideally, countries would work together to raise breeding standards. But restrictions on importing and owning these dogs should be considered, as in the Netherlands. Continuing initiatives to reduce the appeal and status of these dogs through public information campaigns and by targeting irresponsible use of their images in advertising, for example, will also be crucial.

## Conclusion

Despite many initiatives aimed at raising awareness of the health and welfare issues of breeding dogs to extreme conformation and the introduction of a licensing regime for dog breeders, there has been a lack of positive human behaviour change by consumers and breeders. The introduction of more stringent legislation in other jurisdictions aiming to address extreme conformation raises questions concerning the efficacy of the current UK legislative framework, whilst raising potential options for reform. Despite our focus on brachycephaly, much of the discussion is applicable to dogs with other exaggerated conformational features.

The next steps for the UK are not entirely clear. What is clear, however, is that adequate steps need to be taken by all stakeholders to ensure that health and welfare is placed at the heart of breeding decisions. This may well require new legislation coupled with detailed guidance and codes of practice, developed in co-operation with relevant stakeholders. It almost certainly involves more effective use and enforcement of existing rules, as well as their wider publicization. We are at a crucial point where if nothing

is done dogs will continue to suffer and we risk losing some of our best-loved breeds.

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<sup>118</sup> s.46(2) Kept Animals Bill; EFRA, Commercial and Non-Commercial Movement of Pets into Great Britain: Consultation Document, 2021



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