

**Countryside Consultation Response
Draft Animal Welfare (Sentencing and Recognition of Sentience) Bill**

31 January 2018

Introduction

The Countryside Alliance is a membership based organisation that works for everyone who loves the countryside and the rural way of life. We reflect the views and interests of over 100,000 members and supporters who come from all walks of life and every part the United Kingdom.

The Countryside Alliance supports the principles behind the draft Bill. However, we have concerns about the potential for this to be turned from a bill to protect animal welfare into a bill to promote animal rights. We also question the timing of this draft Bill given the demands on the Government's time in this session of Parliament. Defra must not be distracted from the task of implementing new domestic legislation in the key areas of agriculture, fishing, and the environment in preparation for leaving the EU.

The Countryside Alliance recognises the fact that animals are sentient beings. If animals were not sentient then there would be no need for animal welfare legislation, which successive parliaments have passed over nearly 200 years. We note that the scope of the duty in the draft Bill appears to be far wider than the duty under the Treaty on the Functioning of the EU (TFEU), and will create new obligations on Ministers of the Crown to have regard to animal welfare for all animals and across all areas of government policy. We would like to see further information and clarity from the Government on the extent of these new obligations, and an assessment of the impact of this change.

The Countryside Alliance welcomed the Government's announcement last year to increase sentences for the most serious animal welfare offences from a maximum of six months imprisonment to five years, and the inclusion of this policy in the draft Bill. This was a key recommendation of the Environment, Food and Rural Affairs (EFRA) Select Committee's inquiry into animal welfare in the last Parliament. However, we believe this change should be taken forward with the broader range of recommendations in the Committee's report, particularly in respect of the RSPCA ceasing to act as a prosecutor of first resort for animal welfare offences.

We are concerned that creating a statutory duty on all Ministers of the Crown "to have regard to the welfare needs of animals as sentient beings" might be seen by some as an opportunity to limit and curtail the activities of farmers and other land managers, despite the additional requirement that Ministers of the Crown must also have regard to "matters affecting the public interest" in discharging that duty. The Government must resist any attempts to turn this from a bill to protect animal welfare into a bill to promote an animal rights agenda.

Whichever way the draft Bill is looked at it is deficient in almost every respect and far from advancing welfare could have the reverse effect. The Government needs to think again and provide clarity both as to how this duty is to apply across all sectors of government and policy areas, and how the duty is to be discharged, and shown to have been discharged, to avoid legal challenges to ministerial decisions, as well as ensuring that farmers and land managers are not negatively affected.

Consultation Questions

1. Do you consider that the term 'sentience' should be defined explicitly? If so what definition should we use?

Animal sentience is incorrectly referred to as being a 'principle' when it is a question of fact. Animals are either sentient or they are not. They either have the capacity "to be able to perceive or feel things" (Oxford English Dictionary) or they do not. The fact of animal sentience is the reason why the welfare of animals matters. This is reflected in the drafting of both the European legislation and the draft Bill. The wording used in European law is: "the Union and the Member States shall, **since** animals are sentient beings, pay full regard to the welfare requirements of animals"; while the draft Bill reads: "Ministers of the Crown must have regard to the welfare needs of animals **as** sentient beings....." While the European wording is clearer, both texts make clear that it is because animals are sentient that their welfare matters. This understanding was also given by Sir Stephen Laws, former First Parliamentary Counsel, in his oral evidence to the Environment, Food and Rural affairs Select Committee on 17 January 2018. However, whether sentience is an attribute of all animals, or just some animals, is not clear in the draft Bill and is a matter of scientific controversy.

The Countryside Alliance recognises the fact that animals are sentient beings. Those who have the task of husbanding animals and managing wildlife acknowledge and understand the fact that animals are sentient and the consequent need to avoid causing animals unnecessary suffering and of acting humanely in their dealings with animals. Indeed for animals kept by or under the control of man there is the additional duty of care as set out in the Animal Welfare Act 2006, which adopts the "five freedoms" also applied in EU law. Recognition of sentience and the welfare needs of animals is not the same as recognising that animals have rights, in the sense that human beings have rights. It is important that animal welfare is not confused with animal rights.

It is worth noting that the recognition of animal sentience and the consequent need for animal welfare laws is nothing new. Animal welfare laws in the UK date back nearly 200 years to 1822 when the Cruel Treatment of Cattle Act was passed. Successive governments and parliaments have recognised the fact of animal sentience both prior to and since our membership of the EU, as reflected in the body of animal welfare legislation on the Statute Book. Welfare laws in this country go far beyond the minimum standards set by the EU, and it is unclear why a new statutory duty is felt so necessary.

We do not think sentience as such needs defining, but rather any legislation should make clear which animals are to be regarded as sentient. It is, however, a matter of some scientific debate as to which animals should be classed as sentient based on their capacity to experience pleasure and pain. The Animal Welfare Act's Explanatory Notes state:

"The Act will apply only to vertebrate animals, as these are currently the only demonstrably sentient animals. However, section 1(3) makes provision for the appropriate national authority to extend the Act to cover invertebrates in the future if they are satisfied on the basis of scientific evidence that these too are capable of experiencing pain or suffering".

The scope of the Animals (Scientific Procedures) Act 1986 has been extended beyond vertebrates to include cephalopods. Clearly an animal's ability to experience pain and suffering is the dividing line between animals to be regarded as sentient and animals not to be regarded as sentient. However, there is an ongoing scientific debate as to which animals might be regarded as being sentient and which are not. The consequence of acknowledging an animal as sentient is that man then has a duty towards that animal. In defining which animals are regarded as sentient the scope, or extent, of the welfare duty is also defined. Will this duty extend only to vertebrate animals or be extended to include cephalopods or even decapod crustaceans such as lobsters? Unless it is the Government's intention for the draft Bill to apply to all animals as defined in the consultation as being "an organism endowed with life, sensation and voluntary motion" clarity is needed as to those animals which are to be regarded as sentient and thus covered by the welfare duty, otherwise the duty would apply to every animal from insects and earthworms upwards.

2. Do you consider that the term ‘animal’ should be defined explicitly? If so what definition should we use?

We do not think animal needs definition but the extent of the duty could be determined by defining which animals are to be classified as sentient, as explained in our response to the first consultation question. As the Bill is drafted the reference to sentience is explanatory of why the duty to animal welfare is necessary rather than obviously determinative of those animals to which the duty would, or should, apply. The draft Bill could be drafted to state that the duty was to sentient animals rather than to animals account of sentience as it is currently constructed. It should be noted that the duty currently extends to wild animals and as drafted could extend to all animals. The way in which Clause 1 of the draft Bill is drafted fails on every level to make clear the relationship between animal, sentience, and the welfare duty being imposed.

It is assumed that the intention is that a duty to have regard to welfare only makes sense if animals are sentient and as such the duty should not apply to all animals but to those that are deemed sentient. Clearly the nature and proximity of the relationship between man and animal will determine the extent of that duty towards animals recognised as sentient. Where an animal is kept by man or under his control then a duty to ensure welfare arises as well as the obligation to avoid causing unnecessary suffering. For wild animals there cannot reasonably be a duty to ensure welfare but there remains a duty to avoid causing unnecessary suffering such as when wild animals are culled. For example man does not, and should not, have a responsibility to ensure wild rabbits have a suitable diet, but were a wild rabbit to be rescued by an animal sanctuary then while it is not living wild there would be a duty to provide a suitable diet. The welfare duty as far as wild animals are concerned should only apply where there is some interaction between man and the wild animal, so as to avoid unnecessary suffering.

3. Do you consider that the term ‘welfare needs of animals’ should be defined explicitly in the clause? If so what definition should be used, and should the list of needs in the Animal Welfare Act 2006 be changed if at all?

Defra’s consultation document on the draft Bill is somewhat misleading as in seeking views on defining the “welfare needs of animals” it refers to the Animal Welfare Act 2006 and the welfare needs (five freedoms) on which the welfare duty is based. What is not made clear is that the duty of care in the 2006 Act is limited to animals kept by or under the control of man. By contrast, the draft Bill appears to apply to all animals, including wild animals. The ordinary meaning of ‘animal’, referred to in the Defra consultation document, would include not just mammals and birds (vertebrates) but insects, crustaceans etc. It is also unclear whether in formulating or implementing policy animal welfare is to be understood as relating to the overall welfare of a species or to an individual animal, or where there is a conflict between species which species’s welfare takes precedence. Similarly, where there is a conflict between the welfare of domesticated animals and wild animals, as in the case of badgers and cattle, how would this new duty work?

Whether “welfare needs” should be defined depends on whether Ministers intend this duty to apply to all animals from the smallest insect upwards, or only to vertebrate animals as currently under the 2006 Act. The Government must provide clarification on whether the draft Bill applies to all animals without distinction, including those currently outside the scope of the 2006 Act, or only to vertebrate animals.

It is possible to acknowledge that all animals, whether living wild or kept by or under the control of man, have certain needs which if not met would be detrimental to their welfare, while also acknowledging that man does not have the same duty to meet those welfare needs in all cases. The welfare duty to farmed deer would be very different to the welfare duty to wild deer. In the latter case the welfare duty may only apply when man is engaged in deer culling and then only to the extent that the deer is killed in a humane way which avoids unnecessary suffering. So while the ‘five freedoms’ are generally applicable the degree to which they should impose a consequent duty is rather dependent on the circumstances. Therefore, a Minister of the Crown in discharging the proposed duty to “have regard to welfare needs of animals” will clearly have to take account of the particular circumstances of the animals to whose welfare needs he is having regard.

4. Policy scope: The draft Bill would apply to all policy areas. Do you agree with this?

It is important to note that the obligation on the EU and Member States to “pay full regard to the welfare requirements of animals” is a long standing one and appears in the original Treaty of the European Union. Specific reference to animal sentience was inserted much later by an amendment made to the original wording in the Treaty of the European Union by the Lisbon Treaty and is now found as Article 13 of the consolidated treaty – Treaty on the Functioning of the EU (TFEU). As set out above, the reference to animals as sentient is explanatory in purpose making clear that the reason why regard must be had to animal welfare is because animals are recognised as sentient.

The reference in Article 13 to welfare and to sentience is largely explanatory in character and limited to those areas within the competence of the EU. The policy areas in which the welfare duty applies are all associated to the single market and are areas of EU competence. Sentience is referred to, as in the draft Bill, as the explanation as to why there should be a welfare duty. We understand this explanatory statement was felt necessary as within the context of the single market animals had previously been categorised as goods, without recognition that animals were materially different from other goods because of their sentience in contrast to a widget or vegetables. Consequently the duty in the treaty had little, if any, effect in domestic terms.

The UK’s exit from the EU may mean that the legal duty to “pay full regard to animal welfare” would no longer apply in UK law, although this is debatable. It is the duty which the draft Bill seeks to transpose into UK law, reference to sentience is, as in the Treaty, simply explanatory as to why this duty should exist. However, there are important differences between the EU treaty and the draft Bill. The obligation under the TFEU to “pay full regard to the welfare requirements of animals” is balanced against the need to respect “the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage”, and is limited to specified areas of policy: “agriculture, fisheries, transport, internal market, research and technological development and space policies”.

It might be argued that the draft Bill seeks to replicate the limitations on the duty to “pay full regard to the welfare requirements of animals” in the TFEU by requiring Ministers of the Crown to have regard to “matters affecting the public interest” in discharging that duty. However, there is no clarity as to what is included in “public interest”, or which duty should take priority where what might be in the public interest conflicts with animal welfare.

The draft Bill puts no limit on the policy areas to which the duty should apply. It also fails to define policy. Is policy only a matter of a Minister’s decision to do something or does it apply to a decision not to do something? The current scope of the duty created by the draft Bill is entirely open ended. The impact on all government departments developing and implementing policy would have to ensure they had discharged the duty to have regard to animal welfare and potentially demonstrate that they had done so to the satisfaction of a court. The impact of this draft Bill would cover almost anything from spending decisions, procurement of drugs, infrastructure projects, and research funding to name but a few. We do not think this is necessary or practical, and the duty should only apply to areas of policy directly affecting animal welfare.

Given that this duty currently extends to all Ministers of the Crown, all areas of government policy, and all animals, we are concerned that not enough assessment has been made of the potential implications for formulating and implementing policy. Further information and clarity is required from the Government on the proposed nature of the new obligations and how Ministers are to be able to demonstrate that they have had regard to animal welfare and the public interest in discharging this duty.

The key differences between the general open-ended duty proposed by the draft Bill and the duty set out in the TFEU are as follows:

- I. In the TFEU the duty is limited to the areas of “agriculture, fisheries, transport, internal market, research and technological development and space policies”. In contrast the draft Bill covers all government policy where there is a potential impact on animal welfare. This would potentially include key policy areas such as housing, infrastructure, and health which are not

included in the scope of the TFEU. We are unaware of any assessment by the Government of the impact of extending the obligation, especially in additional policy areas, and whether changes to existing policy would be required as a result.

- II. The TFEU states that “the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage” should be respected when taking the welfare requirements of animals into account. The draft Bill simply states that Minister must have regard to “matters affecting the public interest” when discharging the duty to have regard to the welfare of animals as sentient beings when formulating and implementing policy. It is unclear what will be included in the public interest test, and we are concerned that this could be confused with public opinion. Public interest in a policy area should not be reduced to an assessment of public opinion. It should be made clear in the draft Bill that public interest should be assessed on “social, economic, and cultural” criteria in order to clarify this obligation, or adopt the wording currently used in the TFEU.
- III. The TFEU makes clear that the duty to “pay full regard to the welfare requirements of animals” is not only limited to specific areas of policy but also subordinate to the requirement to respect for “religious rites, cultural traditions and regional heritage” of Member States. It is not clear in the draft Bill as to the relationship between the duty to have regard to animal welfare and the duty to have regard to the public interest when discharging that duty. How is a Minister to decide which takes precedence where a conflict arises between animal welfare and the public interest, especially as the Bill does not indicate what “public interest” includes? In giving parity to the two duties, the draft Bill represents a significant departure from the existing obligation under EU law, and we are concerned that this could result in conflict and possible repeated legal challenges to ministerial decisions. This could become a barrier to sustainable development, and potentially be used to limit and curtail the activities of farmers and other land managers.

5. Specifying the level of regard: The draft Bill adopts the term ‘should have regard’. Do you agree with this?

Article 13 of the TFEU uses the term “full regard” rather than just “regard”. If the intention is to replicate Article 13 then the draft should use the term “full regard” However, whether “regard” or “full regard”, given the other substantive differences between Article 13 and the draft Bill and the open ended duty it creates, we doubt either are appropriate in the current context. This open ended duty leaves almost all government policy making and implementation open to judicial interference. We do not believe whatever wording is used, that the current drafting is acceptable.

6. Overall approach: The draft Bill presents one possible formulation for delivering stated policy objectives. Views would be welcome on what you consider may be the consequences of this new duty and also on whether a different formulation or approach might achieve the policy objectives. Views would also be welcome on how the approaches adopted in other countries might apply here.

It is wholly unclear what the policy is which the draft Bill seeks to implement. The draft Bill’s Short Title makes reference to “recognition of sentience” but as explained above there is no legal need to recognise sentience. Indeed what is actually at issue is the duty to have regard to welfare and transposing that into UK law. Is the policy to recognise that all animals, as “animal” is defined in the Oxford English Dictionary as referenced in the consultation document, are to be considered sentient; or are only some animals to be considered sentient and as a result it is only those animals’ welfare to which the Minister has a duty to have regard?

We would suggest that this draft Bill is almost entirely motivated by politics on the back of a public campaign on animal sentience which was both inaccurate and misleading. As Sir Stephen Laws, former First Parliamentary Counsel, in his oral evidence to the EFRA Select Committee on 17 January 2017 noted: “[the draft Bill] suffers from the defect of being an attempt to do politics with law

and then to encourage people to do politics in the courts". Like Sir Stephen we believe this is "unwise".

As the evidence of Sir Stephen Laws and Professor Mike Radford to the EFRA Committee made clear ministerial decisions could be repeatedly challenged in the courts on the basis that they had failed to have regard to animal welfare or indeed the public interest. As the duty exists under EU law it is hard to see how a Minister of the Crown could be challenged in court on the basis of the wording in the TFEU, not least because it has restricted application and is explicitly subordinated to wider considerations. This might not be the case once this duty is enshrined directly in UK law and in much wider and more general terms. This would impact across many government departments, not just DEFRA and would apply not just to policy making but also to the implementation of policy. The danger was very clearly highlighted by Sir Stephen Laws when he noted that the draft Bill: "has enormous potential to create litigation that would be unprofitable, expensive and delay change where change is desirable". He noted that the very ability for challenges to be brought would have a "chilling effect" on policy making" and the focus would be on ensuring "compliance" rather than "sound judgment".

The duty on Member States under existing EU law is limited to specific policy areas within the competency of the EU. It is also subordinated to other considerations reflecting the principle of subsidiarity in the EU. In practice it was declaratory and of little practical or direct effect upon either Ministers or other public bodies. It is inaccurate to suggest that the draft Bill simply puts the existing legal status quo into UK law. The draft Bill is broader in scope and has a direct effect which Article 13 did not.

There is also no clarity in the draft Bill as to how the duty to have regard to welfare is to be balanced against the duty to have regard to matters affecting the public interest. Public interest is not defined. It is also unclear how this statutory duty would relate to other statutory duties on Ministers of the Crown. Which duty is to be prioritised over another? Would there be a hierarchy of duties?

It is clear that while the intention behind Clause 1 of the draft Bill is laudable, it is highly questionable as to whether a duty to have regard to welfare is necessary at all. If it is felt necessary, however, the draft Bill is muddled and should not be progressed.

7. Sentence length: The draft Bill proposes to increase the maximum penalty for the specified animal welfare offences from six months to five years' imprisonment. Do you agree with the new maximum sentence?

We are supportive of the increased penalties for cruelty offences under the Animal Welfare Act 2006 and welcomed the Government's announcement last year to increase sentences for the most serious offences from a maximum of six months to five years imprisonment. This reflects the recommendation of the EFRA Committee's report into animal welfare in the last Parliament.

However, any changes to sentencing should be taken forward in the broader context of the other recommendations of the EFRA Committee's Animal Welfare Report in September 2016, particularly in respect of private prosecutions. If custodial sentences increase to five years, the power and authority of those who enforce and prosecute animal welfare offences would be significantly increased. This would make it even more important to ensure that there was accountability and transparency in all prosecutions, which must include the RSPCA ceasing to act a prosecutor of first resort, as the Committee recommended. The Committee concluded that:

"The RSPCA should continue its important work investigating animal welfare cases and working closely with the police and statutory authorities. It should, however, withdraw from acting as a prosecutor of first resort where there are statutory bodies with a duty to carry out this role. We are not convinced by its arguments that it is in a better position than the CPS to prosecute animal welfare cases".

An increase in sentencing should come with guidance from government that animal welfare offences should be prosecuted by the CPS and other statutory authorities except in exceptional circumstances.