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Animal Welfare Act 2006

B1 Scope

The Animal Welfare Act 2006 (AWA) was a radical departure from the anachronistic Protection of Animals Act 1911 (POA) which it replaced after almost a century. In comparison to the POA which was primarily concerned with cruelty, the AWA is concerned with welfare. The words 'cruel' and 'cruelty' are not used in the AWA at all. Instead the word 'suffering' is used throughout. That is consistent with the twin legal limbs of duty and protection relative to people and animals. While the POA was riddled with legal inconsistencies, especially in the treatment of farm animals and wild animals in captivity, the AWA has a different slant altogether. The approach of the AWA is to place a legal burden on the person responsible to care for the welfare of the animal. To that extent it is a complete change of emphasis as the AWA seeks to protect animals from their natural predators, humans. Equally to that end the AWA restricts an owner's right to treat an animal in a way that harms its welfare.

It was a slow and thorough process that led to the passing of the AWA. Initially there was a public consultation between January and April 2002. That led to a draft Bill which was published in July 2004. The House of Commons Select Committee on Environment, Food and Rural Affairs then carried out a pre-legislative scrutiny of the draft Bill. The Select Committee published its report in December 2004. In March 2005 the Department for Environment, Food and Rural Affairs (Defra) published a response to the Select Committee's report. That Committee published a further report a year later in December 2005.

Following that period of consultation and examination the AWA received the Royal Assent on 8 November 2006 and came into force on 6 April 2007. It was introduced earlier in Wales on 28 March 2007.

The AWA covers various aspects of animal welfare under 11 headings from the *Introductory* to the *General* category. The respective headings deal with the scope of the AWA through to the investigation of offences and the consequent sentences.

All the relevant headings are examined and analysed in the text except for the tenth one which covers sections 46 to 50 as they apply only to Scotland.

While those in the wild are still not largely legally protected, in given circumstances the AWA can extend to them too. The main protection is given to an animal that is owned by a person or there is someone who is responsible for it. Yet the offences relating to cruelty and fighting have a much wider application and catches those who are directly and indirectly involved in the crime. Although animal experiments and vivisection are outside the scope of this book, the AWA touches on that area as well. In general it extends the mantle of law to cover domestic and farm animals as both are often in equal measure used and abused by humans. The AWA seeks to identify and protect their interests.

To the extent that the AWA particularly covers areas that were previously overlooked or deliberately ignored, it is a rare example of Parliamentary prescience. Whether the Act is as revolutionary as it could be now depends upon the judiciary.

B2 Five Freedoms

It was an absurd situation that under the ancient legislation the authorities could only act after the animal had been abused. That was proved in sharp focus by a person representing Richard Martin who applied to the authorities to prevent the pending cruelty of a circus which advertised a spectacle 'A Tame Lion Bait with Dogs'. Wombell's Circus advertised it in 1825 just three years after 'Martin's Act' or An Act to prevent cruel and improper Treatment of Cattle 1822 was introduced. The mayor refused to stop the show. The magistrate refused to stop the show. They explained they could not act until the cruelty was committed. That purblind idea was enshrined in later legislation including the POA.

A crucial point about the AWA is that it allows the authorities to act before the offence is committed. That is a distinct difference between its power and effect as compared to the POA. The POA attempted to punish the owner of an animal after he had abused it. The AWA allows the authorities to bolt he stable door before he has harmed the horse. The essential reason for the difference is that the AWA is based on and incorporates the principles initially outlined by the Brambell Committee in their *Report of the Technical Committee to Enquire into the Welfare of Animals Kept Under Intensive Livestock Husbandry Systems*, in 1965. The effect of the Brambell Committee's Report was immediate and important. For as a direct result of their conclusions the term 'welfare' was adopted in the legislation to protect animals in Britain. By the Agriculture (Miscellaneous Provisions) Act 1968 the welfare of farm animals became a legal consideration which if breached could lead to a farmer being prosecuted.

The concept of welfare in the modern and legal sense that sprang from the Brambell Report was adopted and endorsed by the Farm Animal Welfare Council (FAWC – now Committee) which was formed in 1979. In turn the result of the report by FAWC, *Report on Priorities on Animal Welfare Research and Development*, in 1993 led to the principles of the 'Five Freedoms'. These were established as the requirements that were necessary to ensure an animal's welfare was legally protected. FAWC concluded that all animals should have those basic Five Freedoms which are:

1. Freedom from hunger and thirst – by ready access to water and a diet to maintain health and vigour.

2. Freedom from discomfort – by providing an appropriate environment.

3. Freedom from pain, injury and disease – by prevention or rapid diagnosis and treatment.

4. Freedom to express normal behaviour – by providing sufficient space, proper facilities and appropriate company of the animal's own kind.

5. Freedom from fear and distress – by ensuring conditions and treatment, which avoid mental suffering.

Although those are far from perfect, it should be both emphasised and remember that they are the minimum requirements to ensure an animal is properly treated either by those who have a duty to care for it or are responsible for it or intend to kill it or all those matters. The requirements are now the central plank of the AWA and specifically detailed in sections 9 to 12. Indeed the heading of those sections, Promotion of Welfare, accentuates the aim and approach of the Act. For the regulations and the codes of practice and enforcement powers under the provisions of the AWA enable the authorities to be active in promoting animal welfare as well as reactive to abuse.

B3 Life

In the Scottish case, *Patchett v. Macdougall* [1984] SLT 152 (Note), the court held that when Patchett shot and killed a dog he had to be acquitted because there was no direct evidence or expert opinion that the dog had suffered prior to its death. Although the court condemned his act Lord Hunter said, 'the absence of a positive finding to the effect that the act of the appellant caused the animal suffering is fatal to the conviction.'

It was submitted to the court by the respondent that the fact the dog lost its life was tantamount to 'suffering' and hence an offence. Lord Wheatley laconically responded, 'Metaphysical considerations apart, I do not consider that the structure and purport of the Act opens the door to that view.'

That strict intellectual view was confirmed in essence in the High Court in *Isted v. DPP* [1998] Crim. L. R. 194 where a farmer, Isted, shot a dog, Lily, who was in his pig pen with teeth bared and barking, which resulted in her being wounded but not killed. Brookes LJ said, 'The present state of the law was unnecessarily confusing.' He went on to consider, 'the requisite mental element' under the Criminal Damage Act 1971 as compared to the POA and added, '…the relevant part of the 1911 Act was framed by the reference to the antique law underlying words like "wantonly or unreasonably" which was bound to continue to give trouble to those concerned with its administration.'

That encapsulates all that was wrong with the POA. Brookes LJ added, 'It is time that policy [damage to animate property] was expressed in clear, intelligible and modern language, which would avoid the unnecessary legal expenditure devoted to cases like this.' The AWA has sought to obviate such abstruse language and provide a remedy to that inherent confusion.

Fortunately however that is now in the past. It is consistent with the aim of the AWA that the principle of the welfare of the animal is paramount. Moreover that is consistent with the approach of the Recorder of Aylesbury, His Honour Judge Tyrer DL, in *Gray v. RSPCA* [2010] A20090060 where he said accurately, 'In our judgment the old jurisprudence is no longer relevant.'
[See **B8**; **B9**.]

Put in perspective, notwithstanding that animals are classed as property as a matter of law, there is no reason why it should be 'appropriate and humane' to deprive one of its life, except by a qualified vet or if it is in a condition of manifest distress. That would allow the caring

person, be it the owner or a passing Samaritan, to act in the interests of the animal. The fact it is deprived of its life would be inappropriate and inhumane unless it was shown to be otherwise by the person carrying out the act or the omission. That approach would preserve the legal duty of care with the animals' welfare in remaining alive. Indeed given that such destruction is both final and irrevocable, it accords with the aim of the AWA too as stated specifically in sections 4(4) and 9(4) in the same terms: 'Nothing in this section applies to the destruction of an animal in an appropriate and humane manner'.

There is nothing metaphysical about concluding that if you hit an animal from behind so it is instantaneously killed, or there is no expert evidence, it does not suffer. For sections 4(4) and 9(4) do not stand on their own. They encompass the ethos of the AWA. As such the AWA protects the animal by confirming the manner of its destruction must be appropriate and humane in order to be legal. Whatever the method, depriving an animal of its life without cause or reason is neither appropriate nor humane.

B4 *Introductory*

The Introductory sections 1 to 3 specify which animals are within the protection of the Act.

Animals to which the Act applies

Animal Welfare Act 2006, s.1

(1) In this Act, except subsections (4) and (5), "animal" means a vertebrate other than man.

(2) Nothing in this Act applies to an animal while it is in its foetal or embryonic form.

(3) The appropriate national authority may by regulations for all or any of the purposes of this Act –

(a) extend the definition of "animal" so as to include invertebrates of any description;

(b) make provision in lieu of subsection (2) as respects any invertebrates included in the description of "animal";

(c) amend subsection (2) to extend the application of this Act to an animal from such earlier stage of its development as may be specified in the regulations.

(4) The power under subsection (3)(a) or (c) may only be exercised if the appropriate national authority is satisfied, on the basis of scientific evidence, that animals of the kind concerned are capable of experiencing pain or suffering.

(5) In this section, "vertebrate" means any animal of the Sub-phylum Vertebrata of the Phylum Chordata and "invertebrate" means any animal not of that Sub-phylum.

As a nod to the reality that we are all Darwin's cousins, the AWA defines animals to which the Act applies as 'a vertebrate other than man'.

Unlike the legal protection given to humans, the AWA does not apply to an animal while it is in its foetal or embryonic form. That seems a strange omission given that it would obviously

be an aggravating feature if suffering is caused to a pregnant animal. It is the precise reason why human foetuses have legal protection. After all if an animal is pregnant its needs and welfare are affected because of its condition. Moreover the unborn progeny can have its pending birth terminated and its welfare affected as well as a result of any abuse directed at its prospective parent.

Nevertheless the AWA specifically allows for changes in legal protection according to the advancement of knowledge and science. The 'appropriate national authority' which is defined by section 62(1), is the Secretary of State for England and the National Assembly for Wales. They have power to extend and make and amend the regulations. At present the AWA applies to vertebrate animals as those are currently believed to be the only perceived sentient animals. So those authorities can introduce other animals within the AWA according to scientific advancement. On 24 May 2012 the International Institute for Species Exploration confirmed the existence of 200 new animals and plants. They include such a variety as a sneezing monkey, a blue tarantula and a parasitic wasp. This provision would allow the authorities to include such creatures within the protection of the AWA.

The regulations referred to are the means of amending the AWA under section 12 by the national authority. It is typical of the Act that such regulations must relate to the promotion of animal welfare. That is why that power may only be exercised if it is satisfied 'on the basis of scientific evidence', that animals of the kind concerned are capable of experiencing pain or suffering.

It is noteworthy that 'pain' is not defined directly at all in the Act. While 'suffering' is defined under section 62(1) as 'physical or mental suffering and related expressions shall be construed accordingly'. That definition is particularly significant as we now know that animals can indeed feel mental suffering and in extreme cases even post-traumatic stress disorder. The resonance between the human reaction to conditions and animals are similarly related. Sometimes prisoners can become mentally disturbed, known colloquially as 'cabin fever' or 'stir crazy', which is a condition that can be reflected by animals in a zoo. Where animals are affected it is known as *'stereotypies'*: Pregnant sows whose feed is restricted bite at their stalls' bars and chew without anything in their mouths. In laboratory rats and mice, grooming is the most common activity other than sleep, and grooming stereotypies have been used to investigate several animal models of anxiety and depression…well known in stabled horses, usually developing as a result of being confined...'

Professor Victoria Braithwaite in *Do Fish Feel Pain?* [2010] states, 'In terrestrial zoo animals, like tigers, elephants, and polar bears, boredom, frustration, and enclosures too small and too plain sometimes lead to 'stereotypies' – repetitive actions or movements performed over and over again. Likewise, sharks and other fish species that typically have large home ranges, or make long distance migrations, also show stereotypies in public aquaria. These behaviours are not necessarily painful, but they do represent a welfare concern because they are expressions of frustration on the animal's part…' So the size of the cell and the bars on a cage can induce the same mental stress regardless of whether the one incarcerated is a human or an animal.

FAWC analysed the position of animals in the decades following the Brambell Report with regard to the implementation of the Five Freedoms. In their report, *Farm Animal Welfare in Great Britain: Past, Present and Future* [2009], they say, 'A common misconception is that the Fourth Freedom is to express natural rather than normal behaviour. Normal suggests

behaviour that is not abnormal; stereotypic and other abnormal behaviours such as tail chewing are undesirable and a sign of poor welfare.'

Like the soldiers they serve beside the dogs of war are subject to the same psychological stress that affect the soldiers. Stanley Coren, a professor of psychology, said 'There was always that suspicion and we started to look at PTSD [post-traumatic stress disorder] when some of the dogs used at the Twin Towers after 9/11 started to show symptoms. In the past, the clinical world would have said you were crazy and anthropomorphising but the condition is now widely accepted.' Indeed in the same report in *The Times* of 10/12/11 Kevin Igo, a soldier, confirmed Gina, his 4-year-old German shepherd was traumatised after returning from service in Iraq. After a course of 'desensitisation and counter-conditioning', Gina changed and almost made a full recovery, though she was still affected by gunfire.

That definition in the AWA is and should be wide enough to include all aspects of psychological pain rather than relying on a vague definition that is open to a more limited interpretation. For that was precisely the problem with an austere analysis by judges under the POA. Given the present state of our knowledge, it can and should now be avoided.

"Protected animal"

B5 Animal Welfare Act 2006, s.2

An animal is a "protected animal" for the purposes of this Act if –

(a) it is of a kind which is commonly domesticated in the British Islands,

(b) it is under the control of man whether on a permanent or temporary basis, or

(c) it is not living in a wild state.

In order to be given a legal right in respect of its welfare, the animal has to be a 'protected' one. One problem among many with the POA was that it was full of legal nuances borne of semantics that defied law and logic. The new definition is potentially much wider though it is still lacking in preventing suffering to all animals. A protected animal under the AWA is one that is domesticated or is under our control or is not living wild. That theme runs throughout the AWA in respect of the principal offences.

The meaning of a kind of animal that is 'commonly domesticated' would include stray dogs and feral cats. Essentially it covers animals who because of their collective conduct and life-cycle have been conditioned by being under human control. This would affect their physiology and breed too as normally they would have been subject to living conditions and behaviour dictated by us. There would be a degree of history about the relationship between the type of animal and the human control as it has to be one that we have commonly domesticated. So it would also include wild Dartmoor ponies and visiting Canada geese if people become involved in their feeding and living conditions.

As these are alternative states, if it is a wild animal that has been captured by a man whether on a 'permanent or temporary' basis, the mantle of the Act would provide protection. So the urban fox which occasionally becomes a pet could not be hunted on the High Street or killed at will if it suffered in the process. For it is plain from the Burns Committee Report, the *Report of the Committee of Inquiry into Hunting with Dogs in England and Wales*, in 2000 that a fox's welfare is affected when it is hunted to death: 'We are satisfied, nevertheless, that this experience seriously compromises the welfare of the fox'. In these days of the urban fox

it is not so rare to extend care to them given that we have been instrumental in causing them to move towards us in order to survive. Therefore it would be no less than if it was an ordinary domestic cat. [See Foxes and Foxes in the City: Ch. 4: 1-8 May 2012; also **F3**]

Similarly in *R (Countryside Alliance) v. Attorney-General* [2008] AC 219**,** it was plainly confirmed that a fox's welfare is affected by people and dogs hunting it: 'There is, however, a body of reputable opinion which accepts that the pursuit and digging out of foxes, and their killing by hounds, imposes a degree of suffering. This accords with common sense. To suppose that the contrary is generally true strains one's credulity to breaking point' *per* Bingham LJ.

The term 'captive animal' which was used in the POA often seemed to confuse the courts and prosecutors. Conversely the term 'under the control' is a much wider clause. As a result that should enable the courts to avoid the many problems associated with the interpretation of the former term used in the POA. That limited expression, 'captive animal', has no relevance at all to the AWA. Now.....