ISSN 1751-6072

JOURNAL OF ANIMAL WELFARE LAW

January 2007

www.alaw.org.uk

Association of Lawyers for Animal Welfare

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The Association of Lawyers for Animal Welfare (ALAW) would like to thank Compassion in World Farming Trust for its generous support of this Journal.

Registered Office: Springfield, Rookery Hill, Ashtead Park, Ashtead, Surrey KT21 1HY. A company limited by guarantee (No 5307802 – England).
Registered Charity Number 1113462.

The Animal Welfare Act 2006 – an overview

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The Animal Welfare Bill received royal assent on 8 November 2006 and is due to become law on 6 April 2007.

Scope

It is important to understand at the outset the scope of the Animal Welfare Act 2006 ("the Act"). The Act does not apply to anything lawfully done under the Animals (Scientific Procedures) Act 1986[1] (scientific experiments) and, specifically, the duty under section 9 of the Act (see below) to ensure an animal's welfare does not apply to animals kept at a place designated as a scientific procedure establishment or for the breeding or supply of animals for use in scientific procedures.[2] Nor does the Act apply in relation to anything done in the normal course of fishing.[3] Generally, the provisions contained within the Act relate to "protected animals" (which are domestic, rather than wild, animals) or animals which already fall within the responsibility of a person (see below). Thus, the Act has little or no relevance to wild animals, whose protection is contained within other legislation, and will not affect traditional field sport practices if the animals or birds are wild. The use of the term "animal" within the Act means "a vertebrate[4] other than man",[5] which does not include a foetus or embryo.[6] The Act does however confer a power under section 1(3) to extend by regulations the definition of "animal" to include any invertebrates or animals in the early stage of development, if the appropriate national authority is in the future satisfied, on the basis of scientific evidence, that animals of the kind concerned are capable of experiencing pain or suffering.[7] The Act extends only to England and Wales, save in certain limited respects.[8]

Unnecessary suffering

Section 4 of the Act creates the offence of "unnecessary suffering". The offence arises in two ways. Firstly, under section 4(1) if a protected animal[9] is caused unnecessary suffering by an act or failure to act, which the person causing it knew or ought reasonably to have known would be the likely effect. Secondly, under section 4(2) if a person responsible for an animal fails to take reasonable steps to prevent another person, through their act or failure to act, causing an animal unnecessary suffering. In determining whether suffering is "unnecessary" the court will have regard, under section 4(3), to whether (a) the suffering could reasonably have been avoided or reduced; (b) the conduct which caused the suffering was in compliance with any relevant enactments or provisions or code of practice; (c) the conduct which caused the suffering was for a legitimate purpose, such as benefiting the animal, or protecting a person, property or other animal; (d) the suffering was proportionate to the purpose of the conduct concerned; and (e) the conduct was that of a reasonably competent and humane person. This section does not outlaw the destruction of an animal in an appropriate and humane manner.[10]

Responsibility to ensure animal welfare

Section 9 of the Act requires a person responsible for an animal to take reasonable steps to ensure that its needs

[1] Section 58.
[2] Sections 6 and 7 of the Animals (Scientific Procedures) Act 1986.
[3] Section 59.
[4] Defined as any animal of the Sub-phylum Vertebrata of the Phylum Chordata (section1(5)).
[5] Section 1(1)
[6] Section 1(2).
[7] Section 1(4).
[8] See section 67(2) and (3) (Scotland) and section 67(5) (Northern Ireland).
[9] Defined by section 2 of the Act as an animal which is commonly domesticated in the British Islands, under the control of man (whether temporarily or permanently) or not living in a wild state.
[10] Section 4(4).

(including the needs for a suitable environment, a suitable diet, to be able to exhibit normal behaviour patterns, and to be protected from pain, suffering, injury and disease) are met, and under section 10 an inspector[11] is given the power to serve an "improvement notice" upon a person failing to comply with section 9. The improvement notice will specify the respects in which the inspector considers the person is failing to comply with the relevant conditions, the steps considered necessary to comply and the timescale within which steps should be taken in order to comply.

Tail docking

One of the most controversial issues in the Bill was the proposed ban on tail docking. Animal welfare groups favoured an outright ban, which was vigorously opposed by those supporting the practice. Ultimately, Parliament voted for a compromise position, banning the practice of tail docking except in relation to certain working dogs. Section 6 of the Act creates the offence of removing the whole or part of a dog's tail (other than for medical treatment) or causing, permitting or failing to take reasonable steps to prevent its removal other than for the purpose of medical treatment. Certified working dogs not more than five days old are exempt, if a veterinary surgeon certifies[12] that two conditions are met: firstly, that evidence has been produced to show that the dog is likely to be used for work in connection with law enforcement, activities of HM armed forces, emergency rescue, lawful pest control or the lawful shooting of animals; secondly, that the dog is of a type specified for the purposes of the exemption by regulations made by the appropriate national authority. It is a defence if it can be proved that the person charged had a reasonable belief that the dog was a certified working dog of not more than five days old.[13] Section 6 also creates the offence of showing a dog whose tail has been wholly or partly removed, at an event to which members of the public are admitted on paying a fee, unless it is a certified working dog and the purpose of showing the dog is only to demonstrate its working ability.

Mutilations

Mutilations[14] other than tail docking are prohibited under section 5. A person will be guilty of such an offence if he carried out or causes to be carried out such mutilation on a protected animal, or if a person responsible for an animal permits or fails to take reasonable steps to prevent another person taking such steps.

Poisoning

A person is guilty of an offence under section 7 if, without lawful authority or excuse, he poisons or causes a protected animal to be poisoned or, if responsible for an animal, he permits or fails to take reasonable steps to prevent another person taking such action.

Fighting

The Act also outlaws animal fighting[15] in public. Section 8 creates offences of causing or attempting to cause an animal fight to take place, knowingly taking money for admission to an animal fight, knowingly publicising an animal fight, providing information about an animal fight with the intention of enabling or encouraging attendance at the fight, making or accepting bets on the outcome

[11] A person appointed to be an inspector for the purposes of that provision by the appropriate national authority or a local authority (section 51).

[12] Section 6(12) makes it an offence to knowingly give false information to a veterinary surgeon in connection with the giving of a certificate for the purpose of this section.

[13] Section 6(7).

[14] Section 5(3) – procedures involving interference with the sensitive tissues or bone structure of an animal, other than for the purpose of medical treatment.

[15] An "animal fight" is one in which a protected animal is placed with an animal, or with a human, for the purpose of fighting, wrestling or baiting (section 8(7)).

of an animal fight, taking part in an animal fight, possessing anything for use in connection with a fight, training animals for use in an animal fight or keeping premises for use in an animal fight. It is also now an offence[16] to be present at an animal fight or to supply, publish, show or possess with the intention of supplying a video of such a fight, unless the video recording is of an animal fight which took place outside Great Britain or before the commencement date of the Act.[17] Section 22 of the Act confers powers upon a constable in relation to seizure of animals and entering and searching premises.

Sale or prizes to persons aged under 16

Section 11 makes it an offence for a person to sell an animal to a person whom the seller has reasonable cause to believe to be under the age of 16.[18] Section 11(3) also makes it an offence to enter into an arrangement with a person whom a person has reasonable cause to believe is under the age of 16 under which the former has the chance to win an animal as a prize. Such an arrangement is however allowed if the child is accompanied by a person who is not under the age of 16,[19] or, if the arrangement is not made in the presence of the child, there is reasonable cause to belief that the person with actual care or control of the child has consented to the arrangement, or if the arrangement is made in a family context.[20]

Enforcement

The Act contains wide powers of enforcement, which are intended to deal not only with cases where suffering is occurring or has occurred but, if necessary, to prevent suffering. Under section 18, if an inspector or constable believes that a protected animal is suffering he may take steps as appear to be immediately necessary to alleviate that suffering. This does not include destruction of the animal,[21] which can be carried out by, or on behalf of, an inspector or constable only if a veterinary surgeon certifies that it is in the animal's best interests to be destroyed or if the constable or inspector is of the opinion that the condition of the animal is such that there is no reasonable alternative to destroying it, and the need for action is such that it is not reasonably practicable to wait for a veterinary surgeon.[22] An inspector or constable also has the power to take a protected animal[23] into his possession[24] if a veterinary surgeon specifies that it is suffering, or likely to suffer if its circumstances do not change,[25] or without the certificate of a veterinary surgeon if it appears to him that the animal is suffering or likely to do so if its circumstances do not change, and that the need for action is such that it is not reasonably practicable to wait for a veterinary surgeon,[26] although there is a duty to take reasonable steps to bring the exercise of this power to the attention of the person who is responsible for the animal if he is not already aware that the power has been exercised.[27] The section also creates an offence of intentionally obstructing a person in the exercise of the power conferred by the section[28] and provides that a magistrates' court may order the reimbursement of persons who incur expenses acting under the section.[29] There are also powers under section 19 for an inspector or constable to enter premises for the purpose of searching for a protected animal and exercising powers under section 18, unless the premises are used as a private dwelling.[30]

[16] Section 8(2).
[17] Section 8(3) and (4).
[18] This increases the minimum age at which a child may buy a pet from 12.
[19] Section 11(4).
[20] Section 11(4), (5) and (6).
[21] Section 18(2).
[22] Sections 18(3) and (4).
[23] Or its dependant offspring (section 18(7)).
[24] Section 20 of the Act sets out powers that may be exercised in relation to animals taken into possession; section 21 deals with the powers of appeal made from orders under section 20.
[25] Section 18(5).
[26] Section 18(6).
[27] Section 18(11).
[28] Section 18(12).
[29] Section 18(13)
[30] See also section 25 (inspection of records held by licence holders), section 26 (inspections

Sentencing

Offences under sections 4 (causing unnecessary suffering), 5 (mutilation), 6(1) and (2) (tail docking), 7 (poisoning) and 8 (animal fighting) are summary offences carrying sentences of imprisonment of up to 51 weeks or a fine not exceeding £20,000, or both. If a person convicted of an offence under those sections or under section 9 (duty to ensure animal welfare) is the owner of an animal in relation to which the offence was committed the court may, instead of or in addition to any sentence, make an order depriving him of ownership of the animal[31] and for its disposal.[32] Where the court decides not to make an order depriving the owner of the animal, it must give reasons for the decision in open court and, if it is a magistrates' court, cause them to be entered in the register of proceedings.[33] Offences under section 9, 13(6) (activities in contravention of licensing or registration provisions) and 34(9) (breach of a disqualification order) are summary offences carrying sentences of up to 51 weeks imprisonment or a fine not exceeding level 5 on the standard scale (£5,000), or both. Any other offences carry a sentence of imprisonment of up to 51 weeks or a fine not exceeding level 4 on the standard scale (£4,000), or both. Additionally, where a person is convicted of an offence under section 34(9) because the ownership of the animal is in breach of a disqualification order under section 34(2), the court may make an order depriving him of ownership of the animal and for its disposal.[34]

The court has power under section 34 to make an order disqualifying a person convicted under sections 4, 5, 6(1) and (2), 7, 8, 9, 13(6) and 34(9) from owning, keeping or participating in the keeping of animals, dealing in animals or transporting or arranging for the transport of animals in relation to animals generally, or in relation to animals of one or more kinds.[35] If the court decides not to make an order of disqualification, it must give reasons for the decision. [36] [37]

Under section 37 the court may also order the destruction of an animal in relation to which a person is convicted of an offence under sections 4, 5, 6(1) and (2), 7, 8(1) and (2) and 9, 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.[38] The power is only exercisable however if the owner of the animal has been given an opportunity to be heard, or if the court is satisfied that it is not reasonably practicable to communicate with the owner.[39] In addition, if there is a conviction under section 8(1) or (2) (relating to animal fighting) the court may order the destruction of an animal in relation to which the offence was committed on grounds *other than the interests of the animal*,[40] provided the owner of the animal has been given an opportunity to be heard, or if the court is satisfied that it is not reasonably practicable to communicate with the owner.[41] The court may also order a person convicted of an offence under section 8(1) and (2) to reimburse any expenses incurred by the police in connection with the keeping of an animal in relation to which the offence was committed.[42] There are also provisions in section 40 for the forfeiture of equipment used in offences under sections 4, 5, 6(1) and (2), 7 and 8.

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in connection with registration), section 28 (powers in relation to inspection of farm premises) and section 29 (powers in relation to compliance with Community obligations). There are supplementary provisions in relation to powers of entry, inspection and search contained in Schedule 2 of the Act, which are outside the scope of this article. The reader should also note powers to stop and detain vehicles (section 54), to detain vessels, aircraft and hovercraft (section 55) and to obtain documents (section 56).

[31] Including, where relevant, making provision for any dependant offspring (section 33(3)).

[32] Section 33(1).

[33] Section 33(6).

[34] Section 33(2).

[35] Section 34(2), (3), (4) and (5).

[36] Section 34(8).

[37] Section 35 sets out the powers, including seizure, in connection with those who breach disqualification orders. Section 43 sets out how, and on what terms, a person disqualified by virtue of a section 34 order may apply to the court for the termination of the order.

[38] Section 37(1).

[39] Section 37(2).

[40] Section 38(1).

[41] Section 37(2).

[42] Section 39.

Regulation

By section 12 the Act confers upon the national authority regulatory power to make provisions for the purpose of promoting the welfare of animals for which a person is responsible and the Government has already announced its intention to ban the use of certain wild animals in travelling circuses. Section 13 provides for the licensing or registration of activities involving animals, with associated provisions in section 42 in relation to enforcement. The Act also makes provision in section 14 for the national authority to issue codes of practice to provide practical guidance in respect of any of the provisions under the Act. The failure to comply with any provision in a code of practice will not in itself be an offence, but may be relied upon to establish liability; conversely compliance with a relevant provision may be relied upon as evidence negating liability.[43]

Commentary

The Act brings together existing (and to some extent rather outdated) legislation and extends current powers to make secondary legislation and codes of practice which will enable detailed provisions to be made, as necessary, in the future. The Department for the Environment, Food and Rural Affairs has described it as the most significant animal welfare legislation for nearly a century. Indeed the imposition of new welfare duties upon pet owners *is* a significant step and one that is welcomed by the RSPCA. It is certainly hoped that the Act will reduce animal suffering by enabling preventative action to be taken where an animal is identified as at risk. The new range of disqualification orders are also welcomed, as is the requirement that magistrates give reasons for not imposing such an order in appropriate circumstances. Overall it may be said that the Act represents a positive step for the welfare of domestic animals.

[43] Section 14(4).

Prosecution under the Hunting Act 2004

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Hunting a wild mammal with a dog is now illegal in England and Wales unless the hunting is exempt hunting. There are many and varied exemptions. The sight of the red-coated huntsmen and women on horseback in our countryside is not likely to disappear just yet. The so-called "pest species" such as the fox still cannot relax although the hare comes off somewhat better as coursing is outlawed. Now, instead of being relentlessly pursued by a pack of foxhounds and huntsmen the fox can look forward to being (legally) flushed (by up to two dogs) and shot "as soon as possible" or taken by a bird of prey. These are not the only exemptions. Any huntsman though who continues to indulge in hunting which is not exempt and who is detected, prosecuted and convicted can feel some comfort that the conviction, like a minor traffic offence, will not be entered on the police national computer.

The Hunting Act 2004 ("the Act") came into force on 18 February 2005, creating five new summary offences. The key aim of the Act was to criminalise the hunting of wild mammals with dogs, this offence is contained in section 1. For the purposes of the Act the word "hunting" is to be given its ordinary English meaning, which includes searching for wild animals, chasing them or pursuing them for the purpose of catching or killing.

It is noteworthy that a person must engage or participate in a hunt, those who simply follow a hunt to observe are not technically hunting. There is no offence of attempt in relation to hunting and it is therefore not an offence to gather before a hunt. This can be contrasted to the provisions in relation to hare coursing events which criminalise being present at a hare coursing event, even as a spectator.

Section 3 of the Act makes it an offence for a person to knowingly permit land which is owned by him to be entered or

used for the purposes of unlawful hunting, or to permit a dog owned by him to be used for such purposes. The remaining new offences relate to hare coursing and are found in section 5 of the Act. Offences are committed under this section if a person participates, attends or knowingly facilitates a hare coursing event or permits a dog owned by him to be used for a hare coursing event or controls a dog in such an event.

Penalties for offences committed contrary to the Act include a maximum penalty of a £5,000 fine. Arguably of more significance, the Act also contains provisions for the forfeiture of any dog used during the hunt or in the possession of the convicted person when he was arrested, along with any hunting article or vehicle used in the commission of the offence.

The Act contains provisions which permit a police constable to immediately search any "vehicle, animal or other thing" if it is reasonably believed that evidence of an offence under the Act is likely to be found. Additionally, the police have powers to detain a vehicle, animal or other thing if it may be used as evidence or become subject to a forfeiture order. These powers are retrospective only and there are no powers to search or seize where it is believed that a suspect is about to commit an offence.

The offences and penalties created by the Act appear to be straightforward at first glance. However, the Act has created a number of classes of exempt hunting which will almost certainly create difficulty in enforcing and prosecuting cases relating to hunting.

The exceptions are listed in Schedule 1 and include the use of dogs to hunt rabbits or rats, to retrieve a hare which has been shot, to flush a wild mammal from cover to enable a bird of prey to hunt it, to recapture or rescue a wild mammal or for the purposes of observation of a wild mammal.

Up to two dogs may be used to stalk or flush a wild mammal if the activity is conducted for the purposes of, *inter alia*, (a) preventing or reducing serious damage which the mammal would otherwise cause to livestock, birds or other property, or to the biological diversity of an area; or (b) participation in a field trial in which dogs are assessed for their likely usefulness in connection with shooting. In addition, the stalking or flushing must not involve the use of a dog below ground, and reasonable steps must be taken to ensure that as soon as possible after being found or flushed the animal is shot dead by a competent person.

All exempt hunting must take place on land which belongs to the hunter, or on land owned by a person who has given permission for his land to be used for the purposes of hunting.

A single dog may be used to stalk or flush out a wild mammal if undertaken for the purposes of preventing or reducing serious damage to game or wild birds kept or preserved for shooting. There are a number of conditions attached to this exemption including the need to take reasonable steps to ensure that the animal is shot dead as soon as possible after it is flushed out and ensuring that the dog is under sufficiently close control.

There has, to date, been only one successful prosecution of a huntsman under the Act, namely that of Tony Wright of the Exmoor Foxhounds.

The Exmoor Foxhounds met at Prayway Head on 29 April 2005. The hunt was monitored by members of the League Against Cruel Sports ("the League") who took video evidence which was later shown in court and which showed a mounted Tony Wright and hunt supporters watching two foxhounds that in turn were chasing a fox. The Hunt's marksman was present but a distance away (up to one-and-a-half kilometers) on a quad bike with a shotgun bag slung over his shoulder and a spade and terrier box on the back of the quad bike. It was subsequently accepted by the defence at trial that (a) only one person was present with a gun; (b) attempts were not made on numerous occasions when the hounds appeared to be seeking a fox to place the gun in a position to shoot the fox as soon as possible; and

that (c) the hounds were at times not under the control of Tony Wright.

On 24 May 2005 the League contacted the police and alleged illegal hunting by the Exmoor Foxhounds. On 22 June 2006 the League delivered its evidence to the police who responded on 19 September 2005 that there was insufficient evidence and the case was being dropped.

The League decided to take a private prosecution against Tony Wright and laid the information before Barnstaple Magistrates on 27 October 2005. The trial took place before District Judge Farmer on 31 July and 1, 2 and 4 August 2006.[44]

The Court had first to decide if Tony Wright had been hunting a mammal with dogs. Section 1 of the Act provides: "A person commits an offence if he hunts a wild mammal with a dog, unless his hunting is exempt." District Judge Farmer said that he could do no more than draw his own conclusions having viewed the video evidence. He asked, was what he saw "hunting" in the sense that two hounds bred to hunt were chasing, following or pursuing a fox in a manner which most people would describe as "hunting" or was it something else? In his view he had been shown two dogs hunting foxes that had been found or flushed by them. The video evidence showed a substantial period of chase or, as the judge would say, hunting.

Having found that Tony Wright had been hunting a wild mammal with dogs the judge then had to turn to the rather more difficult issue of whether he could successfully avail himself of the statutory defence under section 4 of the Act which provides: "It is a defence for a person charged with an offence under section 1 … to show that he reasonably believed that the hunting was exempt." The judge made the point that it was for the defence to prove reasonable belief by Tony Wright that the hunting was exempt on the balance of probabilities and that whether a stated belief was reasonable needed to be assessed by an objective evaluation by the court.

As stated above, there are a number of categories of exempt hunting. Tony Wright's case fell into the first exception "Stalking and flushing out". This is exempt hunting if five statutory conditions are met. In Tony Wright's case the first four conditions were met, viz; (a) the stalking and flushing was done with the intention of preventing damage to livestock (clearing foxes to prevent predation of lambs); (b) it took place on land where the hunt had permission to stalk and flush; (c) not more than two dogs were used; (d) the stalking and flushing did not involve the use of dogs below ground. It was Condition 5 that was central and crucial to the case. Condition 5 provides: "(a) reasonable steps are taken for the purpose of ensuring that as soon as possible after being found or flushed out the wild mammal is shot dead by a competent person; and (b) in particular, each dog used in the stalking or flushing out is kept under sufficiently close control to ensure that it does not prevent or obstruct achievement of the objective in paragraph (a)." The judge put it this way:

"The fifth condition is the one that causes the Court concern and does so for the following reasons:

(i) The requirement that "as soon as possible" after being found or flushed the wild mammal is shot dead by a competent person raises three issues for the court:

(a) how long is "as soon as possible";

(b) how many, and how do you deploy competent marksmen [sic];

(c) have the steps taken been reasonable.

(ii) Each dog used in flushing has to be under sufficiently close control not to prevent the ability of the mammal to be shot."[45]

[44] The judgment is available on the website of the League Against Cruel Sports: www.league.org.uk.

[45] Paragraph 23.

In considering those issues the judge made a number of important findings:

– the evidence in the video and that of Tony Wright and Mr Marfleet[46] suggested that once a fox had been flushed "as soon as possible" could be up to two or three minutes, with no indication that it might be inappropriate for the fox to be hunted until it was shot or escaped. In the judge's view that went beyond any definition of "flushing" and he said that the position must be that after the fox is flushed the hounds should be called off,

– on 29 April 2005 Tony Wright had been aware of five foxes being flushed and only one shot and it was not clear if that fox had been flushed by hounds,

– long after the foxes had been flushed they were still being pursued or driven by the hounds, the activity the judge found to be hunting,

– the only gun with the hunt that day was often as far as one-and-a-half kilometers from where the hounds were searching and the gun was never going to be in a position to shoot dead the animal "as soon as possible" after the animal was flushed,

– the effective range of a shotgun is about 25 yards. The area being searched to flush foxes that day was considerable and Mr Marfleet had said in evidence that "you will not know where a fox will go in an area that size",

– because of the distances involved there were occasions when marksman and huntsmen were out of sight of one another so how then once a fox had been flushed could it be killed as soon as possible by a competent marksman?,

– given that Tony Wright had given evidence that there were times when the hounds were some distance from him and, in respect of the second fox, so far ahead that he did not appreciate that a fox had been flushed and was being chased by sight or scent, and given that he did not always know where the marksman had positioned himself (which would not be in the open so as to help improve the chances of a kill) it could not be said that the dogs were under tight control.[47]

Taken together those findings led the judge to conclude that "the answer to the question, were reasonable steps taken to ensure, as soon as possible after a fox having been flushed or found, [that it] was shot dead by a competent marksman, is no", and equally the hounds were not under tight control.[48]

The judge's objective evaluation of Tony Wright's state of belief on 29 April 2005 was that he must have known that the arrangements in place, bearing in mind the terrain, the area being covered, the use of only one marksman and the distance between huntsmen and marksman meant "they could not get close to complying with the fifth condition".[49] Accordingly, he was not satisfied to the required standard that Tony Wright reasonably believed that the hunting he was participating in was exempt hunting within the Act and the prosecution succeeded. It is understood that Tony Wright has appealed against the conviction.

In the light of the passion, controversy and debate arising out of the passing of the Act, some thought that the criminal courts might experience a flurry of prosecutions. This has not happened. The police do not seem keen to make hunt monitoring a priority. The League has set up a body of hunt monitors to gather evidence but given that much hunting takes place on private land they cannot be wholly effective and it is inevitable that much of the hunts' activities are wholly unmonitored.

Some hunts have converted to trail hunting, and some offer a pest control service to farmers. There is no doubt but that many hunts are simply biding their time and waiting for the next Tory government which they hope and expect to repeal the Act.

[46] The terrierman and markman.

[47] Paragraph 30.
[48] Paragraph 31.
[49] Paragraph 32.

What, it is submitted, is clear from the legislation and the approach of the court is that so-called traditional hunting is no longer legal. The only legal hunting that can now take place is that which falls within the exemptions within the Act and they are tightly drawn. Of paramount importance is the requirement to dispatch the hunted animal as quickly as possible. This does not allow for hunting in its previous form at all.

Has the Act been a success? That is a difficult question to answer. Only a few hunts have disbanded. Most still meet on the same days and with the same regularity as before the Act. The exemptions mean that hunts can legitimately go out with their hounds, as long, of course, as they are hunting within the exemption. This points to the real difficulties: monitoring and obtaining evidence of possible offences under the Act. The Avon and Somerset police (who had declined to take the prosecution themselves) issued a statement after the conviction to the effect that the findings of the court had demonstrated a benchmark for what constitutes a breach of the Act, and that they could now learn from this for future standards of prosecution.

Whether the new hunting season will see further prosecutions remains to be seen. A rather surprising method of dealing with hunting annoyance was reported in *The Guardian* on 25 March 2006. Residents of Elcombe valley called on Stroud Council and Gloucestershire police to investigate whether they could issue an anti-social behaviour order (asbo) to members of the Cotswold Hunt after the police and Crown Prosecution Service declined to prosecute alleged breaches of the Act. Colin Peake, anti-social behaviour coordinator for the Council, was reported to have issued a warning under the Anti-social Behaviour Act 2003 – a move which is one step away from issuing an asbo. He stated: "We are saying to three individuals from the hunt, your behaviour has come to our notice and it's not found to be acceptable … People might say this is not what the anti-social behaviour legislation is for, but the Act says it covers actions which cause harassment, alarm or distress to one or more persons. We wanted to find a suitable way of keeping harmony and this was it."

CONSULTATION PROCEDURES

The Department for the Environment, Food and Rural Affairs (DEFRA) has started a period of consultation on two draft regulations under the Animal Welfare Act 2006: the draft Mutilations (Permitted Procedures) (England) (Regulations) 2007 and the draft Docking of Working Dogs' Tails (England) (Regulations). The consultation paper can be obtained from DEFRA and comments should be submitted by 16 January 2007.

DEFRA's consultation period on proposals for changes to the Deer Act 1991 concerning deer management in England and Wales closed on 24 October 2006. In addition, its consultation period on the draft code of practice providing guidance on the humane treatment of poultry awaiting slaughter closed on 29 November 2006.

PARLIAMENTARY ENQUIRY

On 26 October 2006 Eric Martlew MP announced the membership of the parliamentary enquiry into issues surrounding the welfare of greyhounds in British racing. The enquiry is chaired by Mr Martlew and the other members are: Lord Beaumont of Whitley, Lord Bradley of Withington, Russell Brown MP, Harry Cohen MP, Baroness Golding, Lord Hoyle, Alan Meale MP, Nick Palmer MP, Andrew Rosindell MP, and Theresa Villiers.

The practice of shark finning

Penny Morgan
Comparative psychologist

A basking shark's tailfin destined for shark fin soup can fetch $10,000 (£5,250) in a fish market, and a bowl of the soup $100. More than 10,000 tonnes of fins are supplied to Hong Kong, China Taiwan, Japan and Singapore every year.[50]

[50] "Sharks pay high price as demand for fins soars", *The Guardian*, 31.8.2006.

The high market value of shark fins has fuelled the terrible practice of "finning" whereby the fin is hacked off while the shark is still alive and the mutilated creature or carcass is returned to the water – the rest of the shark being less valuable. Although finning is **theoretically** banned in the EU (under Regulation (EC) No 1185/2003[51]), the law is poorly enforced and does not actually prevent the practice from occurring.

Scientists agree that the most effective way to implement a finning ban is to require that sharks are landed whole with their fins still attached. However, in order to grant fishermen the flexibility to store fins and carcasses separately, most of the world's finning bans are enforced through a fin to carcass ratio. Regulation (EC) No 1185/2003 states that fins must not exceed 5% of the total shark catch landed,[52] working on the assumption that the fin weights 5% of the whole body. In theory, the aim is to avoid sharks being thrown back finless by requiring all of the corresponding carcasses to be landed. However, evidently this is not working as the European Parliament recently[53] called on the Commission for a proposal to amend the Regulation in order to address the difficulties created by allowing the landing of fins and carcasses at separate ports. Separate landings prevent a determination as to whether the percentage of fins to bodies exceeds the 5% limit.[54]

In addition, both the Shark Alliance and the World Conservation Union assert that the 5% figure is too high, therefore encouraging finning, and that the appropriate figure would be around 2%, because most species' fins weigh much less than 5% of the whole body.

Recently, a proposal was made which, if successful, would have rendered the ban even more ineffective and pushed many species in the North Atlantic and around our shores (porbeagle, angel, shortfin mako and spiny dogfish) towards extinction. The European Parliament's Fisheries Committee recommended replacing the abovementioned figure of 5% with that of 6.5%[55] (which translates as finning at least three sharks for every one landed). However, the European Parliament has now, in the face of strong Spanish opposition, rejected this recommendation, and supports the adoption of the 2% figure.[56]

"We are pleased that the European Parliament has changed course on shark policy by replacing reckless recommendations with those based on science," said Sonja Fordham, Shark Alliance Policy Director. "This responsible decision reflects the growing awareness of the plight of these vulnerable species and the public's will to safeguard them."[57]

Recent calculations by the University of Hawaii and elsewhere[58] estimate that the numbers of sharks caught around the world are far higher than the figures issued by the UN's Food and Agriculture Organisation (FAO) suggest. The researchers took inventories of shark fin sales at leading auctions in Hong Kong fin markets between October 1999 and March 2001 and estimated that 1.7 million tonnes of fins are sold globally each year. This is more than quadruple the 0.39 million tonnes estimated by the FAO, and equates to **73 million sharks** per year.[59]

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[51] Council Regulation (EC) No 1185/2003 of 26 June 2003 on the removal of fins of sharks on board vessels, OJ L 167, 4.7.2003, p. 1.
[52] Article 4(4) and (5).
[53] On 28 September 2006.
[54] "Shark alert – revealing Europe's impact on shark populations", a report by the Shark Alliance, August 2006.
[55] Decision of the Fisheries Committee of 30 August 2006 on the application of Regulation (EC) No 1185/2003.
[56] Resolution on the application of [Regulation (EC) No 1185/2003] on the removal of fins of sharks on board vessels (2006/2054).
[57] See www.sharktrust.org.uk.
[58] Clarke, S. et al, "Global estimates of shark catches using trade records from commercial markets", *Ecology Letters*, Vol. 9, 2006, p. 115.
[59] "Shark slaughter shock", News upfront, *New Scientist*, No 2571, 2006, p. 7.

It is thought that the percentage by which some shark populations have plummeted since the advent of industrialised fishing is 90%. They are very vulnerable to over-exploitation due to low reproduction rates.

European fishing fleets have become major exporters of shark fins to supply the Hong Kong market. The UK exports about three tonnes compared with 39 tonnes exported by Norway and a massive 2,000 tonnes exported by Spain,[60] one of the world's major producers of shark fins.

The Shark Trust want the EU to follow South Africa, the US, Oman, Brazil, Costa Rica, and parts of Australia which have banned finning in their territorial waters.

Animal welfare and the Charities Act 2005

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Charities Act 2005

The Charities Act 2006 (the "Act") revisits what it means to be a charity in terms of charitable purposes and public benefit. The Act received Royal Assent on 8 November 2006, although with the exception of some technical provisions it is not yet in force.

Under section 1, a charity must be established for charitable purposes only. To satisfy this requirement, section 2 states that a charity must have:

(a) a charitable purpose in law; and

(b) public benefit.

The Act sets out 13 charitable purposes including a specific purpose of the "advancement of animal welfare".[61] This was not included in the original list of ten charitable purposes proposed by the Government's Strategy Unit in its comprehensive review of charity law in September 2002.[62] The Government added this purpose in July 2003,[63] largely in response to comments received during consultation on the Strategy Unit's report, which included lobbying by the RSPCA. The Charity Commission also supported its inclusion.

The Act also contains a separate charitable purpose of "the advancement of environmental protection or improvement",[64] which may be relevant to some animal welfare organisations.

Current charitable purposes

The current law recognises four charitable purposes (heads of charity), the second being the advancement of education and the fourth being the broad "trusts for other purposes beneficial to the community". This is used to cover a number of different purposes which have been accepted as charitable from time to time.

In essence, the Act repeats the current charitable purposes and does not radically change existing law. Instead it lists purposes separately so as to provide further clarity. Section 2(2)(m) contains a similar catch-all provision to the present fourth head of charity.

Currently, case-law has established that animal welfare may be charitable in some circumstances, but there has been no formal charitable purpose designed for animal welfare charities. Some charities concerned with animal welfare are also seen as charitable under the second charitable purpose, the advancement of education (such as some zoos and rare breed parks).

The existence of a new separate purpose will assist organisations working in this field as it will provide formal recognition. It should also mean that these organisations are regulated in a way that is appropriate to their type of charity.

[60] Based on 2001 figures.
[61] Section 2(2)(k) Charities Act.
[62] "Private Action, Public Benefit", a report by the Strategy Unit, September 2002.
[63] Government response "Charities and Not-For-Profits: A Modern Legal Framework", July 2003.
[64] Section 2(2)(i) Charities Act.

Public benefit test prior to the Act

At present, organisations which have objects under the first three charitable heads are presumed to benefit the public, whereas organisations working under the fourth head must demonstrate their public benefit. An organisation helping animals will only be charitable under the fourth head if it can prove this further element of public benefit. The key word to consider is "public", meaning mankind or a section of mankind. Whether something is charitable or not is dependent on its effect on mankind. Advancing animal welfare for the sake of animals alone is not charitable.

Case-law has established that the public benefit gained from animal welfare comes from the moral improvement derived from the promotion of feelings of kindness towards animals. This notion dates back to a 1915 High Court case[65] where it was held that a gift for the benefit of the protection of animals did provide public benefit. This arose from an indirect moral benefit to the community, through the promotion of "feelings of humanity and morality".[66]

It is difficult to identify the boundaries between an organisation which provides public benefit by promoting morality and one which does not. A trust to "rescue, maintain and benefit" cruelly-treated animals was held to be charitable as it checked "the innate tendency to cruelty".[67] Similarly a trust for the welfare of cats and kittens passed the test "with honours" as it allowed "manifestations of the finer side of human nature".[68] In *Re Grove-Grady, Plowden* v *Lawrence*,[69] however, it was held that a gift for the preservation of animals in the form of a wildlife sanctuary was not charitable. The particular sanctuary was prevented from being charitable partly because, although the animals within the sanctuary were protected from human harm, they were still free to kill one another. In *Re Wedgewood* it was also suggested that a trust for the preservation of carnivorous animals, such as birds of prey, might not be charitable.[70]

What is regarded as charitable or morally elevating is unavoidably linked to prevailing social values. In a 2003 decision, for example, the Charity Commission commented on *Re Wedgewood's* exclusion of birds of prey saying, "circumstances and attitudes have changed greatly since that case was decided in 1915".[71]

If an animal welfare organisation argues that it provides a moral public benefit, it must weigh the moral improvement against any other consequences which may be detrimental to the public. For example, in *National Vivisection Society* v *IRC*[72] a trust for the total suppression of vivisection was deemed not charitable. It was decided that the benefit to mankind from research carried out using vivisection outweighed the unquantifiable moral benefit to mankind of promoting the welfare of the animals concerned.

Wildlife organisations which are charitable because they advance education would need to show an educational benefit to the public. This can be established through public access, or the publication of research.

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[65] *Re Wedgewood, Allen* v *Wedgewood* [1915] 1 Ch 113.
[66] Ibid.
[67] *Re Green's Will Trusts* [1935] 3 All ER 455.
[68] *Re Moss, Hobrough* v *Harvey* [1949] 1 All ER 495.
[69] *Re Grove-Grady, Plowden* v *Lawrence* [1929] 1 Ch 557.
[70] See footnote 6.
[71] Charity Commission decision of 30 January 2003, concerning the application for registration of The Wolf Trust.
[72] *National Anti-vivisection Society* v *IRC* [1947] 2 All ER 217.

Public benefit under the Act

Under the Act, all charities will have to show that they are capable of producing a benefit which can be demonstrated and which is recognised in law as beneficial. The Charity Commission will publish guidance on how public benefit will be determined, but this is likely to be based on its current guidance. This requires benefit to the public or a sufficient section of the public. Any private benefit must be incidental. The removal of the presumption of public benefit should not radically change the current legal principles surrounding public benefit; instead it will ensure that these principles are adhered to by all organisations.

It appears that in essence the assessment of public benefit will not change under the Act in relation to organisations which previously relied on the fourth head of charity, such as many animal welfare organisations. Public benefit will be evaluated according to previous case-law and animal welfare charities will still have to demonstrate public benefit in terms of moral improvement or educational value. The difficulties surrounding proving public benefit in this context, as well as the reliance on the prevailing moral climate, are therefore likely to continue.

Concerns were raised during parliamentary debate that the Act might allow an extension of the definition of public benefit to allow further organisations (and in particular certain anti-vivisection organisations) to become charitable. It was suggested that, to prevent this occurring, animal welfare organisations should follow the Charity Commission's definition of animal welfare charities[73] and that this definition should not be widened. The Government also emphasised that it is the Commission's role to intervene if an animal welfare charity acts in a manner detrimental to the public. The rules surrounding charities and political campaigning will also apply.

Conclusion

Under the Act, animal welfare charities will no longer have to fit their objects within the existing four heads of charity because the "advancement of animal welfare" will be recognised as a charitable purpose in its own right. This should make registration and regulation more straightforward for such organisations.

Animal welfare organisations will still have to prove public benefit and show that this benefit is not outweighed by activities or objects which are detrimental to the public. It is likely that this public benefit will continue to be assessed as it is currently, by looking at case-law and ideas of moral improvement, despite the evidential and ethical difficulties involved.

[73] "The advancement of animal welfare includes any purpose directed towards the prevention or suppression of cruelty to animals or the prevention or relief of suffering by animals." See www.charity-commission.gov.uk/spr/corcom1.asp.

Managing wild animals

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In an earlier article,[74] this writer discussed the need, in certain circumstances, to cull wild animals, sometimes to the point of total eradication. This article will continue to examine the management of wild animals in the UK, considering both the need for culling and, more importantly, possible alternatives. The species to be discussed are managed by different methods, for a variety of reasons and, for the purposes of this article, the requirement to manage wild animals will be taken as a given. It is important to note that all culling is carried out under licence and/or legislative provisions.

[74] Martin, B., "Culling of non-native species", *Journal of Animal Welfare Law*, November 2005, pp.12-15.

The American bullfrog, a non-native species, was first imported into this country in the 1970s, where it flourished.[75] Over time, some of the frogs escaped, while others were deliberately released into the wild, where they posed a potentially serious threat to native wildlife, preying not only on other amphibians but also on small mammals and birds. By 1996, they had established two breeding colonies. In 1997, their importation was banned under Regulation (EC) No 2551/97.[76] However, to protect the environment, the colonies had to be eliminated, which has taken time, and in 2004 a sinister development occurred. The chytrid fungus was found in two bullfrogs. Fortunately, this deadly fungus which causes the disease chytridiomycosis, and which has been responsible for wiping out colonies of frog populations throughout the world, seems to have only infected the bullfrogs, although the native frogs continue to be screened.

The grey squirrel, another non-native, was introduced in the late nineteenth century in small numbers to Great Britain, where it flourished and is now normally the only squirrel seen by the public. Like the bullfrog, it is a potential disease vector, this time for the squirrelpox virus, which appears not to harm it but which kills the highly endangered native red squirrels with extreme rapidity. It also strips bark from trees, damaging important habitat and causing severe economic loss. Under the Convention on Biological Diversity (CBD),[77] the red squirrel is a priority UKBAP[78] species, which puts the Forestry Commission under a duty to take measures to conserve it, thus some measure of control was inevitable. In January 2006, the Minister for Biodiversity announced that there would be a cull of greys, targeted on areas where their presence critically threatened the reds and the management of woodland.[79] At the same time, it was made clear that the intention was not total eradication of the greys, and that funding was to be made available to investigate other methods of control such as immuno-contraception. The Forestry Commission is also considering different methods of sylvan management, to offer woodland better protection from the squirrels.

A very different form of management applies, in particular circumstances, to badgers, where they come into conflict with development control. Under Town and Country Planning legislation, all development requires planning permission, but where there are badgers *in situ*, this must be taken into account when deciding on whether to grant such permission. Normally, this is achieved by attaching the appropriate planning conditions to the grant and can include, for example, postponing commencement of the project until the animals have been transferred to new, purpose-built accommodation. Similarly, a licence for translocation could be granted to the owners of a golf course where badgers were digging up the greens. However, badger management is at its most controversial in the area of bovine TB.

Unfortunately, the badger has been demonized as the main transmitter of TB to cattle and, because of this, during the last 30 years, many thousands of badgers have been killed in a vain attempt to halt the spread of the disease. Furthermore, the results of a recent experiment, the Random Badger Culling Trial (RBCT), designed to determine scientifically whether culling badgers in infected areas is an effective and sustainable management tool, have been inconclusive and confusing.

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[75] Fasham, M. & Trumper, K., "Review of non-native species, legislation and guidance", P328 DEFRA NNS review V5.doc, 2001, p.36.

[76] Commission Regulation (EC) No 2551/97 of 15 December 1997 suspending the introduction into the Community of specimens of certain species of wild fauna and flora, OJ L 349, 19.12.1997, p. 4. Now replaced by Commission Regulation (EC) No 191/2001 of 30 January 2001 suspending the introduction into the Community of specimens of certain species of wild fauna and flora, OJ L 29, 31.1.2001, p. 12.

[77] Entered into force on 29 December 1993.

[78] UK Biodiversity Action Plan.

[79] See www.defra.gov.uk/news/latest/2006 /wildlife-0123.htm.

In the trial, areas of land in different parts of the country were divided into three, each section receiving a specific treatment. No badgers were killed in the control area, all badgers were killed in the proactive area and, in the reactive area, only those badgers found near farms where there was a confirmed case of bovine TB during the trial period were killed. However, culling in the latter area was suspended because there was a large increase in infected cattle. This unexpected result might be due, in part, to the "perturbation hypothesis", whereby survivors of stable badger groups that have experienced culling no longer stay within their territories but wander haphazardly, possibly spreading infection.[80] Despite pressure from farmers and vets for a wholesale cull in those areas worst affected by the disease, the Department for the Environment, Food and Rural Affairs (DEFRA) put the matter out for consultation. The response was an overwhelming 96% of participants opposed to a cull, although a more considered approach, running in parallel and using workshops better to explain the many different issues to be taken into account, produced a figure of 50%. Meanwhile, the results of the RBCT are being analysed and research continues unabated in an attempt to find a possible vaccine for the badgers.[81]

Finally, to wild deer, where the numbers of all species have grown so much that current legislation is no longer adequate to "promote effective, sustainable deer management".[82] Therefore DEFRA is seeking "changes to legislation governing deer management in England and Wales",[83] by way of a reform order to amend the Deer Act 1991. This would permit a higher level of culling than is presently allowed by, *inter alia,* shortening the close season, taking or killing dependent deer and licensing some killing or taking at night.[84]

Deer require management because the amount of damage they can cause, just to agriculture for example, can result in severe economic loss. Furthermore, like the grey squirrels, it is the damage that they do to threatened woodland habitats that requires the Government to take action to comply with its obligations under the CBD.

So are there any alternatives to culling? Fencing an area to keep out deer can work well to help regeneration, but as a permanent feature it has the potential to cause further problems. The excluded deer must go somewhere and any change in migration routes could result in more of them crossing roads, potentially very hazardous. DEFRA is researching deer immuno-contraceptives, but their use is not straightforward. On a much smaller scale, solutions of deer repellents can be brushed or sprayed onto vegetation, although this too is fraught with difficulty.

A further possibility could be through the reintroduction of natural predators such as the wolf and/or the lynx. Although this would be permitted under the Directive on the conservation of natural habitats and of wild fauna and flora,[85] whether or not it would be feasible, or even desirable, has yet to be determined,[86] and experience in other countries suggests that the predators themselves could be at risk. Indeed, recent attempts to reintroduce the brown bear into the Pyrenees have met with fierce resistance from farmers.

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[80] Professor David Macdonald and his team at WildCRU, University of Oxford, are actively researching links between badgers and bovine TB, including this extraordinary phenomenon.

[81] Information given to the author by DEFRA.

[82] "Extended deer cull would put orphan fawns in hunters' sights", *The Times,* 30 August 2006.

[83] DEFRA Consultation Document, August 2006.

[84] Ibid

[85] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.192, p. 7.

[86] In any case, it would only take place under licence.

Furthermore, long-term effects are not always predictable.[87] Who could have foreseen that hedgehogs, merely translocated from mainland Britain onto the Outer Hebrides in the 1970s, as a natural form of pest control for slugs, would end up the subject of a highly controversial cull to completely eradicate them.[88] Nor is it possible to ensure that if wolves, for example, were allowed to roam freely within the secure borders of wildlife parks, as has been proposed,[89] some would not escape or even be deliberately released. This is what happened to wild boar. Once a native British species, they were reintroduced to be farmed and they are now so numerous in the wild that although, unlike deer, they are good for woodland habitat, they pose a potential health threat to domestic pigs. DEFRA is currently working on an action plan which, in addition to other forms of management, will include some culling, probably in selected areas.[90]

Thus it would seem that problems can arise when a species becomes so numerous that it impacts adversely on other species and habitats. Although, in this situation, some culling will almost always be inevitable, it will normally only be one facet of a carefully devised management plan, which will use appropriate alternatives whenever possible. Natural control can be even better. This is exemplified by the impact the recent recovery of otters has had on the non-native American mink, outcompeting them and driving them away, which, in turn makes a safer habitat for the critically endangered water voles. In conclusion though, it seems as though some form of management of wild animals will always be required.

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[87] Now a risk assessment would be required first.
[88] See footnote 74.
[89] "Charity's wild ideas for the Pennines", *Bolton Evening News,* 1 November 2005.
[90] Information given to the author by DEFRA.

What is ALAW?

ALAW is an organisation of lawyers interested in animal protection law. We see our role as pioneering a better legal framework for animals and ensuring that the existing law is applied properly.

We believe that lawyers should, as well as interpreting laws, ask questions about the philosophy underlying them: they have always had a central role in law reform. There is also a real need to educate professionals and public alike about the law.

Animal cruelty, of course, does not recognize national boundaries and we are building up a network of lawyers who are interested in animal protection in many different countries.

What ALAW will do

ALAW will:

- take part in consultations and monitor developments in Parliament and in European and other relevant international institutions,
- highlight areas of animal welfare law in need of reform,
- disseminate information about animal welfare law, including through articles, conferences, training and encouraging the establishment of tertiary courses,
- through its members provide advice to NGOs and take appropriate test cases,
- provide mutual support and information exchange for lawyers engaged in animal protection law.

Who can be a member?

Solicitors, trainee solicitors, legal executives, barristers, pupil barristers, judges and legal academics are eligible to join and will receive regular issues of the Journal of Animal Welfare Law. Other interested parties can become subscribers to the Journal and receive information about conferences and training courses. Membership fees: UK and EU – £25.00; overseas = £35.00; concessionary (student/retired etc) – £5.00.

How can you help?

Apart from animal protection law itself, expertise in many other areas is important – for example, public law, civil liberties, environmental health, planning law, freedom of information, civil litigation, media law, company law, charity law and many others.

In addition, lawyers have well-developed general skills such as advocacy and drafting which will be useful in myriad ways. Help with articles and training will also be welcome.

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