

Bil Anifeiliaid Gwyllt a Sycrasau (Cymru) | Wild Animals and Circuses (Wales) Bill
WA 22

Ymateb gan : Mike Radford OBE, Darllenydd ym maes Cyfraith Lles Anifeiliaid a
Chyfraith Gyhoeddus, Prifysgol Aberdeen

Evidence from : Mike Radford OBE, Reader in Animal Welfare Law and Public Law,
University of Aberdeen

WILD ANIMALS AND CIRCUSES (WALES) BILL

ABSTRACT

- **Notwithstanding the relatively small number of animals involved, primary legislation is necessary in order to give effect to the Welsh Government's policy because:**
 - **The justification for introducing a ban is in part, and arguably principally, on ethical grounds;**
 - **the present licensing regime, introduced under the authority of legislation passed by the Westminster Parliament - and applying to England only - which regulates the use of wild animals in circuses and purports to safeguard their welfare, expires on the 19th January 2020;**
 - **by providing express legal authority and state sanction for the use of wild animals in circuses, the present licensing regime serves to undermine the effectiveness of the unnecessary suffering and welfare offences in the Animal Welfare Act 2006. The same would apply to any similar alternative scheme.**

- **It is considered that the proposed ban is compatible with both European Union law and the European Convention on Human Rights.**

- **Further consideration should be given to the meaning to be applied to the following terms:**
 - **'travelling circus';**
 - **'domesticated';**
 - **'use a wild animal'.**

Mike Radford is Reader in Law at the University of Aberdeen, where he specialises in animal welfare law and public law. Over the course of nearly 30 years he has worked extensively with politicians, officials, veterinarians, local authorities, and welfare organisations in developing public policy relating to animals. Mr Radford has previously served as a member of the Dog Advisory Council, the Companion Animal Welfare Council, the Animal Welfare Science, Ethics and Law Board of the Royal College of Veterinary Surgeons, and as a trustee of the PDSA. He was a founder member of both the Animal Welfare Science, Ethics and Law Veterinary Association, and the Association of Lawyers for Animal Welfare. He is presently a Trustee of Dogs Trust and the Universities Federation for Animal Welfare. He was appointed OBE in 2008 for services to animal welfare law.

Mr Radford was Chairman of the Circus Working Group. His report was published in October 2007.

This evidence is submitted to the Committee in a personal capacity.

PART ONE - WHY A BAN ON THE USE OF WILD ANIMALS IN TRAVELLING CIRCUSES SHOULD BE INTRODUCED IN WALES, AND WHY IT REQUIRES PRIMARY LEGISLATION TO ACHIEVE THIS

1. Why Something Must Be Done

- 1.1. There is presently no specific legislation applying in Wales relating specifically to the use of wild animals in circuses. When such circuses which operate in England visit Wales it may be assumed that they are properly licensed according to the provisions of the Welfare of Animals in Travelling Circuses (England) Regulations 2012, but if this were not to be the case, or they otherwise fail to comply with the terms of such a licence while in Wales, the regulations cannot be relied upon because they have no force outside England.
- 1.2. From a Welsh perspective, this may in itself be considered a lacuna requiring to be addressed, but what makes the situation more pressing is that the English regulations contain a sunset clause and will cease to have effect after the 19th January 2020. Following Scotland, the UK government intends to replace the regulations with a statutory ban applying to England on the use of wild animals in travelling circuses and a Bill to that effect is presently before the Westminster Parliament.

- 1.3. Accordingly, in the absence of further legislation in Wales, the situation would revert to that prior to the introduction of the 2012 regulations: there would be no legal provision, directly or indirectly, applying specifically to travelling circuses operating in Wales.

2. The Legitimacy Issue

- 2.1. Prior to the introduction of the present licensing scheme there was no specific legal authority for the use of wild animals in circuses. Circus operators had the freedom to do so according to the general common law principle that a person is at liberty to conduct themselves as they wish, subject to any restriction imposed by law ('everything is permitted except what is expressly forbidden'): no legal impediment, therefore no practical restraint. Accordingly, although the licensing regime introduced a degree of regulation, and thereby control and accountability, on the use of wild animals in circuses, it also for the first time provided specific legal sanction for the practice.
- 2.2. Ironically, then, at the same time as putting the use of wild animals in circuses under stricter control, the regulations - subject to the relevant conditions being met - had the effect of not only introducing an express legal right to continue the practice, but also bolstered its legitimacy by now being carried on with the consent, and under the authority, of the state. This is the antithesis of expressed public opinion and government policy. Accordingly, the effect of the regulations may therefore be regarded as inappropriate, but so too would reverting to the situation prior to 2013 when there was no particular regulation of these animals. It follows that the only expedient option to address this anomaly is a ban by means of primary legislation.

3. Undermining application of the Animal Welfare Act 2006

- 3.1. Although the licensing scheme was introduced in the interests of wild animals used in circuses, it is arguable that it may have had the opposite effect. The two principal offences in the Animal Welfare Act 2006 relate to, first, causing an animal unnecessary suffering and, second, failing to ensure an animal's needs. These offences are, however, circumscribed.

- 3.2. In relation to the former, suffering will generally not be considered unnecessary (and therefore unlawful) if the conduct which caused it was in compliance with any relevant provisions of a licence; and the duty to have regard to an animal's needs are limited to such steps as are reasonable in the circumstances and to the extent required by good practice.¹ It is, of course, for the courts to interpret and apply these latter terms, but it is highly likely that they would give considerable weight to the conditions contained in the licence. In other words, provided the licence conditions are complied with, the licensing regime effectively prevents a prosecution for either unnecessary suffering or poor welfare on the basis that the use of wild animals in circuses is itself inherently wrong and inappropriate.
- 3.3. Further, the qualification applied to the responsibility to have regard for an animal's welfare under section 9 of the Animal Welfare Act 2006 - that it is to be judged according to "such steps as are reasonable in all the circumstances" – means that it is open to the courts to apply a standard which they consider is reasonable in the environment of a travelling circus, notwithstanding that this may be of a significantly lower standard of welfare than that required in other circumstances.

4. The Welfare Issue

- 4.1. Following a long campaign by those opposed to the use of wild animals in circuses, during 2006 the Labour Government gave an undertaking to both Houses that, once the Animal Welfare Bill was enacted, it would rely on the new Act's enabling powers to introduce a ban by means of secondary legislation on the use of specific types of animals. The animals proscribed to be determined by reference to relevant scientific evidence.²
- 4.2. In June 2006, the Government appointed a Circus Working Group, of which I was Chairman, to review the relevant scientific evidence and to advise on which types of animals should be banned. Having considered the evidence, the international panel of assessors who were asked to review

¹ Animal Welfare Act 2006, ss 4(3)(b) and 9(1).

² *HC Hansard*, 8 March 2006, col 60WS; Standing Committee A, 24 January 2006, col 237 (Ben Bradshaw MP). *HL Hansard*, 1 November 2006, cols 315 and 317 (Lord Rooker).

it³ concluded that “There appears to be little evidence to demonstrate that the welfare of animals kept in travelling circuses is any better or worse than that of animals kept in other captive environments.”⁴

4.3. This statement was regarded in some quarters as a vindication of the use of wild animals in circuses. It was not. It was merely an acceptance of a lack of relevant evidence – a consequence, at least in part, of the very narrow terms of reference imposed on the Working Group. These restricted its enquiry to just accommodation and transport. The most contentious issues – training, performance, and allegations of cruel treatment – were expressly stated to be outwith the Working Group’s terms of reference. Furthermore, the Government provided no funding to undertake further research into the two issues which the Working Group was charged with considering. The assessment of the available evidence therefore amounted to little more than a literature review of a very limited topic. The lack of compelling relevant evidence was therefore unsurprising.

4.4. As highlighted in the Explanatory Memorandum which accompanies the Bill, Harris and colleagues,⁵ adopt a significantly more robust view of the risk to the welfare of wild animals in travelling circuses, concluding that:

“The available scientific evidence indicates that captive wild animals in circuses and other travelling animal shows do not achieve their optimal welfare requirements, as set out under the Animal Welfare Act 2006, and the evidence would therefore support a ban on using wild animals in travelling circuses and mobile zoos on animal welfare grounds.”

4.5. Harris et al were working to much wider terms of reference than were available to the Circus Working Group and the science of animal welfare has advanced significantly in the period between the publication of the two reports. While I do not disagree with the thrust of the latter report’s conclusions, I would take issue with one point in the above quotation: as already stated in paragraph 3.3 above, the Animal Welfare Act 2006 does

³ Mike Lomas BVSc MRCVS JP, Professor Sir Patrick Bateson MA Phd ScD FRS, Professor Ted Friend PhD, Dr Marthe Kiley-Worthington BSc DPhil MPhil, Samantha Lindley BVSc MRCVS, Professor Georgia Mason BSc PhD, and Peter Scott MSc BVSc FRCVS.

⁴ *Wild Animals in Travelling Circuses. The Report of the Chairman of the Circus Working Group* (DEFRA 2007), para 5.1.3.

⁵ Harris et al. (April 2016). *The Welfare of Wild Animals in Travelling Circuses* (<https://beta.gov.wales/welfare-wild-animals-travelling-circuses>).

not require the achievement of “optimal welfare requirements” per se. Rather, the Act imposes a duty to “take such steps as are reasonable in all the circumstances to ensure that the needs of an animal for which he is responsible are met to the extent required by good practice”. In other words, the standard of welfare which a person responsible for an animal in a travelling circus is required to provide may be lower than that expected in other circumstances, assuming it is accepted that the very nature of such an environment makes it impossible to achieve optimal standards. The standard required is that which is reasonable in the circumstances of a travelling circus.

- 4.6. Accordingly, while Harris and his colleagues, in the light of their interpretation of the relevant scientific evidence, argue for a ban on the ground of animal welfare, as a lawyer, I would submit that a ban is also necessary because the 2006 Act arguably has the effect of permitting a lower standard of welfare for wild animals in circuses than would be required if the same animals were being kept in a different environment.

5. The Ethical Dimension

- 5.1. While the argument that animal welfare provides justification for a ban on wild animals in circuses is growing in strength, it is questionable whether the scientific evidence is yet sufficient to form the basis for a ban on *all* wild animals, regardless of species.
- 5.2. Hence, those seeking a ban emphasise that, in their view, the practice is unethical. The issue is addressed in the Explanatory Memorandum accompanying the Bill and need not be rehearsed here, except to make the important point that the ethical dimension of the debate underpins the need for primary legislation.
- 5.3. The significance of this is that ministers cannot generally rely on secondary legislation to promote their moral views. As I stated in my Report,⁶

‘In enacting primary legislation, Parliament is, of course, in a very different situation from that of a Minister bringing forward regulations. Parliament would not, for example, be confined to taking account of the scientific evidence. It could legitimately give consideration to ethical

⁶ N4 above, paragraph 8.3.2.

issues, public opinion, and is able to attach much greater weight to the interests of the animals involved. Furthermore, where there is uncertainty as to the impact on the welfare of the animals, Parliament may give them the benefit of the doubt in a manner which is simply not open to a minister employing delegated statutory powers.’

- 5.4. While the above statement refers specifically to the Westminster Parliament, it is submitted that the same principle applies to the devolved administrations.
- 5.5. The ethical debate about the proper treatment of animals, their use, and our relationship with them, has moved on significantly since 2007. In particular, there is a wide consensus that preventing suffering and meeting their needs, while essential, are in themselves insufficient considerations, and attention has turned increasingly to the need to ensure that they have at least ‘a life worth living’ or, ideally, ‘a good life’.⁷ While it could be argued that taking account of such standards may now provide Ministers with the requisite legal basis to enable a ban to be introduced by way of secondary legislation, the fact is that the Welsh Government continues to base its case on ethical as well as scientific grounds. As the Cabinet Secretary for Energy, Planning and Rural Affairs stated in her Foreword to the Welsh Government’s Consultation on the Bill:

Many of the calls for a ban on the use of wild animals in travelling circuses focus on the perceived animal welfare issues and there is a strong body of opinion that the welfare needs of wild animals in travelling circuses cannot be met.

However, there are wider ethical considerations that go beyond the question of whether the welfare of animals kept in travelling circuses is compromised. The use of wild animals in circuses is increasingly viewed as an outdated notion and ethically unacceptable....I am concerned about the impact seeing wild animals perform unnatural tricks, purely for entertainment, has on people’s attitudes towards animals, particularly the developing attitudes of children and young people. Animals should not be objectified or perceived as commodities for our entertainment, rather as sentient beings with their own unique sets of needs.⁸

⁷ See further: Farm Animal Welfare Council (2009), *Farm Animal Welfare in Great Britain: Past, Present and Future*.

⁸ Welsh Government *Wild Animals in Travelling Circuses (Wales) Bill. Consultation* (WG35797), October 2018.

- 5.6. It is submitted that, as with other legislatures in the United Kingdom, the Welsh Assembly, unlike Ministers, has the competence to incorporate its moral view in law by means of primary legislation. Accordingly, notwithstanding that relatively few wild animals are used in circuses in Wales (or, indeed, other parts of the United Kingdom), it is submitted that primary legislation is the appropriate and, indeed, necessary means by which a ban should be introduced.

PART TWO – OTHER ISSUES

6. European Union law and the European Convention on Human Rights

- 6.1. The European Commission has confirmed that ‘the welfare of circus animals remains the responsibility of the Member States’.⁹
- 6.2. To date, sixteen members of the Council of Europe have introduced a complete ban on the use of wild animals in circuses.¹⁰ There has been no successful challenge to these measures before the European Court of Human Rights.
- 6.3. A ban has also, of course, been introduced in Scotland by virtue of the Wild Animals in Travelling Circuses (Scotland) Act 2018. Notwithstanding that the Scottish Parliament is required to legislate compatibly with both European Union law and the Human Rights Act 1998, no legal challenge to the competency of the legislation has been forthcoming.
- 6.4. If a challenge were brought before the European Court of Human Rights, regardless of the country of origin, it is anticipated that the Court would regard the member state as having a ‘margin of appreciation’ to decide for itself its policy on the use of wild animals in circuses.

⁹ E-004427/2011 Answer given by Mr Potočnik on behalf of the Commission, 2 June 2011.

¹⁰ Austria, Bosnia and Herzegovina, Croatia, Cyprus, Estonia, Greece, Ireland, Italy, Luxembourg, Macedonia, Malta, the Netherlands, Romania, Serbia, Slovakia, Slovenia.

7. The Definition of ‘Travelling Circus’

- 7.1. While the Bill, sensibly includes an enabling power to define further what is and is not a travelling circus, the Bill itself does not define either ‘circus’ or ‘travelling’. It is submitted that the Committee may wish to explore the meaning of this term further and to consider whether it should be more clearly defined in the Bill.
- 7.2. While we may all think we know what we mean by a circus, clarity and certainty are essential in legislation of this nature. Similarly, what does “travelling from one place to another” mean in practice?
- 7.3. For the Committee’s information, there are presently two (similar) definitions of ‘circus’ in British legislation:
- ‘any place where animals are kept or introduced wholly or mainly for the purpose of performing tricks or manoeuvres.’¹¹
 - ‘a place where animals are kept or introduced wholly or mainly for the purpose of performing tricks or manoeuvres as that place.’¹²

There are also two definitions of a ‘travelling circus’. The first being a circus

- (i) which travels from place to place for the purpose of giving performances, displays or exhibitions, and
- (ii) (as part of which wild animals are kept or introduced (whether for the purpose of performance, display or otherwise) and (b) any place where a wild animal associated with such a circus is kept.¹³

The second

- (a) means a circus which travels, whether regularly or irregularly, from one place to another for the purpose of providing entertainment,
- (b) includes
 - (i) a circus which travels as mentioned in paragraph (a) for the purpose mentioned there, despite there being periods during which it does not travel from one place to another,

¹¹ Dangerous Wild Animals Act 1976, s7(4)(3).

¹² Zoo Licensing Act 1981, s 21(2).

¹³ Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012, reg 2.

- (ii) any place where a wild animal associated with such a circus is kept (including temporarily), (but not, for example, a circus which travels in order to relocate to a new fixed base for use only or mainly as a place to give performances).¹⁴

8. The meaning of the term ‘wild animal’

8.1. The Bill defines a ‘wild animal’ as a vertebrate other than man of a kind which is not commonly domesticated in Great Britain. It is important that the Bill makes it clear that the concept of domestication is distinct from breeding an animal in captivity, taming or training it.

8.2. In evidence to the Scottish Parliament on this issue, Dr Dorothy McKeegan, senior lecturer at the Institute of Biodiversity, Animal Health and Comparative Medicine at the University of Glasgow, stated that, in her view, where a trainer reared and trained cubs,

‘they would still be wild animals, because they would still have very strong inherent and instinctive behavioural, physiological and psychological needs that would have been slightly altered but not completely removed by hand rearing. Such needs are not just down to the environment that the animal is in; these are behavioural needs and expressions that are consistent across a species, regardless of how the animal has been reared. I think that those cubs would still be wild animals.’¹⁵

8.3. On being asked whether she would hold the same view in relation to the fourth or fifth generation of such animals, Dr McKeegan replied,

‘Yes, I would. The domestication of animals is not just about captive breeding and sometimes hand rearing but about the behavioural and genetic modification of the animal away from its wild progenitor. That is not going to happen with rearing generation after generation of animals in captivity. These are still wild animals.’¹⁶

¹⁴ Wild Animals in Travelling Circuses (Scotland) Act 2018, s 3.

¹⁵ Scottish Parliament, Environment, Climate Change and Land Reform Committee, Official Report, 6 June 2017, Col 13.

¹⁶ Ibid.

- 8.4. Reflecting this advice, the Scottish Act further defines ‘domesticated’ to mean that ‘the behaviour, life cycle or physiology of animals of that kind has been altered as a result of the breeding or living conditions of multiple generations of that kind being under human control’.¹⁷ In addition, the Act contains a provision enabling Scottish Ministers to introduce regulations specifying whether a kind of animal is, or is not, to be regarded as wild.¹⁸
- 8.5. The Explanatory Notes prepared by the Scottish Government to accompany the 2018 Act spell out the intention in greater detail:

‘Section 2 provides a definition of “wild animal” for the purposes of the Act. A wild animal is an animal other than one which is of a kind that is commonly domesticated in the British Islands. The Act explains what it means for an animal to be “domesticated” to inform that definition. Where an animal is of a kind whose behaviour, life cycle or physiology has, over multiple generations, been changed through breeding or living conditions being controlled by humans, it is said to be domesticated for the purposes of the Act. Wild animals are those not commonly domesticated in the British Islands under that definition of “domesticated”. Animals can be considered commonly domesticated in their country of origin although they are not of a kind commonly domesticated in the British Islands. Such animals would be “wild animals” under the Act. In this context, “British Islands” takes its meaning from the Interpretation Act 1978, and refers to the United Kingdom, the Channel Islands and the Isle of Man.’¹⁹

9. Meaning of the term ‘use a wild animal’

- 9.1. The Bill presently provides that a circus operator uses a wild animal in a travelling circus if the animal performs or is exhibited as part of the circus. It is submitted that training should be included in this list. However, if the intention underlying the legislation is a complete ban on wild animals being associated or involved with travelling circuses, it is submitted that it would be desirable to adopt appropriate wording to make this explicit.

¹⁷ Wild Animals in Travelling Circuses (Scotland) Act 2018, s 2(2).

¹⁸ Ibid, s 4.

¹⁹ Paragraphs 9-11.