ANIMAL SENTIENCE & SENTENCING

EFRA Committee Inquiry
January 2018

A-LAW
UK Centre for Animal Law

Written evidence submitted by the UK Centre for Animal Law (A-Law) (AWB0011)

Executive summary

- The UK Centre for Animal Law (A-Law) is a legal education charity bringing together the expertise of volunteer lawyers. We seek to be a source of objective, independent legal analysis on animal protection law issues.

- Whilst the draft Bill goes a long way towards meeting DEFRA's objective of at least replicating Article 13 TFEU and thus ensuring that the UK's animal welfare protections are not reduced as a result of Brexit, it fails to do so in two important respects.

- The first is that the duty to have regard to animals' welfare needs is imposed only on "Ministers of the Crown". This would leave out many English public bodies which, because they are 'emanations of the State', are currently subject to the Article 13 duty, and which formulate and/or implement policies affecting animal welfare.

- The second is that the draft Bill uses the term "regard", rather than "full regard", and DEFRA has not explained how it would replicate EU mechanisms that currently enable compliance with Article 13 to be audited. There is a risk that the duty imposed by the Bill, which is merely to "have regard" to animals' welfare needs, would not have any practical effect.

- We are also unclear as to why the draft Bill provides for Clause 1 to come into force on a date to be appointed by a Minister, rather than at the same time as Clause 2.

Who we are

1. The UK Centre for Animal Law (A-Law) exists to promote knowledge and education about the law relating to animal protection, and the more effective @enforcement of legislation relating to animals. We seek to be a source of objective, independent legal analysis on animal protection law issues. Whilst legal topics are often complex, it is our job to explain them as clearly as possible, so as to increase the effectiveness of UK animal protection organisations collectively, and to promote informed public debate.

2. Formerly the Association of Lawyers for Animal Welfare, A-Law is led by lawyers – predominantly practising solicitors and barristers – and works closely with legal academics. This present submission is the work product of a working group made up of four lawyers: a practising barrister specialising in public and constitutional law, one of the UK's leading animal law academics, a

retired senior government lawyer and assistant Parliamentary Counsel, and A-Law's barrister chairperson.

3. We are registered as a charity in England and Wales. We are politically neutral and, in particular, take no position on the UK's withdrawal from the EU. As well as publishing legal analyses to inform public debates, we also provide animal protection organisations with access to high quality legal advice to assist their work. We also promote the teaching of animal law in UK universities.

4. Our work has been cited by MPs during the debate on 'animal sentience' in the context of the EU Withdrawal Bill currently before Parliament, and we published a legal analysis paper on that subject, which can be found here: http://www.alaw.org.uk/wp-content/uploads/Article-13-Legal-Briefing-Note.pdf

5. For further information about us, or to access our online resources, please see our website: www.alaw.org.uk

Outline views on the draft Sentencing and Sentience Bill

6. In our view, the draft Bill, published on 12 December 2017, is broadly consistent with DEFRA's stated objective of ensuring that animal welfare protections in UK law are *at least as strong* after Brexit as they are now. In particular, the Bill goes a long way towards at least replicating in UK law post-Brexit the duty currently placed on all UK public authorities, by reason of Article 13 of the Treaty on the Functioning of the European Union (**TFEU**), to have "*full regard to the welfare needs of animals*" when formulating and implementing policies.

7. We are concerned that there is a danger of the Parliamentary and public debate being misdirected into an essentially peripheral debate about recognising animals' 'sentience'. The reference in Article 13 to "sentient beings" identifies the reason behind the Article, which imposes the "full regard" duty on both the EU institutions and the Member States. The operative element of Article 13 TFEU, and its significance, lies not in a recognition of "sentience", but in the duty to have "*full regard to the welfare needs of animals*". Likewise, the significance of Clause 1(1) of the draft Bill is not in recognising 'sentience', but in imposing a duty to "*have regard to the welfare needs of animals*".

8. As a legal education charity seeking to provide objective analysis, we deliberately express no view on the merits of the Bill from a general policy perspective. We think it right to point out (and to draw to the EFRA Select Committee's attention), however, that the Bill, in certain respects, falls short of achieving DEFRA's stated aim of *at least* replicating in UK law post-Brexit the

measure of protection current afforded to animals in UK law by Article 13 TFEU (which, whilst the United Kingdom is an EU Member State, is directly applicable as part of UK law). That is because:

a. The limitation of the "have regard" duty to "Ministers of the Crown" would leave out many public bodies (including public bodies carrying out functions in England) to which Article 13 presently applies (because those bodies are 'emanations of the State') and which are involved in formulating and/or implementing policies relating to, or bearing substantially upon, the extent to which animals' welfare needs are met.

b. The words "have regard" do not carry the same import as "have full regard".

9. To put these concerns into context, we note that the Bill would in certain respects go further than the Article 13 duty. It would not be confined to specific areas of policy (i.e. policy areas falling within the EU's internal market and other competences) but would extend to all areas of UK Government policy. Further, there is no attempt to transpose Article 13's reference to 'religious rites' and 'cultural traditions' (the so-called 'subsidiarity carve-out' which effectively enshrines Member States' rights to make their own moral decisions about things like bullfighting and non-stunned religious slaughter). DEFRA has rightly recognised that it would be hard to justify carrying across those limitations to the post-Brexit situation, since there will no longer be any meaningful or principled distinction to be drawn between policy areas on the basis of whether or not they fall within 'EU competence'.

10. Nevertheless, we suggest that the Select Committee may wish to explore with DEFRA how the Bill might be modified so as to address the 'transposition gaps' we have identified at paragraph 8 above.

The Committee's first question: Potential conflicts between the "*welfare needs of animals as sentient beings*" and "*matters affecting the public interest*"

11. Policy makers often decide upon policies that involve compromising the degree to which animals' welfare needs are met, in order to pursue economic or other public benefits. From a legal perspective, however, we do not think it is accurate to describe the duty in Clause 1(1) to "*have regard to the welfare needs of animals*" as conflicting with the duty in Clause 1(2) to "*have regard to matters affecting the public interest*". Ministers and public bodies have no difficulty in having regard to more than one consideration at the same time. Thus, a duty to have regard to more than one matter does not, of itself, create any conflict between those matters.

12. Clause 1(1) does not go further than requiring Ministers to "have regard to" animals' welfare needs, i.e. take those needs into account as a relevant consideration. That form of words imposes the lowest possible level of duty on Ministers, in that it identifies a matter that they should consider when formulating and implementing policies, but *does not say what, if any, weight should be given to that consideration*. It is a well-established principle of English public law that the fact that a Minister or public body must regard something as a relevant consideration does not constrain the Minister's discretion to decide what weight to give to those considerations (provided only that the Minister's exercise of discretion is not '*Wednesbury* unreasonable'). A Minister could therefore comply with Clause 1(1) even if he or she decided to give little, or even no, weight to animals' welfare needs.

"Full regard" and ensuring that Clause 1 makes a practical difference to animal protection in the UK

13. The fact that Clause 1, as presently drafted, would not give rise to any conflict highlights that there are good reasons for concern that Clause 1, as presently drafted, would have little or no practical effect in terms of ensuring that animals' welfare needs are properly considered by policy-makers. There is a real risk that Ministers would comply with the duty merely by stating that they have considered animal welfare interests, whilst not explaining how animals' welfare needs have been balanced against – and perhaps ultimately outweighed by – competing public interest considerations. There is also a real risk that Ministers will give little or no weight to animals' welfare needs.

14. Whilst Article 13 uses the term "full regard", Clause 1(1) merely requires Ministers to have "regard" to animals' welfare needs. We understand why DEFRA has preferred the term "regard": the term "full regard" is not one that is used in other UK legislation, and it arguably lacks precision as to its intended meaning and effects. It does not follow, however, that a duty in UK law to have "regard" can properly be regarded as being equivalent to the "full regard" duty in Article 13. In our view, Article 13 uses the term "full regard" (rather than merely "regard") in order to convey the imperative for EU and State bodies that are formulating or implementing policies affecting animals to give *particular* consideration to animals' welfare needs. This would include thinking about what relevant needs the affected animals have, how those needs can be met, and (where necessary) balancing those needs against competing public interests. A duty merely to have "regard" does not convey the same sense.

15. We therefore suggest that, in view of DEFRA's stated objectives behind the Bill, it would be appropriate for Clause 1(1) to use the term "full regard".

16. If, however, DEFRA maintains its reluctance to use terms that are not already in use in other UK legislation, then consideration should be given to using the term "due regard". We note that the term "due regard" is used in other UK legislation: see, for example, the Equality Act 2010, section 1(1) of which requires public authorities to "*have due regard to the desirability of exercising [their functions] in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage*", and section 149(1) which requires public authorities to "*have due regard to the need to*" eliminate discrimination and advance equality of opportunity. The Equality Act used the term "due regard" because the Government of the time did not consider that the word "regard" would capture adequately the sense that it wanted the legislative provisions to convey.

17. Further, in order that the duty (however it is ultimately formulated) to "*have regard to the welfare needs of animals*" has a real practical effect, we suggest that Parliament give consideration to what mechanisms would be appropriate for evaluating, periodically, how the duty is being observed in practice, and how policy-makers are balancing animals' welfare needs against other public interests. The mechanisms that might be adopted could, for example, include any of the following:

    a. A requirement that Ministers (or other public bodies) to whom the duty applies should, where they are considering policy changes likely to have a significant impact on the protection of animals' welfare, carry out a prospective assessment of that impact and consider how any negative impacts might be mitigated.

    b. A requirement that the Secretary of State for EFRA deliver a report to Parliament every two years on the impact that the duty is having, and on what actions have been taken for ensuring that the welfare needs of animals are being met (i) by UK legislation and administrative practice and (ii) in relation to the United Kingdom's agreements with other sovereign States relating to international trade.

    c. The creation of an Animal Welfare Commission whose responsibilities would include keeping under review, and reporting periodically on, how the duty was being met in practice. (We note that the creation of an Animal Welfare Commission may be necessary in any event after Brexit, when the UK will no longer be part of the EU's scientific and technical committees. The UK will need to develop its own alternative mechanisms for ensuring that robust animal welfare standards are developed and evaluated by a science-led independent body.)

18. We note that EU law includes mechanisms for auditing how the Article 13 duty is being met in practice. In that regard, we refer, by way of example, to the

EU Court of Auditors' currently ongoing audit of animal welfare in Romania, Poland, France, Italy and Germany: see the news release announcing the start of the audit in October 2017 and the auditor's recent background paper: https://www.eca.europa.eu/en/Pages/NewsItem.aspx?nid=8909 and https://www.eca.europa.eu/en/Pages/NewsItem.aspx?nid=9441. Again, DEFRA's stated objective of ensuring that animal protection is not reduced as a result of Brexit suggests that it would be appropriate for UK law to provide its own audit mechanism post-Brexit.

Is it appropriate for Clause 1(2) to impose a new "duty" on Ministers to "have regard to matters affecting the public interest"

19. We understand why the Bill makes clear that animals' welfare needs may need to be weighed alongside other public interest considerations. However, the phrasing of Clause 1(2) is curious in that it would impose a new *legal duty* on Ministers to "*have regard to matters affecting the public interest*" when formulating and implementing government policy.

20. No such statutory duty currently exists in English law (albeit that it is a non-statutory principle of English public law that Ministers and public authorities must, when taking decisions and carrying out functions, take account of all relevant considerations, whilst disregarding any considerations that legally cannot be relevant). If Clause 1(2) were to be retained in its present form, it would, for the first time, impose an overarching duty on Ministers to "*have regard to matters affecting the public interest*".

21. In our view, it is difficult to see the need for the statutory imposition of such a duty. The imposition of such a duty could have legal consequences that we doubt DEFRA intends to bring about. For example, a person unhappy with a particular decision of a Government Department, for reasons unconnected with animal welfare, could potentially rely on Clause 1(2) so as to bring a judicial review claim against the relevant Minister, alleging that the Minister had, by not considering it appropriate to take a particular consideration into account, breached the Clause 1(2) duty to "*have regard to matters affecting the public interest*". Were the court to entertain such an approach, then this could undermine the longstanding public law principle that it is generally for the decision-maker to decide what considerations are "relevant", provided that the decision-maker's decision that a particular matter is not relevant is consistent with any relevant statutory framework and is not irrational.

22. Further, the imposition of such a duty could serve to weaken the Clause 1(1) duty to "*have regard to the welfare needs of animals*" because the terminology used – "*have regard to*" – is the same in the two sub-clauses. The courts could interpret this similarity as demonstrating that Parliament was not seeking to require that any specific consideration be given to animal welfare,

even when formulating and implementing policies that are obviously liable to impact significantly on animal welfare. If the courts interpreted Clause 1(1) in that way, then the clause could be rendered of no real legal or practical value.

23. It seems to us that DEFRA's true policy intent behind Clause 1(2) is not to impose a new statutory duty on Ministers to have regard to (all) matters affecting the public interest, but rather to make clear that Clause 1(1) does not mean that the welfare needs of animals should necessarily trump competing public interests. We therefore suggest that Clause 1(2) be replaced with alternative wording which makes clear that animal welfare interests may be outweighed by competing public interests, but which does not impose a new statutory duty to take (all) public interest considerations into account when formulating or implementing policies.

The Committee's second question: Definitions of words used in the Bill

'sentient'

24. We think that the preferable approach is the one already taken by the draft Bill, which does not define 'sentient beings'. Our reasons are these:

    a. The meaning of the word 'sentient' in Clause 1(1) is not likely to be of legal or practical significance. To the extent that Clause 1(1) produces a legal and practical effect, it is by imposing a duty to *have regard to animals' welfare needs*. It is therefore unclear what, if any, useful legal purpose would be served by defining 'sentient beings'.

    b. To the extent that the reference in Clause 1 to the concept of 'sentience' has any legal significance, it is simply in explaining the reason why animals have welfare needs, namely that animals are "*able to perceive and feel things*" (this is the Oxford English Dictionary definition of 'sentience' and is quoted in the DEFRA consultation). It seems appropriate that the concept of 'sentient beings' should be a flexible one, and should not be artificially narrowed so as to apply only to species of animals that can experience a broad range of feelings, or feelings of a particular kind. Further, our understandings of animal 'sentience' are likely to develop over time due to developments in scientific knowledge, and this is another reason why it is not desirable to attempt to define 'sentience': a definition risks laying down an approach that may later be found not to represent the best understanding of the issue.

    c. The extent and degree to which animals of particular species may experience feelings (physical, mental or emotional) will vary from species to species. The fact that an animal species is thought to have

only limited ability to experience pain or suffering does not necessarily mean that it has *no* welfare needs, but it is certainly relevant to identifying what those welfare needs might be. A Minister (or public body) to whom the Clause 1(1) duty applies should consider this when identifying the welfare needs of the animals likely to be affected by the policy being formulated or implemented. The fact that an animal is likely to experience *some* feelings should suffice for the Minister to be required to have regard to the animal's welfare needs relating to those potential feelings (e.g. pain or hunger), even if there is little scientific evidence that animals of that species experience more complex feelings (e.g. loneliness or emotional distress).

'animal'

25. We think that the preferable approach is the one already taken by the draft Bill, which does not define 'animal'. Our reasons are these:

    a. The word 'animal' is a perfectly good ordinary English word, which is (as the DEFRA consultation notes) defined in the Oxford English Dictionary as meaning "*an organism endowed with life, sensation and voluntary motion*". It is difficult to see how the dictionary meaning of the word 'animal' could usefully be improved upon by a statutory definition.

    b. The fact that the legislation does not define 'animal' would not have the consequence of requiring a person to whom the Clause 1(1) duty applies to have regard to *non-existent* welfare needs of any species of animal. A duty to "*have regard to the welfare needs of animals*" does not make any assumption that all animals have specific welfare needs, or as to what those welfare needs would be. In other words, the appropriate parameters of the duty are already set by reference to the concept of 'welfare needs': welfare needs should be considered in relation to species of animals to the extent that they have such needs.

    c. Thus, if the word 'animal' is not defined, then the duty will have built into it an appropriate degree of flexibility, recognising that even relatively simple animal species may have *some* ability to feel, and may therefore have *some* welfare needs. Animals' abilities to experience pain, suffering and pleasure of various kinds will vary from species to species, and therefore welfare needs will vary from species to species. If, for example, there does not exist scientific evidence indicating that a species of animal can feel a sense of fear, this does not prevent it from having other welfare needs (such as a habitat or food supply) that ought to be at least weighed in the balance when formulating policy. Allowing the word 'animal' to carry its ordinary language meaning

would therefore be appropriate for ensuring that the welfare needs of animals are at least considered when policies are being formulated and implemented.

d. The flexibility of allowing the dictionary meaning to apply would also assist in ensuring that the legislation keeps pace with any changes in scientific understanding regarding the welfare needs of animals of different species.

e. We do not think that this flexibility would be at the expense of creating legal uncertainty and/or practical difficulties. In that regard, we note that: (i) the duty is to *have regard* to welfare needs, not necessarily to ensure they are met; and (ii) a statutory definition would not necessarily achieve greater legal certainty, but could in fact have the opposite result.

'welfare needs'

26. We think that it would be helpful for the Bill to define 'welfare needs of animals' by way of a non-exhaustive list of needs that animals might have. This approach could help give the Clause 1 duty a degree of substance and depth by identifying the kinds of welfare needs that the person who is subject to the duty should think about. This could reduce the risk of Ministers 'discharging' the duty by dismissing animal welfare considerations in a very cursory manner.

27. The list could, for example, provide that references to "*the welfare needs of animals*" include (so far as relevant to the relevant animals of the relevant species):

- protection from pain, suffering (whether physical or otherwise) or discomfort;
- protection from injury and disease;
- protection from hunger and thirst;
- protection from fear and distress;
- ability to express natural behaviours and having sufficient space in which to do so; and
- promotion of a positive state of well-being (including mental well-being).

<u>Additional issue #1: The persons or bodies to which the duty applies</u>

28. We wish to bring to the Select Committee's attention a number of points that do not fit within the Committee's two specific questions regarding Clause 1. The first such point is as to the persons or bodies to which the Clause 1(1) duty would apply.

29. We agree that, as a matter of legislative and political pragmatism, it would be appropriate for the Bill to avoid imposing duties on the devolved administrations. (We note the indication in the DEFRA consultation that DEFRA is working with the devolved administrations to encourage them to adopt their own legislation for imposing on their Ministers and public authorities a similar duty. It may be that the devolved legislatures would be willing to pass Legislative Consent Motions with respect to the Bill, but we have made no assumptions that they would do so.)

30. We do not, however, agree that the draft Bill's limitation of the duty to "Ministers of the Crown" has been rationally justified by DEFRA, or would achieve DEFRA's stated objective of ensuring that the UK's animal welfare laws are not weakened as a result of Brexit. That is so for the following reasons:

    a. The use of the term "Ministers of the Crown" would give rise to a distinction, for which we can see no rational policy justification, as between (a) policy formulation and/or implementation by Ministerial Government Departments, including by executive agencies which are, on a correct legal analysis, acting in the name of (i.e. as an *alter ego* of) a UK Minister, and (b) policy formulation and/or implementation by Non-Ministerial Government Departments and Non-Departmental Public Bodies.

    b. The exclusion of Non-Ministerial Government Departments and Non-Departmental Public Bodies from the Clause 1 duty would be a serious and unjustifiable lacuna, since many areas of animal welfare policy and implementation are the responsibility of such bodies. For example:

        i. The Food Standards Agency, which is responsible for the inspection of slaughterhouses, is a Non-Ministerial Government Department.

        ii. The Forestry Commission, which has public law powers to take decisions having major impacts on wild animal welfare, is a Non-Ministerial Government Department.

        iii. A wide range of licensing powers relating to the killing and/or management of birds and other wild species are invested in Natural England, which is a Non-Departmental Public Body.

    c. It is also unclear why the Clause 1 duty has been framed so that it would not apply to local authorities. Local authorities have a wide range of functions and powers relating to animal welfare, including the

collection of stray dogs, the licensing of boarding and breeding establishments, and the enforcement of the Animal Welfare Act 2006.

d. We understand that DEFRA may have confined the Clause 1 duty to UK Ministers on the basis of a mistaken assumption that the Article 13 duty currently applies only to the UK Government. It does not. As a matter of EU law, Article 13 (which currently has direct effect in, and therefore forms part of, UK law) imposes a duty on "Member States", and that term includes all 'emanations of the State'. The EU law concept of 'emanations of the State' includes all central and local government bodies and agencies, where they are carrying out functions of the State.

31. For all these reasons, if the Clause 1 duty remains confined to "Ministers of the Crown", then the Bill will not achieve DEFRA's stated objective of ensuring that current animal welfare protections applicable in UK law are not weakened as a result of Brexit. We therefore propose that the Clause 1 duty be extended to include *at least* the following bodies, in addition to UK Ministers:

    a. UK Government bodies listed in a schedule to the Bill – a list that should include the Food Standards Agency, the Forestry Commission, Natural England, and such other bodies as the Secretary of State for EFRA may by order add to the list from time to time (this provision for bodies to be added will enable the Secretary of State to, in due course, add to the list the new animal welfare and other bodies that are likely to be created post-Brexit in order to carry out functions that are currently carried out at EU level); and

    b. English local authorities.

Additional issue #2: Making clear that the duty to consider animal welfare applies when considering whether or not to review a policy

32. In order to ensure that animal welfare protections keep pace with societal expectations and changes in scientific knowledge, it is important that those policies be kept under review. Arguably, it is implicit in Clause 1 that the duty that it imposes extends to decisions about whether or not to review a policy. However, it would assist the clarity, and therefore the effectiveness, of the legislation to state this expressly. We suggest that this could be done by adding a provision to the Bill stating expressly that 'formulating policy' includes considering whether or when existing policy should be reconsidered or reviewed.

Additional issue #3: Date of coming into force

33. Clause 3(3) of the draft Bill provides for Clause 1 not to come into force until such time as it is brought into force by the Secretary of State (whereas the sentencing change in Clause 2 would come into force two months after the Bill received Royal Assent).

34. It is not apparent to us why DEFRA considers it necessary to make the coming into force of the Clause 1 duty conditional on a decision by the Secretary of State. As we understand DEFRA's position regarding Article 13, the UK Government already has regard to animal welfare when formulating and implementing policy. It would seem to follow that no time is required for the Government to put measures in place in anticipation of having to comply with the Clause 1 duty. Accordingly, we suggest that the Select Committee may wish to ask DEFRA to explain why Clause 1 could not come into force at the same time as Clause 2, i.e. two months after Royal Assent.

The Committee's third question: Increase in maximum sentence for certain animal welfare offences

35. On the basis of our knowledge of the criminal law landscape, including the maximum sentences that apply for criminal offences of particular types, we agree that a maximum sentence of five years would be appropriate for reflecting the seriousness of the offences to which DEFRA is proposing to apply that maximum sentence.

36. We also agree with DEFRA that it would be difficult to justify extending that maximum sentence to the offence in section 9 of the Animal Welfare Act 2006 (the offence of failing to take reasonable steps to meet an animal's needs in accordance with good practice), having regard to the kinds of offences that typically carry a maximum sentence of five years. We note, however, that DEFRA should ensure that, where a defendant is accused of a section 9 offence alongside more serious offences, and he/she elects for trial in the Crown Court on the more serious offences, then the legislation should allow for all of the offences to be tried together in the Crown Court.

37. We suggest that paragraph 21 of DEFRA's Explanatory Notes to the draft Bill is not entirely accurate in that it appears to state that a person could receive a sentence of longer than six months only if convicted following a "trial on indictment" in the Crown Court. We understand that the effect of Clause 2 would in fact also allow for sentences of up to five years' imprisonment to be imposed following conviction in a magistrates' court, where that court decided, following the conviction decision, to transfer the case to the Crown Court at that stage, i.e. for sentencing. The Select Committee may wish to seek DEFRA's confirmation that this is indeed the intention. It seems likely that a

significant proportion of sentences of more than six months will follow convictions (following trials or 'guilty pleas') in a magistrates' court, with magistrates deciding to transfer the case because they consider their sentencing powers insufficient to reflect the gravity of the offences.

We are grateful for this opportunity to provide our views to the Select Committee. If there is anything we can do to assist the Select Committee's work, whether in relation to the Bill or any other inquiry or matter, we would be happy to do so.

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