



House of Commons
Environment, Food and Rural
Affairs Committee

**The Draft Animal
Welfare Bill:
Government Reply to
the Committee's
Report**

**Fourth Special Report of Session
2004–2005**

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The Environment, Food and Rural Affairs Committee

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FOURTH SPECIAL REPORT

The Environment, Food and Rural Affairs Committee reported to the House on *The Draft Animal Welfare Bill* in its First Report of Session 2004–05, published on 8 December 2004 as HC 52–I. The Government’s Reply to the Report was received on 14 February 2005.

Government response

Letter from Rt Hon Margaret Beckett MP, Secretary of State, to the Chairman of the Environment, Food and Rural Affairs Committee, 14 February 2005:

I am writing to thank you and members of the Efra Select Committee for the pre-legislative scrutiny that you gave to the draft Animal Welfare Bill.

The Committee worked hard and in a tight timescale to produce what is a comprehensive report on the a complex subject of significant public interest. The Committee’s hearings and the report itself have been of considerable assistance in helping me improve the Bill, and I am confident that the Bill I am preparing for introduction is better as a result. I am very grateful to you and your team for this.

I enclose my response to the recommendations made by the Committee, and look forward to further debate when the Bill is introduced in Parliament.

With best wishes

Margaret Beckett

Introduction

Defra welcomes the contribution that this report has made to the preparation of the Animal Welfare Bill. The clear message that has emerged from the Committee hearings and the report itself is one of widespread support for a Bill to modernise and improve animal welfare legislation. The report has also confirmed considerable enthusiasm for the introduction of a welfare offence for animals kept by man. These are the key principles of the Animal Welfare Bill, and we are pleased to see them endorsed in this way.

The report has drawn attention to many important and complex issues. Highlighting the powers given in the Bill to the Secretary of State (in England) and the National Assembly (in Wales) to make regulations to promote the welfare of kept animals, the

report has asked for greater clarity about the circumstances in which these powers will be exercised and for public and parliamentary consultation prior to their use.

The report has commented helpfully on problematic definitions, the drafting of the cruelty offence and the enforcement and prosecution provisions within the Bill. It has also raised concerns about the regulatory impact assessment and the extent of public consultation in preparing the draft Bill.

We are grateful for the clear manner in which the report has set out these concerns and criticisms. We will address many of them by making changes to the Bill and the regulatory impact assessment, though we did not agree with everything the report recommends. These changes have been considered in consultation with colleagues in the Welsh Assembly Government.

We have set out below our detailed response to the recommendations in the report.

Conclusions and recommendations on definitions

Recommendations 1, 2 and 3

1. We agree with the RSPCA that the legislation should specify the criteria according to which the delegated power in clause 53(3) may be exercised. The definition of "animal" is fundamental to the draft legislation; it would determine the scope of the legislation's application. It should therefore be clear on what basis the power to extend the Act's application may be exercised. (Paragraph 20)

2. We endorse the RSPCA's suggestion that the appropriate national authority should be able to make an order under clause 53(3) only where the authority has reasonable grounds to believe, on the basis of scientific evidence, that the animal to which it is proposed to extend the protection of the Act has the capacity to experience pain, suffering, distress or lasting harm. We recommend that the Government amend clause 53(3) to include words to this effect. (Paragraph 21)

3. It is crucial that these criteria be spelt out on the face of the legislation. It is not sufficient for Defra to give an undertaking that orders will be made under clause 53(3) only on the basis of appropriate scientific evidence. (Paragraph 22)

We have accepted these recommendations and the relevant criteria for extending the definition of animal will appear on the face of the Bill, although we intend to limit these to the capacity to experience pain or suffering so as to be consistent with wording elsewhere in the Bill.

Recommendation 4

We believe that a strong case has been made for the inclusion of octopus, squids and cuttlefish, and of crabs, lobsters and crayfish, in the clause 53(1) definition of "animal". The position of the Animal Procedures Committee on octopus, squids and cuttlefish is particularly persuasive in this respect. However, although it seems to us that octopus, squids and cuttlefish, and crabs, lobsters and crayfish, ought to be included in the clause 53(1) definition of "animal", we consider that we have received insufficient evidence on which to base a final conclusion on this matter. We therefore recommend that, prior to introducing a Bill to Parliament, the Government should reassess whether there are reasonable grounds to believe, on the basis of scientific evidence, that octopus, squids and cuttlefish, and crabs, lobsters and crayfish, have the capacity to experience pain, suffering, distress or lasting harm. The Government should have particular regard to evidence relied on by New Zealand and the Australian Capital Territory in choosing to include cephalopods and certain crustaceans in their respective animal welfare legislation. Whilst this assessment is being undertaken a code of practice should be issued giving details of humane ways in which crabs and lobsters should be stunned prior to cooking. (Paragraph 30)

Defra veterinarians have reviewed the scientific evidence for the inclusion of cephalopods and crustaceans. We do not consider there is sufficient scientific evidence to suggest that crustaceans can experience pain or suffering to warrant their inclusion. The evidence for cephalopods is more balanced and we will continue to review. We have noted the comments of the Committee concerning the conclusions reached by the Animal Procedures Committee and we intend to work closely with the Home Office and the European Commission, who are also reviewing this issue, as to the inclusion of cephalopods in the laws to protect animals in research.

It will not be possible to issue codes of practice for animals not captured by the definition of animal, unless regulations extending that definition have already entered into force.

Recommendations 5 to 9

5. We support the Government's position that the protection offered by the draft Bill should not extend to wild animals, living in the wild; such animals are better covered by other, existing legislation. However, we are unconvinced that the phrase "temporarily in the custody or control of man" in the definition of a "protected animal" will achieve the Government's intended position. (Paragraph 39)

6. We therefore recommend that the Government adopt the approach taken in the Protection of Animals Act 1911 and in more recent Northern Ireland and New Zealand legislation of:

- adopting a broad definition of what constitutes an animal, but

- **limiting the application of the definition by excluding specific activities from the scope of the legislation's protection, rather than by seeking to define a narrower class of "animal" (a "protected animal", in this case).**

Examples of activities to be excluded would include hunting or killing wild animals or animals in a wild state, including in accordance with relevant legislation for pest control or conservation purposes. (Paragraph 40)

7. If the Government does not accept our recommendation then, at the very least, a definition of the word "control", as it is used in the phrase "temporarily in the custody or control of man", should be included on the face of the Bill. Such a definition should be drawn sufficiently narrowly so as to ensure that the protection offered by the draft Bill would not extend to wild animals, living in the wild. (Paragraph 41)

8. We consider that, as the draft Bill is currently drafted, there is a strong argument that a person catching a fish, both in a commercial and a recreational context, could be liable to prosecution under the clause 1 cruelty offence, which would include the clause 1(4) mutilation offence in the case of fishing hooks and, perhaps, fishing nets. There is also an argument that a prosecution could be brought under the clause 3 welfare offence. We therefore doubt the Government's position that the draft Bill would be unlikely to have any impact on traditional fishing or angling practices. (Paragraph 46)

9. We accept that neither commercial fishing nor recreational angling should fall within the remit of the draft Bill and we therefore support the Government's intention to exempt fishing as an activity—rather than fish as a species—from the scope of the legislation. Amendment is necessary: even if prosecutions for fishing-related activities were to prove unsuccessful when brought, the fact remains that those prosecutions should not be able to be brought in the first place. However, in exempting fishing, the Government should be careful to ensure that those persons who catch fish are not given carte blanche to inflict unnecessary suffering in the course of pursuing this activity; welfare standards should continue to apply where appropriate. (Paragraph 47)

Animals living in the wild do not fall within the definition of 'protected animal', so to that extent they are exempted. But we agree that the definitions become less clear when a wild animal is, for example, stranded, or trapped, or injured as in a road accident. Our approach is that once the animal is under the control of man, it is incumbent on man not to cause it, or permit it to be caused, unnecessary suffering. We do not believe that wild animals in these circumstances should be exempted. We have been advised against attempting a definition of "under the control of man" by Parliamentary Counsel since it is thought more likely to confuse than aid interpretation. Listing or categorizing every scenario that may cause an animal to come under the control of man is not possible and

in most cases the meaning of 'under the control of man' will be clear. In borderline cases, our view is the term should be open to interpretation by the courts.

In light of the Committee's recommendations, we will amend the draft Bill to include a specific exemption from the cruelty offence for fishing (including angling). The welfare offence will only apply to fish for which a person is responsible, and so will exclude situations commonly arising during fishing and angling. The welfare offence will, however, apply to farmed fish - which are already protected under EU Directive 98/58/EC concerning the protection of animals kept for farming purposes - and fish kept in other situations where man is responsible, such as in aquaria. If a person is fishing or angling, he will not generally assume responsibility for the fish. In cases where a person can be said to be responsible for fish, the court must take into account any lawful purpose for which an animal is kept and any lawful practice undertaken in relation to the animal in determining whether its welfare needs have been met in accordance with good practice. If a fish were kept in a stocked pond in order that it could be caught by anglers, this would be relevant in determining what steps ought reasonably to be taken to ensure its needs are met in accordance with good practice.

We do not intend to exempt shooting from either the cruelty or the welfare offence. We consider animals at liberty in the wild, such as pheasants that are free to roam wherever they wish, to be in a wild state and not within the definition of 'protected animal'. However if a shot or hunted animal does come under the control of man, perhaps when wounded, it could fall within the definition of 'protected animal'. Generally it is difficult to envisage circumstances in which such animals would come under the control of man other than when the purpose was to kill the animal in an appropriate and humane manner. If gratuitous suffering were inflicted, it might amount to an offence of cruelty.

The Bill will not affect lawful pest control activities.

Recommendations 10 & 11

10. We consider that the way in which the definitions of "animal", "protected animal", "kept by man" and "keeper" apply within the framework of the draft Bill, and the interrelationship between the definitions, is problematic and is likely to prove confusing to many future users of the legislation. 'Casual' users of the legislation will need to know the legislation in some detail before they are in a position to understand and apply it. (Paragraph 55)

11. We recommend that the Government amend the draft Bill to clarify the interrelationship between these definitions. The changes which the Government has indicated it is considering certainly warrant exploration; in particular, the Government should be careful to make clear the relationship between the clause 3 welfare offence and the clause 6(1) delegated power by using consistent language in the two clauses. (Paragraph 56)

We will amend the draft Bill to reflect this recommendation and ensure the wording in the welfare and regulation-making clauses is more consistent. Both clauses will refer to being responsible for an animal, a definition of which will be included in the Bill, and references to “keeper”, “kept” and “kept by man” will be removed. In addition, the definition of “protected animal” will be simplified.

Conclusion and recommendation on offences

Recommendations 12 and 13

12. We consider that the clarity and utility of clause 1 would be greatly improved if it were divided into separate clauses, each setting out one offence.

We recommend that each of the following sub-clauses or groups of sub-clauses should be separated out:

- sub-clauses (4), (5) and (6) (mutilation)
- sub-clauses (7) and (8) (administering injurious drugs)
- sub-clause (9) (performing an operation without due care).

The Government should consider how the clause 1(10) definition of “keeper”, which is relevant to each of these offences, can best be incorporated into each offence. (Paragraph 67)

13. Although the offences of mutilation, administering injurious drugs and performing an operation without due care are specific cases of the ‘parent’ offence of “causing unnecessary suffering”, rather than new and unrelated offences, the clause 2 offence of fighting is equally a specific case of causing unnecessary suffering, and it has been—helpfully—made into a separate clause. We consider that separating out the cruelty offences will assist clarity and will not affect the ability to bring prosecutions under the various offences. (Paragraph 68)

We agree that there is a logical distinction between on the one hand the offence of unnecessary suffering and the specific cases of unnecessary suffering referred to in the draft Bill. We will create separate offences as suggested by the Committee.

Recommendations 14 to 17

14. We welcome the Government’s undertaking that it will seek to simplify the drafting of clause 1(1). (Paragraph 70)

15. We are extremely concerned that the Government apparently intends that the clause 1(1) cruelty offence should apply only to deliberate infliction of unnecessary suffering and that it should not extend to unnecessary suffering which arises as a result of negligence or neglect. As currently drafted, unnecessary suffering which arises as a result of negligence or neglect would appear to engage the cruelty offence

only where the suffering is caused by another person who is not the keeper, as a result of the keeper's negligence or neglect. The Government's apparent position would represent a backward step in terms of animal protection: it would lessen the current protections in existing animal welfare law and would significantly restrict the scope of the cruelty offence. (Paragraph 80)

16. We assume it is the Government's intention that unnecessary suffering which arises as a result of negligence or neglect should be dealt with under the clause 3 welfare offence. We consider such an approach is inappropriate for two reasons. First, the penalties available under the welfare offence are less serious than those available under the clause 1(1) cruelty offence. Second, and more importantly, we understand the purpose of the welfare offence to be to deal with those cases where the standard of care given to an animal is clearly inadequate, but where it is not possible to demonstrate that the animal has suffered unnecessarily. The distinction between the cruelty offence and the welfare offence should be whether the animal has suffered unnecessarily, not the mental state of the person who caused that suffering. The extent of an offender's mental culpability can best be reflected at the sentencing stage, where we would expect those whose negligence or neglect has caused unnecessary suffering generally to receive a lesser sentence than those who intentionally or recklessly caused such suffering. (Paragraph 81)

17. We therefore recommend that the Government amend the draft Bill to make it clear that the mens rea element of the clause 1(1) cruelty offence should be assessed by means of an objective test, so that the defendant's conduct will be assessed on the basis of what a reasonable person in the position of the defendant would have known about the consequences of his or her conduct. (Paragraph 82)

The cruelty offence was always intended to capture acts of neglect where these amounted to unnecessary suffering. We agree with the Committee that it would be entirely inappropriate for acts of neglect leading to unnecessary suffering to be dealt with under the welfare offence.

We agree with the comments regarding the mens rea element and an objective mental test will apply, i.e. "knew or ought reasonably to have known".

Recommendation 18

We recommend that the Government amend clause 1 so as to make clear that it is an offence to cause unnecessary mental suffering to an animal, whether or not that mental suffering is accompanied by physical suffering. (Paragraph 84)

Having discussed the matter with Parliamentary Counsel, we do not accept that it is necessary to amend the draft Bill to meet this recommendation. Suffering includes mental suffering, so to mention it specifically would both be unnecessary and would give it an inappropriate prominence and weight. In addition, we have concluded that it

is not appropriate to restrict the application of the clause to specific forms of mental suffering as under the 1911 Act, i.e. infuriate and terrify. This would rule out other forms of mental suffering that might be relevant. In our view the most appropriate course is to allow the courts, taking into account the relevant evidence, a margin of discretion in applying this provision.

Recommendation 19

We consider that clause 1(3) is unclear in its intent and application. We are concerned that, as presently drafted, the complexity of clause 1(3) will create uncertainty for prosecutors and the courts, which could make it difficult for a prosecutor to secure a conviction under clause 1(1) or (2). We recommend that the Government consider how clause 1(3) can best be clarified. (Paragraphs 88 and 89)

We have not accepted this recommendation. We do not believe that subsection (3) is open to misinterpretation. This provision provides guidance on the meaning of unnecessary suffering and it is expected that it will be helpful both to the courts and those seeking to regulate their conduct in accordance with the provision.

Recommendations 20, 21 and 22

20. In order to make the scope of the proposed mutilation offence clear, we consider that it is crucial that a definition of "mutilation" is included on the face of the legislation. Without such a definition, what constitutes "mutilation" would effectively be defined by the appropriate national authority, on the basis of what mutilations the authority chose not to exempt from clause 1(4) by means of clause 1(5). The definition should also assist in rendering "mutilation" a less emotive word in the context of animal welfare legislation, because it will have a clear meaning in both a legal and a veterinary context. (Paragraph 96)

21. On the basis of the evidence we have received, it is evident that the list of exemptions to the clause 1(4) mutilation offence is likely to be lengthy. We have therefore considered whether it is in fact appropriate or meaningful to have an absolute ban on mutilation on the face of the legislation, given that the ban is likely to be considerably less than 'absolute' in practice. This is particularly true given that farmed and companion animals can have quite distinct welfare needs and practices in this respect, and any exemptions made under clause 1(5) will need to distinguish between these. (Paragraph 101)

22. On balance, we support the inclusion of clause 1(4) on the face of the Bill because it will send a strong message about animal welfare to the courts and the public. The inclusion of mutilation as a separate class of welfare offence is also important for evidential reasons: if acts of mutilation were left to be dealt with by clause 1(1) and (2), evidence of suffering as a consequence of the mutilation would be required. (Paragraph 102)

We welcome the constructive comment from the Committee. We agree with the Committee's conclusion that a definition of mutilation would be helpful in both a legal and a veterinary context.

Recommendation 23

We consider that each of the acts specified in clauses 2(1)(a) to (e) of the fighting offence should be deemed to be offences at the time at which each act takes place. Provided that sufficient evidence exists in the absence of the fight, prosecutions should be able to be pursued in respect of such acts without the need for the animal fight to take place. The enforcing authorities should not have to wait for a fight to take place before being able to take enforcement action. We recommend that the Government amend clauses 2(1)(a) to (e) accordingly. (Paragraph 106)

We agree with the Committee's comments. The Bill enables a court to convict for this offence if a fight does not take place, provided that there is evidence of arrangements for a fight. The fighting offence will no longer contain the detail of either the published draft or the equivalent provision in the 1911 Act, but we believe that it will capture all of the situations previously covered.

Recommendations 24 and 25

24. We commend the Government for the introduction of the welfare offence under clause 3. This clause will allow preventive action to be taken at a point at which harm has yet to occur to the animal in question, something which is not possible under current animal welfare law. It should make a significant and important contribution towards enhancing animal welfare. (Paragraph 111)

25. However, we consider that the Government is being disingenuous in presenting the proposed clause 3 welfare offence as a simple extension, from farmed animals to all kept and companion animals, of an existing duty to ensure welfare. The existing offence on which the Government relies, section 1(1) of the Agriculture (Miscellaneous Provisions) Act 1968, is not analogous to the proposed welfare offence. We consider that clause 3 would in fact extend the protection currently offered by section 1(1) of the 1968 Act. We entirely support this extension, but we consider it is important that the Government should accurately represent to Parliament the nature of the proposals to which it is seeking Parliament's agreement. (Paragraph 112)

We do not consider that we have misled Parliament, and we are concerned by the Committee's suggestion that we did so. However, we accept there may have been some confusion as to our meaning in the explanatory notes to the draft Bill.

Offences under the Agriculture (Miscellaneous Provisions) Act 1968 relating to farmed animals are:

(a) causing unnecessary pain or unnecessary distress contrary to section 1(1); and

(b) a failure to fulfil the duty to ensure the animal's welfare, under the Welfare of Farmed Animals Regulations (2000) (WOFAR). A breach of WOFAR is an offence under section 2. Therefore the welfare offence is analogous to the offence in WOFAR but not to the offence under section 1.

Recommendations 26 to 29

26. We recommend that the Government re-consider the wording of the clause 3(1) offence, in order to clarify the nature of the offence. In particular:

- A keeper should be required to ensure an animal's good or beneficial welfare. As currently drafted, an offence would be committed if a keeper fails to take reasonable steps "to ensure the animal's welfare". "Welfare" in itself is a neutral term; clarification of what kind of welfare a keeper needs to ensure is required.
- The Government should consider whether clause 3(1) would not be better and more helpfully expressed as a positive duty of care, rather than as an offence of omission. (Paragraph 116)

27. We consider it is appropriate that the welfare offence should have only an actus reus (or action) element and no mens rea (or mental) element. This would mean that a keeper who unknowingly or negligently failed to take reasonable steps to ensure an animal's welfare would be as culpable as a keeper who intentionally or recklessly failed to take such reasonable steps. However, our endorsement of the elements of the clause 3 welfare offence should be read in the context of our comments on the mens rea element of the clause 1 cruelty offence. (Paragraph 117)

28. We support the Government's approach of setting out a modified version of the five freedoms on the face of the draft Bill. The five needs in clause 3(4) provide a strong statement of the ideal animal welfare circumstances towards which those responsible for animals should be working. We consider it imperative, however, that the five needs should continue to be framed as aspirational, and therefore not achievable in all circumstances. (Paragraph 128)

29. In respect of clause 3(5), we support the RSPCA's suggestion of amending the existing clause 3(5) so that it mirrors the factors set out in regulation 3(3) of the Welfare of Farmed Animals (England) Regulations 2000. The factors listed in regulation 3(3) should be more helpful to the courts in distinguishing the circumstances in which the clause 3(4) needs are not attainable. It also seems sensible

to us to aim, wherever possible, for consistency in definitions in animal welfare legislation. (Paragraph 129)

We understand the concerns about the way that the welfare clause was set out and the potential for confusion as to what constitutes good welfare. We accept that there is a sliding scale of welfare which runs from the minimum that is necessary to ensure good welfare to that which would be necessary to ensure an exceptionally high standard of welfare. We have amended the draft Bill to reflect this more clearly, and the current draft refers to an obligation to do all that is reasonable to meet the needs of an animal for which a person is responsible in accordance with good practice. The purpose for which the animal is kept and any lawful activity being undertaken in relation to it should be taken into account when considering whether its needs have been appropriately met. Exactly what constitutes good practice will vary according to the circumstances. In some cases regulations and codes of practice will provide greater clarity as to what is required for particular types of animal or activity. Where appropriate, prosecutors, courts and those responsible for animals will need to take into account evidence of good practice from other sources such as the opinion of experts, and reference books and guides.

Recommendations 30 to 32

30. We do not object to the removal of clause 3(3) provided that the Government is certain that abandonment of an animal would not serve to divest a person of legal ownership or the responsibilities that follow on from it, and that a charge could therefore be laid and successfully prosecuted under clause 3(1). (Paragraph 136)

31. However, we are concerned that the draft Bill would represent a significant weakening of the current law on the abandonment of animals. Under the Abandonment of Animals Act 1960, an offence is committed at the time at which abandonment occurs; no evidence of the animal having suffered is required, and a person who is found guilty of abandonment is deemed to be guilty of a cruelty offence within the meaning of the Protection of Animals Act 1911. Under the draft Bill, although an act of abandonment could form the basis of a charge laid under the main cruelty offence, clause 1(1), evidence of the animal having suffered would be required. Evidence of abandonment without evidence of the animal having suffered could form the basis only of a charge laid under the welfare offence, clause 3(1), which carries lesser penalties than the clause 1 cruelty offences. (Paragraph 137)

32. We recommend that the Government amend the draft Bill so that the act of abandoning an animal continues to be treated as a cruelty offence without the need for evidence of the animal having suffered as a consequence of the abandonment. The present law presumably does not require such evidence for the very good reason that an abandoned animal may not be able to be traced, in order for its suffering to be able to be demonstrated. No doubt the 1960 Act was enacted in the first place to deal with the requirement in the 1911 Act that unnecessary suffering be

demonstrated. The fact that the act of abandonment, in and of itself, constitutes an offence is a key animal welfare protection in current law and it is crucial that it be maintained. (Paragraph 138)

We do not agree that the Bill represents a weakening of the law on abandonment. The Abandonment of Animals Act 1960 provided for an offence to be committed under the Protection of Animals Act 1911 where a person abandoned an animal and the abandonment was likely to cause the animal unnecessary suffering. Under the welfare offence in the Bill, an offence will be committed if an animal is abandoned, and the abandonment amounts to a failure to take all reasonable steps to meet the needs of the animal concerned. If someone who is responsible for an animal abandons it and suffering actually occurs, this would engage the Bill's provisions on cruelty. There will be no weakening in the penalties and sanctions available to the court in comparison with those already available under the 1911 Act.

Conclusion and recommendation on delegated powers

Recommendations 33 to 35

33. The power that would be delegated under clause 6 is very broad. We are unconvinced by the Minister's justification for the breadth of the clause 6(1) delegated power. (Paragraphs 146 and 151)

34. The suggestion that the mechanism of judicial review would provide a sufficient limitation on the exercise of the clause 6(1) power is unacceptable. (Paragraph 152)

35. We are disappointed by the Minister's reluctance to consider redrafting the clause 6(1) power in order to limit its breadth. We recommend that the Government amend clause 6 so that:

- a more precise word than "promote" is used: "ensure" seems sensible, provided that it continues to be used in clause 3
- the appropriate national authority must certify that any draft regulation proposed to be made under clause 6(1) is justified either on the basis of scientific evidence or because it meets a genuine welfare need evidenced by the consultation process on the proposed draft regulations. (Paragraph 155)

We do not accept that the regulation-making powers contained in the Bill are unreasonably broad. Similar regulation-making powers for promoting the welfare of farmed animals are already conferred on Ministers under section 2 of the Agriculture (Miscellaneous Provisions) Act 1968 and have thus been in existence for over thirty years. The absence of a similar power to promote the welfare of non-farmed animals is an anomaly that the Bill is designed to address. Given the complexity of animal welfare, it is highly appropriate that this provision should be framed as a regulation-making power. As a result of the need to use primary legislation to update the law for non-farmed animals, there has been a widening gap between the welfare standards that apply

to farmed and non-farmed animals. We believe that the Bill addresses this in the most appropriate and direct way. In deciding whether to make regulations, codes or to use other means to promote animal welfare, we will of course need to follow general principles concerning the proper use of legislative powers, including the need to ensure that the degree of regulation is proportionate and not excessive.

We judge that the use of the word ‘ensure’ in this clause would be inappropriate. It would be impossible to say that any set of regulations would ‘ensure’ welfare. The Bill therefore enables regulations to be made which ‘promote the welfare of animals’ and restricts the scope of regulations to those which move the welfare of animals in a positive direction. The concepts of “promote” and “ensure” differ and, whereas in some instances one will be broader than the other, an obligation to “ensure” a given result could preclude the making of any regulations, thus reducing opportunities to improve animal welfare.

We do not consider that certification is necessary. Consultation, pre-legislative scrutiny where appropriate, and parliamentary debate will ensure that any proposals from the Secretary of State are fully debated in an open and transparent fashion. While we shall take into account the latest scientific evidence when assessing the level of regulation that should apply to a particular activity, there are other issues such as good practice that we shall also need to consider. Any regulations introduced must be for the purpose of promoting the welfare of animals in accordance with subsection (1).

Recommendation 36

We recommend that clearer requirements about the way in which licensing powers are to be exercised should be included on the face of the legislation, rather than being left for the appropriate national authority to specify under delegated legislation. It should be clearly stated that the licensing authority has the power to attach welfare conditions to a licence and to revoke a licence. The legislation should also require the licensing authority to have regard, in issuing a licence, to relevant guidance laid down in the form of codes of practice issued by the appropriate national authority under clause 7. (Paragraph 161)

We accept that there should be clear requirements on the face of the Bill concerning licensing and registration, and will accordingly include more detailed provisions. These clarify the roles and powers of local authorities, as well as the Secretary of State and the National Assembly for Wales, and will be contained in a separate clause on licensing and in a new schedule.

Recommendation 37

We recommend that the Government re-examine the issue of whether the degree of detail in clause 6(2) could potentially circumscribe the generality of the clause 6(1) delegated power in ways which the Government does not intend. (Paragraph 163)

We accept this recommendation and will amend the subsection so that there is a clearer link between this clause and the welfare clause by referring to the needs listed in the welfare clause. The appropriate national authority will be able to introduce regulations giving more detail as to the needs and how they should be met in specific circumstances. We agree that the published draft of subsection (2) could inadvertently have curtailed the power in subsection (1) and we have now overcome this problem.

Recommendation 38

We recommend that the Government amend clause 1 so as to require the appropriate national authority to certify that any draft order proposed to be made under clause 1(5) is justified either on the basis of scientific evidence or because it meets a genuine welfare need evidenced by the consultation process on the proposed draft regulations. (Paragraph 166)

Consultation, pre-legislative scrutiny where appropriate, and parliamentary debate will ensure that any proposals from the Secretary of State are fully debated in an open and transparent fashion. As mentioned above, there are issues other than scientific evidence which it will be necessary to consider before regulations can be introduced. We do not consider that certification is necessary.

Recommendations 39 to 42

39. We endorse the inclusion of a duty for the appropriate national authority to consult on any draft code of practice which the authority proposes to make under clause 7, as set out in clauses 8(1)(b) and 9(1)(b). We believe that an obligation to consult on draft codes of practice should improve the quality and relevance of the final codes. (Paragraph 175)

40. Given the Government's readiness to include a duty to consult on draft codes of practice, we are extremely disappointed by the Minister's refusal to include a parallel duty to consult on draft regulations. Regulations made under clause 6(1), and orders made under clause 1(5), will form part of the law of the land—regulations made under clause 6(1) may create criminal offences and repeal primary legislation, amongst other things—whereas codes of practice will exist primarily for the purpose of guidance. We do not accept the Minister's argument that, as Defra intends to consult on draft regulations anyway, there is nothing to be gained by including a requirement to consult on the face of the Bill. The Cabinet Office code of practice has no legal force and cannot require government departments to consult; nor is there any obligation for the National Assembly for Wales—an appropriate national authority under clause 6(1) and clause 1(5)—to adopt the code of practice. If the Minister intends to consult appropriately on all draft regulations anyway, he can have no objection to a requirement to consult being included on the face of the draft Bill. (Paragraph 176)

41. We recommend that clause 6 should be amended to place a duty on the appropriate national authority to consult on any draft regulation which the authority proposes to make under clause 6(1). This duty should be in equivalent terms to the duty for the appropriate national authority to consult on any draft code of practice which the authority proposes to make under clause 7, as set out in clauses 8(1)(b) and 9(1)(b). (Paragraph 177)

42. Likewise, we recommend that clause 1 should be amended to place a duty on the appropriate national authority to consult on any draft order which the authority proposes to make under clause 1(5). This duty should be in equivalent terms to the duty for the appropriate national authority to consult on any draft code of practice which the authority proposes to make under clause 7, as set out in clauses 8(1)(b) and 9(1)(b). (Paragraph 178)

We accept this recommendation. We will insert a duty to consult.

Recommendation 43

We suggest to Defra that, if it intends to continue to use working groups to formulate animal welfare policy, then it would be well-advised to formalise the process by which the groups' membership and programme of work is decided, in order to ensure transparency and build confidence in the quality of those undertaking this work. (Paragraph 179)

The criteria for the working groups on the secondary legislation were that the members should reflect as broad a range of opinion as possible and be capable of working constructively with people who hold differing views. We accept that in one or two cases, some groups have felt excluded from what, by its nature, cannot be a totally inclusive process. However, we consider that these criteria should continue to be used as far as possible, although we recognise that there could be occasions where it may be necessary to depart from them. To put in place a formal selection process based on Nolan procedures would be excessively resource intensive for temporary working groups that only meet a few times and whose output is subsequently subject to public consultation.

Recommendations 44 and 45

44. We recommend that the Secretary of State agree to enter into a 'memorandum of understanding' with this Committee, undertaking to:

- publish in draft form any regulation proposed to be made under clause 6(1) or order proposed to be made under clause 1(5)
- inform the Committee of such publication
- allow the Committee a period of 30 sitting days in which to report to the House on the draft instrument

- agree that no motion to approve may be made until either the period of 30 sitting days has elapsed or the Committee reported to the House on the draft instrument, whichever occurs first.

The memorandum of understanding should make it clear for what period of time such an arrangement should apply. It should also provide for the possibility that an exception could be made to this arrangement in circumstances of genuine emergency. (Paragraph 184)

45. If such a process were adopted, the Committee would have flexibility to decide either to call for evidence on the draft regulation or order and to examine it thoroughly, or to decide at an early stage that the draft regulation or order did not warrant a thorough examination and to report to the House that it had no matters to raise. (Paragraph 185)

We agree with the Committee that pre-legislative scrutiny is likely to be beneficial in these sensitive areas, and are grateful to the EFRA Committee for its offer of assistance. We wish to consider further the right mechanism for taking this forward and will wish to discuss with the authorities of the House of Lords as well as the EFRA Committee.

Conclusion and recommendation on enforcement, prosecution and penalties

Recommendation 46

We recommend that the clauses on enforcement should be set out in the draft Bill as they would occur chronologically. The current arrangement of the enforcement provisions in the draft Bill does not follow a logical sequence, is unduly complicated and is difficult to follow. (Paragraph 190)

We accept this recommendation. The order of the clauses on enforcement will be improved, with a simpler structure that deals in sequence with emergency powers, powers of entry and inspection, prosecutions and orders which may be made upon conviction.

Recommendation 47

Defra has acknowledged that the period for which an animal taken into possession can be retained needs to be reviewed. We recommend the retention of the existing legal position, whereby there would not be a time limit on the retention of an animal in distress but its owner would have the immediate right to apply to court for its return. (Paragraph 195)

We accept this recommendation. The scheme for taking animals in distress into possession will be altered. There will no longer be any time limit for their keeping. The owner or other person with a sufficient interest in the animals will be able to apply for

their release at any time after they are taken into possession. The Bill will allow action in an emergency, with an appropriate power of entry in support of these powers. There can be an application for the release of an animal at any stage, and the court will be able to make orders in relation to animals which have been taken into possession under the emergency powers. We feel this scheme provides protection for animals whilst at the same time protecting the rights of those with an interest in the animal, and preserves the role of the court whilst seeking to avoid unnecessary applications.

Recommendation 48

We recommend that the current provisions on reimbursement of reasonable costs in the Protection of Animals (Amendment) Act 2000 should be reflected throughout the draft Bill, so that inspectors and prosecutors are able to be reimbursed only for reasonable costs incurred by them in the performance of their functions under the Bill. (Paragraph 199)

We will amend the draft Bill so that the Magistrates' court may order that the person who incurs expense in dealing with a distressed animal may be reimbursed. It will be for the court, on the basis of the evidence put before it, to decide the amount to be reimbursed and by whom. We do not consider it necessary to put on the face of the Bill that the court should only order reasonable expenses to be reimbursed since as a public body the court has a duty to act reasonably in any event.

Recommendation 49

We are satisfied it is appropriate that constables and inspectors should be empowered to authorise the killing of a protected animal where there is no reasonable alternative. However, we consider that constables and inspectors would be greatly assisted in their functions if the term "reasonable alternative" was defined in the Bill. Furthermore, we seek assurances from the Government that those persons tasked with animal inspection work will be properly trained in animal behaviour so as to recognise when it will be necessary to kill an animal; constables and inspectors should also be trained to kill an animal in as humane a way as possible. (Paragraph 203)

We do not consider that the term 'reasonable alternative' is capable of further definition. We cannot foresee all the situations which might present themselves, and an element of discretion needs to be given to those dealing with emergencies. What is reasonable in each case will depend on all the facts and is best assessed by the inspectors and constables on the ground at the time. Some inspectors will be qualified veterinary surgeons and will therefore have received relevant training. Clearly it would be a good idea for local authority officers and the police to receive training in how to deal with suffering animals in an emergency and we will be considering how best to achieve this.

Recommendation 50

We consider that the powers contained in clauses 39 and 40 are appropriate. We believe that the serious nature of offences against animals justifies empowering constables and inspectors to enter premises, other than premises used solely as private dwellings, without a warrant on the basis of reasonable suspicion or belief that an offence is being or has been committed or that evidence of a relevant offence is on the premises. (Paragraph 206)

The draft Bill will be amended so that premises may only be entered for the purposes of searching for evidence of a suspected offence under the authority of a warrant. This change has been made after careful consideration of human rights law in this area. Recent authority, including the case of *Camenzind v Switzerland* RJD-III 2880 states that powers of search and seizure must be proportionate and subject to adequate safeguards. In that case, the European Court of Human Rights said that it would be particularly vigilant where national law allowed searches without judicial warrant and stated that very strict limits on such powers are necessary in order to protect individuals from arbitrary interference.

We have taken the view that, given the general approach to search and seizure in the Police and Criminal Evidence Act 1984, it would be difficult to justify a power to enter without a warrant to search for evidence of offences under the Bill, where no similar power was necessarily available in relation to other, possibly more serious offences.

Recommendation 51

To avoid confusion, we recommend that the Government amend the Bill to clarify what is meant by "any part of premises which is used as a private dwelling." (Paragraph 208)

The phrase used in the Bill is 'entry into any part of premises which is used as a private dwelling'. We do not consider this to be ambiguous. The antecedent of "which" is "part". In other words, if there is a part of a dwelling which is not used as a private dwelling, such as an office in the garage, then there might be a right of entry without a warrant in respect of this part. The phrase therefore takes the meaning in the second bullet point of paragraph 207 of the report, and the assumption in paragraph 208 is incorrect.

Recommendation 52

We endorse the underlying intention of the powers of entry in the draft Bill, namely that inspectors and constables should not be permitted to enter a private dwelling unless they have first obtained a warrant. We recommend that the Bill should provide greater powers of entry so that entry would not be permitted, without a warrant, to premises used only as a private dwelling. This would allow inspectors to

enter premises used as both business premises and private dwellings, such as farm premises, without a warrant. (Paragraph 214)

We do not agree with this recommendation, though we know that such a provision is to be found in other legislation and we appreciate that LACORS, in particular, have requested this power. We take the view that, in order to protect occupiers of private dwellings, it is appropriate to require inspectors to obtain a warrant if they wish to enter parts of the dwelling used partly for business purposes and partly as a home. So, for example, where a farmer keeps his records in the kitchen, then it is inappropriate to allow entry against the will of the occupier without a warrant. Even though the kitchen may not be used *only* as a dwelling, that is still one of its uses. Furthermore, entry into such a room might involve walking through other more private parts of a home, and we therefore feel that a warrant is appropriate to protect the inspector against allegations of unlawful entry into those parts, as well as to protect the rights of the occupier.

Recommendation 53

We recommend that the Government give consideration to implementing the suggestion made by the Association of Chief Police Officers that one set of justifications should be adopted, instead of different powers in different statutes, setting out the circumstances in which a private dwelling may be entered without a warrant. (Paragraph 215)

We will forward this recommendation to the Home Office. It is outside the scope of this Bill.

Recommendation 54

Given that both inspectors and constables will be exercising the powers of entry and search under the draft Bill, we recommend that the draft Bill should be amended to include a requirement that the codes of practice issued under the Police and Criminal Evidence Act 1984 in connection with the exercise of those powers should be complied with when exercising search and entry powers under the Bill. (Paragraph 218)

The codes of practice in PACE which relate to search and seizure are applicable to the police only and are drafted as such. They are not suitable for use in connection with powers under this Bill. We do not object in principle to drawing up a similar code for searches under the Bill but this cannot be done immediately. In any event, the requirements of sections 15 and 16 of PACE do apply to applications for, and execution of, warrants under the Bill. In addition, Schedule 2 of the Bill contains other safeguards.

Recommendations 55 and 56

55. As currently drafted, there is nothing in the draft Bill to prevent an RSPCA inspector, or an employee of any other charitable organisation, from being

appointed as an inspector under the legislation, because the Secretary of State is not prevented from including them on a list of suitable persons. We have only Defra's stated intention that the list will extend to only the State Veterinary Service and local authorities. If this is indeed Defra's intention, then we recommend that it should be specified on the face of the Bill. Currently, the draft Bill effectively delegates an unlimited power to the Secretary of State to decide who may act as an inspector. At the very least, the Bill should specify the appropriate categories of person or 'characteristics' of persons who may be appointed to the role. We further recommend that the draft Bill be amended to specify how inspectors will be appointed in Wales: currently, clause 44 makes reference only to the Secretary of State; no mention is made of the National Assembly for Wales. (Paragraph 224)

56. We believe that the RSPCA has performed a valuable role in ensuring animal welfare, and that it should be encouraged to continue to do so. Nevertheless, it is a ultimately a charitable body and therefore should have a separate and distinct role from "inspectors" appointed to enforce the draft Bill. To avoid confusion with the RSPCA's own inspectors, we recommend that the Government consider changing the term "inspector" in the draft Bill to "approved person", "approved officer", or some other term that sits appropriately with relevant legislation. (Paragraph 226)

The term 'Inspector' for those appointed by the Secretary of State and local authorities is prevalent throughout animal health legislation and we judge that to use different terminology in this Bill would be more confusing rather than less.

The draft Bill will be amended to deal with appointment of inspectors in Wales.

We do not expect RSPCA Inspectors to be appointed as inspectors to undertake work on behalf of local authorities. But if they are so appointed, they, like any person appointed by the local authority to inspect on its behalf, will be accountable to the local authority for their behaviour and performance in that capacity.

Recommendation 57

We recommend that the draft Bill should be amended to ensure that the standard with which an inspector must comply in order not to be held criminally or civilly liable is the same as the standard applied to constables exercising equivalent powers. (Paragraph 228)

The relevant clause seeks to protect inspectors acting in good faith against personal liability. We wish to retain this protection. There are precedents for this approach, for example in the Food Safety Act 1990. This approach is seen as particularly important in the field of animal welfare, since inspectors may need to act swiftly and on their own initiative in order to protect an animal from suffering. In addition, provided an inspector is acting in good faith and reasonably, then it is unlikely that a tort or crime has been committed. However, we will redraft the clause to make it clear that this protection is only afforded to the inspector personally, and not, for example, to the local

or national authority that employs him and which could still be vicariously liable for his actions in the course of his employment.

Recommendation 58

We consider that it is imperative that there is consistency in animal welfare enforcement between local authorities. It is most unsatisfactory and inequitable to have different standards of enforcement in different regions. We therefore recommend that the Government should adopt a system, such as a database, to ensure that enforcement across licensing departments in England and Wales is consistent. The information should be entered and held by local authorities. Although the RSPCA should be permitted to have access to the information, we consider it wholly inappropriate that the RSPCA should be given responsibility for compiling and maintaining the database. (Paragraph 233)

We agree that consistency in enforcement standards is important and that the establishment of the database would assist local authorities in raising enforcement standards and achieving a greater degree of consistency in the quality of their enforcement work. Any database would be held by central government. We will be looking at ways to improve data sharing between enforcement agencies, consistent with data protection legislation. RSPCA inspectors and prosecutors would have access to the database on an individual basis, rather than the entire organisation obtaining access.

Recommendation 59

We recommend that provision should be made to provide that compensation may be made available to persons whose animals have been dealt with under clauses 16 or 17 but who have subsequently been acquitted of any animal welfare charges. The draft Bill should be amended to specify and limit the circumstances in which a court can order the slaughter of an animal. It should specify that the court can make such an order only where no reasonable or humane alternative exists. (Paragraph 236)

We consider that a power to remove animals in an emergency is extremely important in order to provide adequate protection where necessary. We therefore feel that the provisions in the Bill are an improvement on the present very restricted powers of protection to be found in the Protection of Animals Acts.

In the Bill, the powers to deal with animals in distress and the power of the court to make orders in relation to animals removed in an emergency are no longer linked to the existence or otherwise of prosecutions. If an owner or keeper feels that his animal has been wrongly removed or should no longer be retained, he may apply to the court at any time for its return. No compensation would ordinarily be payable following a successful application for the return of animals removed using powers in the Bill if the defence of statutory authority is available.

Obviously, however, there is a need to exercise this power in a reasonable and proportionate manner, and compensation could therefore become appropriate if it was established that the power had been exercised unreasonably. We hope that such cases will be extremely rare, but if this should occur the claimant would be able to bring an action under existing procedures.

If an owner or keeper is aggrieved at an order made by a court in relation to an animal which has been removed, then the appropriate remedy would be to appeal against that order.

It is suggested that the draft Bill should be amended to state specifically that the court may only order the slaughter of an animal removed in an emergency where no reasonable humane alternative exists. We consider that it is highly unlikely that a court would make such an order if a reasonable alternative did exist. However, we are unwilling to tie the hands of the courts by inserting such a provision since it is impossible to foresee all the different sets of circumstances which may present themselves, and it is felt that the courts should be relied upon to make reasonable orders taking into account all relevant factors. If an order is felt to be unreasonable then the owner or keeper is protected by his right of appeal. In addition, the courts are bound to act in accordance with the Human Rights Act 1998 and will be mindful of this duty.

Recommendation 60

We consider that improvement notices would assist in ensuring that proceedings are commenced only in appropriate cases. They would not only save court time but could also encourage owners to improve standards of animal welfare. We recommend that, although enforcement agencies should have a discretion to issue improvement notices for protected animals, that discretion and the relevant procedural requirements should be specified on the face of the Bill. This should include a right of appeal on the part of the person to whom an improvement notice is issued. (Paragraph 242)

We have considered carefully whether it would be appropriate to include a requirement for improvement notices and agree that in general those responsible for animals should be given a clear indication of what they need to do to avoid prosecution under the welfare offence. Prosecution should be the last resort. This is in keeping with guidelines on enforcement. However, we also believe that prosecutors should have the discretion to proceed directly to a prosecution if that is what is required in the circumstances.

Since this is a common informers' offence we do not judge it appropriate to place a requirement to issue notices on the face of the Bill. The difficulties of ensuring consistency and quality control over the contents of formal improvement notices issued by private prosecutors would detract significantly from their value to the recipient. However, we note the RSPCA's commitment to providing suitable advice before proceeding to prosecution, and public authorities which prosecute will continue to

follow the relevant guidance which requires the service of a notice setting out the recommended steps to be taken. Inspectors' powers to issue improvement notices in relation to farmed animals will not be affected.

Recommendation 61

We recommend that clause 15(2)(c) be deleted from the Bill if the Government is unable to demonstrate a convincing reason for its inclusion. The Government should explain to whom it intends the powers of a prosecutor would be delegated under clause 15(2)(c) if it is not to the RSPCA. We consider it wholly inappropriate that prosecution powers under the draft Bill should be able to be exercised by any organisation other than the Police, the State Veterinary Service and local authorities. (Paragraph 250)

This point reflects a misunderstanding. Clause 15(2)(c) referred to agreements along the lines of the agreement with the RSPCA under the Protection of Animals (Amendment) Act 2000. The 2000 Act agreement did not give power to prosecute, but power to make additional applications for disposal orders in relation to a commercial animal that was the subject of an ongoing prosecution. The RSPCA has always had the power to prosecute for offences under the 1911 Act and will continue to be able to prosecute under the Bill. Clause 15(2)(C) of the draft Bill has been superseded, and provisions relating to written agreements with the Secretary of State will appear in the clauses that deal with applications for orders relating to animals seized under the emergency powers.

Recommendation 62

We consider that the RSPCA should be able to continue to institute private prosecutions on its own behalf. (Paragraph 258)

We agree with this recommendation. It was never our intention to remove the power for the RSPCA to bring a prosecution.

Recommendation 63

We consider that the gravity of the offences under the draft Bill should be reflected in increased sentencing powers. We recommend that certain offences should be triable 'either way'—that is, either summary or indictable—in order to give the courts the ability to impose longer sentences in appropriate cases, and we urge Defra to take this matter up with the Home Office. The offences which should be triable 'either way' should be the clause 2 fighting offence and the most serious cruelty offences under clause 1. We note that such offences would necessarily involve premeditation, whereas a welfare offence might not necessarily be intentional. (Paragraph 264)

We have consulted further with the Home Office who have confirmed both that the sentences are proportionate and that there is no evidence for pressure from courts for sentencing powers that go beyond those contained in the draft Bill (see the written memorandum sent to the Committee by the Magistrates' Association Sentencing Committee).

The Committee highlighted a seeming anomaly that theft of an animal would be an offence triable either way, whereas cruelty to an animal would not. However, the law on theft applies to theft of any object, not just animals, and so has to be triable either way to ensure that the most serious cases can go to Crown Court.

Recommendation 64

We welcome the Government's intention to close the loophole in the current provisions on disqualification by ensuring that an offender cannot circumvent disqualification by transferring ownership and, therefore, custody of an animal. However, we consider that clause 26 does not achieve this intention and we therefore recommend that the activities prohibited by clause 26 of the draft Bill should be extended to include "having custody, control or the power to control animals". (Paragraph 267)

The current power to disqualify is a power to disqualify from having 'custody' of animals. The court has no power to disqualify a person from owning animals at the moment. Therefore, it is not the case that owners need to transfer 'ownership and therefore custody' in order to evade disqualification, as stated by the Committee report.

We do not wish to retain the term 'custody', since this is the term which enforcement authorities currently have difficulty in interpreting. The clause will be redrafted to include an option allowing the court to disqualify a person from 'being party to an arrangement under which he is entitled to control or influence the way in which animals are kept.'

Recommendation 65

We recommend that fighting should automatically attract a disqualification order. We further recommend that certain animal cruelty offences carried out for a profit, such as making 'snuff' videos, should also attract automatic disqualification to reflect the seriousness of the offence (Paragraph 269).

Automatic disqualification prevents the courts from imposing sentences and orders which are proportionate and suited to the facts of the case. We resist the idea of mandatory disqualification orders, particularly as a disqualification engages the rights set out in article 1 of the first protocol to the ECHR (right to peaceful enjoyment of possessions). Such automatic orders could be disproportionate and breach those rights.

The Regulatory Impact Assessment

Recommendations 66 to 70

66. Given that Defra has had well over two years since its initial consultation on the draft Bill in January 2002, we are both surprised and concerned that the appraisal of alternatives to regulation in the Regulatory Impact Assessment accompanying the draft Bill is not better developed. Defra's excessively simplistic assessment of options fails to quantify the benefits of the legislation or its alternatives, which limits Defra's ability to demonstrate that the benefits of the proposed legislation would exceed the costs. (Paragraph 274)

67. Defra's assessment of the probable enforcement costs arising from the implementation of the legislation as "negligible" appears to us to be simplistic in the extreme, for the following reasons:

- Defra appears to have ignored the probable increase—at least initially—in prosecution and conviction numbers from the new offences which the draft Bill would create.
- Defra does not appear to have accounted for the fact that proposals in secondary legislation will require appropriately skilled personnel to provide enforcement and inspection services and veterinary expertise in newly regulated areas such as animal sanctuaries, livery yards and greyhound tracks. We received evidence suggesting that there is a significant skills shortage in these areas and we are therefore concerned that the Regulatory Impact Assessment does not quantify what extra resources will be required nor how they will be provided. The Regulatory Impact Assessment states that "each piece of secondary legislation will be subject to a separate RIA and consultation once it is decided to take forward work on that particular regulation/order", which suggests to us that
- Defra has given no detailed consideration to the likely resource implications of its proposed secondary legislation.
- Defra has proposed that local authorities should operate their licensing services on the basis of full cost recovery, yet the practicalities of this proposal are nowhere discussed in the Regulatory Impact Assessment. (Paragraph 282)

68. We consider that the Regulatory Impact Assessment accompanying the draft Bill fails to demonstrate that the benefits of the proposed legislation would exceed the costs, as is required by Cabinet Office and National Audit Office guidance. The Regulatory Impact Assessment shows evidence of a lack of thorough consideration, on the part of Defra, about the likely consequences of enacting the draft Bill. It fails to demonstrate what measurable benefits would arise from enactment and provides only weakly evidenced and limited cost information. We are concerned that Defra's poor assessment of the likely long-term implications of the draft Bill, together with

the extent to which Defra proposes to defer policy decisions to secondary legislation, indicates that Defra is not yet properly prepared to legislate in this area. We therefore consider that the Regulatory Impact Assessment lacks credibility and provides an inadequate basis for pre-legislative scrutiny. (Paragraph 283)

69. Consequently, we recommend that, before a final Bill is introduced to Parliament, Defra produces a new Regulatory Impact Assessment which better meets the requirements of Cabinet Office and National Audit Office guidance. The revised Regulatory Impact Assessment should include:

- a more thorough options appraisal
- a quantification of benefits
- a more comprehensive consideration of costs, including the costs of secondary legislation
- evidence to demonstrate that full cost recovery by local authorities is a realistic operational objective, and
- evidence to demonstrate that sufficient appropriately skilled personnel exist to provide enforcement and inspection services and veterinary expertise in newly regulated areas such as animal sanctuaries, livery yards and greyhound tracks. If such evidence is not available, Defra should explain how it proposes to address this shortage. (Paragraph 284)

70. We also recommend that, in order to gauge whether costs are accurately reflected in its Regulatory Impact Assessment, Defra consults with the appropriate authorities about the likely costs of enforcement, licensing and inspection. (Paragraph 285)

We do not accept that the draft RIA failed to meet Cabinet Office and NAO guidelines. The Cabinet Office was consulted at all stages during the preparation of the RIA and we also worked closely with local authority associations and representatives, the Office of the Deputy Prime Minister and other government departments, the professional veterinarian associations, the RSPCA and other major welfare organisations, the police, industries and groups that the Bill may impact on and the Small Business Service. The Cabinet Office has indicated that they are satisfied with the contents, including costs, of the revised RIA.

However, in the light of the comments made by the Committee, we propose to make a number of changes to the RIA to address some of the concerns highlighted. Two tables will be inserted that demonstrate the number of visits that the RSPCA, the principal enforcer of animal welfare law, makes in a 12 month period to ‘welfare cases’ and the costs associated with these visits. The tables show that by having a specific welfare offence the need for so many visits to such cases will be reduced leading to savings.

In addition, we have added more detail to explain the benefits, in terms of improved animal welfare, that regulation has brought to existing activities (e.g. pet shops, dog breeding, animal boarding and riding establishments) and to show that we can therefore expect similar benefits to result from the regulation of new activities.

Another major criticism was that the RIA did not explain why enforcement costs for local authorities would not rise significantly. A table will be inserted that shows the average number of existing licensed activities per local authority compared with the average number proposed under the Bill. Although there will be more licensed activities under the Bill for local authorities to administer, the table shows that because of the move from 12 month to 18 month licences, the average number of inspections per local authority over a three year period will not rise significantly (from 109.2 to 121.0).

We will also mention the scope for contracting staff from other agencies, e.g. the British Horse Society, to assist with licensing work where there is a need for additional help.

We intend to bring forward the proposed regulation of greyhound tracks by one year from 2009/10 to 2008/9 in response to the concern that a timescale of the end of the decade was too far away. We will however emphasise the need to have time to allow the greyhound racing authorities to continue to implement change and the need for time to train local authority inspectors.

In terms of presentation, the table that was at the end of the main body of the published RIA (page 82 of that document) that summarised the costs set out at each annex will be moved to the Option 3 costs section together with its introductory paragraph.

Annex A (Proposal to licence circuses and other performing animals in entertainment) will be amended to reflect more accurately the proposal to licence all trainers/suppliers of animals with a requirement that professional entertainments and advertisers, including film, theatre, television and circus should only use animals provided by a licensed trainer.

The statistics (the risk that the Bill addresses) will be updated from 2002 to 2003 figures and the number of animal rescue centres/ sanctuaries will be changed from “no statistics available” to an estimated figure of 700 to reflect the total figure at Annex E.

The revised RIA will also refer to the possibility of centrally provided training to help local authorities to get to grips with new ways of working under the Bill.

We will also add annexes relating to the licensing of dog breeders, animal boarding establishments and riding establishments.

Proposed and possible secondary legislation and codes of practice

Recommendation 71

We recommend that, at such time as the Bill may be introduced to Parliament, the Government clarify its reference in annex L to the Regulatory Impact Assessment to regulations it intends to make within a year of the Bill's enactment that would effectively "define" the clause 3 welfare offence. Such regulations would appear to be in addition to the proposed regulations about which the Government has provided details in the annexes to the RIA. (Paragraph 291)

The welfare offence will as far as possible and appropriate be supported by regulations and codes. The advisory codes will be drawn up in consultation with representatives of welfare organisations, industry interests and animal keepers, and we have drawn up the first draft of a code for domestic cats. Others will follow. Following further consideration we do not anticipate introducing a general regulation for non-farmed animals but do not rule it out should subsequent work on codes of practice suggest that such regulations are necessary.

Recommendation 72

We recommend that, at the same time, the Government also clarify its reference in annex L to regulations it intends to make within a year of the Bill's enactment in order to regulate means of selling animals, other than pet shops and pet fairs. (Paragraph 292)

The reference to selling animals, other than at pet shops and pet fairs, is intended to include sales of pets over the internet. However, due to the complications inherent in regulating Internet activities, we accept that to produce regulations and a code within a year to govern Internet sales may not be possible.

Proposed first tranche of secondary legislation and codes of practice

Recommendations 73 and 74

73. We are concerned that Defra has not set out in the draft Bill document any detail on its proposals to license riding schools, dog and cat boarding establishments and pet shops, given that it intends to implement these proposals within a year of the Bill being enacted. A clear indication of the policy which Defra intends to implement in respect of these businesses should be made available if and when the final Bill is introduced to Parliament. (Paragraph 299)

74. At this stage, we support Defra's proposal to introduce mandatory licensing and inspection for all livery yards in England. (Paragraph 301)

The detail is largely contained in the existing legislation concerning these activities. We do not anticipate that the detail will change substantially, although the replacement of

the previous Acts will provide some opportunity for modernisation where this is appropriate.

Recommendation 75

We consider it vital that the legal status of pet fairs be clarified. Obviously, the confusion caused by the wording of the Pet Animals Act 1951 is most unsatisfactory. Given the current situation is so murky, and that the ethics of pet fairs are so hotly contested, we are extremely concerned that Defra appears to have assumed that it should legislate so that pet fairs are clearly legal, without first consulting widely on this issue. Defra appears to have proceeded straight to the question of asking how pet fairs should be regulated, without first asking whether they should be clearly legalised. This is a significant deficiency in the approach adopted by Defra in updating animal welfare legislation. We recommend that, before Defra proceeds to draft regulations which would repeal the 1951 Act and introduce, in its place, a licensing regime on pet fairs, it first consult on whether pet fairs should be made unequivocally legal. (Paragraph 316)

We recognise that there is ambiguity over the legality of pet fairs and the licensing provisions in the Bill provide an opportunity to remove this uncertainty. Following consultation with welfare interests, local authorities and the organisers of pet fairs, it is our belief that these events could be held under licence. The welfare offence, additional regulatory safeguards and a government code would allow pet fairs to take place without the welfare of an animal being compromised when compared with an animal being sold in a pet shop. However, we recognise that strong views are held on both sides of this argument and we will continue to review the evidence when preparing proposals for consultation.

Recommendation 76

We recommend that Defra reappraise the basis on which its proposed regime for licensing pet fairs is predicated. (Paragraph 317)

We agree that more work needs to be done on the draft proposals relating to pet fairs. This will include a public consultation.

Recommendation 77

We do not support Defra's proposal to introduce 18-month licences, rather than annual licences, in respect of licensing of circuses, pet fairs, livery yards or animal sanctuaries, or in respect of any other business currently licensed under animal welfare legislation. The proposal would reduce the frequency with which businesses or premises would be inspected, and would therefore not promote the highest standards of animal welfare because it would increase the period of time during which breaches of legislation could go undetected. We consider that any possible benefits to business offered by a shift to 18-month licences are outweighed by animal

welfare considerations. In particular, we consider 18-month licences would be entirely inappropriate for itinerant, annual, often one-off events, such as pet fairs. We therefore recommend that Defra does not pursue its proposal to replace annual licences with 18-month licences. In respect of pet fairs and similar events, we recommend that a licence for a pet fair should apply to a single event only, and that each separate event should require a separate licence. (Paragraph 320)

We do not accept the comments regarding 18 month licensing periods. 18 months would be the maximum period between inspections, and it would be up to the local authority to use risk management techniques to decide whether more frequent inspections were necessary. In addition, a greater use of veterinarians or other experts in licensing visits will raise the current standards that apply at licensing inspections. We agree that should pet fairs be licensed, it would be appropriate to license individual events.

Recommendation 78

We recommend that vet-accompanied inspections of livery yards, animal sanctuaries and dog and cat boarding establishments should be required at least every two years, rather than Defra's proposed requirement of only once every five years. If Defra accepts our recommendation to provide for annual licences, rather than the proposed 18-month licences, then a vet-accompanied inspection should be required every two years - at the time of application and at every second licence renewal thereafter. If Defra proceeds with its proposal to introduce 18-month licences, then a vet-accompanied inspection should be required every 18 months — at the time of application and at every licence renewal thereafter. (Paragraph 323)

We do not accept the comments concerning the frequency of veterinarian involvement in licensing visits, although we agree that there is a need for greater veterinary support than currently is the case and that the regulations should specify the maximum period before which a veterinarian has to accompany the inspector. We consider that the introduction of the welfare offence coupled with up-to-date regulations and government produced codes, should improve the overall quality of the inspection. For inspections that are at less than the maximum period set in the regulations for a veterinarian to accompany the inspector, it should be left to the discretion of the inspector to decide whether a veterinarian should be present.

Recommendation 79

We commend Defra on its proposed scheme to require pet vendors to issue appropriate information about animal husbandry and care at the point of sale. However, we are concerned that Defra has apparently failed to consider extending this requirement beyond pet shops and dog breeding establishments to other vendors of pet animals, such as vendors at pet fairs and at other types of breeding establishments. We therefore recommend that the proposed scheme be extended to other vendors of pet animals. We recommend that the information which vendors

are required to provide to prospective and actual purchasers should be able to be provided by the Pet Care Trust only if Defra first institutes a system whereby the information is checked by an independent, expert source prior to being published. (Paragraph 327)

We have noted the recommendations concerning pet care leaflets and they will be taken into consideration when draft regulations are prepared.

Recommendation 80

If electronic shock collars and perimeter fence devices have indeed been in use in the UK for 13 years now, as one submitter claimed, then we are surprised that Defra has not yet undertaken sufficient research into these devices in order to have formed an opinion of them, particularly given the controversy surrounding their use. We urge Defra to undertake a process of consultation and research about the possible regulation of these devices as soon as possible. (Paragraph 333)

We are studying the feasibility of a research project to clarify the welfare risks and benefits.

Recommendation 81

At this stage, it seems to us that an appropriate approach to electronic shock collars and perimeter fence devices would be to outlaw their use for purposes of training except, perhaps, with the exception of suitably licensed veterinarians. On the basis of the evidence we have received, we do not oppose the use of these devices to contain dogs within a particular area without the need for fences. (Paragraph 334)

We note the Committee's recommendations and will keep the evidence under review. As yet we are unconvinced that the available evidence is sufficient to justify a decision to restrict the use of electronic shock collars to licensed veterinarians.

Recommendations 82 and 83

82. We consider that tail docking in dogs should be banned for cosmetic reasons. Tail docking should continue to be permitted for therapeutic reasons, where it is in an animal's best welfare interests. The question of allowing an exemption for prophylactic docking for certain breeds or types of working dogs is more difficult. For example, there is a risk that a whole litter of puppies which might one day be used as working dogs could be docked as a precautionary measure. Unless there is a system to guarantee that a docked puppy will be used as a working dog, an exemption for prophylactic docking risks being abused. (Paragraph 340)

83. We therefore support Defra's proposed position on this issue. To prevent an abuse of any exemption for prophylactic docking, we recommend that a puppy's tail should be permitted to be docked for prophylactic reasons only where the following conditions are met:

- as is currently required by law, tail docking should be carried out only by a veterinarian
- the veterinarian should take all reasonable steps to satisfy him or herself that the puppy is of a specified breed of dog, generally used as a working dog, or that the puppy is likely to be used as a specified type of working dog
- the veterinarian should be required to maintain records demonstrating why he or she was satisfied that these conditions were met—for example, a gun licence
- the veterinarian should be required to microchip any puppy which he or she docks; the microchip should contain the details of the veterinarian who docked the puppy, and
- the veterinarian should provide the owner with a certificate endorsing the tail docking; the certificate should include the details of the veterinarian who carried out the procedure. (Paragraph 341)

We will consider the feasibility of the recommendation concerning micro-chipping.

Recommendations 84 and 85

84. We recommend that, prior to drawing up a draft code of practice on the rearing of game birds for sport shooting purposes, Defra should ensure that it has consulted with a broad range of groups and individuals with an interest in this area, including those groups which are critical of current game bird rearing practices. The Government should ensure that it has solid data on the numbers of game farms in England and Wales and the scale of these farms. (Paragraph 352)

85. On the basis of the evidence we have received, we do not support the existing Game Farmers' Association code of practice being adopted as a statutory code of practice under clause 7 without further consideration first being given to the appropriateness of certain rearing practices, including beak trimming and burning and the fitting of bits, masks and spectacles. We consider that gamekeepers should be required to try other methods first before resorting to these practices, as currently appears to be the requirement in relation to tail docking in piglets. (Paragraph 353)

We note the recommendations of the Committee. We had not intended that the existing Game Farmers' Association code should be adopted as a statutory code of practice. We will continue to take account of all views when drawing up our proposals for codes and regulations. We are studying the feasibility of a programme of scientific research on certain rearing techniques before drawing up proposals on the rearing of game birds.

Recommendation 86

We are also concerned that, of the game birds being reared, only 40% end up being shot. However, we have heard insufficient evidence to draw any firm conclusion on this issue. (Paragraph 354)

We note the Committee's concerns. We have focused our considerations on the conditions in which game birds are reared, and not on what happens to them once they are free to roam and no longer the responsibility of man or within the scope of the Bill.

Recommendation 87

We do not consider that gamekeepers should continue to be responsible for taking reasonable steps to ensure the welfare of game birds once they have been released into the wild, in terms of the clause 3 welfare offence. However, as the draft Bill stands, we consider there is scope for prosecutions to be brought in this respect. We recommend that the Government ensure that the protection provided by the draft Bill does not extend to game birds once they have been released into the wild. (Paragraph 355)

We consider non-domesticated animals at liberty to roam in the wild, such as pheasants, to be in a wild state and not within the definition of 'protected animal'. Nor do such birds have the type of relationship with man whereby a person could be said to be responsible for them. However, we accept that reared pheasants do not always make the transition from a state of dependency on man inside a release pen to a wild state outside the pen purely as a result of the act of releasing them, any more than a wild animal taken into care by a sanctuary and subsequently released into the wild would. To that extent a gamekeeper might be said to have a limited responsibility to meet certain needs of the pheasants, such as feed, immediately after their release. In spite of this we do not expect successful prosecutions for failure to ensure welfare in this situation. The court would have regard to the wild state of the pheasant, the limited extent of the responsibility of the keeper, to the 'lawful purpose for which the animal is kept' and 'any lawful activity undertaken in relation to the animal'.

Recommendation 88

We support Defra's suggestion that vendors who sell pet animals over the internet in England should be subject to a code of practice, issued under clause 7, which would set out minimum welfare standards. However, given that Defra describes its policy in this area as "to be agreed", we doubt whether Defra will be in a position to issue such a code of practice within a year of any Bill being enacted, as is its stated intention. We recommend that the Government assess whether it is really in a position to issue a code of practice on internet trading within its intended timescale. (Paragraph 358)

We intend to commence work on pet vending matters shortly (including internet sales). However, as mentioned in our response to recommendation 72, we recognise the

difficulties in regulating Internet activity and accept that the production of regulations and a code within a year may prove too ambitious a timescale.

Recommendation 89

Given the importance of any secondary legislation made under a future Act for the practical operation of the Act, we consider it is important that Parliament should have some indication of what policies the Government is proposing to implement under the delegated powers in the Act. This is particularly crucial given the wide-ranging concerns that have been raised in evidence about many aspects of the policies proposed for implementation in the first tranche of secondary legislation and codes of practice. We therefore recommend that the Government publish revised details of its proposed policies for implementation in the first tranche at such time as it may introduce a final Bill to Parliament. (Paragraph 359)

We agree that there is likely to be considerable interest in the contents of the planned regulations and codes, and that they should be subject to an open and transparent process as they are drawn up and proceed through parliament. But it is not feasible to make available the exact details at the time of introducing this Bill in Parliament. We will continue to be as open as possible on the state of our thinking on policy in these areas, but by its very nature, the details are liable to change and develop.

Proposed second tranche of secondary legislation and codes of practice

Recommendation 90

We recommend that, prior to publishing any draft regulations providing for the licensing and registration of animal sanctuaries, Defra consult widely in order to produce a practical definition of what types of establishment constitute an "animal sanctuary". As part of this exercise, Defra will need to establish with greater certainty how many animal sanctuaries there are in England. (Paragraph 367)

We agree with the Committee's comments regarding the need for consultation on the definition of a sanctuary. Consultation will also clarify in what circumstances either registration or licensing is most appropriate. However, we would look to local authorities to obtain details of sanctuaries within their area.

Recommendation 91

We recommend that a licensing scheme should be extended to all animal sanctuaries, regardless of their size. We acknowledge that the imposition of the compliance costs associated with such a requirement may cause some smaller sanctuaries to close down. On balance, however, we consider it is more important that minimum animal welfare standards be ensured across all sanctuaries. (Paragraph 369)

We do not want to force well run, smaller sanctuaries to close, and it should be possible to build safeguards into the proposed registration scheme to ensure that those sanctuaries that are likely to have welfare difficulties can be readily identified. The welfare offence will be important in dealing with sanctuaries that fail to meet the welfare needs of animals for which they are responsible.

Recommendation 92

We recommend that Defra amends its proposals to license the use of performing animals in circuses by distinguishing between the use of wild animals and domesticated animals in circuses, with a view to prohibiting the use of the former. Circuses should not be permitted either to bring in new wild animals or to breed from their existing wild animals. (Paragraph 381)

We consider that the introduction of the welfare offence is likely to prevent unsuitable animals from performing in circuses and elsewhere. Not all non-domesticated species, most of which are captive bred, are unsuitable for performing in circuses and elsewhere, and therefore the type of prohibition proposed by the Committee could lead to anomalies and unfairness.

Recommendation 93

With this qualification, we support Defra's proposals to license the use of performing animals in circuses, television, films, theatre and promotional work. However, we recommend that Defra clarify whether it proposes to license the circus/organisation, the trainer or the animal. We also recommend that Defra clarify what use it envisages being made of registration requirements in these circumstances. (Paragraph 382)

Currently trainers of performing animals are registered. We propose that they should be licensed and premises where animals are housed, trained or where they perform should be subject to inspection. The only animals that would be permitted to perform are those under the control of licensed trainers. We will need to consult about this proposal but it is not our current intention to impose registration on the industry.

Recommendation 94

We recommend that any draft regulations proposing to implement a licensing regime for the use of performing animals should specify that all personnel who train, work with, supply or are responsible for supplying animals must be licensed. Such personnel should be required to attain a formal animal training qualification before they can be licensed. (Paragraph 383)

We agree that it would be appropriate to license trainers and to bring in minimum qualifications for them. We do not consider that this would be realistic for other personnel in the industry.

Recommendation 95

We recommend that Defra explain whether it intends to regulate international circuses visiting England and, if so, how. (Paragraph 384)

We would want trainers employed by international circuses to be subject to the same regulation, including inspection. We are aware that the draft Services Directive currently under negotiation in the EU may affect the legal basis of circuses operating in this country.

Recommendation 96

We recommend that Defra re-examine its rationale for exempting "amateur theatrical productions" from any licensing or registration scheme. The proposed exemption appears to be contrary to the draft Bill's ultimate objective of improving animal welfare. (Paragraph 385)

We recognise that this issue needs to be carefully considered when we consult on draft regulations.

Recommendations 97 and 98

97. We are unconvinced by the argument that the greyhound racing industry should be allowed until 2010 to regulate itself and improve its own welfare standards. We accept that the British Greyhound Racing Board and the National Greyhound Racing Club are making significant efforts to improve welfare standards at NGRC-registered tracks, but their best efforts cannot alter the fact that about 40% of greyhound racing tracks are run independently of the NGRC, and therefore apparently operate free from external, independent scrutiny. If these tracks do not wish to register with the NGRC, they cannot be compelled to do so. We therefore consider external, independent regulation of these tracks is essential, and we do not consider that it would be fair to exclude NGRC-registered tracks from such regulation. (Paragraph 392)

98. We consider that greyhound racing tracks should be subject to a licensing regime, not a code of practice, and we therefore recommend that Defra should publish draft regulations to address this issue as soon as possible. We do not accept that regulation in this area should wait until 2010, or five years after any future Bill is enacted. (Paragraph 393)

We agree that there is a case for bringing forward the proposed timescale for determining the level of regulation that should apply to greyhound racing, and are considering the practicalities. All tracks – whether or not they race under NGRC Rules – should be subject to registration.

Comments on the pre-legislative scrutiny process

Recommendations 99 to 101

99. We welcome the extent to which Defra has chosen to involve itself in our pre-legislative scrutiny process, and the helpful and open-minded attitude adopted by the Minister and his officials in the course of our oral evidence sessions with them. (Paragraph 395)

100. However, we consider that this draft Bill was not an appropriate candidate for pre-legislative scrutiny by Parliament in the absence of the Government having first conducted its own consultation process. Defra last consulted on this policy proposal two and a half years before the publication of the draft Bill. Given the complexity of the proposal and the widespread public interest in it, we consider that it should have been subject to further consultation prior to being published for the purposes of pre-legislative scrutiny. (Paragraph 396)

101. While it is not always inappropriate for government departments to choose to rely on Parliament's pre-legislative scrutiny process, rather than conducting a separate consultation process in accordance with Cabinet Office guidelines, we consider the Government should adopt such an approach only where the policy behind a draft Bill has recently been consulted on, or where the draft Bill is minor or uncontroversial. Neither of these conditions were met in the case of the draft Animal Welfare Bill. (Paragraph 398)

The process of pre-legislative scrutiny is still a new one and we will consider the Committee's comments when considering the timing of pre-legislative scrutiny for future Bills.

While the deadline for the receipt of comments on Defra's public consultation on the Animal Welfare Bill was in August 2002, we have continued to hold numerous meetings since then with a wide spectrum of people and organisations about both the contents of the Bill and possible secondary legislation. The draft Bill and the RIA were prepared in the light of the views that we received during this ongoing consultative process. We are satisfied that the contents of the published draft Bill and the RIA were in line with the expectations of key stakeholders.