



**SOCIETY OF CONSERVATIVE LAWYERS**

**SUBMISSION ON THE  
DRAFT ANIMAL WELFARE BILL**

***FROM PRINCIPLE INTO PRACTICE***

**James Pavey  
Simon Murray**

## EXECUTIVE SUMMARY

This Submission to the Environment, Food & Rural Affairs Sub-Committee is made by James Pavey and Simon Murray, respectively a litigation solicitor and a barrister, whose practices incorporate criminal litigation and public law litigation in the wider sense. Both have experience of conducting animal welfare litigation under the current, Protection of Animals Act 1911 regime. In addition, James Pavey has advised stakeholders in the consultation process with DEFRA for secondary legislation on animal fairs under the draft Animal Welfare Bill.

This Submission raises a significant number of concerns with the draft Animal Welfare Bill launched on 14 July 2004. These include:

- Lack of clarity in the drafting scheme: eg, the definition of “protected animal”.
- Possible unintended consequences of the legislation: eg, whether the Bill will, inadvertently, criminalise fishing.
- The scope of the secondary legislation that could be made under the Bill, if enacted.
- The unprecedented delegation of powers of investigation and prosecution to private and unaccountable bodies, such as the RSPCA.
- The absence of objective justification by DEFRA for the severity of penalties for offences.
- The balance that the draft Bill strikes between human rights (eg, to property) and human responsibilities towards animals.

If enacted in its current form, the draft Bill, through its wide application and severity, will constitute a deterrent to the keeping of pet animals in particular. We question whether this will, in the long term, improve standards of animal welfare, if fewer people have experience of animal keeping.

Two Appendices to this Submission set out in tabular form:

- A. Proposed amendments to the draft Bill.
- B. Questions that we urge members of the EFRA Committee to ask DEFRA.

A copy of this Submission will be sent to the Animal Welfare Division of DEFRA, in particular so that it can be considered with Parliamentary Counsel.

***James Pavey  
& Simon Murray  
24 August 2004***

*Note. It should be stressed that, in keeping with the tradition of the Society of Conservative Lawyers, the views expressed in this paper are those of the authors and not the Society as a whole. In common with other SCL publications, this paper is a contribution to debate and not an official Party pronouncement.*

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<i>Contents</i>	<i>Page</i>
<i>Biographical details of authors</i>	
<b>1. Introduction</b>	<b>1</b>
<b>2. General concerns</b>	<b>2-12</b>
<b>3. Clause-by-clause critique</b>	<b>13-32</b>
<b>4. Conclusions</b>	<b>33</b>

**Appendix A: Proposed amendments**

**Appendix B: Information sought from DEFRA.**

**Appendix C: Relevant statutory provisions**

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## 1. INTRODUCTION

In her foreword to the “Launch of the Draft Animal Welfare Bill” (“AWB”), Margaret Beckett MP, Secretary of State for the Environment, Food and Rural Affairs, observes that “We have a deserved reputation in this country as a nation of animal lovers.”

This is certainly the popular conception and the ultimate aim of this paper is to ensure that we continue to be a nation of animal lovers – and animal keepers.

We wholeheartedly support the aims of the Government in trying to bring the disparate sprawl of animal welfare legislation “under one roof”. We believe that there is a need for strong, clear law, spelling out the responsibilities that human keepers have for animals in their charge and that humans have for animals generally. However, the draft AWB is more than a mere consolidating Bill: it goes much further than previous animal welfare legislation.

The Government has laid much emphasis on the new pre-emptive powers and the welfare “duty of care”<sup>1</sup> in the draft Bill. We believe that there are serious flaws in these clauses of the draft Bill and that the draft Bill raises a variety of more general concerns.

This Government has not distinguished itself in displaying an understanding of or respect for established legal, constitutional principles: the Constitutional Reform Bill is a case in point. The AWB also offends in this sphere: it proposes unprecedented delegation of state functions to private bodies. This is a matter of great concern.

On a practical level, we believe that the draft AWB, if enacted in the draft terms, may be a significant deterrent to animal keeping. When reviewing the draft Bill, we invite DEFRA and the House of Commons Environment, Food & Rural Affairs Select Committee at all times to consider whether it goes further than is necessary to protect animal welfare. If, in the long term, the legislation acts as a deterrent to animal keeping and fewer people have experience of keeping animals, will the standard of animal keeping improve? Will there be a net benefit to animal welfare?

A number of principles underpin this critique of the draft AWB:

- That legislative control should only be introduced where necessary and, then, it should be proportionate to the need.
- That humans – not animals - have rights and the function of animal welfare legislation is to determine levels of human responsibility.
- That good law is clear and unambiguous.
- That, if the new law is to improve standards of welfare, it should not generally deter people from keeping animals.

In many respects, the draft AWB is illiberal: it discloses little thought as to the proper balance between the rights of humans, at common law and as enshrined in the European Convention of Human Rights (“ECHR”), and the responsibilities of humans as to animals.

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<sup>1</sup> Foreword by Rt Hon Margaret Beckett MP to “Launch of the Draft Animal Welfare Bill”, July 2004; DEFRA Press Release “Launch of the Draft Animal Welfare Bill”, of 14 July 2004.

## **2. GENERAL CONCERNS**

2.1 Before turning to the AWB on a clause-by-clause basis, we have set out a number of general, headline concerns about the scheme, the effects and the implications of the AWB.

### **A. “Protected animal” v “animal”**

2.2 Clause 53(1) provides that, subject to qualifications within clause 53, “in this Act “animal” means a vertebrate other than man.”

2.3 Clause 54(2) of the draft AWB provides that, “An animal is a “protected animal” for the purposes of this Act if –

- (a) it is of a kind which is commonly domesticated in the British Islands, or
- (b) it is not of such a kind but –
  - (i) is being kept by man,
  - (ii) has ceased to be so kept but is not (or not yet) living in a wild state, or
  - (iii) is temporarily in the custody or control of man.”

For completeness, “An animal is “kept by man” for the purposes of this Act if there is a person who owns, or is responsible for, or in charge of it.” (Clause 54(3).)

2.4 Explanatory Note 206 says that clause 54(2) “defines the expression “protected animal” which is what sets the boundary of the application of the offences under the clause. Broadly, animals of a kind which are commonly domesticated in the British Isles will be within the protection of the offences. This category includes most pets and farmed animals. Non-domestic animals are only protected in specified circumstances and not if living in a wild state.”

2.5 There appears to be significant confusion in the application of the draft AWB’s provisions to animals and protected animals. Clauses 1(1) and clause 1(2) appear to provide the basic cruelty offences – though see below as to the lack of clarity in clause 1. Clause 1(1) clearly applies the offence of causing unnecessary suffering by act or omission with actual or constructive knowledge to a “protected animal” (sub-clause 1(1)(d)). However, clause 1(2) makes it an offence for the keeper of “an animal” to permit another to cause it unnecessary suffering. Is the distinction between the two offences deliberate? Or is the point that, if an animal has a keeper, it must be “protected”?

2.6 The clause 3 welfare “duty of care” is explicitly applied to an “animal”, not merely a “protected animal”. It may follow that, if the potential offender is “a keeper of an animal”, the “animal” must logically be a “protected animal”, by virtue of clause 54(2)(b)(i). Again, however, it is unclear: tautology would be better than lack of clarity.

2.7 For clarity and, in particular, as the offences and the powers contained within the draft AWB engage Convention rights, DEFRA is invited to re-submit the draft Bill to Parliamentary Counsel to clarify this confusion in the drafting. If the drafting scheme works in this regard, it is too subtle to be easily comprehensible; if it does not work, it clearly needs amendment.

### **B. Human Rights Act 1998**

2.8 Explanatory Note 219 to the draft Bill indicates that “[t]he Secretary of State is satisfied that the draft Bill is compatible with the European Convention of Human Rights”.

This foreshadows the Secretary of State's formal obligations under s.19 Human Rights Act ("HRA") 1998 to make a statement of compatibility.

2.9 Explanatory Note 221 on Article 1, First Protocol (the "right to property")<sup>2</sup> is revealing: the powers in the draft Bill "to deprive a person of his animals or to destroy them, are justified in interests of animal welfare, *provided the powers are exercised in a proportionate manner*" (emphasis added). Notwithstanding the obligations of public authorities to act in accordance with Convention rights (s.6 HRA 1998), if the Bill is to be HRA 1998 compatible, it should incorporate its own safeguards against breaches of Convention rights. As we indicate below, we believe that certain provisions will very clearly permit such breaches and should be amended.

2.10 Clause 12(1) provides an inspector or constable with powers to remove and care for animals that have been taken into possession under clause 11(1). Clause 12(4) provides that "any costs in relation to the removal or care of an animal which are incurred by a person acting under this section shall be recoverable from the owner of an animal summarily as a civil debt." This effectively enables the police or an authorised inspectorate (we presume the RSPCA will be one such) to expropriate property (the owner's money) with no safeguards as to proportionality ("*any costs*") and notwithstanding that the animal has wrongly been taken into possession and/or that there is no prosecution and/or that there is no conviction. It is difficult to see how such misappropriation of property could be justified as being in the public or general interest under Article 1, First Protocol – despite being lawful on the face of the statute.

2.11 In contrast with clause 12 of the draft AWB, s.2 and s.4(1) Protection of Animals (Amendment) Act ("PA(A)A") 2000<sup>3</sup>, which are currently in force, do broadly appear to be compatible with Article 1, First Protocol. Under the 2000 Act, the court, rather than the constable or inspector, sanctions the activities for which the prosecutor can recover expenses; the costs must be reasonable; and veterinary advice is required in all circumstances (contrast clause 11(2) of the draft Bill). The safeguards of the 2000 Act appear to be re-used in clauses in 16, 17 and 20 of the draft AWB and it is recommended that they should also be re-used as in relation to clause 12.

2.12 Clause 16 "borrows" from s.2 PA(A)A 2000 – but goes much further. S.2 PA(A)A 2000 empowers a court, on the basis of veterinary evidence, to authorise a prosecutor to carry out a number of operations in the interests of the welfare of the animals in question. Those operations include taking charge of and caring for the animals, selling it for a fair price and slaughtering it. The "animals in question" under s.2 are those to which the (alleged) offence relates<sup>4</sup>. By contrast, clause 16 empowers a court, on the basis of veterinary evidence, to authorise a prosecutor to carry out a number of operations in the interests of the welfare of the animals *other than those to which the alleged offence relates*, while trial of the defendant is pending. The list of operations is similar, but more extensive. Clause 16 would, therefore, allow a prosecutor to apply to court and for a court to permit the sale or destruction of an animal belonging to the defendant in relation to which no prosecution has been brought or even need be brought.

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<sup>2</sup> Appendix C.

<sup>3</sup> Appendix C.

<sup>4</sup> *Cornwall County Council v Baker* [2003] EWHC 374 (Admin), [2003] 2 All ER 178, [2003] 1 WLR 1813, (2003) 167 JP 198.

2.13 Explanatory Note 221 acknowledges that “animals are a form of property covered by” Article 1, First Protocol. More precisely, in terms of the legal taxonomy of property, non-wild animals are their owners’ chattels. Article 1, First Protocol very clearly, then, engages: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions.”

2.14 The second part of Article 1, First Protocol provides that, “No one shall be deprived of his possessions except in the public interest and subject to conditions provided for by law and by the general principles of international law.” Clearly, the sale or destruction of an animal that is not the subject of a prosecution would be such a deprivation – and an irreversible deprivation. Both the “public interest” criterion in the second part of the Convention right and the “general interest” criterion of the third part need to be satisfied before a breach of the right is to be avoided. The facility for deprivation in these circumstances also needs to be proportionate.

2.15 DEFRA omits to address the public/general interest in the “Launch of the Draft Animal Welfare Bill”: Explanatory Note 221 justifies powers of deprivation and destruction “in the interests of animal welfare”. This appears to miss the point: in the absence of rights for animals, public and general interests must be interpreted as the interests of human citizens, individually and collectively. We believe that it is in the general interest of a civilised society that humans are not permitted to cause unnecessary suffering to animals. However, this is a more subtle point and inherently requires balancing the right of the individual to property with his responsibilities as a keeper of living property. The factual nexus between the determination of a person’s criminal liability in relation to the treatment of one animal and the deprivation of a wholly different animal, where no prosecution is brought, is insufficient to justify the clause 16 powers to sell or destroy the second animal.

2.16 For the reasons given above, we do not consider it a responsible approach to law making, nor one that is genuinely compatible with the Secretary of State’s obligations under the HRA 1998, to provide magistrates with such a power and then simply to depend on their (not) exercising the power in accordance with the right.

### **C. Secondary legislation and Codes of Practice**

2.17 In the press release accompanying the “Launch of the Draft Animal Welfare Bill”, Ben Bradshaw MP, Minister of State at DEFRA, commented that, “The Bill will also provide powers to introduce secondary legislation and Codes of Practice to protect the welfare of non-farmed kept animals. This enabling power is already available for farmed animals and our aim is to ensure that in future all domestic and captive animals will be protected by legislation that can be easily revised to take account of changing welfare needs and increased scientific knowledge.”

2.18 We welcome an increase in legislative flexibility in this regard - but not without safeguards. Some, though by no means all, primary legislation to protect animal welfare has become ossified and is difficult to apply in practice. The Pet Animals Act 1951 (as amended) is a prime example.

2.19 Clause 6(1) provides a general power to the Secretary of State in England and National Assembly in Wales “by regulations [to] make such provision as [they] think fit for the purpose of promoting the welfare of animals kept by man”. Clause 6(2) particularises the areas in which the Secretary of State and National Assembly can legislate, without prejudice to the general power in clause 6(1). The general power in clause 6(1) is delegated in very

loose words and is almost limitless. Not least because of its potency, we believe that the wording of clause 6(1) should be tighter:

“The appropriate national authority [ie, Secretary of State or Welsh National Assembly] may by regulations make such provision as they certify fit for ensuring the welfare of animals kept by man.”

2.20 As Mr Bradshaw indicated, the flexibility is intended to accommodate “changing welfare needs and increased scientific knowledge”. We believe that it should be mandatory for the Secretary of State and the National Assembly:

- (a) to consult on the proposed legislation; and
- (b) formally to certify that the draft secondary legislation meets a change in animal welfare needs on the basis of expert opinion and/or a demonstrable increment in scientific knowledge.

2.21 Clauses 8(1)(b) and 9(1)(b) make consultation mandatory where the Secretary of State and Welsh National Assembly, respectively, propose to issue or revise a Code of Practice. It is anomalous and perverse that consultation should be mandatory for Codes of Practice, but not for the secondary legislation, which is higher in the legislative hierarchy and will impose significant legal obligations, including potential criminal sanctions, on animal keepers.

2.22 Further, a sub-clause should be included in clause 6 to provide a certification requirement for secondary legislation by the Secretary of State and Welsh National Assembly, with the grounds and parameters clearly spelled out. For example, the power should be exercisable where there is peer-reviewed scientific evidence that indicates a deficiency in animal welfare laws and the legislation should be certified that it is made on this basis, with explicit reference to the scientific evidence.

2.23 It is axiomatic in good, transparent decision-making that cogent reasons are given; and, if there are legitimate animal welfare reasons for making regulations, DEFRA and the National Assembly of Wales should have nothing to hide. Nor should they have anything to fear by way of challenge: if the legislation accords with the certification reasons, then it will be neither unreasonable nor unlawful in public law terms.

2.24 The list of areas under clause 6(2) in which delegated legislation may be made, though necessarily not exhaustive, is very extensive indeed. Consultation and certification should apply as safeguards against arbitrary and bad law making where clause 6(2) is invoked in the exercise of clause 6(1).

2.25 We take clause 6(2) as a clear acknowledgement of general areas that DEFRA has identified as necessary for animal welfare (secondary) legislation. Annex L to the “Launch of the Draft Animal Welfare Bill” document lists those specific subject areas already identified for secondary legislation:

- Riding schools.
- Livery yards.
- Dog and cat boarding.
- Pet shops.
- Pet fairs.

- Breeding of gamebirds.
- Mutilations.
- Tethering of horses.
- Animal sanctuaries.
- Performing animals.
- Greyhounds.

2.26 We remain concerned, however, at what other legislation may be introduced under these sub-clauses. Is it intended that clause 6 be available for the following, legislative purposes?

- a ban on fishing (clause 6(2)(k)).
- a ban on the shooting of game birds and mammals (clauses 6(2)(k) and (l)).
- a ban on hunting with dogs and/or coursing (clause 6(2)(k), (l) or (m)).
- licensing hunting with dogs and/or coursing (clause 6(2)(h)).

From clause 6(3)(a), it is clear that any regulations made under clause 6(1) can create separate, new offences, which are not necessarily limited to “protected animals” (if indeed that concept works coherently and consistently within the draft AWB).

2.27 The issue of hunting with dogs is clearly perceived to be a matter for primary legislation: if a banning Bill is to be debated, it merits the level of Parliamentary scrutiny that primary legislation is afforded and which secondary legislation is usually not. If these provisions are to remain in clause 6(2), DEFRA is asked to clarify its intentions. (See also below.)

2.28 We welcome the requirement, under sub-clause 6(6), that regulations made under clause 6(1) are subject to the affirmative parliamentary procedure. This is an important safeguard, though it is recognised that, in reality, such regulations are unlikely to receive significant parliamentary time for debate. Against this background and as issues of animal welfare are often politically contentious, DEFRA is urged to include provisions for consultation and certification of draft regulations in the AWB.

#### **D. Intended consequences?**

2.29 As we have noted at 2.26 above, clauses 6(1) and 6(2), read together, will clearly permit a secondary legislative ban on fishing, shooting, hunting and coursing.

2.30 S.1(3) Protection of Animals Act (“PAA”) 1911<sup>5</sup> provides legal clarity: that hunting with dogs and coursing are outside the scope of the s.1(1) offence. There is no equivalent provision in the draft AWB. DEFRA is invited to clarify whether the “protected animal” concept at clause 54(2) is intended to remove hunting with dogs and coursing from the scope of the offences contained within clauses 1 to 3 of the draft Bill.

#### **E. Delegation of powers of inspection and prosecution**

2.31 As we have indicated at C above, we are concerned that the very considerable power to make delegated legislation and Codes of Practice is exercised responsibly – and, more

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<sup>5</sup> Appendix C.

specifically, that there are necessary safeguards in place to ensure that it is not exercised irresponsibly. In a similar vein, we believe that the degree of delegation permitted by the draft Bill in the areas of inspection, enforcement and prosecution is of great concern: much power is devolved; there will be insufficient safeguards in place to check the misuse of those powers.

2.32 Clause 44 provides for the appointment of inspectors by local authorities. However, it appears from clause 44(2) that inspectors will not be limited to local authority employees:

“The Secretary of State may, in connection with guidance under subsection 1, draw up a list of persons whom he considers suitable for appointment by a local authority to be an inspector for the purposes of this Act.”

2.33 Explanatory Note 180 in the “Launch of the Draft Animal Welfare Bill” is a little opaque in this regard: “Under subsection (2) the Secretary of State may also issue a list of approved persons who are considered suitable for appointment as inspectors from whom inspectors are to be selected.” The administrative law reality is that the Secretary of State will be providing a list of approved organisations to whom the delegate local authorities can further delegate their powers. Proposed powers exercisable by inspectors are considerable, will frequently engage individuals’ Convention Rights and, in certain cases, will no longer require the present sanction of the court. In particular with this further devolution of power, there should be safeguards – in the draft AWB and elsewhere at law. The draft Bill is, however, wanting in such safeguards.

2.34 On 1 July 2004, DEFRA announced that the RSPCA had been awarded “approved prosecutor” status under the PA(A)A 2000 from 1 September 2004. Broadly, the 2000 Act provides certain prosecutors of offences under the PAA 1911 relating to non-pet animals with ancillary powers and benefits. These include, on the order of the court:

- powers of care, disposal and slaughter of animals.
- powers of entry to mark an animal.
- an entitlement to reimbursement of reasonable expenses incurred in the care, disposal and slaughter of animals.

2.35 S.1(3) of the 2000 Act specifies to whom it applies: the DPP, Crown Prosecution Service, government departments, local authorities and a person who, at the request of DEFRA, has entered into a written agreement under which he may perform the functions conferred on a prosecutor by virtue of the 2000 Act (s.1(3)(d)). The RSPCA is currently the only prosecutor who has entered into such a written agreement. Clause 15 of the draft Bill carries forward this facility for DEFRA or, in Wales, the National Assembly to authorise a prosecutor to exercise enhanced powers, which it would not have available as a mere private prosecutor.

2.36 The powers for inspectors to deal with animals in distress before prosecution (clauses 11 to 14) and the powers for an authorised prosecutor to deal with animals in distress with proceedings pending (clauses 16 to 20) are very strong. They engage common law property rights, as well as Articles 6 and 8 and Article 1, First Protocol ECHR/Schedule 1 HRA 1998. Before 31 August 2004, no non-governmental body (central or local) has enjoyed any of these powers. From 1 September 2004, the RSPCA will enjoy certain of these powers under the PA(A)A 2000, but only in relation to commercial animals. After the passage of the

Animal Welfare Act, it is presumed that the RSPCA will enjoy all these powers, by virtue of becoming an authorised prosecutor under clause 15 and a listed inspectorate under clauses 44(2) and (3) in relation to a pet and commercial animals. (DEFRA is invited to confirm whether or not this is intended.) It is not inconceivable that the RSPB will seek to follow suit.

2.37 Unlike the 2000 Act, clause 15 of the draft Bill does not even specify that prosecutors must be authorised in a written agreement. This should be amended to ensure that there is a transparent public record of the terms on which the prosecutor is authorised to use the clause 16 to 20 powers and to conduct itself generally.

2.38 Clauses 44(2) and (3) of the draft Bill require similar amendment and clarification. Currently, all that will be required for the appointment of an inspector by a local authority is that the inspector be listed on the Secretary of State's suitability list; this is inadequate. First, the terms, including proper safeguards and indemnities (see below), should be recorded. Secondly, the route of delegation and accountability should be clarified. Clearly, if the appointed inspector is to carry out functions on appointment by a local authority, he must be accountable to that local authority. However, what criteria and guarantees are to be given, and in what form, before an inspector, or more likely an inspectorate, is placed on the Secretary of State's list?

2.39 In this connection, we recommend the following safeguards:

- That any inspectorate performing functions on behalf of a local authority should do so under a suitable written agreement. (As to the terms of such agreements generally, see below.)
- That the Secretary of State should produce a standard form agreement for local authorities to use, otherwise there is a risk of inconsistent application of these very strong powers.
- That, before inclusion on the Secretary of State's list, the inspectorate should be required to enter into a written, standard form agreement, making similar guarantees to those made in the 2000 Act approval agreement.

2.40 DEFRA has published the model written agreement for "approving" prosecutors under the 2000 Act. It can be found at:

[http://www.defra.gov.uk/animalh/welfare/pdf/writtenagreement\\_model.pdf](http://www.defra.gov.uk/animalh/welfare/pdf/writtenagreement_model.pdf)

2.41 Certain contents of the model written agreement are appropriate and necessary. For example:

- The prosecutor's obligation to have due regard to the interests of the owner of any animals which are the subject of proceedings.
- The prosecutor's obligation to perform his function as a prosecutor under the 2000 Act in a manner compatible with the Convention rights in Schedule 1 HRA 1998.
- The prosecutor's general obligation to use his best endeavours to notify the owner of the animals, the Divisional Manager of the State Veterinary Service and local authority, where powers under s.2 PA(A)A 2000 are exercised.
- The prosecutor's wide-ranging indemnity to DEFRA in respect of liabilities arising out of or in connection with the prosecutor under s.2 and s.3 PA(A)A 2000.

- The prosecutor’s obligation to act as if bound by the Code for Crown Prosecutors issued by the DPP under s.10 Prosecution of Offences Act 1985, when bringing proceedings and when exercising powers of seizure, retention and disposal of animals.

However, the model written agreement is deficient in a number of ways, which should be remedied, in particular in relation to the augmented powers under the draft AWB.

2.42 First, the authorised prosecutors should be required to act in a way that is compatible with and not contrary to the provisions of the Police and Criminal Evidence Act 1984.

2.43 Secondly, clause 10 (“Financial Provisions”) of the model written agreement does not explicitly address a current problem in relation to costs awards. The usual practice at present in unsuccessful RSPCA prosecutions is for the RSPCA to ask and/or for the court to order that the defendant’s costs be paid out of Central Funds (ie, by the taxpayer). The Court should, of course, retain an absolute discretion in relation to costs. However, there is no apparent reason, as a matter of public policy, why the “state” should subsidise unsuccessful prosecutions brought by the RSPCA or other “non-state” bodies. One way in which this could be remedied is for the model agreement to provide that the authorised prosecutor must undertake to the court that issues proceedings to pay the successful defendant’s costs.

2.44 Thirdly, the written agreement between DEFRA and authorised prosecutors should include an explicit prohibition on publicising prosecutions that are *sub iudice* in the media, where the publication is or might be (a) in contempt of court and/or (b) defamatory. From our own experience in practice, RSPCA prosecutions are attended by a great deal more publicity than prosecutions by the Crown Prosecution Service or by local authorities. We do not believe that this is a coincidence. The RSPCA is dependent on donations, bequests and legacies for its solvency: being seen to prosecute offenders is an easy way in which to publicise itself. The Article 10(1) right to freedom of speech needs to be respected. However, proportionate restrictions on the exercise of that right are clearly justified where criminal proceedings have been commenced and the matter has yet to be tried – in particular to guarantee the defendant’s Article 6 rights. Beyond the context of the model written agreement, the Sub-Committee is also invited to consider the issue of publicity before judgment in criminal prosecution for offences under the new legislation. In doing so, relevant considerations are:

- The link between publicity and income-generation for “volunteer” prosecutors, such as the RSPCA.
- The status of such prosecutors as a matter of public law and in terms of the HRA 1998, on which we have commented below.
- The highly emotive nature of animal prosecutions.

2.45 Fourthly, we note that, for most of the obligations under the model written agreement, third party rights under the Contracts (Rights of Third Parties) (“C(RTP)A”) 1999 are excluded (see term 18). It might be an appropriate check against misuse of powers if such clauses as the agreement to perform the functions of a prosecutor under the 2000 Act in an HRA 1998 compatible manner were made enforceable by third party beneficiaries, who could be identified as a class of people in respect of whose animals the powers under the legislation were exercised.

2.46 PACE 1984 compliance, financial autonomy and restrictions on commenting to the media should also be included in written agreements setting out conditions for DEFRA-listed inspectors. Likewise, the duties in the first four bullet points at 2.41 above should be adapted for incorporation into agreements with inspectors.

2.47 As we have indicated, our concern is that clauses 15 and 44 place a great number of statutory powers into the hands of non-governmental organisations, with insufficient checks on their use of those powers. The RSPCA is the prime and, so far, only example available. It is, nevertheless, an instructive example, where issues of accountability and public law duties are concerned.

2.48 The RSPCA is a charity incorporated by Act of Parliament<sup>6</sup>. As such it has all the characteristics of a “public body” and would appear, superficially, to be amenable to public law challenge by judicial review in relation to any irrational or unlawful acts. However, Parliament has laid down a special procedure for monitoring the activities of charities: charity proceedings under s.33 Charities Act 1993. The approach of the High Court in the litigation arising from a ban on deerhunting by the National Trust (a statutory charity) in 1997 is instructive<sup>7</sup>. In all but the most exceptional cases, the s.33 Charities Act 1993 procedure should be followed: judicial review would not normally be granted, as this alternative remedy was available. The act that provoked the National Trust litigation was a decision by its governing council in relation to its powers of land management. As such, it was a matter that could be dealt with under s.33 Charities Act 1993. It is less clear how such proceedings would remedy the irrational act of an RSPCA inspector who seizes a large herd of cows in relation to which no charges are subsequently made or prosecution brought, and then proceeds to try to recover excessive costs of their removal and care under clause 12(4) of the draft AWB. Is this an exceptional occasion on which the High Court would depart from the charity proceedings route? There is no clear answer.

2.49 As we have indicated at B above, an attempt to recover the costs of care and removal in that example would engage and would, almost certainly, infringe the Article 1, First Protocol rights of the owner of the cattle – if the RSPCA is a “public authority” within the meaning of s.6 HRA 1998. DEFRA’s assessment, as set out at term 2.4 of the model written agreement with prosecutors, is that there is a *possibility* that the RSPCA could be regarded as a public authority, by virtue of s.6(3)(b) HRA 1998, in performing the functions of a prosecutor under the PA(A)A 2000. We agree, both in relation to the current legislation and the proposed legislation: there is a distinct possibility that, by nature of the functions being discharged, an RSPCA prosecutor or inspector could be a public authority for these purposes. However, there is no decided case exactly on point and, as far as we can ascertain, there is no approximate case law. Again, is judicial review, which seems the most logical procedural route, an available option?

2.50 Further, it is not good enough that there is a *possibility* that the RSPCA *could* be regarded as a public authority when exercising powers as prosecutors and inspectors under the draft AWB. The police, central government inspectors (eg, for the State Veterinary Service) and local government inspectors do not carry out criminal investigations, arrest

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<sup>6</sup> Royal Society for the Prevention of Cruelty to Animals Act 1932, as amended by the RSPCA Acts 1940 and 1958.

<sup>7</sup> *R(Scott & Ors) v Council of the National Trust for Places of Historic Interest or Natural Beauty* [1998] 1 WLR 226; *Scott & Ors v National Trust for Places of Historic Interest of Natural Beauty & Attorney-General* [1998] 2 All ER 705.

people and seize property acting as private bodies, free from public law obligations. The Crown Prosecution Service and local authority prosecution departments do not exercise their duties as private prosecutors. So that there is proper parity with those bodies, it should be spelt out in the AWB that any authorised prosecutors and DEFRA-listed inspectors will be public authorities for the purpose of s.6 HRA 1998.

2.51 We are also very concerned that the AWB, if enacted, will provide the RSPCA with additional, state-sanctioned powers to investigate and bring prosecutions in relation to activities that it currently campaigns to end. The RSPCA's campaign to ban hunting is well-known. We understand that its Chief Executive is on record as wishing to end game shooting<sup>8</sup>. Approved/authorised prosecutor status and inspector's powers under the AWB will enable the RSPCA to target, eg, game shooting operations on private land for inspection.

2.52 As a matter of public policy and of proper constitutional checks and balances, it is not enough simply to rely on RSPCA officers with state powers to behave themselves, when they are employed by an organisation that has clear campaigning objectives. How can those inspectors be impartial, given their employer's policies, or be seen to be impartial in administering their functions in those circumstances?

2.53 If the RSPCA or any other body with an active campaigning purpose (eg, the RSPB) is to undertake prosecution and inspection activities on a basis that is commensurate with the powers that will be given by the AWB, the obvious safeguard would be to separate the investigation and enforcement activities from the campaigning activities, organisationally, systemically and, as much as possible, in terms of funding. Not least as the draft AWB comes close to creating an "animal police", there may be a long-term benefit in such separation.

2.54 Further, through the Home Secretary, there is general accountability to Parliament for the actions of the police. The factual and legal nexus between DEFRA and approved/authorised prosecutors or DEFRA-listed inspectors is much less proximate. There is not only a lack of legal accountability, as described above, but also democratic accountability in the proposals.

2.55 Lastly, in this connection, Annex K to the Regulatory Impact Assessment proposes the establishment and operation of a National Database for recording (a) licences held under the Act and (b) animal cruelty offences. Annex K indicates that, "*The RSPCA have confirmed that this would not be a drain on their resources.*" (No emphasis added.) This seems to us entirely to miss the point. The question is not whether the RSPCA can afford to operate it, but whether a private and unaccountable body should be entrusted with processing such sensitive personal data – both in the literal sense and within the meaning of s.2(g) Data Protection Act 1998. Annex K lists three options. A preferable option 4 would be for the police to hold such data on the Police National Computer and for the police, who are very clearly publicly accountable, to be responsible for checking the database, for example at the request of the local authority or RSPCA inspector.

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<sup>8</sup> Jackie Ballard, on BBC South Politics Show, 2 February 2003 re shooting: "It is horrible and nasty and one day when the RSPCA has a lot of money and we have ended all other examples of cruelty to animals we will get round to try and end this."

2.56 The EFRA Committee is asked to remember that, in the final and legal analysis, the RSPCA, the RSPB and similar bodies are charitable member organisations, not alternative police forces.

### 3. CLAUSE-BY-CLAUSE CRITIQUE OF DRAFT AWB

It is recommended that this section be read together with a copy of the draft AWB, which can be found at: <http://www.official-documents.co.uk/document/cm62/6252/6252.pdf>

#### *Specific offences relating to animals*

##### **Clause 1 - Cruelty**

3.1 Under the banner “Cruelty”, clause 1 contains not one, but a number of offences. In summary, these are:

- causing unnecessary suffering (clause 1(1));
- allowing another to cause unnecessary suffering (clause 1(2));
- mutilating, or causing or permitting mutilation (clause 1(4));
- administering an injurious drug or substance or causing or permitting an injurious drug or substance to be administered (clause 1(7)); and
- performing an operation without care and humanity or permitting such an operation to be performed (clause 1(9)).

From a drafting perspective, clause 1 is overfull: the legislation would be much clearer if the offences were separated out into discrete clauses.

3.2 The basic offence of cruelty under s.1(1) PAA 1911 was, essentially, causing unnecessary suffering - though less succinctly expressed. The basic offence under clause 1(1) of the draft AWB goes further than its predecessor, though its essence (causing unnecessary suffering) is similar. The major novelty is to be found in clause 1(1)(b), which sets out the *mens rea* for the offence: the offender “knew, or ought reasonably to have known, that the act, or failure to act, would have that effect [ie, causing the animal to suffer] or be likely to do so.” As we have indicated, clarity and certainty of law are guiding principles in our consideration of the draft Bill. The *mens rea* of the person who “knowingly acts in a way that will cause unnecessary suffering to an animal” is clear and certain as a matter of obligation and as a matter of proof. Contrast the *mens rea* of the person who “ought reasonably to have known that his omission would be likely to cause unnecessary suffering”: this is much less clear.

3.3 Further, the objective standard implied in “ought reasonably to have known” sits uncomfortably with the October 2003 decision of the House of Lords in *R v G & R*<sup>9</sup> on recklessness. In *R v G & R* the House of Lords revisited its own decision in *R v Caldwell*<sup>10</sup>, which had imported an objective standard into recklessness as a required state of mind for commission of Criminal Damage Act 1971 offences. Prior to *Caldwell*, one, essentially subjective definition of recklessness had applied to all cases, including cases of criminal damage: the accused must have foreseen that the particular kind of harm might be done, yet have gone on to take the risk of it<sup>11</sup>. Following *Caldwell*, the accused in criminal damage cases would be reckless as to whether property would be destroyed or damaged if (a) he did an act that created an obvious risk that the property would be destroyed and (b), when he did the act, he either did not give any thought to the possibility of there being any such risk or

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<sup>9</sup> [2004] 1 AC 1034.

<sup>10</sup> [1982] AC 341.

<sup>11</sup> *R v Cunningham* [1957] 2 QB 396.

had recognised that there was some risk involved and nevertheless went on to do it. The notion of an objective, obvious risk is analogous to what ought reasonably to have been known in Clause 1(1)(b) of the draft AWB.

3.4 The House of Lords in *R v G & R* unanimously rejected the “objective” recklessness formulated in *Caldwell* and restored the “subjective” recklessness, formulated in *R v Cunningham*<sup>12</sup>. Lord Bingham of Cornhill, in the leading opinion, highlighted two principles of public policy that are very relevant here:

3.4.1 “that conviction of a serious crime should depend on proof not simply that the defendant caused (by act or omission) an injurious result to another but that this state of mind when so acting was culpable.”

3.4.2 “It is neither moral nor just to convict a defendant (least of all a child) on the strength of what someone else would have apprehended if the defendant himself had no such apprehension.”

3.5 In formulating the appropriate test for recklessness, Lord Bingham borrowed from clause 18(c) of the Criminal Code Bill annexed by the Law Commission to its report “A Criminal Code for England and Wales Volume 1: Report and Draft Criminal Code Bill” (Law Com No 177, April 1989):

“A person acts recklessly within the meaning of section 1 of the Criminal Damage Act 1971 with respect to –

- (i) a circumstance when he is aware of a risk that it exists or will exist;
- (ii) a result when he is aware of a risk that will occur;

and it is, in the circumstances known to him, unreasonable to take the risk.”

3.6 We, therefore, suggest that clause 1(1)(b) be amended to read:

“(b) he knew that or was reckless as to whether the act or failure to act would have that effect or be likely to do so,”

Following *R v G & R*, Lord Bingham’s formulation of “recklessness” seems to stand as the definition at common law. Though strictly unnecessary, Parliamentary Counsel may consider it helpful to incorporate this definition, suitably adapted, into the draft AWB.

3.7 Clause 1(2) contains the second cruelty offence: “A keeper of an animal commits an offence if –

- (a) he permits another person to cause the animal to suffer, and
- (b) the suffering caused by the other person is unnecessary.”

Its drafting is, we believe, dangerously ambiguous. It is a clearly established principle of law that, where an offence is one of strict liability (ie, no proof of mental culpability is required), this should be explicit: it should not be left to inference. It is unclear whether “permits” in clause 1(2)(a) describes part of the *actus reus* necessary to commit the offence or whether it

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<sup>12</sup> Ibid.

describes the *mens rea*. If Explanatory Note 25 to the “Launch of the Draft Animal Welfare Bill” is to be followed, clause 1(2) describes part of the necessary *actus reus*: “[F]or example, if a parent fails to supervise his children in the care of their animals, he may be committing an offence if the children cause unnecessary suffering.” However, “permit” must be given its natural meaning as a matter of statutory interpretation and it is very easy to infer that a certain state of mind is required to prove the offence.

3.8 It is, therefore, recommended that clause 1(2)(a) be amended to:

“(a) he *knowingly* permits another person to cause the animal to suffer” (emphasis added).

3.9 Clause 1(2) would have unfortunate and wide-reaching consequences in practice, which, from the Explanatory Notes, may not have been foreseen. Is clause 1(2) intended to impose criminal liability on the owner of a halal slaughterhouse every time one of his employees slaughters an animal? Within the confines of the statutory wording, it would be very difficult to argue that halal butchery was “necessary”, when there are other methods of butchery available. Whether the owner of the slaughterhouse permitted or knowingly permitted the slaughter, the only issue would be whether the slaughter caused the animal to suffer: depending on the evidence presented, it is foreseeable that some courts would be persuaded that the butchered animal did suffer.

3.10 The economic interest of the slaughterhouse owner would clearly constitute “property” within the meaning of Article 1, First Protocol<sup>13</sup>. Similarly, shooting rights constitute an interest in land that can be leased or licensed and would engage Article 1, First Protocol. If there is to be interference with those interests, it must be *clearly* prescribed by law. It does not appear to be so prescribed here. DEFRA is invited to comment whether it is intended such activities as halal butchery and shooting should be criminalised. If not, clause 1(2) should be amended as to “knowingly” and an explicit list of activities that are not covered should be included within the Bill. It is not sufficient, in order to satisfy the Minister’s HRA 1998 obligations, to place clause 1(2) unamended before Parliament and promise exemptions in secondary legislation at a later date - not least as the first tranche of secondary legislation is expected in 2006.

3.11 Clause 1(3) sets out a list of relevant considerations when determining, for the purposes of clause 1(1) and 1(2), whether suffering is unnecessary. These go beyond the s.1 PAA 1911 offences and accumulated case law, introducing new concepts, such as the legitimacy or proportionality of the conduct that caused the suffering (respectively clauses 1(3)(c) and 1(3)(d)). The question “whether the suffering was proportionate to the purpose of the conduct concerned” may not always be easy in practice to answer; however, the balancing act involved in proportionality is not, in practice, dissimilar to that in determining whether suffering is unreasonable.

3.12 The introduction of the concept of the ‘legitimate purpose’ for causing unnecessary suffering may well lead to uncertainty. Subclauses 1(3)(c)(i) and (ii) provide non-exhaustive examples of legitimate purposes. The “purpose of protecting a person, property or another animal” has a clear legal basis; the “purpose of benefiting the animal” is much less clear. We believe that it will be very difficult for magistrates’ courts to determine with certainty and

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<sup>13</sup> See *Tre Traktörer Aktiebolag v Sweden* (1989) 13 EHRR 309, ECtHR.

consistency what constitutes a “legitimate purpose”. Indeed, it appears from the two statutory examples that “legitimate purpose” will not be limited to a purpose sanctioned by law. To revert to the earlier example, if two different courts are persuaded that the actions of two different halal butchers caused unnecessary suffering to the animals slaughtered, what certainty is there that both defendant butchers would be acquitted on the basis that halal butchery was a “legitimate purpose”?

3.13 A further relevant consideration when determining whether suffering is unnecessary is “whether the conduct concerned was in all the circumstances that of a reasonably competent and humane person”. Assuming that “reasonably competent” is not intended to imply professional veterinary qualifications, how can reasonable competence be determined by courts with consistency and certainty? Likewise, there is no common understanding of what constitutes “a humane person”, whether in law or philosophically. If this relevant consideration is to be retained (and we would advise against it), it would better employ the language of s.1(1)(e) PAA 1911 – “due care and humanity” – which is, in any event, adopted at clause 1(9) of the draft AWB. To this end, we suggest for 1(3)(e):

“whether the person concerned conducted himself with due care and humanity to the animal in all the circumstances.”

In fact, we believe that the clause would have greater clarity of meaning if the concept of humanity was removed altogether:

“whether the person concerned conducted himself with due care to the animal in all the circumstances.”

3.14 Clause 1(4) creates what is apparently a strict liability offence relating to “mutilation”. We say “apparently”, as, again, it is an offence to “permit” mutilation. For the reasons at 3.7 above, clause 1(4)(c) needs to be clarified: is it intended that there is a mental element to this offence?

3.15 Further, “mutilation” is not defined in the AWB and must, therefore, be given its natural – and somewhat emotive – meaning. From note 27 and Annex F to the Regulatory Impact Assessments in the “Launch of the Draft Animal Welfare Bill”, we infer that DEFRA intends mutilation to include docking of dogs. Does it also include “pinning” of wildfowl? Or clipping the wings of pheasants?

3.16 Clause 1(9) effectively re-enacts s.1(1)(e) PAA 1911, prohibiting operations to be carried out on a protected animal without due care and humanity. For the reasons given at 3.14, humanity is a problematic and ambiguous concept: both clauses 1(9)(a) and (b) would be more certain if limited to “without due care”. We do not see that “and humanity” adds anything but uncertainty.

3.17 Clause 1(10)(a) defines the “keeper” of an animal, amongst other things, by ownership. At common law, there are certain categories of ownership of live wild animals: for example, the young of wild birds or mammals born on the land until they can fly or run away<sup>14</sup>. In particular in the absence of a clear distinction between a protected animal and an

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<sup>14</sup> See Halsbury’s Laws of England, Animals, paras.508f.

animal in the text of the draft AWB, is it intended that such categories of “ownership” be included?

3.18 Clause 1(10) provides that, “a keeper of an animal shall be treated as permitting something to happen to the animal if he fails to exercise reasonable care and supervision in relation to protecting the animal from it.” There appears to be great potential for overlap and duplicity with the clause 3 welfare offence: “A keeper of an animal commits an offence if he fails to take reasonable steps to ensure the animal’s welfare.” The explanatory notes to the draft Bill offer scant explanation of the relationship between the clause 1 and the clause 3 offences. DEFRA is invited to comment whether it is envisaged that prosecution of offences under both provisions should or will be commonplace?

### **Clause 2 – Fighting etc**

3.19 Clause 2(1) lists the various activities in relation to an “animal fight” (as defined) that constitute a criminal offence. The list greatly expands the scope of s.1(1)(c) 1911, which we welcome. There are, however, a number of drafting concerns.

3.20 Clause 2(1)(c) and (d) criminalise, *inter alia*, permitting a place to be used for an animal fight and permitting a place to be kept for use for an animal fight. Again, there is ambiguity: what *mens rea*, if any, is required for “permitting”? Again, we recommend that “knowingly” is imported into the offences:

“(c) uses a place, or knowingly permits a place to be used, for an animal fight;  
(d) keeps a place, or knowingly permits a place to be kept, for an animal fight[.]”

3.21 Clause 2(1)(h) is very cumbersome when read properly with the defined term “animal fight”:

*A person commits a criminal offence if he places a protected animal with an animal, or with a human, for the purposes of an occasion on which a protected animal is placed with an animal, or with a human, for the purposes of fighting, wrestling or baiting.*

Clause 2(1)(h) would be much less cumbersome if reduced to:

“(h) places a protected animal with an animal, or with a human, for the purposes of fighting, wrestling or baiting.”

3.22 Clause 2(1)(i) criminalises possessing “anything capable of being used in connection with an animal fight with a view to its being so used.” This is very loosely drafted and ambiguous. The following is preferable for certainty:

“(i) has in his possession any item capable of being used for an animal fight with the intention that it be so used.”

3.23 The intended scope of “animal fight” within clause 2(3) is unclear. Is it intended that it apply to a terrier used for pest control? Or even to flying a falcon or hawk for live prey? If it is intended that these activities are covered, DEFRA should say so. If not, explicit wording (for example, in a clause 2(4)) should provide a non-exhaustive list of activities that are not encompassed by the clause 2(1) offences and 2(3) definition of an “animal fight”.

### Clause 3 - Welfare

3.24 Clause 3 contains the much-vaunted “duty of care”: “A keeper of an animal commits an offence if he fails to take reasonable steps to ensure the animal’s welfare.” S.1(1) PAA 1911 does not set the threshold for committing an offence in relation to an animal this low. Note 34 to “Launch of the Draft Animal Welfare Bill” says that s.1(1) Agriculture (Miscellaneous) Provisions Act 1968<sup>15</sup> sets a precedent for the positive duty of care to ensure the welfare of animals – in that case, livestock situated on agricultural land. This is misleading for the following reasons.

3.25 The furthest reach of the s.1(1) A(MP)A 1968 offence is where a person permits livestock that are on agricultural land and under his control to suffer any unnecessary pain or unnecessary distress and he has actual or constructive knowledge of it. This is a much higher threshold for committing an offence than clause 3(1): the 1968 Act; causing or knowingly permitting “unnecessary pain” and “unnecessary distress” is much closer to causing “unnecessary suffering” in s.1 PAA 1911 and clause 1(1) of the draft AWB, than it is to failing to take reasonable steps to ensure an animal’s welfare under clause 3(1) of the draft AWB.

3.26 Further, the *mens rea* required for committing the offence of permitting unnecessary pain or distress under s.1(1) of the 1968 Act is clear: it must be unnecessary pain or distress “of which he knows or may reasonably be expected to know”. By contrast, clause 3(1) appears to be a strict liability offence of omission. Is this intended? In the light of Lord Bingham’s comment at 3.4.1, we think it entirely appropriate from a public policy perspective that a mental element of culpability is introduced: a person should only be capable of committing the clause 3(1) offence knowingly or recklessly. (The penalties at clauses 24f leave little doubt that this is a “serious” offence within the scope of Lord Bingham’s comments.)

3.27 In any event, the clause 3(1) offence has been misleadingly publicised. It does not, in fact, impose a positive duty of care, providing that an offence would be committed if that duty is not met. Rather, it is an offence of omission and would be more clearly expressed if the word “commit” was excised: “A keeper of a protected animal shall be guilty of an offence if he knowingly or recklessly fails to take reasonable steps ... .”

3.28 The essence of the clause 1(3) offence is also highly ambiguous – in contrast with relatively clear words in s.1(1) A(MP)A 1968. “[F]ails to take reasonable steps to ensure the animal’s welfare” is legally uncertain. Although clauses 3(4) and (5) expand on the meaning of “an animal’s welfare”, what constitute “reasonable steps” to ensure that standard and scope of welfare? For example, is the offence committed if a person fails to take any or some or all reasonable steps to ensure the animal’s welfare? If, as Explanatory Note 35 suggests, the answer is “all reasonable steps”, this sets the threshold for being guilty of the offence even lower. Although the concept of reasonableness affords the magistrates hearing any case a wide margin of discretion to make a fact-sensitive decision, it also affords a wide margin of uncertainty for any keeper of pet or agricultural animals.

3.29 As we have indicated at 2.6 above, we believe that it should be spelt out explicitly that the clause 3(1) offence applies to “protected animals”, not just to the broader category of

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<sup>15</sup> See Appendix C.

“animals”. However, a number of problems remain with the interrelationship of the clause 3(1) offence with the clause 3(2) definition of “keeper” and the clause 54 definition of “protected animal”.

3.30 The clause 3(1) offence is only committed by the “keeper” of an animal. The scope of “keeper”, which is defined in clause 3(2) in identical terms to the definition in clause 1, is problematic. For example, a man owns a stream, including the “fishing rights” to that stream. There are pike in the stream, which are “ferae naturae”/wild animals at law. He fishes the stream and catches a pike. Does he assume potential criminal liability for what he does or does not do to that pike from the moment he hooks it, being in charge of it (clause 3(2)(b))? Or from the moment that he puts it in the net? Or does he only become the keeper when he kills it?

3.31 More fundamentally, is clause 3(1) intended to include such an example in its scope at all? Nevertheless, despite its wildness, the pike in the example above becomes a “protected animal”, being “temporarily in the ... control of man” (clause 54(2)(b)(iii)), the moment that it is hooked. If the pike swims hard against the line once hooked and the fisherman has to struggle to reel it in, is he failing to take reasonable steps to ensure its welfare and, thereby, committing a criminal offence?

3.32 Clause 3(3) provides that a keeper does not absolve himself of liability under clause 3(1) by abandoning an animal - until another person becomes the keeper. This too is problematic in its relationship with the responsibilities of a keeper. If the owner of the stream above stocks it with trout, would he remain the keeper of those trout? On the wording of clause 3(3), he would remain the keeper and would, therefore, be criminally liable for failing to take any reasonable steps to ensure their welfare, for example by letting others fish the trout. The same analysis applies to the owner of land who releases game birds on to that land for shooting. The draft AWB conflicts directly with the common law position – that the fish or birds become wild “ferae naturae” – and its necessary implications. Indeed, by the doctrine of implied repeal, it is arguable that clause 3(3) would repeal the common law if enacted. Clarification and re-drafting, possibly to exclude certain activities, is required.

3.33 It is worth noting that s.1(1) A(MP)A 1968 deals with the liable party with much greater ease and clarity: “Any person who causes unnecessary pain or unnecessary distress to any livestock for the time being situated on agricultural land and *under his control....*” (Emphasis added.)

3.34 Clause 3(4) provides that “an animal’s welfare shall be taken to consist of the meeting of its needs in an appropriate manner” and goes on to provide a non-exhaustive list of those needs. One such need is “the need to be able to exhibit normal behaviour patterns” (clause 3(4)(c)). This implies an objective standard and by doing so, it imposes a disproportionate burden of knowledge, in particular, on pet animal owners. For example, how is the first-time budgerigar owner expected to know what constitute normal behaviour patterns for budgerigars, notwithstanding that he has been given a care sheet by the pet shop from which he bought the bird?

3.35 A further need under clause 3(4) is “the need for appropriate protection from, and diagnosis and treatment of, pain, injury and disease.” In a clause that abounds with ‘appropriateness’, as defined and undefined, and for greater clarity, we believe that this clause should be amended to read:

“(e) the need for *adequate* protection from, and diagnosis and treatment of, pain , injury and disease.” (Emphasis added.)

3.36 Clause 3(5) defines what constitutes meeting the needs of an animal in “an appropriate manner”. Clause 3(6) goes on to provide a statutory defence of killing an animal “in an appropriate and humane manner.” Is “appropriate” in clause 3(6) intended to be given its plain, natural meaning or is it qualified by the criteria set out at clauses 3(5)(a) to (c)? This is currently unclear from the drafting and should be clarified.

3.37 As noted, clause 3(6) provides a defence of killing an animal in “an appropriate and humane manner” to the clause 3(1) welfare offence. As we commented at 3.13 above, “humanity” is a very vague concept and should not be used.

3.38 As set out above, we believe that clause 3, in particular in its current draft form, makes the keeping of animals a risky undertaking:

- the threshold for the offence is set much lower than the s.1(1) A(MP)A 1968 offence.
- the essence of the offence – “reasonable steps” to ensure welfare – lacks certainty.
- it is probably a strict liability offence.

DEFRA is invited to consider the amendments proposed and whether, in the long run, this offence will deter people from keeping animals.

#### **Clause 4 – Sale to persons under 16**

3.39 Clause 4 makes it an offence to sell an animal to a person whom one has reasonable cause to believe is under 16 years old. This appears to be a proportionate and simple way in which to achieve what we infer to be the end in question: to stop impulse purchases of animals by children, where they lack the resources or commitment or knowledge to keep the animal in question. Our only caveat: on what *proven* basis is this a sufficient problem to require a legislative remedy? The Explanatory Notes and Regulatory Impact Assessment are entirely silent on this point.

#### **Clause 5 – Giving as prizes**

3.40 Clause 5 creates an offence of giving an animal to another as a prize. Though generally commendable, this provision may offend against Article 1, First Protocol rights - as it curtails the freedom to deal with property - unless it is justifiable in the general or public interest. Unfortunately, the Explanatory Notes and Regulatory Impact Assessment are silent on this point too as a matter of proven fact. All Note 42 indicates is that, “The giving of animals as prizes is not thought to be consistent with a responsible approach to becoming an owner or keeper.” Who thinks this? And on what basis?

3.41 Explanatory Note 42, in fact, muddles donor with donee. It would, clearly, be perverse to make it an offence to accept an animal as a prize, but not to offer one as a prize – although this would actually deal with the problem identified in Note 42. This approach would lead to uncertainty. If there is a demonstrable need for this provision generally, we recommend the following amendment:

“A person commits an offence if he offers or gives an animal to another as a prize or accepts an animal from another as a prize.”

## Clauses 6-10

3.42 Please see 2.17 to 2.28 above in relation to delegated legislation.

### *Animals in distress: general*

#### **Clause 11 – Powers to take possession of, and retain, animals in distress**

3.43 We have raised concerns about the HRA 1998 compatibility of the Bill at 2.8 to 2.16 above, in particular focusing on clause 12. Many of those concerns extend to clause 11. We have also spelled out the implications of clause 11 and other clauses in the context of delegation of state powers above.

3.44 Explanatory Note 52 spells out some of the ways in which clause 11 extends the powers contained in the PA(A) 2000:

“Firstly, the power is available immediately and before proceedings are commenced. Secondly, it is not restricted to animals kept for commercial purposes. Thirdly, it covers not only the animals which are suffering but also those which are likely to suffer if action is not taken.”

The Explanatory Note, however, omits to make clear that, for the first time, the power to take an animal into possession is exercisable without an order of the court.

3.45 Dealing with specific concerns, clause 11(1) and clause 11(2) provide circumstances in which an inspector or a constable may take an animal into possession, the latter without certification from a vet. The common thread is that the animal is suffering or, if its circumstances do not change, it is likely to do so. We believe that an important and obvious qualification needs to be made: that the animal must be suffering *unnecessarily*, so as to accord with the basic premise of clause 1.

3.46 A number of further safeguards are recommended. Clause 11(2) entitles an inspector or a constable to take an animal into possession without certification from a vet “it if appears to him [ie, the inspector] that the animal is suffering or, if its circumstances do not change, it is likely to suffer.” Not least as clause 11(1) legalises trespass to property and engages Article 1, First Protocol, it is desirable that there be some objective justification for exercising the power. We, therefore, suggest that clause 11(2) be amended to read:

“An inspector or constable may act under subsection (1) without the certificate of a veterinary surgeon if *he reasonably believes* –

(a) that the animal is suffering ...[.]”

3.47 Is it intended that the veterinary surgeon who certifies that the animal is suffering or likely to suffer must attend, rather than giving advice by telephone to an inspector or constable? If so, this should be spelt out:

“(1) An inspector or a constable may take a protected animal into possession if a veterinary surgeon *who is present* certifies ...[.]”

Similarly, clause 11(2) needs to be clarified: "... it is not reasonably practicable to wait for a veterinary surgeon *to attend*."

3.48 From our experience in practice, we are concerned about the exercise of the pre-emptive power in clause 11(1)(c) by the constable and, in particular, by the inspector, in the absence of a vet under clause 11(2)(b). There are, of course, obvious examples, such as the dog left in a hot car, which militate towards this power. However, it is important to remember that inspectors, in particular RSPCA inspectors, are not trained veterinary surgeons. Our experience is that police constables tend to assume less knowledge than RSPCA inspectors and often defer to the RSPCA on questions of animal welfare. Our experience is also that RSPCA inspectors have significantly greater experience of handling pet animals than they do dealing with farm animals.

3.49 Clause 11(3) allows the retention of the animal taken into possession (a) for a period of eight days or (b), if "relevant proceedings" are begun before the end of the eight-day period, until the proceedings are discontinued or otherwise disposed of. Clause 11(4) provides that "relevant proceedings" for these purposes are "proceedings for an offence under this Act in respect of -

- (a) the animal in question, or
  - (b) another animal taken into possession under subsection (1) on the same occasion as that animal,
- being proceedings brought against the owner or keeper of that animal."

3.50 Clause 11(4)(a) follows logically. Clause 11(4)(b) is more problematic: why should animals A to D be retained, possibly at a cost to the owner under clause 12(4), if proceedings are only being brought in relation to animal E? If, for example, a small flock of 10 sheep is seized on the certification of a vet because three sheep are suffering from untreated flystrike, why does a local authority or the police or the RSPCA need to retain the other 7 sheep for more than the eight days? An eight-day period is sufficient for a vet to examine the other sheep if there are genuine concerns about their welfare. Not least as the detention of the animals engages the owner's Article 1, First Protocol rights, clause 11(4)(b) should not simply avail enforcement authorities with a means to facilitate a fishing expedition for further evidence with which to prosecute. It is worth noting that the Explanatory Notes offer no reason *why* it is necessary to retain the entire herd of cattle (DEFRA's example), where only some are to be found suffering<sup>16</sup>. The only possible reason for retention of the other animals taken into possession on the same occasion as the animal in respect of which proceedings have been issued is that there is a legitimate concern that, if returned to their owner, they will suffer unnecessarily or will not be properly cared for. It seems, from the way in which clauses 11(7), 11(5) and 11(3) interact, that this may be the circumstance that the draftsman intended to cover; however, it is not clear.

3.51 We, therefore, recommend that, if magistrates are to sanction the continuing detention of animals in respect of which no proceedings have been brought, they should do so on the certification of a veterinary surgeon that, if the animals were returned to their owner, it is likely that they would suffer or would not be properly cared for.

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<sup>16</sup> DEFRA's example at Explanatory Note 55, "Launch of the Draft Animal Welfare Bill."

3.52 Clause 11(8) allows the owner of any animal retained under clause 3(a) or the person from whom it has been taken to apply to court for an order that it cease to be so retained. We believe that the rights of the owner would be much better served if the owner were given a right to be heard *when* the inspector or constable applies for an extension of time for the retention of the animal. This would be speedier and more cost efficient for the court, for the inspectorate or constabulary, and for the owner of the animal. It would better serve the owner's property rights. The mechanism that is already used in the draft AWB as clauses 16(3) and (4) and 17(4) and (5) appears an appropriate model.

### **Clause 12 – Powers to remove and care for animals in distress**

3.53 As we have indicated at 2.8f above, we think that there is a significant risk that clause 12 will penalise the innocent, as well as the guilty: a case need never proceed to court or even to a caution for the constabulary or inspectorate to recover an unlimited amount of money from the owner of an animal that it has seized for the animal's care. As we have highlighted above, in certain circumstances the seizure does not require the certification of anyone who is formally qualified to judge whether the animal is suffering or in need of care (clause 11(2)).

3.54 By virtue of its relationship with clause 11, the clause 12(4) power to recover the costs of keeping the animal will not be enforceable without proceedings having been commenced or the court sanctioning the detention of the animals for a longer period than the initial eight days. However, it remains that clause 12(4) provides a constabulary or inspectorate with an unchecked facility to recover whatever costs of keeping the animal they choose to incur, however excessive. We, therefore, suggest that:

3.54.1 only "reasonable and proportionate costs" should be recoverable; and

3.54.2 in accordance with the provisions of the PA(A)A 2000, a court must order that those reasonable and proportionate costs be recoverable.

### **Clause 13 – Other powers in relation to animals in distress**

3.55 For clarity, clause 13(3) should authorise the inspector or constable to exercise the clause 13(2) powers of destroying the animal "if he believes", rather than "if it appears to him", that there is no reasonable alternative and the need for action is such that it is not reasonably practicable to wait for a veterinary surgeon.

3.56 There is a typographical error at clause 13(4), which should read, "A veterinary surgeon ... ."

### **Clause 14 – Entry to search for and deal with animals in distress**

3.57 It should be remembered that this clause deals with powers of entry prior to prosecution. The basic power of entry for an inspector or a constable is exercisable if he reasonably believes -

“(a) that there is a protected animal on any premises, and

(b) that the animal is suffering or, if the circumstances of the animal do not change, it is likely to suffer[.]” (Clause 14(1).)

The clause extends beyond search to the exercise of any other powers the inspector or constable may have under the Act. Notwithstanding the qualifications to this power in clauses 14(2)f, this is a significant power, cutting across the constraints of common law

trespass and engaging Article 1, First Protocol rights. Again, we recommend that the reasonable belief should be that the animal is suffering *unnecessarily* or is likely to do so.

3.58 The constraints include the requirement for a warrant from the court to enter any part of premises that are used as a private dwelling (clause 14(2)). This is an important provision to safeguard the Article 8 ECHR/Schedule 1 HRA 1998 rights of the residential dweller. A further constraint is that the occupier of any part of premises that are used as private dwelling house must be informed of the decision to apply for the warrant, otherwise the court cannot exercise its power to grant the warrant (clauses 14(5) and (6)(a)). We do not believe that clause 14(6)(a) is sufficient. It is not enough that the occupier should be informed of the decision to apply for the warrant. He should be informed (a) from which court the warrant is to be sought and (b) the date and time when the warrant is to be sought, in order that he can make representations to the court. If the matter is truly urgent and giving notice of the application for a warrant would frustrate the search, then clause 14(6)(c)(iii) is always available to the applicant.

3.59 Clause 14(8) applies s.15 (Search warrants – safeguards) and s.16 (Execution of warrants) PACE 1984 to an inspector in relation to a warrant issued under clause 14 of the draft AWB. Notwithstanding the duties under s.15(2) PACE 1984 to state the grounds and basis of the warrant, we believe that a further safeguard against inappropriate and over-zealous use of the clause 14 powers would be for the inspector or constable to put sworn information in front of the justices, as under s.16 Animal Health Act 1981 (as amended).

### ***Animals in distress: proceedings pending***

#### **Clause 15 – Application of sections 16 to 19**

3.60 Clauses 16 to 19 derive generally from the PA(A)A 2000. The authorisation of non-governmental organisations as prosecutors under the PA(A)A 2000 and clause 15(2)(c) is discussed in detail at 2.31f above.

#### **Clause 16 – Orders in relation to animals owned or kept by the defendant**

3.61 As we have observed above, we are very concerned that clause 16 is incompatible with Article 1, First Protocol, as it would enable a court to sanction the destruction or sale of an animal in relation to which no prosecution had been brought or, indeed, was to be brought.

3.62 As in clauses 11 and 14, the power to expropriate the animal should be exercisable where the animal is suffering *unnecessarily* or is likely to suffer *unnecessarily*.

#### **Clause 17 – Orders for disposal of animals taken under section 11(1) or 16(1)**

3.63 Clause 16 and 17 need to be read together. The former provides a facility to apply to the court for it to authorise a variety of activities (“things”) in relation to any animal owned by the defendant that a vet certifies is suffering or is likely to suffer or is not being cared for (clause 16(1)). Those “things”, under clause 16(2), include:

- “(d) selling the animal at a fair price;
- (e) disposing of the animal otherwise than by way of sale;
- (f) slaughtering the animal, or causing or procuring it to be slaughtered.”

Clause 17 provides a power to apply to court for the court to authorise the same three “things” to a “relevant animal” (clauses 17(1) and (2)). A “relevant animal” is one which –

“(a) has been taken into possession under section 11(1), or under an order under section 16(1), and  
(c) is being retained under section 11(3)(b), or under such order.

and of which the defendant was the owner or a keeper immediately before it was so taken into possession.”

3.64 Clause 16(7) provides that an order under clause 16(1) ceases to have effect on the discontinuance or other disposal of the proceedings; but this is without prejudice to anything done before the order ceases to have effect. Clause 17(8) makes similar provision for orders made under clauses 17(1) and (2). It is, of course, impossible to turn the clock back if the animal has been sold or killed. However, where there is discontinuance or the defendant is acquitted on a submission of no case to answer or the defendant is acquitted after a full trial, the draft AWB appears to include no facility for compensation for the not-guilty defendant whose animal has been sold. Clause 20(2) (“Orders under section 16 and 17: financial provisions”) provides that the owner is entitled to be paid any amount realised by *disposal or slaughter*. The prosecutor is entitled to his reasonable expenses incurred in the exercise of his powers and the amount realised by disposal or slaughter can be used towards this. Two points require clarification:

3.64.1 the owner should be entitled, under clause 20(2), “to be paid any amount realised by *sale or disposal or slaughter* of the animal in pursuance of the order.”

3.64.2 the distinctions between sale, disposal and slaughter should be clarified. “Disposal” could be a synonym for both “sale” and “slaughter”.

3.65 Additionally and for clarity, clause 16(7) should make explicit reference to orders under clause 16(1) ceasing to have effect if the court orders the release of the animal under clause 18(1)(b).

### **Clause 19 – Powers in connection with orders under section 16(1) or 17(1)**

3.66 Clause 19(1) provides that, where –

“(a) an order is made under section 16(1) or 17(1), or  
(b) the prosecutor has given notice to the court of his intention to apply for an order under section 16(1),

and the prosecutor is of the opinion that the animal to which the order, or proposed order, relates needs to be marked for identification purposes, he or a person authorised by him may enter the premises on which the animal is kept and mark it for those purposes (whether by the application or an ear tag or by any other means).”

3.67 Clause 19(3) provides that the power of entry is only exercisable in relation to a private dwelling where magistrates issue a warrant. We believe that it would be an appropriate safeguard for Article 8 rights if the information placed before the magistrates were sworn.

### *Animals kept for fighting etc*

3.68 The powers under clauses 21, 22 and 23 echo those of clauses 11, 12 and 14 respectively. The significant difference is, however, that the powers for seizing, retaining, removing and caring for animals kept for fighting are restricted to the police: inspectors are not so empowered. In the light of our concerns set out at 2.31f, this is welcome. Further, although the Explanatory Notes do not say so, there is a practical reason for restricting these powers to the police: they are much better trained and resourced for situations such as interrupting an illegal animal fight.

#### **Clause 21 – Powers to take possession of, and retain, animals kept for fighting etc**

3.69 Clause 21 sets out the general powers of seizure and retention of animals kept for fighting. These powers are exercisable on the arrest of a person for keeping or training an animal for fighting or for placing a protected animal in an animal fight. Clause 21(7) provides that, “Where an animal is being retained under subsection (2), a magistrates’ court may, on application by -

- “(a) the person from whom the animal has been taken, or
- (b) if different, the owner of the animal,

order that the animal cease to be so retained.”

Unfortunately, the draft AWB does not specify the grounds on which the application can be made and the order should be granted. The grounds should be specified and should include that no proceedings have been commenced in relation to the animal seized.

#### **Clause 22 – Powers to remove and care for animals kept for fighting etc**

3.70 Clause 22(2) provides that, “Any costs in relation to the removal or care of an animal which are incurred by a person acting under this section shall be recoverable from the arrested person summarily as a civil debt.” However distasteful animal fighting is, this should be amended, as clause 12(4), so that:

3.70.1 only “reasonable and proportionate costs” should be recoverable; and

3.70.2 in accordance with the provisions of the PA(A)A 2000 currently in force, a court must order that the costs be recoverable.

### *Powers following conviction*

#### **Clause 24 – Imprisonment or fine**

3.71 Clause 24 prescribes the penalties for the various offences under the draft AWB. There is essentially a hierarchy, in descending order:

- Cruelty and fighting: fine of up to £20,000 and/or imprisonment of up to 51 weeks.
- Welfare or breaching a disqualification order: fine of up to £5,000 or imprisonment of up to 51 weeks.
- Other offences (eg, obstructing inspectors): fine of up to £2,500 or imprisonment of up to 51 weeks.

For comparison, the current maxima for s.1(1) PAA 1911 offences (ie, cruelty and fighting) are a fine of up to £5,000 and/or imprisonment of up to six months.

3.72 Nowhere in the Explanatory Notes<sup>17</sup> or Regulatory Impact Assessment<sup>18</sup> is there any explanation why the maximum fine for cruelty and fighting offences has leapt up by £15,000 or the maximum custodial sentence has doubled. A £20,000 fine is sometimes imposed by statute on corporate defendants, for example, in relation to environmental and planning control offences. However, there appears to be no obvious and general precedent for such a quantum in relation to summary offences where individuals and, particularly, animals are concerned. We deplore the activities that these offences are intended to deter and punish. However, there should be an objective justification for such maxima, otherwise the six-month maximum imprisonment and £5,000 maximum fine should be retained. DEFRA is invited to explain its thinking in this regard and to set out the objective basis for what it has proposed.

### **Clause 25 - Deprivation**

3.73 Clause 25(1) provides a court with the facility to make an order depriving a person convicted of an offence under clause 1, 2(1)(g) or 3 of ownership of the animal and for its disposal. For clarity, this power, like that in s.3 PAA 1911, provides for absolute, not temporary, deprivation: if the “deprivation” is to be temporary, then the disqualification power under clause 26 is appropriate. The clause 25 deprivation power is exercisable instead or in addition to any other powers (eg, imprisonment or disqualification).

3.74 We have two concerns in relation to this power. First, the permanent deprivation of the animal, whether or not including the destruction of the animal, clearly engages Article 1, First Protocol. However, clause 25, unlike clause 30 (“Destruction in the interests of the animal”), provides no right for the owner of the animal to be heard before an order is made by the court. Similar provisions to clauses 30(3) and (4) should be incorporated into clause 25.

3.75 Secondly, there appears to be no relationship between the severity of the offence (in terms of the hierarchy described at 3.71 above) and the availability of this power for use by the court. We accept that flexibility in the orders that magistrates may make can be useful in imposing a proportionate and fitting penalty. Nevertheless, it is hoped that sensible sentencing guidelines will be drawn up to assist magistrates in the exercise of the variety of powers under the AWB.

### **Clause 26 - Disqualification**

3.76 As Explanatory Note 110 highlights, clause 26(1) widens the scope of a deprivation order from disqualification from “having custody of”<sup>19</sup> an animal to disqualification “from engaging in the following activities:

- “(a) owning animals’
- (b) keeping, or arranging for or participating in the keeping of, animals;
- (c) dealing in animals;
- (d) transporting, or arranging for the transport of, animals.”

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<sup>17</sup> “Launch of the Draft Animal Welfare Bill”, Explanatory Notes 102 to 104.

<sup>18</sup> Op cit, Annex J.

<sup>19</sup> S.1 Protection of Animals (Amendment) Act 1954: see Appendix C.

DEFRA's reasoning is that, "It has been difficult in practice to determine in many cases when a disqualified person "has custody of" animals such as to place him in breach of a disqualification order and this has limited the effectiveness of such orders. For example, a farmer who has been disqualified may employ a farm manager to organise the day to day care of the animals and continue to operate a farming enterprise despite his disqualification."

3.77 We agree that the law should be phrased with clarity, so that it is easy to determine when a disqualified person has breached a disqualification order. However, DEFRA appears to have tried to remedy the lack of clarity with a general widening of the disqualification provisions: see clause 26(1)(a)-(d) at 3.76 above. No justification for widening the disqualification provisions is given *per se*. In response to DEFRA's example of the farmer who has been disqualified and employs a farm manager to organise the day-to-day care of the animals, we pose the following question. Does not the act of placing the custody of the animals into the day-to-day care of the farm manager remedy the animal welfare problem which precipitated the prosecution and disqualification order? And if so, does it not achieve this without expropriating the farmer's property and needing to breach his Article 1, First Protocol rights?

3.78 The answers cannot, of course, be clear-cut either way: it is fact sensitive. To ensure that the court has greater flexibility and because the drafting is not, in fact, clear, we recommend that clauses 26(1)(a) to (d) be clearly made disjunctive: ie, the court has a choice whether to disqualify a guilty person in respect of any or all of -

- “(a) owning animals’
- (b) keeping, or arranging for or participating in the keeping of, animals;
- (c) dealing in animals; *or*
- (d) transporting, or arranging for the transport of, animals.”

3.79 Explanatory Note 110 identifies two further omissions in the current legislation: “[T]he 1954 Act does not give any power to make consequential orders to provide for the welfare of animals kept or owned by a disqualified person. Nor does it provide for removal of such animals on conviction for breach of the disqualification.” We agree that these deficiencies, which can clearly lead to animal welfare being compromised, should be remedied.

#### **Clause 27 – Duty to explain non-exercise of powers under sections 25 and 26**

3.80 Clause 27 requires a court to give the reasons in open court for not making a deprivation or disqualification order, where a person is convicted. DEFRA offers no justification in the Explanatory Notes why this duty is necessary or even desirable. It is excessive and will undoubtedly waste court time. More significantly, it is incorrect in its approach: the presumption is that a persuasive, positive case should be made by the prosecution for deprivation or disqualification and, in the absence of such a positive case, such orders should not be made. It is not the position that a court should first presume to make such orders and then justify why it should not, in fact, do so.

3.81 It is axiomatic in public law terms that reasons should be given for making an order, but this does not need to be spelt out in the AWB.

### **Clause 28 – Seizure of animals in connection with disqualification**

3.82 Clause 28(5) provides the court with powers to effect the appropriation of animals of which appear to have been kept or have been kept in breach of a disqualification order. Clause 28(5)(c) allows it to give such directions as it thinks fit -

“(i) with respect to the carrying-out of the order, and  
(ii) with respect to the manner in which the animal to which the order relates is to be dealt with (whether by way or retention or disposal) after being taken into possession.”

Clause 28(6) goes on to provide that directions under clause 28(5)(c)(ii) may –

“(a) specify the manner in which the animal is to be dealt with, or  
(b) authorise the person appointed to carry out the order to deal with the animal in such manner as the person thinks fit.”

Clause 28(6) is superfluous and should be excised.

### **Clause 30 – Destruction in the interests of the animal**

3.83 Where a person is convicted of cruelty, of the clause 2(1)(g) and (h) fighting offences or of the welfare offence, clause 30(1) provides the court with the power to “order the destruction of the relevant animal if it is satisfied, on the basis of evidence given by a veterinary surgeon, that it is appropriate to do so in the interests of the animal.” As Explanatory Note 128 acknowledges, “in the interests of the animal” is a somewhat wider test than that in s.2 PAA 1911: whether it would be “cruel to keep the animal alive”. DEFRA offers no explanation why the wider power is, in fact, desirable or required.

3.84 Whether it would be “cruel to keep the animal alive” is a clearer test than the vague and potentially anthropomorphic test whether destruction is “in the interests of the animal”. If a wider test is justified, we recommend the following, clearer wording for clause 30(1):

“The court by or before which a person is convicted of an offence under section 1, 2(1)(g) or (h) or 3 may order the destruction of the relevant animal if it is satisfied, on the basis of evidence given by a veterinary surgeon, that it *would be contrary to the welfare of the animal to keep it alive.*”

3.85 Clause 30(10) requires consequential amendment if this proposed clarification is adopted.

### **Clause 32 – Orders under sections 25, 28, 30 or 31: pending appeals**

3.86 Clause 32(5) provides that, where the court makes a deprivation order and that order or the conviction on which it is based, is appealed, the court may order the appellant not to sell or part with the animal to which the order relates while the appeal is pending. Failure to comply with the order not to sell or part with the animal constitutes an offence (clause 32(6)). For clarity and because the prosecutor or a third party may hold the animal, the court should be able to make similar orders in relation to the prosecutor and third parties, with similar sanctions.

### **Clause 33 – Orders with respect to licences**

3.87 Clause 33(1) provides that, if a person is convicted of an offence under clauses 1 to 5, or under regulations made under clause 6(1), the court may, instead of or in addition to making any other orders -

- “(a) make an order cancelling any licence held by him;
- (b) make an order disqualifying him, for such period as it thinks fit, from holding a licence.”

It is worth clarifying that, under clause 54(1), “licence” means a licence under regulations under section 6(1) of the AWB. Any extension of these powers to other licences, with no factual connection to animal welfare, would be questionable: those licences should be dealt with discretely under the relevant legislation.

### ***Enforcement powers***

#### **Clauses 35 to 41**

3.88 The current scheme for warrants to enter and inspect premises as proposed in these clauses is unnecessarily cumbersome and overcomplicated. For clarity, it should be redrafted with the warrant related sections first. Prosecuting authorities should have resort to the courts before exercising rare powers of entry and inspection without a warrant. The preservation of the usual safeguards however – in clause 41(4) and s.15 and s.16 PACE 1984 – is welcome.

### ***Prosecutions***

#### **Clause 43 – Time limits for prosecutions**

3.89 Notwithstanding the usual six-month limitation period for commencing a prosecution for a summary offence in a magistrates’ court, clause 43 provides that “a magistrates’ court may try an information relating to an offence under this Act if the information is laid before –

- (a) at the end of the period of three years beginning with the date of the commission of the offence, or
- (b) the end of the period of six months beginning with the date on which evidence which the prosecutor thinks is sufficient to justify the proceedings comes to his knowledge,

whichever is the earlier.”

3.90 DEFRA’s justification for this significant departure from the norm is very weak: “Under the existing law it has sometimes proved difficult to prosecute for cruelty to animals because the evidence of the offence has not been discovered until some considerable time after the offence was committed.” This is not entirely straightforward: the same could be said for many other offences, in a variety of areas of law, for which a six-month limitation period is effective.

3.91 From our experience in practice, there is not a limitation problem in the vast majority of animal cruelty/welfare cases: finding 200 dead tortoises in a small, urban flat in

horrendous conditions a year after they have died is the exception, not the rule. Indeed, the nature of a living creature is that, unless ill-treatment or neglect is so severe that death results, it can heal and its condition can ameliorate: ie, there is, if anything, an imperative for expeditious evidence-gathering, not for extended limitation periods. Further, there needs to be a compelling public policy reason to depart from the six-month limitation period: as with civil limitation periods, it is there for legal certainty. DEFRA has offered no reason that distinguishes the offences under the AWB from any others, let alone a compelling reason.

3.92 By contrast there are evidential reasons why, for example, summary offences under the Companies Act 1985 should have longer limitation periods than six months: many relate to record keeping and accounting, which is often subject only to external scrutiny on an annual basis. There are, likewise, very clear practical reasons why s.34 Health & Safety at Work Act 1974 extends time for bringing summary proceedings: a Health and Safety inquiry report that is published or an inquest that is held more than six months after the event may shed detailed light on offences committed.

3.93 A clear six-month time limit has legal certainty. What is proposed does not. For example, there is not even a limitation backstop for the clause 43(1)(b) time limit. The simple and clear six-month time limit in the current legislation should be re-enacted.

### ***Inspectors***

#### **Clause 44 – Appointment of inspectors by local authorities**

3.94 Our concerns, especially in relation to inspectors appointed by local authorities from the Secretary of State's list, are set out at 2.31f above.

#### **Clause 45 – Protection of inspectors**

3.95 This clause as drafted purports to exclude civil and criminal liability for an act done by an inspector in purported performance of his functions under the Act. The explanatory notes are conspicuously silent on this proposal - which is unusual given the stark novelty of the immunity provision. The effect of this clause is essentially to provide a complete defence to any civil claim against the inspector in, say, negligence, conversion or trespass (either to land or goods) provided that inspector can cross the low threshold set in the clause: "the act was done in good faith and ... there were reasonable grounds for doing it." This would be remarkable in that it would afford DEFRA or RSPCA inspectors a much higher degree of immunity from suit than, for example, the police (under the same or any other legislation) or officers of HM Customs and Excise.

3.96 This is a significant cause for concern, as it severely limits the supervision by civil courts of the actions of inspectors. Not only, then, are there doubts about the public law accountability of inspectors, but also about the private law accountability. Clause 44 ought to be excised: inspectors should be subject to the same common law rules as other inspection and enforcement officers.

3.97 The inclusion of clause 45 by DEFRA is apparently self-serving. For transparency and in the interests of Open Government, DEFRA is invited to clarify whether this clause is included of its own motion or whether it derives from proposals made by the RSPCA and/or the Local Government Association. DEFRA is also asked to justify why inspectors should be afforded much higher protection from civil action than police officers exercising the same powers or, more generally, other state officers exercising a variety of statutory powers.

## ***General***

### **Clause 53 – “Animal”**

3.98 The restriction of “animal” within the AWB to “a vertebrate other than man” is welcome; likewise, the exclusion of animals in foetal, larval or embryonic form from the scope of the AWB. Given the far-reaching implications of loosening these restrictions, the affirmative procedure for secondary legislation is appropriate.

### **Clause 54 – General Interpretation**

3.99 We have commented on the apparent problems with the definition of “protected animal” at 2.2 to 2.7 above and within the body of the text.

#### 4. CONCLUSION

4.1 We firmly support the principle of strong, clear law, spelling out the responsibilities of individuals towards animals. As we have indicated, we welcome a consolidation of animal welfare law that has become diffuse and unclear. We also consider that the draft Bill would represent a missed opportunity if it did not address deficiencies in the current system.

4.2 This Submission is entitled “From Principle into Practice”. The proposals that we make and questions that we ask are with this in mind: to make the legislation work, as enforceable and well-balanced law.

4.3 We are particularly keen to ensure that:

- The legislation is readily comprehensible to any keeper of animals.
- The legislation properly balances human rights and human responsibilities.
- The offences and, in particular, the penalties are proportionate to proven needs.
- Secondary legislation under the draft Bill is not excessive and is subject to Parliamentary scrutiny.
- Those who will investigate and prosecute offenders under the Act are subject to proper levels of public accountability.

In particular, if there is a proper balance, we believe that the legislation should not be a deterrent to animal keeping. Without such a balance and without continuity and widespread experience of animal keeping, we believe that “our deserved reputation as a nation of animal lovers”<sup>20</sup> may be tarnished.

*James Pavey  
& Simon Murray*  
**24 August 2004**

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<sup>20</sup> Foreword by Rt Hon Margaret Beckett MP to “Launch of the Draft Animal Welfare Bill”, July 2004; DEFRA Press Release “Launch of the Draft Animal Welfare Bill”, of 14 July 2004.

## APPENDIX A

### PROPOSED AMENDMENTS

<b><i>Submission paragraph number</i></b>	<b><i>Draft AWB clause</i></b>	<b><i>Proposed amendment</i></b>
<b>2.6</b>	<b>3</b>	The welfare “duty of care” is applied specifically to an “animal”, not merely a “protected animal”. If the offender is “keeper of an animal”, the “animal must logically be a “protected animal”, by virtue of clause 54(2)(b)(i): this should be spelled out explicitly.
<b>2.11</b>	<b>12</b>	The safeguards of the Protection of Animals (Amendment) Act 2000 should be re-used in clause 12: that the court, rather than the inspector, sanctions the activities for which the prosecutor can recover expenses; the costs must be reasonable; and veterinary advice is required at all times.
<b>2.19</b>	<b>6(1)</b>	The general power is delegated in very loose words and is almost limitless. Not least because of its potency, we believe that the wording should be tighter: “The appropriate national authority [i.e. Secretary of State or Welsh National Assembly] may by regulations make such provision as they <u>certify</u> fit for <u>ensuring</u> the welfare of animals kept by man.”
<b>2.21</b>	<b>8(1)(b) &amp; 9(1)(b)</b>	These clauses make consultation mandatory where the Secretary of State or Welsh National Assembly propose to issue or revise a Code of Practice. It is anomalous and perverse that consultation should be mandatory for Codes of Practice, but not for secondary legislation, which is higher in the legislative hierarchy and will impose significant legal obligations, including potential criminal sanctions, on animal keepers. Consultation should be mandatory for the secondary legislation.
<b>2.22</b>	<b>6</b>	A sub-clause should be included in clause 6 to provide a certification requirement for secondary legislation by the Secretary of State and Welsh National Assembly, with the grounds and parameters clearly spelled out. For example, the power should be exercisable where there is peer-reviewed scientific evidence that indicates a deficiency in the animal welfare laws and the legislation should be certified that it is made on this basis, with explicit reference to the <u>scientific</u> evidence.
<b>2.24</b>	<b>6(2)</b>	Consultation and certification should apply as safeguards against arbitrary and bad law making where clause 6(2) is invoked in the exercise of 6(1).
<b>2.39</b>	<b>15</b>	Unlike the 2000 Act, clause 15 of the draft Bill does not even specify that that prosecutors must be authorised in a written agreement. This should be amended to ensure that there is a clear public record of the terms on which the prosecutor is authorised to use the clause 16 to 20 powers and to conduct itself

		generally.
2.41	44(2) and (3)	<p>We recommend the following safeguards:</p> <ul style="list-style-type: none"> <li>• That any inspectorate performing functions on behalf of a local authority should do so under a suitable written agreement (as to the terms of such agreements generally, see below.).</li> <li>• That the Secretary of State should produce a standard form of agreement for local authorities to use, otherwise there is a risk of inconsistent application of these very strong powers.</li> <li>• That, before inclusion in the Secretary of State’s list, the inspectorate should be required to enter into a written, standard form agreement, making similar guarantees to those made in the 2000 Act approval agreement.</li> </ul>
2.52	15 and 44	<p>It is not good enough that there is a <i>possibility</i> that the RSPCA <i>could</i> be regarded as a public authority when exercising powers as prosecutors and inspectors under the draft AWB: see model written agreement between DEFRA and approved prosecutors. It should be spelt out in the AWB that any authorised prosecutors and DEFRA-listed inspectors <u>will</u> be public authorities for the purpose of s.6 Human Rights Act 1998.</p>
3.1	1	<p>From a drafting perspective, clause 1 is overfull: the legislation would be much clearer if the offences were separated out into discrete clauses.</p>
3.6	1(1)(b)	<p>We suggest clause 1(1)(b) be amended to read: “(b) he knew that he was reckless as to whether the act or failure to act would have that effect or be likely to do so,”</p>
3.8	1(2)(a)	<p>It is unclear whether “permits” describes part of the <i>actus reus</i> necessary to commit an offence or whether it describes the <i>mens rea</i>. It is recommended that clause 1(2)(a) be amended to: “(a) he <i>knowingly</i> permits another person to cause the animal to suffer” (emphasis added).</p>
3.10	1(2)	<p>If such activities as halal butchery and shooting are not to be criminalized, clause 1(2) should be amended to “knowingly” <u>and</u> an explicit list of activities that are covered should be included within the Bill.</p>
3.12	1(3)(c)(i) and (ii)	<p>We believe it will be very difficult for magistrates’ courts to determine with certainty and consistency what constitutes a “legitimate purpose”.</p>
3.13	1(3)(e)	<p>How can “reasonable competence” be determined by courts with consistency and certainty? Likewise, there is no common understanding of what constitutes “a humane person”, whether in law or philosophically. We suggest for 1(3)(e): “whether the person concerned conducted himself with due care and humanity to the animal in all circumstances,” or better, for certainty, “whether the person conducted himself with due care to the</p>

		animal in all the circumstances.”
<b>3.20</b>	<b>21(c) and (d)</b>	We recommend that “knowingly” is imported into the offences: “(c) uses a place, or knowingly permits a place to be used, for an animal fight; (d) keeps a place, or knowingly permits a place to be kept, for an animal fight[.]”
<b>3.21</b>	<b>2(1)(h)</b>	Clause 2(1)(h) would be much less cumbersome if reduced to: “(h) places a protected animal with an animal, or with a human, for the purposes of fighting, wrestling or baiting.”
<b>3.22</b>	<b>2(1)(i)</b>	This is very loosely drafted and ambiguous. The following is preferable for certainty: “(i) has in his possession any item capable of being used for an animal fight with the intention that it be so used.”
<b>3.23</b>	<b>2(3)</b>	If it is intended that activities such as using a terrier for pest control, or flying a hawk or falcon fro live pray are covered, DEFRA should say so. If not, explicit wording (for example, in a clause 2(4)) should provide a non-exhaustive list of activities that are not encompassed by the clause 2(1) offences and 2(3) definition of an “animal fight”.
<b>3.26</b>	<b>3(1)</b>	We think it entirely appropriate from a public policy perspective that a mental element of culpability is introduced: a person should only be capable of committing the clause 3(1) offence knowingly or recklessly.
<b>3.27</b>	<b>3(1)</b>	Clause 3(1) would be more clearly expressed if the word “commit” was excised: “A keeper of a protected animal shall be guilty of an offence if he knowingly or recklessly fails to take reasonable steps ... .”
<b>3.29</b>	<b>3(1)</b>	We believe that it should be spelt out explicitly that the clause 3(1) offence applies to “protected animals”, not just to the broader category of “animals”.
<b>3.32</b>	<b>3(3)</b>	The draft AWB conflicts directly with the common law position – that the fish or birds become wild “ferae naturae” – and its necessary implications. Indeed, by the doctrine of implied repeal, it is arguable that clause 3(3) would repeal the common law if enacted. Clarification and re-drafting, possibly to exclude certain activities, is required.
<b>3.35</b>	<b>3(4)</b>	We believe that this clause should be amended to read: “(e) the need for <i>adequate</i> protection from, and diagnosis and treatment of, pain, injury and disease.” (Emphasis added.)
<b>3.37</b>	<b>3(6)</b>	Clause 3(6) provides a defence of killing an animal in “an appropriate and humane manner” to the clause 3(1) welfare offence. “Humanity” is a very vague concept and should not be used.
<b>3.41</b>	<b>5</b>	It would, clearly, be perverse to make it an offence to accept an animal as a prize, but not to offer one as

		<p>a prize. This approach would lead to uncertainty. If there is a demonstrable need for this provision generally, we recommend the following amendment:</p> <p>“A person commits an offence if he gives an animal to another as a prize or accepts an animal from another as a prize.”</p>
<b>3.46</b>	<b>11(1)</b>	<p>Not least as clause 11(1) legalises trespass to property and engages Article 1, First Protocol, it is desirable that there be some objective justification for exercising the power. We, therefore, suggest that clause 11(2) be amended to read:</p> <p>“An inspector or constable may act under subsection (1) without the certificate of a veterinary surgeon if <i>he reasonably believes</i> –</p> <p style="padding-left: 40px;">(a) that the animal is suffering ...[.]”</p>
<b>3.47</b>	<b>11(1) and (2)</b>	<p>If it is intended that the veterinary surgeon who certifies that the animal is suffering or likely to suffer must attend, rather than giving advice by telephone to an inspector or constable, this should be spelt out:</p> <p>“(1) An inspector or a constable may take a protected animal into possession if a veterinary surgeon <i>who is present</i> certifies ...[.]”</p> <p>Similarly, clause 11(2) needs to be clarified: “... it is not reasonably practicable to wait for a veterinary surgeon <i>to attend</i>.”</p>
<b>3.50</b>	<b>11</b>	<p>The only possible reason for retention of other animals taken into possession on the same occasion as the animal in respect of which proceedings have been issued is that there is a legitimate concern that, if returned to their owner, they will suffer unnecessarily or will not be properly cared for. It seems, from the way in which clauses 11(7), 11(5) and 11(3) interact, that this <u>may</u> be the circumstance that the draftsman intended to cover; however, it is not clear.</p>
<b>3.51</b>	<b>11</b>	<p>We recommend that, if magistrates are to sanction the continuing detention of animals in respect of which no proceedings have been brought, they should do so on the certification of a veterinary surgeon that, if the animals were returned to their owner, it is likely that they would suffer or would not be properly cared for.</p>
<b>3.52</b>	<b>11(8)</b>	<p>Clause 11(8) allows the owner of any animal retained under clause 3(a) or the person from whom it has been taken to apply to court for an order that it cease to be so retained. We believe that the rights of the owner would be much better served if the owner were given a right to be heard <i>when</i> the inspector or constable applies for an extension of time for the retention of the animal. This would be speedier and more cost efficient for the court, for the inspectorate or constabulary, and for the owner of the animal. It would better serve the owner’s property rights. The mechanism that is already used in the draft AWB as clauses 16(3) and (4) and 17(4) and (5) appears an appropriate model.</p>

<b>3.53</b>	<b>12</b>	We think that there is a significant risk that clause 12 will penalise the innocent, as well as the guilty: a case need never proceed to court or even to a caution for the constabulary or inspectorate to recover an unlimited amount of money from the owner of an animal that it has seized for the animal's care. As we have highlighted above, in certain circumstances the seizure does not require the certification of anyone who is formally qualified to judge whether the animal is suffering or in need of care (clause 11(2)).
<b>3.54</b>	<b>12(4)</b>	By virtue of its relationship with clause 11, the clause 12(4) power to recover the costs of keeping the animal will not be enforceable without proceedings having been commenced or the court sanctioning the detention of the animals for a longer period than the initial eight days. However, it remains that clause 12(4) provides a constabulary or inspectorate with an unchecked facility to recover whatever costs of keeping the animal they choose to incur, however excessive. We, therefore, suggest that: <ul style="list-style-type: none"> <li>• only "reasonable and proportionate costs" should be recoverable; and</li> <li>• in accordance with the provisions of the PA(A)A 2000, a court must order that those reasonable and proportionate costs be recoverable.</li> </ul>
<b>3.55</b>	<b>13(3)</b>	For clarity, clause 13(3) should authorise the inspector or constable to exercise the clause 13(2) powers of destroying the animal "if he believes", rather than "if it appears to him", that there is no reasonable alternative and the need for action is such that it is not reasonably practicable to wait for a veterinary surgeon.
<b>3.56</b>	<b>13(4)</b>	There is a typographical error at clause 13(4), which should read, "A <u>veterinary</u> surgeon ... ."
<b>3.57</b>	<b>14(1)</b>	We recommend that the reasonable belief should be that the animal is suffering <i>unnecessarily</i> or is likely to do so.
<b>3.58</b>	<b>14(6)(a)</b>	We do not believe that clause 14(6)(a) is sufficient. It is not enough that the occupier should be informed of the decision to apply for the warrant. He should be informed (a) from which court the warrant is to be sought and (b) the date and time when the warrant is to be sought, in order that he can make representations to the court. If the matter is truly urgent and giving notice of the application for a warrant would frustrate the search, then clause 14(6)(c)(iii) is always available to the applicant.
<b>3.59</b>	<b>14(8)</b>	Notwithstanding the duties under s.15(2) PACE 1984 to state the grounds and basis of the warrant, we believe that a further safeguard against inappropriate and over-zealous use of the clause 14 powers would be for the inspector or constable to put <u>sworn</u> information in front of the justices
<b>3.61</b>	<b>16</b>	We are very concerned that clause 16 is incompatible with Article 1, First Protocol, as it would enable a court to sanction the destruction or sale of an animal in relation to which no prosecution had been brought or, indeed, was to be brought.
<b>3.62</b>	<b>16</b>	As in clauses 11 and 14, the power to expropriate the animal should be exercisable where the animal is

		suffering <i>unnecessarily</i> or is likely to suffer <i>unnecessarily</i> .
<b>3.64</b>	<b>17 and 20(2)</b>	<p>Where there is discontinuance or the defendant is acquitted on a submission of no case to answer or the defendant is acquitted after a full trial, the draft AWB appears to include no facility for compensation for the not-guilty defendant whose animal has been sold. Clause 20(2) provides that the owner is entitled to be paid any amount realised by <i>disposal or slaughter</i>. The prosecutor is entitled to his reasonable expenses incurred in the exercise of his powers and the amount realised by disposal or slaughter can be used towards this. Two points require clarification:</p> <ul style="list-style-type: none"> <li>• the owner should be entitled, under clause 20(2), “to be paid any amount realised by <i>sale or disposal or slaughter</i> of the animal in pursuance of the order.”</li> <li>• the distinctions between sale, disposal and slaughter should be clarified. “Disposal” could be a synonym for both “sale” and “slaughter”.</li> </ul>
<b>3.65</b>	<b>16(7)</b>	Additionally and for clarity, clause 16(7) should make explicit reference to orders under clause 16(1) ceasing to have effect if the court orders the release of the animal under clause 18(1)(b).
<b>3.67</b>	<b>19(3)</b>	Clause 19(3) provides that the power of entry is only exercisable in relation to a private dwelling where magistrates issue a warrant. We believe that it would be an appropriate safeguard for Article 8 rights if the information placed before the magistrates were sworn.
<b>3.69</b>	<b>21(7)</b>	<p>Clause 21(7) provides that, “Where an animal is being retained under subsection (2), a magistrates’ court may, on application by -</p> <p>“(a) the person from whom the animal has been taken, or</p> <p>(b) if different, the owner of the animal,</p> <p>order that the animal cease to be so retained.”</p> <p>Unfortunately, the draft AWB does not specify the grounds on which the application can be made and the order should be granted. The grounds should be specified and should include that no proceedings have been commenced in relation to the animal seized.</p>
<b>3.70</b>	<b>22(2)</b>	<p>This should be amended, as clause 12(4), so that:</p> <ul style="list-style-type: none"> <li>• only “reasonable and proportionate costs” should be recoverable; and</li> <li>• in accordance with the provisions of the PA(A)A 2000 currently in force, a court must order that the costs be recoverable.</li> </ul>
<b>3.74</b>	<b>25(1)</b>	The permanent deprivation of the animal, whether or not including the destruction of the animal, clearly engages Article 1, First Protocol. However, clause 25, unlike clause 30 (“Destruction in the interests of the animal”), provides no right for the owner of the animal to be heard before an order is made by the

		court. Similar provisions to clauses 30(3) and (4) should be incorporated into clause 25.
<b>3.75</b>	<b>25(1)</b>	There appears to be no relationship between the severity of the offence and the availability of this power for use by the court. It is hoped that sensible sentencing guidelines will be drawn up to assist magistrates in the exercise of the variety of powers under the AWB.
<b>3.78</b>	<b>26(1)(a) to (d)</b>	To ensure that the court has greater flexibility and because the drafting is not, in fact, clear, we recommend that clauses 26(1)(a) to (d) be clearly made disjunctive: ie, the court has a choice whether to disqualify a guilty person in respect of any or all of - “(a) owning animals’ (b) keeping, or arranging for or participating in the keeping of, animals; (c) dealing in animals; <i>or</i> (d) transporting, or arranging for the transport of, animals.”
<b>3.80</b>	<b>27</b>	Clause 27 requires a court to give the reasons in open court for <u>not</u> making a deprivation or disqualification order, where a person is convicted. DEFRA offers no justification in the Explanatory Notes why this duty is necessary or even desirable. It is excessive and will undoubtedly waste court time. More significantly, it is incorrect in its approach: the presumption is that a persuasive, positive case should be made by the prosecution for deprivation or disqualification and, in the absence of such a positive case, such orders should not be made. It is not the position that a court should first presume to make such orders and then justify why it should not, in fact, do so.
<b>3.82</b>	<b>28(c)</b>	Clause 28(6) is superfluous and should be excised.
<b>3.84</b>	<b>30(1)</b>	Whether it would be “cruel to keep the animal alive” is a clearer test than the vague and potentially anthropomorphic test whether destruction is “in the interests of the animal”. If a wider test is justified, we recommend the following, clearer wording for clause 30(1): “The court by or before which a person is convicted of an offence under section 1, 2(1)(g) or (h) or 3 may order the destruction of the relevant animal if it is satisfied, on the basis of evidence given by a veterinary surgeon, that it <i>would be contrary to the welfare of the animal to keep it alive.</i> ”
<b>3.85</b>	<b>30(10)</b>	Clause 30(10) requires consequential amendment if the above proposed clarification is adopted.
<b>3.86</b>	<b>32(5)</b>	Clause 32(5) provides that, where the court makes a deprivation order and that order or the conviction on which it is based, is appealed, the court may order the appellant not to sell or part with the animal to which the order relates while the appeal is pending. Failure to comply with the order not to sell or part with the animal constitutes an offence (clause 32(6)). For clarity and because the prosecutor or a third party may hold the animal, the court should be able to make similar orders in relation to the prosecutor

		and third parties, with similar sanctions.
<b>3.88</b>	<b>35-41</b>	The current scheme for warrants to enter and inspect premises as proposed in these clauses is unnecessarily cumbersome and overcomplicated. For clarity, it should be redrafted with the warrant related sections first.
<b>3.93</b>	<b>43</b>	There is, if anything, an imperative for expeditious evidence-gathering, not for extended limitation periods. Further, there needs to be a compelling public policy reason to depart from the six-month limitation period: as with civil limitation periods, it is there for legal certainty. DEFRA has offered no reason that distinguishes the offences under the AWB from any others, let alone a compelling reason. The simple and clear six-month time limit in the current legislation should be re-enacted.
<b>3.96</b>	<b>44</b>	Clause 44 ought to be excised: inspectors should be subject to the same common law rules as other inspection and enforcement officers.

## APPENDIX B

### INFORMATION REQUESTED OF DEFRA

<b>Submission paragraph number</b>	<b>Draft AWB clause</b>	<b>Information requested</b>
<b>2.5</b>	<b>1(1) &amp; 1(2)</b>	Is the distinction between the two offences relating to a “protected animal” (1(1)) and an “animal” (1(2)) deliberate? Or is it the point that if an animal has a keeper, it must be “protected?”
<b>2.26</b>	<b>6</b>	Is it intended that clause 6 be available for the following legislative purposes? <ul style="list-style-type: none"> <li>• A ban on fishing (clause 6(2)(k))</li> <li>• A ban on the shooting of game birds and mammals (clauses 6(2)(k) and (l))</li> <li>• A ban on hunting with dogs and/or coursing (clause 6(2)(k), (l) or (m))</li> <li>• Licensing hunting with dogs and/or coursing (clause 6(2)(h)).</li> </ul>
<b>2.27</b>	<b>6(2)</b>	The issue of hunting with dogs is clearly perceived to be a matter for primary legislation: if a banning Bill is to be debated, it merits the level of Parliamentary scrutiny that primary legislation is afforded and which secondary legislation is usually not. If these provisions are to remain in clause 6(2), DEFRA is asked to clarify its intentions.
<b>2.31</b>	<b>54(2)</b>	DEFRA is invited to clarify whether the “protected animal” concept at clause 54(2) is intended to remove hunting with dogs and coursing from the scope of the offences contained within clauses 1 to 3 of the draft Bill.
<b>2.38</b>	<b>15, 44(2) and (3)</b>	DEFRA is invited to confirm whether the RSPCA will become an authorised prosecutor under clause 15 and a listed inspectorate under clauses 44(2) and (3) in relation to pet and commercial animals.
<b>2.40</b>	<b>44(2) and (3)</b>	What criteria and guarantees are to be given, and in what form, before an inspector, or more likely an inspectorate, is placed on the Secretary of State’s suitability list?
<b>3.10</b>	<b>1(2)</b>	DEFRA is invited to comment whether it is intended such activities as halal butchery and shooting should be criminalized.
<b>3.14</b>	<b>1(4)(c)</b>	Clause 1(4)(c) needs to be clarified: is it intended that there is a mental element to this offence?
<b>3.15</b>	<b>1(4)</b>	We infer that DEFRA intends mutilation to include the docking of dogs. Does it also include “pinning” of wildfowl? Or clipping the wings of pheasants?
<b>3.17</b>	<b>1(10)(a)</b>	In the absence of a clear distinction between a protected animal and an animal in the text of the draft AWB, is it intended that different categories of “ownership” of live wild animals be included?

<b>3.18</b>	<b>1(10)</b>	DEFRA is invited to comment whether it is envisaged that prosecution of offences under both clause 1 and clause 3 should or will be commonplace?
<b>3.20</b>	<b>2(1)(c) and (d)</b>	Clause 2(1)(c) and (d) criminalise, <i>inter alia</i> , permitting a place to be used for an animal fight and permitting a place to be kept for use for an animal fight. Again, there is ambiguity: what <i>mens rea</i> , if any, is required for “permitting”?
<b>3.23</b>	<b>2(3)</b>	The intended scope of “animal fight” within clause 2(3) is unclear. Is it intended that it apply to a terrier used for pest control? Or even to flying a falcon or hawk for live prey?
<b>3.26</b>	<b>3(1)</b>	Clause 3(1) appears to be a strict liability offence of omission. Is this intended?
<b>3.28</b>	<b>3(1)</b>	What constitute “reasonable steps” to ensure the standard and scope of welfare? For example, is the offence committed if a person fails to take any or some or all reasonable steps to ensure the animal’s welfare?
<b>3.34</b>	<b>3(4)</b>	Clause 3(4) provides that “an animal’s welfare shall be taken to consist of the meeting of its needs in an appropriate manner” and goes on to provide a non-exhaustive list of those needs. One such need is “the need to be able to exhibit normal behaviour patterns” (clause 3(4)(c)). This implies an objective standard and by doing so, it imposes a disproportionate burden of knowledge, in particular, on pet animal owners. For example, how is the first-time budgerigar owner expected to know what constitute normal behaviour patterns for budgerigars, notwithstanding that he has been given a care sheet by the pet shop from which he bought the bird?
<b>3.36</b>	<b>3(6)</b>	Is “appropriate” in clause 3(6) intended to be given its plain, natural meaning or is it qualified by the criteria set out at clauses 3(5)(a) to (c)? This is currently unclear from the drafting and should be clarified.
<b>3.38</b>	<b>3</b>	We believe that clause 3, in particular in its current draft form, makes the keeping of animals a risky undertaking: <ul style="list-style-type: none"> <li>• the threshold for the offence is set much lower than the s.1(1) A(MP)A 1968 offence.</li> <li>• the essence of the offence – “reasonable steps” to ensure welfare – lacks certainty.</li> <li>• it is probably a strict liability offence.</li> </ul> DEFRA is invited to consider the amendments proposed and whether, in the long run, this offence will deter people from keeping animals.
<b>3.39</b>	<b>4</b>	On what <i>proven</i> basis is selling animals to children under sixteen a sufficient problem to require a legislative remedy?
<b>3.40</b>	<b>5</b>	Explanatory note 42 indicates is that, “The giving of animals as prizes is not thought to be consistent with a responsible approach to becoming an owner or keeper.” Who thinks this? And why?

<b>3.47</b>	<b>11(1)</b>	Is it intended that the veterinary surgeon who certifies that the animal is suffering or likely to suffer must attend, rather than giving advice by telephone to an inspector or constable?
<b>3.50</b>	<b>11(4)(b)</b>	Why should animals A to D be retained, possibly at a cost to the owner under clause 12(4), if proceedings are only being brought in relation to animal E? If, for example, a small flock of 10 sheep is seized on the certification of a vet because three sheep are suffering from untreated flystrike, why does a local authority or the police or the RSPCA need to retain the other 7 sheep for more than the eight days?
<b>3.72</b>	<b>24</b>	Nowhere in the Explanatory Notes or Regulatory Impact Assessment is there any explanation why the maximum fine for cruelty and fighting offences has leapt up by £15,000 or the maximum custodial sentence has doubled. We deplore the activities that these offences are intended to deter and punish. However, there should be an objective justification for such maxima. DEFRA is invited to explain its thinking in this regard.
<b>3.77</b>	<b>26(1)(a) to (d)</b>	DEFRA appears to have tried to remedy the lack of clarity with a general widening of the disqualification provisions: see clause 26(1)(a)-(d) at 3.76 above. No justification for widening the disqualification provisions is given <i>per se</i> . In response to DEFRA's example of the farmer who has been disqualified and employs a farm manager to organise the day-to-day care of the animals, we pose the following question. Does not the act of placing the custody of the animals into the day-to-day care of the farm manager remedy the animal welfare problem which precipitated the prosecution and disqualification order? And if so, does it not achieve this without expropriating the farmer's property and needing to breach his Article 1, First Protocol rights?
<b>3.91</b>	<b>43</b>	There needs to be a compelling public policy reason to depart from the six-month limitation period: as with civil limitation periods, it is there for legal certainty. DEFRA has offered no reason that distinguishes the offences under the AWB from any others, let alone a compelling reason
<b>3.97</b>	<b>45</b>	For transparency and in the interests of Open Government, DEFRA is invited to clarify whether this clause is included of its own motion or whether it derives from proposals made by the RSPCA and/or the Local Government Association. DEFRA is also asked to justify why inspectors should be afforded much higher protection from civil action than police officers exercising the same powers or, more generally, other state officers exercising a variety of statutory powers.

## APPENDIX C – LEGISLATIVE PROVISIONS

### A. Protection of Animals Act 1911

#### 1. Cruelty

(1) If any person –

- (a) shall cruelly beat, kick, ill-treat, over-ride, over-drive, over-load, torture, infuriate, or terrify any animal, or shall cause or procure, or, being the owner, permit any animal to be so used, or shall, by wantonly or unreasonably doing or omitting to do any act, or causing or procuring the commission or omission of any act, cause any unnecessary suffering, or, being the owner, permit any unnecessary suffering to be so caused to any animal; or
- (b) shall convey or carry, or cause or procure, or, being the owner, permit to be conveyed or carried, any animal in such manner or position as to cause that animal any unnecessary suffering; or
- (c) shall cause, procure, or assist at the fighting or baiting of any animal; or shall keep, use, manage, or act or assist in the management of, any premises or place for the purpose, or partly for the purpose, of fighting or baiting any animal, or shall permit any premises or place to be so kept, managed, or used, or shall receive, or cause or procure any person to receive, money for the admission of any person to such premises or place; or
- (d) shall wilfully, without any reasonable cause or excuse, administer, or cause or procure, or being the owner permit, such administration of, any poisonous or injurious drug or substance to any animal, or shall wilfully, without any reasonable cause or excuse, cause any such substance to be taken by any animal; or
- (e) shall subject, or cause or procure, or being the owner permit, to be subjected, any animal to any operation which is performed without due care and humanity; or
- (f) shall tether any horse, ass or mule under such conditions or in such manner as to cause that animal unnecessary suffering;

such person shall be guilty of an offence of cruelty within the meaning of this Act and shall be liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or both.

(2) For the purposes of this section, an owner shall be deemed to have permitted cruelty within the meaning of this Act if he shall have failed to exercise reasonable care and supervision in respect of the protection of the animal therefrom:

Provided that, where an owner is convicted of permitting cruelty within the meaning of this Act by reason only of his having failed to exercise such care and supervision, he shall not be liable to imprisonment without the option of a fine.

(3) Nothing in this section shall render illegal any act lawfully done under the Animals (Scientific Procedures) Act 1986, or shall apply –

- (a) to the commission or omission of any act in the course of the destruction, or the preparation for destruction, of any animal as food for mankind, unless such destruction or such preparation was accompanied by the infliction of unnecessary suffering; or
- (b) to the coursing or hunting of any captive animal, unless such animal is liberated in an injured, mutilated, or exhausted condition; but a captive animal shall not, for the purposes of this section, be deemed to be coursed or hunted before it is liberated for the purpose of being coursed or hunted, or after it has been recaptured, or if it is under control and a captive animal shall not be deemed to be coursed or hunted within the meaning of this subsection if it is coursed or hunted in an enclosed space from which it has no reasonable chance of escape.

## **2. Destruction of animal**

Where the owner of an animal is convicted of an offence of cruelty within the meaning of this Act, it shall be lawful for the court, if the court is satisfied that it would be cruel to keep the animal alive, to direct that the animal be destroyed, and to assign the animal to any suitable person for that purpose; and the person to whom such an animal is so assigned shall, as soon as possible, destroy such animal, or cause or procure such animal to be destroyed, in his presence without any unnecessary suffering. Any reasonable expenses incurred in destroying the animal may be ordered by the court to be paid by the owner, and thereupon shall be recoverable summarily as a civil debt:

Provided that, unless the owner assent, no order shall be made under this section except upon the evidence of a duly registered veterinary surgeon.

## **3. Deprivation of ownership**

If the owner of any animal shall be guilty of cruelty within the meaning of this Act to the animal, the court, upon his conviction thereof, may, if they think fit, in addition to any other punishment, deprive such person of the ownership of the animal, and may make such order as to the disposal of the animal as they think fit under the circumstances:

Provided that no order shall be made under this section, unless it is shown by evidence as to a previous conviction, or as to the character of the owner, or otherwise, that the animal, if left with the owner, is likely to be exposed to further cruelty.

## **B. Protection of Animals (Amendment) Act 1954**

### **1. Power to disqualify persons convicted of cruelty to animals**

(1) Where a person has been convicted under the Protection of Animals Act 1911 or the Protection of Animals (Scotland) Act 1912 of an offence of cruelty to any animal the court by which he is convicted may, if it thinks fit, in addition to, or in substitution for any other punishment, order him to be disqualified, for such a period as it thinks fit, for having custody of any animal or any animal of a kind specified in the order.

(2) A court which has ordered the disqualification of a person in pursuance of this section may, if it thinks fit, suspend the operation of the order –

- (a) for such a period as the court thinks necessary for enabling arrangements to be made for the custody of any animal or animals to which the disqualification relates; or
- (b) pending an appeal.

(3) A person who is disqualified by virtue of an order under this section may, at any time after the expiration of twelve months from the date of the order, and from time to time apply to the court by which the order was made to remove the disqualification, and on any such application the court may, as it thinks proper, having regard to the character of the applicant and his conduct subsequent to the order, the nature of the offence of which he was convicted, and any other circumstances of the case, either –

- (a) direct that, as from such date as may be specified in the direction, the disqualification be removed or the order be so varied as to apply only to animals of a kind specified in the direction; or
- (b) refuse the application:

Provided that where on an application under this section the court directs the variation of the order or refuses the application, a further application thereunder shall not be entertained if made within twelve months after the date of the direction or, as the case may be, the refusal.

## **2. Breach of disqualification order**

If a person has custody of any animal in contravention of an order made under this Act, he shall be liable on summary conviction to a fine not exceeding level 3 on the standard scale or to imprisonment for a term not exceeding three months or to both such fine and imprisonment.

## **C. Agriculture (Miscellaneous Provisions) Act 1968**

### **Part I – Welfare of Livestock**

#### **1. Prevention of unnecessary pain and distress for livestock**

(1) Any person who causes unnecessary pain or unnecessary distress to any livestock for the time being situated on agricultural land and under his control or permits any such livestock to suffer any such pain or distress of which he knows or may reasonably be expected to know shall be guilty of an offence under this section.

(2) Nothing in the foregoing subsection shall apply to any act lawfully done under the Animals (Scientific Procedures) Act 1986 or to any thing done or omitted by or under the direction of any person in accordance with the terms of a licence issued by the Minister for the purpose of enabling that person to undertake scientific research.

## **D. Protection of Animals (Amendment) Act 2000**

#### **1. Application of Act**

(1) Sections 2 to 4 apply where –

- (a) a person who is mentioned in subsection (3) (referred to in this Act as “the prosecutor”) has brought proceedings for an offence under section 1 of the Protection of Animals Act 1911 (referred to in this Act as “the 1911 Act”) against the owner of the animals to which the offence relates; and
- (b) the proceedings have not been discontinued or otherwise disposed of.

(2) But those sections only apply in relation to an animal which the owner keeps or has kept for commercial purposes.

(3) The persons referred to in subsection (1) are –

- (a) the Director of Public Prosecutions;
- (b) a Crown Prosecutor;
- (c) a government department;
- (d) a local authority;
- (e) in relation to a prosecution in England, a person who, at the request of the Secretary of State, has entered into a written agreement under which he may perform the functions conferred on a prosecutor by virtue of this Act;
- (f) in relation to a prosecution in Wales, a person who, at the request of the National Assembly for Wales, has entered into a written agreement under which he may perform the functions conferred on a prosecutor by virtue of this Act;

## **2. Orders for care, disposal or slaughter of animals**

(1) If, on the application of the prosecutor, it appears to the court from evidence given by a veterinary surgeon that it is necessary in the interests of the welfare of the animals in question for the prosecutor to do one or more of the things mentioned in subsection (2), the court may make an order authorising him to do so.

(2) Those things are –

- (a) taking charge of the animals and caring for them, or causing or procuring them to be cared for, on the premises on which they are kept or at some other place;
- (b) selling the animals at a fair price;
- (c) disposing of the animals otherwise than by way of sale;
- (d) slaughtering the animals, or causing or procuring them to be slaughtered.

(3) In determining what to authorise by the order, the court must have regard to all the circumstances, including the desirability of protecting the owner's interest in the value of the animals and avoiding increasing his costs.

(4) An order under this section ceases to have effect on the discontinuance or other disposal of the proceedings under section 1 of the 1911 Act; but this is without prejudice to anything done before, or done in pursuance of a contract entered into before, the order ceases to have effect.

## **3. Powers of entry, etc.**

(1) Where –

- (a) the prosecutor has given notice to the court of his intention to apply for an order under section 2; and
- (b) he is of the opinion that the animals need to be marked for identification purposes, the prosecutor, or a person authorised by him, may enter the premises on which the animals are kept and mark them for those purposes.

(2) Where an order is made under section 2, the prosecutor, or a person authorised by him, may –

- (a) enter the premises on which the animals are kept for the purpose of exercising the powers conferred by the order;
- (b) mark the animals (whether by the application of an ear tag or by any other means); and
- (c) in the case of an order making any provision mentioned in section 2(2)(a), make use for that purpose of any equipment on the premises.

(3) Any person who obstructs the prosecutor, or a person authorised by him, in the exercise of powers conferred by subsection (1) or (2) or an order under section 2 is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(4) Nothing in this section authorises a person to enter a dwelling house.

(5) A person entering any premises in the exercise of powers conferred on him by this section must, if so required by the owner or occupier or person in charge of the premises –

- (a) produce to him some duly authenticated document showing that he is, or is a person authorised by, the prosecutor; and

(b) state in writing his reasons for entering.

#### **4. Other supplementary provisions**

(1) Where an order is made under section 2 –

(a) the prosecutor is entitled to be reimbursed for any reasonable expenses incurred by him in the exercise of the powers conferred by virtue of the order; and

(b) subject to that, in the case of an order making any provision mentioned in subsection (2)(b), (c) or (d) of that section, the prosecutor must pay to the owner the proceeds of any disposal or slaughter of the animals.

(2) Any amount for which the prosecutor is entitled to be reimbursed under subsection (1) may be recovered by him from the owner summarily as a civil debt.

(3) Where –

(a) an order under section 2 makes any provision mentioned in subsection (2)(b), (c) or (d) of that section; and

(b) the owner has in his possession or under his control documents –

(i) without which the animals cannot be slaughtered for human consumption; or

(ii) which are otherwise relevant to the condition or value of the animals,

the owner must, as soon as practicable and in any event within 10 days of the making of the order, deliver those documents to the prosecutor.

(4) If the owner without reasonable excuse fails to deliver any documents as required by subsection (3), he is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(5) The prosecutor may, if the owner fails to deliver as required by subsection (3) any documents within paragraph (b)(i), apply to the person by whom the documents were issued for replacement documents to be issued and that person must, if he has sufficient information to do so, issue replacement documents to the prosecutor.

(6) An application under subsection (5) is to be accompanied by –

(a) a copy of the order under section 2; and

(b) such reasonable fee (if any) as is determined by the person to whom the application is made.

(7) In this section, “the owner” means the owner against whom the proceedings were brought.

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## **E. The European Convention on Human Rights**

### **Article 6**

#### **RIGHT TO A FAIR TRIAL**

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced

publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law.

(3) Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

## **Article 8**

### **RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE, HOME AND CORRESPONDENCE**

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

## **Article 1 of the First Protocol**

### **RIGHT TO PROPERTY**

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.