

Examining the Application and Efficacy of Licensing Regimes as a means
to Regulate the Use of Animals

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Introduction	7
I. A Common Legislative Approach.....	7
II. The Purpose and Scope of this Research: Filling the Information Gap	10
III. Why Focus on Zoos?	20
Chapter One: Should Animal Use Be Regulated by Law And, If So, How?	24
1.1 Can Animals Suffer at All and, If So, How Does This Affect Our Treatment of Them?	27
1.2 What Are Interests?	36
1.3 Do Animals Have Interests?	38
1.4 Balancing Our Interests with Those of Animals	42
1.5 Animal Welfare Theory Vs Animal Rights Theory	45
Chapter Two: How Is Animal Use Regulated and How Does This Protect Them?	55
2.1 History of the Regulation of Animal Use in England	55
2.2 Animals as Property	61
2.3 Prevention of Cruelty	62
2.4 Ensuring the Welfare of The Individual Animal	64
2.4.1 The Animal Welfare Act 2006.....	66
2.4.2 "Good Practice" Considered.....	70
2.5 Trade Restrictions and Conservation of Biodiversity	74
2.6 Abolition of Practices	75
2.6.1 Ethical and Welfare Approaches to Legislation.....	78
2.7 The Extent to Which Regulation of Animal Use Protects Animals	80
Chapter Three: Regulatory Licensing Regimes as a Legislative Framework	82
3.1 The Circumstances in Which Regulatory Licensing Regimes Are Employed.....	82
3.2 Licensing Regimes and Animals.....	86
3.3 Secondary legislation and the Animal Welfare Act 2006.....	87
3.3.1 The Introduction of Licensing Regimes Under s.13 of the Animal Welfare Act 2006	90

3.3.2 The Scope of Regulations Introduced Under S.13 Of The Animal Welfare Act 2006	92
3.4 Licence Conditions	97
3.5 Systems of Inspection	98
Chapter Four: The Regulation of Zoos.....	100
4.1 The Size and Shape of The Zoo Industry in England.....	100
4.2 The Development of Zoo Regulation in Great Britain.....	109
4.3 The Original Zoo Licensing Act 1981	110
4.4 The EC Zoo Directive	113
4.5 The Zoo Licensing Act (as Amended)	115
4.6 The Secretary of State’s Standards of Modern Zoo Practice (SSSMZP)	116
4.7 The Zoo Expert Committee Handbook.....	120
4.8 Guidance to the Provisions of The Zoo Licensing Act 1981	121
4.9 The Extent of The Welfare Provisions Under The Zoo Licensing Act 1981	122
Chapter Five: Exploring Exemptions to The Zoo Licensing Act 1981.....	125
5.1 Static Circuses and The Zoo Licensing Act 1981.....	127
5.2 Pet Shops and The Zoo Licensing Act 1981	129
5.2.1 Closing the Loophole	133
5.3 Mobile Zoos and the Zoo Licensing Act 1981.....	136
5.3.1 Mobile Zoos in England	137
5.3.2 Why Are Mobile Zoos Not Subject to Specific Legislation?	140
5.3.4 The Potential for Application of The Zoo Licensing Act 1981 to Mobile Zoos Businesses	141
5.3.5 Conclusion	146
Chapter Six: Enforcing the Zoo Licensing Act 1981.....	148
6.1 The Operation of the Zoo Licensing Act 1981.....	148
6.2 The Inspection Process.....	152
6.3 Assessing the Extent to which The Zoo Licensing Act 1981 is Enforced with Respect to Non-Compliant Zoos	159

6.4 Data Collection	160
6.5 Data Entry.....	162
6.6 Interpretation: When Does a “No” Answer Indicate Non-Compliance with the Law?...	167
6.7 Results	170
6.8 Discussion.....	174
6.8.1 Considering the Extent to Which Animal Welfare is Impacted by Recognised Breaches	174
6.8.2 Corroborating Evidence and Potential Reasons for Non-Compliance	179
6.8.3 Case Studies.....	187
6.9 Conclusion	194
Chapter Seven: The Regulation of the Use of Wild Animals in Travelling Circuses in England	196
7.1 The Size and Shape of the Travelling Circus Industry.....	198
7.2 The Introduction of The Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012.....	200
7.3 Schedule of Conditions.....	204
7.4 Guidance on the Welfare of Wild Animals in Travelling Circuses (Regulations) 2012....	204
7.5 Exploring Exemptions to the Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012.....	205
7.5.1 Travelling and Static Circuses	205
Chapter Eight: Enforcing the Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012	211
8.1 The Operation of the Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012.....	211
8.2 The Ability to Enforce the Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012.....	213
8.3 The Inspection Process.....	216
8.4 Assessing the Extent to Which Circuses are Compliant with The Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012.....	223
8.5 Data Collection	224

8.6 Data entry.....	225
8.7 Results	227
8.7.1 Case Study: Attempts to Suspend a Licence – November 2015.....	230
8.7.2 Questions Over Oversight of Winter Quarters.....	232
8.7.3 Conflating “Use” with “Ownership”	235
8.7.4 The Impression of Oversight vs the Reality.....	236
8.8 Conclusion	238
Chapter Nine: Is Licensing an Effective Means to regulate the Use of Animals?.....	241
9.1 Why Licensing Can Never “Ensure High Standards of Welfare” For Regulated Animals	242
9.1.1 “Good Practice” Does Not Equal “Good Welfare”	242
9.1.2 The Limitations Created by the ‘Good Practice’ Caveat Limits Potential Efficacy of Licensing	244
9.1.3 Possession of a Licence Does Not Indicate Compliance with Standards.....	245
9.1.4 Licensing Is Not Individualistic, Welfare Is	247
9.1.5 Conclusion: Licensing is an Inappropriate Legal Mechanism for the Guarantee of High Animal Welfare Standards	252
9.2 Licensing as a Mechanism to Enhance Monitoring and Scrutiny of Practices Which Impact Upon Animal Welfare.....	253
9.2.1 Responsive Regulation	254
9.2.2 Drafting of Legislation	265
Chapter Ten: Making Licensing More Effective: Recommendations for Change.....	267
10.2 Effective Licensing as Secondary Legislation under S.13 of The Animal Welfare Act 2006	268
10.2.1 Insurmountable Welfare Problems? Licensing is Not the Answer	270
10.2.2 Ensuring that the Regulated Activity is Clearly Differentiated from Ownership	270
10.2.3 Standards and Conditions Relating to Processes to be Implemented Using Response Regulation Model.....	271

10.2.4 How the Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012 can be made Effective	271
10.2.6 Conclusion	273
10.3 Effective Licensing of Zoos	274
10.3.1 Closing Loopholes.....	276
10.3.2 Training.....	277
Chapter Eleven: Conclusion	279
Appendix One: Emails sent to Freedom of Information Departments	283
Email One: Freedom of Information Request to Councils with Zoos Listed.....	283
Email two: Freedom of Information Request to Councils without Zoos Listed	284
Email Three: Freedom of Information Request to All Councils	286
Appendix Two: How changes in the DEFRA ZOO2 form have been dealt with	287
Appendix Three: All instance of non-compliance with the Zoo Licensing Act 1981	295
Appendix Four: Email sent to DEFRA Freedom of Information Department regarding circus licensing.....	309

Introduction

Licensing regimes which regulate the use of animals generally implement a process whereby an individual must be deemed to comply with a particular set of regulations in order to be granted, and retain, a licence to keep or use animals in a particular manner. The set of regulations will differ dependent on the specific use that the licensee intends to put the animals to. This research will consider the efficacy of the common regulatory model of the licensing regime as a means of regulating animal use in England, with a particular focus on their ability to ensure animal welfare. The research aims to address the gap in available information on the practical application of two pieces of legislation, whose provisions create licensing regimes; The Zoo Licensing Act 1981 (ZLA 1981) and The Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012 (WWATC 2012), introduced under the Animal Welfare Act 2006 (AWA 2006).

I. A Common Legislative Approach

Given the ever-changing landscape with regard to animal use, perceptions of animals, and scale of industries and practices which involve animals, it is perhaps not surprising that animal law takes on a number of different forms and frameworks; from Acts which prohibit particular practices¹ to measures which impose a specific duty of care on the person responsible for the animal in question to treat that animal in a humane manner and avoid the infliction of unnecessary suffering².

¹ e.g. The Hunting Act 2004.

² e.g. The Animal Welfare Act 2006.

A common framework for laws pertaining to the regulation of animal use is the licensing regime. For example, the Animals (Scientific Procedures) Act 1986 (ASPA 1986) requires that licences must be sought and awarded in order for the licensee to be allowed to carry out painful experiments on animals³ and, likewise, the Welfare of Animals (Slaughter or Killing) Regulations 1995 set out conditions relating to certificates of competence and licences which must be sought and granted prior to being permitted to carry out the slaughter of animals for food⁴. Both of these statutes could reasonably be considered to be seeking to protect animals from 'unnecessary suffering' (during experimentation and at the time of slaughter), rather than being designed to promote the welfare of an individual animal within the more modern and holistic context of the Five Freedoms, a concept which will be examined in detail in Chapter 1.5 of this thesis. Some licensing regimes have, as their main purpose, something other than the protection of animals but include provisions which nonetheless impact upon animal welfare. An example is the Dangerous Wild Animals Act 1976, which is predominantly concerned, as the title suggests, with protecting the general public from harm but includes some basic provisions which are intended to protect animal welfare, albeit in a fairly rudimentary manner⁵. The licensing regimes under specific consideration as part of the present thesis are two of those concerned with the protection of wild animals kept or used in captivity; namely those implemented by the ZLA 1981 and the WWATC 2012. These pieces of legislations demand that a licence be sought and granted in order to carry out the practice of operating a zoo and operating a travelling circus with wild animals, respectively. Licensees are subjected to an inspection regime to allow monitoring of compliance with legal standards. If standards are not deemed to be met on

³ S. 3 Animals (Scientific Procedures) Act 1986.

⁴ S.6 The Welfare of Animals (Slaughter and Killing) Regulations 1995.

⁵ S. 3 Dangerous Wild Animals' Act 1976.

inspection, the licence may be refused, suspended or revoked (in the case of WWATC 2012) or the establishment, or part of it, might eventually be closed down if it is governed by the ZLA 1981.

During the passage through parliament of the AWA 2006, it was stated by the then Secretary of State for Environment Food and Rural Affairs, Margaret Beckett, that “The powers for licensing and registration [included in the Bill] will replace a range of statutes regulating such activities as performing animals, pet shops, riding schools and dog-breeding and animal-boarding establishments”⁶. The specific legislation earmarked for replacement as part of this initiative were the Performing Animals (Regulation) Act 1925, Pet Animals Act 1951 (as amended in 1983), Animal Boarding Establishments Act 1963, Riding Establishments Act 1964 and 1970 and Breeding and Sale of Dogs (Welfare) Act 1999, Breeding of Dogs Act 1991 and Breeding of Dogs Act 1973. Section 13(8) of the AWA 2006 grants explicit powers to the appropriate national authority to repeal these Acts and introduce replacement legislation under the same section of the AWA 2006. In 2013, the WWATC 2012 became the first licensing regime introduced using powers granted by the AWA 2006.

While the WWATC 2012 is considered to be a temporary measure due to the Government’s stated plan to introduce an outright ban on the use of wild animals in travelling circuses in England⁷, the regulations warrant consideration due to the fact that the same legal mechanism (powers granted to the Secretary of State under s.13 of the AWA 2006) will be used to license other practices, such as those mentioned above, on a permanent basis in the

⁶ HC Deb, 10th January 2006, Official Report, column. 167.

⁷ HC Deb, 1 March 2012, c41WS, and HC Deb, 12 July 2012, c43WS

future. Indeed, following many years of inaction on this issue following the aforementioned suggestion made during the passage of the AWA 2006 that laws relating to riding establishments, boarding kennels, dog breeding establishments and pet shops might be repealed, and systems of regulation reintroduced as secondary legislation under the AWA 2006, a consultation was launched by the UK Government in December 2015 to seek initial views on these changes being carried out⁸ and, at the time of writing (October 2017) those consultation responses are under consideration.

II. The Purpose and Scope of this Research: Filling the Information Gap

The limited analysis of animal welfare law and its scope that has been carried out to date has, in general, been largely from a theoretical standpoint, with philosophers and lawyers considering the legal nuances of existing legislation and its application. Discussion on this subject is often focused around whether the law goes far enough, or too far, in its consideration of animals and whether or not it is enough to provide for basic welfare needs or whether moves should be made towards granting animals identifiable and enforceable legal rights under the law. Much of this work has been carried out with the legal system of the United States in mind, rather than the UK, and much consideration has been given to the principle of legal standing (which, at present animals do not have in law)⁹ or to the

⁸ Consult.DEFRA.gov.uk. (2015). *Consultation on the review of animal establishments licensing in England* - DEFRA - Citizen Space. [online] Available at: <https://consult.DEFRA.gov.uk/animal-health-and-welfare/consultation-on-the-review-of-animal-licensing/> [Accessed 15 Jan. 2017].

⁹ For example: Stone, C.D, (2010) *Should Trees Have Standing?*, 3rd Edition, Oxford University Press, discusses the principle of developing models for the introduction of legal standing for natural resources and, by extension, for animals.

problems associated with the legal classification of animals in law as “property”¹⁰.

Underlying these important discussions though, is often the implicit assumption that animal welfare law, once enacted, serves the purpose for which it was introduced and is effectively enforced. Joan E. Shaffner demonstrates this point when discussing the difference between vivisection (animal experimentation) laws in the United States compared to those in the UK:

*“In comparing the [Animals (Scientific Procedures)] Act governing research animals with the United States [Animal Welfare Act], it appears that the use of animals in research is more limited and the animals who are used **are better protected** in the United Kingdom¹¹” [my emphasis].*

The implicit assumption in Shaffner’s assertion above is that – without the need to carry out an examination of implementation or enforcement of the legislation in question – the law simply works as it was intended. On the other hand, Mike Radford, of Aberdeen University, makes the point that legislation is of little value if it is not effectively enforced, and gives some examples of areas of animal law where it would seem that enforcement might be ineffective¹². Lack of transparency and access to information made any definitive conclusion on levels of enforcement at the time that Radford’s work, which was carried out in 2001, was published difficult, but the subsequent introduction of the Freedom of Information Act 2000 (FOIA 2000), which came into force on the 1st January 2005, has meant that enforcement by public bodies is now, to some extent, subject to public scrutiny in a way that it never was before.

Section 1 of the FOIA 2000 states:

¹⁰ For example: Francione, G., *Animals, Property and the Law*, discusses argue that the classification of animals as “chattels” results in legal balancing which, in the vast majority of instances, leads to the animal’s interests being relegated below those of its owners.

¹¹ Shaffner, J., (2011) *An Introduction to Animals and the Law*, Palgrave Macmillan, p.90

¹² Radford, M., (2001) *Animal Welfare Law in Britain*, Oxford University Press, pp. 356-392

*(1) Any person making a request for information to a public authority is entitled—
(a) to be informed in writing by the public authority whether it holds
information of the description specified in the request, and
(b) if that is the case, to have that information communicated to him.*

Whereas there used to be no means of gaining access to documentation relating to government licensing schemes if the relevant public authority was disinclined to share that information, the FOIA 2000 opened up access to a huge amount of information, including that relating to the licensing of practices involving animals. Where speculation was previously necessary, analysis can now be carried out in order to establish a clearer picture of some (but not all) industries which use animals.

For example, as a general rule, documentation, inspection reports and correspondence relating to the operation of zoos circuses and pet shops are now normally available under the provisions of the FOIA 2000. This is by virtue of the fact that this information is held on file by the relevant authorities (local or national), who are charged with regulation of zoos¹³, circuses¹⁴ and pet shops¹⁵. On the other hand, as a result of the fact that the right of access to information under the Act is not absolute and can be subject to exemptions¹⁶, documentation and inspection reports relating to animal testing, a practice regulated by ASPA 1986, are far more difficult (and sometimes impossible) to access. Access to information on animal testing is particularly stifled by the application of s. 44 of the FOIA 2000 which provides an absolute exemption to the public body where the release of

¹³ S. 1(1) Zoo Licensing Act 1981

¹⁴ S. 62(1) Animal Welfare Act 2006

¹⁵ S. 1(2) Pet Animals Act 1951

¹⁶ Ss. 21-44 Freedom of Information Act 2000

information is prohibited by a separate legislative measure. Within ASPA 1986, this prohibition of release of information can be found in s. 24 which states that:

“A person is guilty of an offence if otherwise than for the purpose of discharging his functions under this Act he discloses any information which has been obtained by him in the exercise of those functions and which he knows or has reasonable grounds for believing to have been given in confidence”.

In short, as long as s.24 of ASPA 1986 remains in force, s. 44 of the FOIA 2000 can legitimately be used to refuse the release of information. This blanket prohibition on release of information has been argued to go against the spirit and explicit intention of the FOIA 2000 and has been challenged, notably by the UK-based anti-vivisection NGO, Cruelty Free International (formerly The British Union for the Abolition of Vivisection (BUAV)). The case of *Home Office v BUAV & Anor* [2008]¹⁷ challenged the validity of s.24 of ASPA 1986 (and the subsequent use of the exemption under s. 44 of the Freedom of Information Act 2000). The Court of Appeal dismissed BUAV’s case. Agreeing with, and extending, the judgment of the High Court, the Court of Appeal concluded that:

“Where a public official reasonably believed that information had been given under a statutory procedure in circumstances which gave rise at that time to a reasonable expectation of privacy, and the statute prohibited disclosure for purposes other than those to which the Act related, that information was exempt from disclosure under the Freedom of Information Act 2000.”¹⁸

The court’s ruling mandated that it is for the provider of the information in question to decide whether or not that information has been provided in confidence and thus, it was within the rights of those engaged in animal testing to simply request non-disclosure of information and that information would automatically fall under s. 24. Commenting on the verdict, a solicitor for the BUAV, David Thomas, noted *“it ...means that, as a Home Office*

¹⁷ Secretary of State for the Home Department v British Union for the Abolition of Vivisection and another [2008] EWCA Civ 870

¹⁸ *Ibid.*

*official candidly accepted in evidence, judicial scrutiny of regulatory decisions under ASPA is all but impossible*¹⁹.

At the outset of the present research, the possibility of assessing the efficacy of licensing of animal experimentation under ASPA 1986 was considered as part of the author's remit however, the inability to access meaningful information with regard to compliance with and enforcement of ASPA 1986 due to the lack of publicly-available information meant that scrutiny of this industry was not possible. This is something which could be considered a concern for effective oversight of animal welfare in and of itself.

Despite the issues identified in attempting to access information relating to animal experimentation, ongoing monitoring and research carried out by NGOs into the practical application of legislation relating to other animal-use industries and its ability to provide effective legal protection for animals has highlighted significant concerns with regard to the enforcement and delivery of the law. A study²⁰ commissioned by the Captive Animals' Protection Society (CAPS)²¹ in 2011, which explored a number of aspects of the zoo licensing system in England, suggested that there is widespread, long term and persistent failure to properly meet legal obligations on the part of the zoos themselves as well as on the part of the local authorities responsible for the Act's enforcement. The study concluded that, amongst other issues including administration, poor training and lack of expertise, the legal

¹⁹ Thomas, D. (2009). *Freedom of Information - Putting FOI to the Test*. Freedom of Information, 6(2), pp.11-13.

²⁰ Casamitjana, J. (2012). *Inspecting Zoos: A study of the official zoo inspection system in England from 2005 to 2011*. The Captive Animal's Protection Society, Manchester

²¹ The author (E Tyson) was previously the Director of this charity and commissioned and oversaw this study.

framework around which the system is based appears to be, in part, to blame for its overall failings²².

The report reinforced concerns identified by the charity over a number of years as a result of ongoing monitoring (using access to information under the FOIA 2000) which suggest that lack of enforcement action under the ZLA 1981 is a major contributing factor to some zoos persistently falling below legal standard. A subsequent study carried out by the author of this work found at least 996 instances of local authority failure to take mandatory enforcement action against between the years 2005 – 2011. During these years, there were various instances in which the authorities were arguably under an obligation to close zoos due to the latter's persistent non-compliance with standards, but in no instance was such action taken.

The 2011 study by CAPS²³ (commissioned by the author in her capacity as Director of the organisation at the time) went some way towards explaining the way in which the licensing of English zoos was approached by the relevant authorities. Further study was required, however, in order to draw firm conclusions as to the overall efficacy of this regime and others which employ licensing with the intention of protecting animal welfare. Of particular interest to the author was the debate surrounding, and subsequent introduction of, the WWATC 2012. This licensing regime - the first of its kind to be introduced using powers granted to the Secretary of State under s. 13 of the AWA 2006 - was introduced on the premise that the regime "will protect the welfare of [wild animals in circuses] while they are

²² Captive Animals' Protection Society, (2012). *A Licence to Suffer*. [online] Manchester: CAPS, p.17. Available at: http://www.captiveanimals.org/wp-content/uploads/2012/03/CAPS_Zoo_Insp_Rep_0112_Final.pdf [Accessed 15 Jan. 2017].

²³ Casamitjana, J., (2012), *Inspecting Zoos*, APC/CAPS

in use in travelling circuses”²⁴. The ability of the regime to protect animal welfare was strongly contested by all leading animal welfare organisations in the UK²⁵. Despite opposition, the government introduced the licensing regime and made the claim that this would “dramatically improve the welfare of animals in travelling circuses”.²⁶ The conflict of views between the animal welfare experts and vets on the one hand²⁷ – who all maintained that the welfare of wild animals simply cannot be met in a travelling circus environment²⁸ and that the new regulations would therefore inevitably be ineffective – and the views of the government and the circus industry – who maintained that welfare needs can be met if the regulations were followed - raised important new questions. Among these were: Is it possible for legislation to be implemented with a view to protect animal welfare, that law then be enforced correctly, and animals remain either unprotected or inadequately protected in practice despite the legislation’s correct application?

This thesis seeks to consider the role of licensing regimes as a means to regulate animal use with a particular focus on their impact on animal welfare. In Chapter One, the broad theoretical and philosophical arguments surrounding human society’s moral obligations towards animals will be explored. This provides the foundations upon which Chapter Two, which considers the history and evolution of animal welfare law in the England, is then

²⁴ HC Deb, 1 March 2012, c41WS

²⁵ E.g. Born Free Foundation. (2011). *Born Free Statement on the Regulation of Wild Animals in Circuses*. [online] Available at: http://www.bornfree.org.uk/news/news-article/?no_cache=1&tx_ttnews%5Btt_news%5D=935 [Accessed 15 Jan. 2017].

²⁶ BBC.co.uk, (2012). *BBC News - Circuses face new rules on animal use as ban ruled out*. [online] Available at: <http://www.bbc.co.uk/news/mobile/uk-13697887> [Accessed 30 Jan. 2016].

²⁷ Born Free Foundation, Captive Animals' Protection Society, RSPCA and British Veterinary Association, (2013). *The Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012: unethical, ineffective and unenforceable*.

constructed. Chapter Three focuses specifically on the application and mechanisms of licensing regimes as a regulatory vehicle; exploring when and how licensing might be employed and to what end.

In Chapter Four, the history of the zoo industry in England and its regulation is outlined, leading to the consideration of the first piece of legislation analysed as part of this thesis: The ZLA 1981. In Chapter Five, concerns surrounding businesses deemed exempt from zoo licensing are highlighted. Examples are given whereby businesses, which appear to meet all the criteria in order to be captured by the zoo licensing regime, have escaped licensing altogether or have been deemed to be governable under other, less stringent legislation. It is argued that these anomalies can and should be addressed via minor legislative amendments or by adjusting the practical interpretation of the ZLA 1981. Particular areas of concern highlighted in this chapter are mobile zoos – a relatively new type of business which, to all intents and purposes, present themselves as zoos, albeit ones that move animals from place-to-place. At present these businesses are largely unregulated. A proposal for bringing these businesses under the mantle of the ZLA 1981 is made in the conclusion of this Chapter 5.

Chapter Six provides an original and detailed analysis of the enforcement of the ZLA 1981 in England using data from over 300 zoo inspection reports completed by Government inspectors between 2008 - 2014. The results of this analysis highlight an almost complete absence of correct enforcement action being delivered against zoos found to be non-compliant with the ZLA 1981. Of 783 instances of non-compliance noted by inspectors during the six-year period under analysis, not one instance of correctly-executed enforcement action was noted in response. Reasons for this lack of enforcement are then explored and conclusions drawn as to the reasons for this regulatory failure.

Chapter Seven considers the second piece of legislation under examination as part of this thesis: The WWATC 2012 and their origins. Chapter Eight carries out a similar analysis as seen in Chapter Six whereby the implementation of these regulations is considered. Given the small sample size (just two circuses currently licensed in England to use wild animals) and the short time during which the regulations had been in effect at the time of analysis (just over two years), the ability to draw detailed conclusions on the efficacy of these regulations is more limited than for English zoo industry. However, in spite of this, while initial enforcement appears to demonstrate circuses are largely compliant with the regulations, an attempt to suspend a licence in late 2015 served to demonstrate that the flaws in these particular regulations can be considered to be found in the manner in which they were drafted, which prevents enforcement action, such as suspensions, from being effectively delivered as originally planned, and as promised, during the policy development stage. While these particular regulations are deemed “temporary” while the Government works on bringing in an outright ban on the use of wild animals in circuses, the problems with the drafting of this licensing regime has wider relevance due to it being the first licensing regime introduced via secondary legislation using powers granted to the Secretary of State under s. 13 of the AWA 2006. As the Government is currently consulting upon licensing regimes to update laws relating to pet shops, boarding kennels, riding establishments, performing animals and dog breeding using the same s. 13 mechanisms, identifying and understanding flaws and problems encountered in implementing and enforcing the WWATC 2012 can be used to inform better policy and legislative implementation for these proposed new measures.

Chapter Nine draws together the findings of the research in order to answer the question: Is licensing an effective means to regulate the use of animals? In exploring the way in which

animal welfare is necessarily limited by the 'good practice' caveat inherent in the application of the Five Freedoms (See: Chapter 1.5 for detail), the fact that neither licensing regime under consideration makes any demand that legal standards are complied with consistently and the fundamental acknowledgment that licensing is a regulatory tool which allows the monitoring of processes and practices in a holistic sense but is not designed to assess individual welfare, it is concluded that, contrary to claims made by industry and Government, licensing (in and of itself) cannot be considered to be a viable legal vehicle for guaranteeing animal welfare. Instead, it is concluded that licensing can be used as an important tool to scrutinise industry and provide additional protection to animals by virtue of that increased scrutiny; albeit under the proviso that the licensing regime in question is considered to fit the model for 'responsive regulation' (See: Chapter 9.2.1 for detail) and it is drafted in a way that allows it to be correctly enforced.

Chapter Ten provides a series of recommendations for change which would allow existing and future licensing regimes governing the use of animals to be put to best effect. This includes recommendations for licensing regimes introduced in the future under s. 13 of the AWA 2006 as well as those licensing regimes, such as the ZLA 1981, which are introduced as stand-alone primary legislation. Finally, Chapter Eleven concludes this thesis with some broad, closing comments and considerations. Ultimately, it is concluded, while the licensing of the use of animals can and does provide important regulatory oversight and scrutiny, claims that animals' welfare is guaranteed by such regimes should be met with caution. If we are committed to truly guaranteeing the welfare needs of animals are met, then we must begin with restructuring our core animal protection legislation (particularly the AWA 2006) with a view to facilitating the introduction of universal minimum welfare standards, based on the individual and species-specific needs of the animals themselves, regardless of the use that they are put to by either individual people or wider industries. At present, no

such minimum standards exist and protection for animals is limited by the constraints of the particular industry using the animal, or the use to which the animal is put. Until such a time as these minimum standards are realised, licensing regimes implemented to protect animals will be necessarily limited as to their ability to contribute to the delivery of high animal welfare standards in England.

III. Why Focus on Zoos?

As outlined in the foregoing sections, licensing is increasingly becoming the means by which animal welfare standards in industry are monitored and regulated and current proposals for regulatory reform seek to update and amend existing animal licensing regimes in line with our ever-developing understanding of animal welfare needs. Despite this, it is undeniable that the number of animals used in the industries in question as part of this research – predominantly circuses and zoos – is far lower than those used in other animal industries. In particular, the animal farming industry – producers of meat and other animal products such as milk and eggs – dwarfs the zoo and circus industries in terms of numbers of animals used (see Section 2.1 for statistics) and, arguably, also presents far more risk of animal welfare being compromised or simply not met at all. Put bluntly, zoos and circuses do not, as their sole purpose, breed animals in order to kill them for their body parts or to use their bodies for produce (milk, eggs etc.) and so it could be argued that focusing on welfare concerns in these industries is misguided when compared to, for example, farming. With the above in mind, it is important to consider why an investigation into welfare provision and legal protection for animals in zoos and circuses might be deemed important, regardless of suffering caused in other animal use industries.

It is perhaps safe to say that, while circuses which use animals (and particularly wild animals) have fallen out of favour with the general public amid growing concern for animal welfare, zoos are generally seen as institutions which are, at best, doing a great service to conservation and species survival and, at worst, benign organisations which do no real harm to the animals who live on their premises. Indeed, with just a few exceptions (the Born Free Foundation²⁹ and Freedom for Animals³⁰ being the most notable examples in the UK), while some organisations may have stated positions against (wild) animal captivity, zoos rarely form part of focused campaigning work for the numerous animal welfare and rights organisations currently operating in this country. It could be argued that this is a numbers issue – that fewer animals are in zoos than are used in agriculture, and thus organisations are focusing their work where the greatest number of animals are suffering – but this does not appear to be the case. Leading animal welfare organisations such as the RSPCA, World Animal Protection, PeTA, Four Paws and Animal Defenders International, among others, have active campaigns to bring an end to the use of wild animals in travelling circuses in the UK, despite this industry using only a handful of animals. In the case of circuses, it would appear that campaign efforts are warranted on the basis of the depth of concern for welfare and it is for this same reason that this research will focus upon circuses in spite of the very small number of number of animals used by the industry. The same organisations mentioned above, while they will speak out in opposition of particular zoos, or the entire zoo industry in some cases, when an incident occurs which warrants comment³¹, do not

²⁹ See: www.bornfree.org.uk

³⁰ See: www.freedomforanimals.org.uk

³¹ E.g.: Animal Defenders International. (2012). Building work begins on new elephant enclosure condemned by welfare groups. [online] Available at: http://www.ad-international.org/animals_in_entertainment/go.php?id=2834&ssi=12 [Accessed 27 Aug. 2018].

carry out specific campaign work to oppose zoos in the same way that they do other animal use industries.

It seems clear that, even within organisations who are ethically opposed to other animal use and exploitation, there is little being done to challenge the zoo industry by the UK's animal welfare lobby. This is in spite of there being widespread and well-documented welfare concerns related to holding animals captive in zoos. For example, the case of South Lakes Safari Zoo, where almost 500 animals died over the course of three years³², and where a zoo keeper was mauled to death by a tiger in 2013³³ demonstrated serious failures with regard to animal welfare and staff safety at a licensed UK zoo. In zoos around the world, animals may be allowed to breed only to have their offspring culled³⁴. Social animals, such as elephants, might spend upwards of seventy years in the same space and, in the case of male elephants, may spend a large part of that time completely isolated from others of the same species. The impact of prolonged captivity has been noted in species including elephants, bears, camels, big cats, primates and reptiles and can often manifest itself in the development of abnormal behaviours known as stereotypies³⁵.

³² Marsh, S. (2017). 'You'd come in and think, what's dead or escaped?': inside Britain's most controversial zoo. [online] the Guardian. Available at: <https://www.theguardian.com/world/2017/may/20/south-lakes-safari-zoo-animal-deaths> [Accessed 27 Aug. 2018].

³³ BBC News. (2016). Tiger maul death zoo fined for breaches. [online] Available at: <https://www.bbc.co.uk/news/uk-england-cumbria-36501417> [Accessed 27 Aug. 2018].

³⁴ BBC News. (2014). How many healthy animals do zoos put down?. [online] Available at: <https://www.bbc.co.uk/news/magazine-26356099> [Accessed 27 Aug. 2018].

³⁵ Manteca, X. and Salas, M. (2015). Stereotypies as animal welfare indicators. [online] Zawec.org. Available at: <https://www.zawec.org/en/fact-sheets/44-stereotypies-as-animal-welfare-indicators> [Accessed 27 Aug. 2018].

These stereotypies might involve pacing, head twisting, rocking backwards and forwards, self-mutilation and bar biting, among other things. Stereotypies are signs of mental distress in animals in captivity and, importantly, are behaviours which have never been witnessed in the same species in the wild. As such, these disturbing, abnormal behaviours are indicative that being held captive, for these animals, may be considered a harm in and of itself.

In addition to the issues listed above, many zoos also use a form of mutilation called “pinioning” on certain species of bird in order to permanently prevent flight and other zoos cull wild bird populations to prevent them interfering with the captive animals³⁶.

In the view of the author, there is little evidence to demonstrate that zoos make a meaningful contribution to either broad conservation efforts or species survival³⁷. Indeed, even if this were not the case, there is ample evidence to suggest that at least some animals can and do suffer in zoos. While that suffering is of a different nature to the suffering of animals in farming and vivisection, it is suffering nonetheless.

For the reasons outlined above, while it is recognised that the zoo and circus industries comprise fewer animals than industries such as farming or vivisection, the welfare provision for animals used in these industries warrants further scrutiny and consideration. For this reason, they were chosen as the focal point of this research.

³⁶ Tyson, E. (2014). For an End to Pinioning: The Case Against the Legal Mutilation of Birds in Captivity. *Journal of Animal Ethics*, 4(1)

³⁷ Tyson, E. (2018). Speciesism and Zoos: Shifting the Paradigm, Maintaining the Prejudice. In: A. Linzey and C. Linzey, ed., *The Palgrave Handbook of Practical Animal Ethics*. London: Palgrave Macmillan.

Chapter One: Should Animal Use Be Regulated by Law

And, If So, How?

The introduction to this thesis explored the broad scope of this research: an examination of the efficacy of licensing regimes as a means to regulate the use of animals, with a particular interest on their impact on animal welfare. This chapter will explore the foundational theories which influence and inform the regulation of animal use. Because there are already numerous laws in effect which are designed to regulate animal use, asking the question “should animal use be regulated?” may be deemed a moot point. For reasons which that will be explored in-depth in later chapters, it is necessary to offer at least a brief overview of the different theories in relation to the regulation of animal use. This overview will include discussion of whether it is necessary, or indeed desirable, to regulate the use of animals at all and, if so, for what purposes and to what extent it might be necessary or desirable, as well as ways in which the proposed purpose of the regulation is to be achieved. This will provide a foundation upon which to build arguments as to the efficacy of existing laws and their potential shortcomings.

It should be noted that this thesis seeks to consider the regulation of animal use which is implemented either in full or in part in the interests of the animals, rather than for some other, external purpose. For example, the licensing of the use of wild animals in circuses was implemented with the express aim of protecting animal welfare³⁸. The ZLA 1981 was implemented following long-term concern for the negative impact on the welfare of animals

³⁸ HC Deb, 1 March 2012, c41WS

in zoos if the industry remained unregulated³⁹. The licensing of pet shops under the Pet Animals Act 1951 was likewise introduced with a view to “regulate the sale of pets as to eliminate cruelty and prevent suffering to the animals concerned”⁴⁰. It is this type of regulation that this research is considering. Measures which fall outside of this research, despite regulating animal use, are those such as the newly-proposed restriction on antibiotic use in animal farming as these would be introduced, not as a means to protect the animals or provide benefit to the animals themselves, but as a means to combat antibiotic resistance in the human population who consume animal products⁴¹.

It could easily be argued that, in today’s society, there is recognition that animals should not be abused or mistreated. Most reasonable people would be horrified if they saw a dog being beaten, for example, and there was national uproar when footage was released in early 2011 of an elephant in a circus being beaten with a pitch fork,⁴² an act which led to the prosecution and conviction of the elephant’s owner⁴³. A clear indication of public concern over the mistreatment of animals is the fact that the RSPCA received 1,153,744 calls during 2016 from concerned members of the public on issues relating to the treatment of animals,

³⁹ For example: HC Deb 25 October 1967 vol 751 cc512-3W 512W, HL Deb 20 May 1970 vol 310 cc1049-52 1049, HL Deb 29 October 1970 vol 312 cc218-36 218 and HL Deb 28 January 1974 vol 349 cc55-77.

⁴⁰ Lord Ailwyn (Eric William Edward Fellowes), HL Deb 07 June 1951 vol 171 cc1187-98

⁴¹ Knapton, S. (2016). *Antibiotics for animals to be restricted under government plans to beat drug resistance*. [online] The Telegraph. Available at: <http://www.telegraph.co.uk/science/2016/05/13/antibiotics-for-animals-to-be-restricted-under-government-plans/> [Accessed 15 Jan. 2017].

⁴² Daily Mail, 28th March 2011, “Anne's agony: Battered, kicked and stabbed, the desperate plight of Britain's last circus elephant”.

⁴³ *R v Bobby and Moira Roberts* (2012), Northamptonshire Magistrates’ Court sitting at Northamptonshire Crown Court, 23 November 2012.

investigated 149,604 cruelty cases and secured 1,477 convictions as a result of private prosecutions brought by the charity.⁴⁴

Today, there is a near universal view that animals should be spared abuse, but this view has not always been prevalent. Despite the fact most would agree that family pets should not be kicked and elephants in circuses should not be beaten with pitch forks, views on the extent to which animals should be protected from the actions of people is still the cause of much debate.

The academic debate about the extent to which our treatment of animals should be restricted centres around three major areas: sentience (largely agreed to be synonymous with the ability of animals to suffer), whether (sentient) animals can be considered to possess “interests” and, to a lesser extent in more recent times, whether or not the kind treatment of animals is necessary in order not to debase or erode our sense of humanity. The last position, which was notably championed by philosophers such as Thomas Aquinas during the 13th century⁴⁵ and Immanuel Kant in the 18th century⁴⁶, is largely considered outdated in modern times (as the majority view is that animals possess at least some inherent worth which is worthy of protection in its own right) although mention of it can be found in Trust law for the reasons that charitable trusts under UK law can only be established for “the benefit of the public”, not for the benefit of animals. As such, any

⁴⁴ RSPCA.org.uk. (2016). *RSPCA Facts and Figures*. [online] Available at: <http://www.rspca.org.uk/media/facts>.

⁴⁵ Honderich, Ted, ed. (1995). "*Animals: Peter Singer*". The Oxford Companion to Philosophy. Oxford. pp. 35–36.

⁴⁶ Ed. P. Heath and J.B. Schneewind. (1997). *Lectures on Ethics*, Cambridge: Cambridge University Press, p. 212.

charitable trust with the aim of promoting the welfare of animals must do so for the public benefit, thus perpetuating the standpoint that kindness to animals is intrinsically morally good and beneficial to those who practice it, rather than desirable for the animals themselves in a more direct sense. A historical example of case law where this point was explicitly dealt with was *Re: Wedgwood Trust* [1915]⁴⁷ which considered the estate of a woman who had established a charitable trust for the express purpose of benefitting animals. It was ruled that helping to “stimulate humane and generous sentiments in man towards lower animals” could be considered a charitable purpose.

The core discussion within this chapter will focus on the issue of sentience as a logical starting point followed by consideration of whether or not a sentient animal can be deemed to be a possessor of interests and, if so, what those interests may be and to what extent sentience, combined with the possession of interests, may give rise to moral consideration and thus, protection under law.

1.1 Can Animals Suffer at All and, If So, How Does This Affect Our Treatment of Them?

The word “suffer” is defined as to “experience something bad or unpleasant”⁴⁸ and for people, the concept of “suffering” comprehends a great number of mental states of emotions. These might include, *inter alia*, pain, stress, fear, anxiety, shame, apprehension, uncertainty and depression. Aaltola provides a working definition of suffering as follows: “Suffering is substantial physical discomfort and/or mental distress which affects our whole being and sidelines most (if not all) other considerations normally important to us”⁴⁹. This

⁴⁷ Re: Wedgwood Trust [1915] 1 Ch 113

⁴⁸ Oxford English Dictionary

⁴⁹ Aaltola, E., (2012), *Animal Suffering: Philosophy and Culture*, Palgrave Macmillan, p. 16

section will explore how the concept of suffering applies to animals and, by extension, what the ability (or lack thereof) to suffer could mean with regard to their moral standing.

Suffering has formed the cornerstone of the debate on animal protection since the time of eighteenth century philosopher, Jeremy Bentham, who wrote the following, now famous, passage in 1789:

It may one day come to be recognised that the number of the legs, the villosity of the skin, or the termination of the os sacrum are reasons equally insufficient for abandoning a sensitive being to the same fate [as slaves]. What else is it that should trace the insuperable line? Is it the faculty of reason or perhaps the faculty of discourse? But a full-grown horse or dog, is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day or a week or even a month, old. But suppose the case were otherwise, what would it avail? The question is not, Can they reason? nor, Can they talk? but, Can they suffer?⁵⁰

It is largely agreed that answering Bentham's question "can they suffer?" in relation to a being or object gives us the baseline for differentiating between those beings or objects which might require moral consideration, and those that do not. For example, if we ask ourselves the question: "can it suffer?" about a rock on a beach, our knowledge of the composition of rocks and their inanimate state allows us to conclude that "no, it does not suffer". As such, it is logical that we have no reason to be concerned (for the rock) if we throw it into the sea, kick it with our shoe or bury it in the ground. It is therefore universally agreed that rocks, in and of themselves, do not require moral consideration and we do not need to consider or amend our behaviour towards them to avoid causing suffering. On the other hand, most people would accept without question that, as a result of our knowledge of mammalian physiology and behaviour, to kick, throw or bury alive a kitten we see on the street would *inevitably* cause suffering. As such, if it can be agreed that a kitten can suffer, it stands to reason that kittens should be granted some level of moral consideration with a

⁵⁰ Bentham, J., (1907). *An Introduction to the Principles of Morals and Legislation*, 1907.

view to avoid causing the kitten suffering. The extent to which kitten (and other non-human animals) should be granted moral consideration remains subject to debate.

Few people now share the view of the 17th century philosopher, Rene Descartes that: “animals are without feeling or awareness of any kind”⁵¹ and, instead, it is widely agreed now that at least some animals can be considered sentient or, in other words, *with* feeling and awareness. Sentience, in turn, is considered to be a prerequisite for an individual to be able to experience suffering (in that an individual with no feeling or awareness could not be considered to have the capacity to suffer). There remains debate surrounding how sentience should be defined, particularly when it is considered that those individuals deemed to be sentient might, as a result, be considered to warrant the grant of moral (and subsequently legal) consideration and those who fall outside of the definition might be deemed to warrant no such moral or legal consideration. Regan, for example, suggests that the test for sentience should be the ability to feel pain; something which is largely deemed to be an attribute of many taxa and species of animal. Regan similarly connects the ability to feel pain with the ability to suffer, on the broad basis that pain in animals should be “considered intrinsically, just as much of an evil as a comparable experience of a human being”⁵². The ability to suffer, he argues, is an important criterion in classifying individuals as “subjects-of-a-life” who warrant moral consideration⁵³.

Frey, on the other hand, whilst recognising that many animals feel pain or, due to the fact that he believes that animals do not have the rational capacity to conceptualise pain,

⁵¹ Kemp Smith, N., (1952). *New Studies in the Philosophy of Descartes*, Macmillan, London, pp. 136 and 140.

⁵² Regan, T. (2010). *The case for animal rights*. 2nd ed. Berkeley: University of California Press, p.26.

⁵³ *Ibid.*, p.263

believes they experience “unpleasant sensations”⁵⁴, argues both that sentience is poorly defined and open to interpretation and that pain, as a stand-alone criterion, is inadequate to establish moral significance. As such, he rejects the argument that sentience should be a deciding factor in who or what might be granted moral consideration and equally rejects that argument that the capacity to feel pain provides a sound basis from which to draw the same conclusion.

On the first point, he argues that sentience could be defined in many different ways, with not all of them necessarily indicating that the “sentient” being or object experiences pain and thus have the potential to suffer. For example, he argues that “if ‘sentience’ is taken to mean ‘reaction to stimuli’, ...perhaps even litmus paper... [is a] candidate for having rights”⁵⁵. On the second point, he argues that pain is a “naturalistic-cum-evolutionary” experience which has “no moral status whatsoever” and compares it to the fact that the way in which a chameleon changes colour in reaction to his surroundings is a similarly naturalistic-cum-evolutionary experience which is not given any moral significance within human society⁵⁶. He also suggests that equating pain with suffering is erroneous in that the assumption that “pain is an intrinsic evil” has not been substantiated⁵⁷. Indeed, Frey argues that he can conceive of “someone liking a pain to which he has nevertheless given his full attention”⁵⁸. Finally, Frey points out that the ability to experience pain as the *only* criterion to establish who or what should be granted moral consideration would exclude “marginal

⁵⁴ Frey, R. (1980). *Interests and rights: The Case Against Animals*. Oxford: Clarendon Press, p163

⁵⁵ *Ibid.*, p.34

⁵⁶ *Ibid.*, p.50

⁵⁷ *Ibid.*, p.48

⁵⁸ *Ibid.*,

cases” such as those people with nerve damage who could not feel pain at all in either all or part of their bodies⁵⁹.

To consider these arguments – for and against the view that the ability to experience pain should constitute the sole criterion for establishing sentience and, in turn, that sentience is synonymous with an ability to suffer - in detail would divert from the main question under consideration which is “can animals suffer at all?” but a conclusion sufficient to allow the continued exploration of this question can be reached at this point. For the purposes of this thesis, it can be concluded that the nuances of Frey’s argument surrounding pain not necessarily being an ‘intrinsic evil’⁶⁰ have merit, as do his arguments that some individuals who cannot feel pain (such as those with nerve damage) might be excluded if pain is the *only* criterion used to gauge sentience. However, to dismiss the ability to experience pain as a reliable indicator of the ability to suffer on the basis of the exceptions, rather than the rule, appears somewhat ill-conceived.

Pain is, as Frey suggests, an evolutionary tool and, as a general rule, experiencing pain is unpleasant. It is this very fact that will cause a young child to withdraw their hand quickly if coming into contact with an open flame despite that child not necessarily having the pre-conceived understanding and foresight that putting one’s hand in a flame might cause pain and, subsequently, suffering if the hand is burned and it is this that allows us, and many other species, to avoid constant injury or accident. As such, the very ability to experience pain suggests that the individual in question *may* have a capacity to suffer in that the experience of pain is the biological warning system which helps that individual to avoid such

⁵⁹ *Ibid.*

⁶⁰ Regan, T. (2010). *The case for animal rights*. 2nd ed. Berkeley: University of California Press, p.26.

instances of suffering. It is recognised, as Frey points out, reflexive rather than conscious reactions to painful stimuli can be found in life forms such as amoebas, which are generally agreed to lack the biological complexity to experience pain and thus lack the ability to suffer despite being 'sentient' when judged against other criteria, and it is generally accepted that experiencing pain requires more than simply reflexive response and requires some feeling of negative experience which extends beyond the initial reflexive reaction. However, work carried out by Braithwaite *et al* on fish concluded that fish have both the capacity to feel pain as well as experience "the emotional part of pain, the part that generates the negative feeling of suffering" and therefore further concludes that she sees "no logical reason why we should not extend to fish the same welfare considerations that we currently extend to birds and mammals"⁶¹.

If it can be accepted that fish have the capacity to suffer then it seems nonsensical to suggest that mammals and birds, whose physiology is closer to our own, should lack the capacity to suffer. Indeed, writing in the 1700s, David Hume warned against denying that animals possess similar levels of consciousness to humans when evidence suggests otherwise. He opens his chapter on the existence of animal consciousness with the forthright statement: "*[n]ext to the ridicule of denying an evident truth, is that of taking much pains to defend it; and no truth appears to me more evident, than that beasts are endow'd with thought and reason as well as men*"⁶². To conclude this part of the discussion, while Frey and those who concur with his view may dispute the rights and wrongs of affording animals moral consideration as a result of their ability to suffer, there seems to be

⁶¹ Braithwaite, V. (2010). *Do fish feel pain?*. Oxford: Oxford University Press, p.113.

⁶² Hume, D., (1739). *A Treatise on Human Nature.*, p 93

little evidence to support the view that the suffering itself (though perhaps experienced differently between one species and another) does not exist in many, if not most, animals.

With the above discussion in mind, it is fair to say that, it is now generally accepted at least some animals have the capacity to suffer. In recent years, the debate has focused far more upon the *extent* of suffering that animals are capable of and, with this in mind, the extent to which the infliction of suffering upon animals is deemed acceptable when balanced against other factors. An outline of the main areas of discussion on suffering is provided below.

Until now, the instances of suffering mentioned have largely involved the infliction of physical pain. However, suffering is not just concerned with pain. It might be that, on reading the earlier passage about the kitten being kicked and buried alive, one might invoke mental images of other forms of suffering different to mere physical pain. Depending on one's views as to the extent of animal sentience and cognition, one might imagine the kitten also feeling frightened, anxious or stressed. It might be considered that a kitten buried alive will struggle to free herself so that she does not die from suffocation. If the kitten survived her ordeal, it might be considered reasonable to imagine her being ever fearful of people and of a nervous disposition henceforth. Any one of these reactions to the passage might be considered a reasonable response. The necessity of recognising that suffering is not limited to experiences of pain in animals was noted in the 1965 Brambell Report⁶³, published by the UK Government (and is considered in detail in Chapter 1.5 of this thesis), which highlighted the need to consider the cumulative effect of factors other than pain in evaluating suffering. The report noted:

⁶³ Brambell, F. W. R. (1965). *Report of the Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems*. London, Her Majesty's Stationery Office.

“We, for our part, must pay special attention to the possible cumulative effect on the animal of the long continuance of conditions which might be tolerable or even acceptable, in the short term. Factors producing prolonged stress, discomfort or deprivation must weigh heavily with us and may, on occasion, be of much more significance for the total welfare of the animal than more acute, but transitory, suffering”⁶⁴.

Whilst Cartesian theorists denied that animals were capable of suffering at all, it is perhaps fair to say that, up until the 1960s, which saw the development of what became known as the Five Freedoms (introduced following the publication of the aforementioned Brambell Report, mentioned above, and discussed in detail in Chapter 1.5 of the present thesis), many of those who agreed that animals could suffer physical pain were sceptical as to the ability of animals to experience emotions or mental states in the way that humans do. With the exception of the previously mentioned view of scholars such as David Hume, whose viewpoint on this issue was something of an anomaly at the time he was writing, there was a time when to attribute what were considered to be wholly human emotions, such as happiness, sadness, depression and others, to animals and thus to anthropomorphise them, was considered to be wholly unscientific. For example, the now celebrated primatologist, Jane Goodall, was heavily criticised when she began her behavioural studies of chimpanzees in the 1960s for committing the “cardinal sin in ethology⁶⁵” of attributing human emotions to animals (anthropomorphism). Since then, her work and that of other leading ethologists, such as Marc Bekoff⁶⁶, have added to the growing body of clear evidence that the emotional lives of animals are far more expansive than we previously believed them to be.

⁶⁴ Brambell, F. W. R. (1965). *Report of the Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems*. London, Her Majesty's Stationery Office., p.10.

⁶⁵ Goodall, J., (1990) *Through a Window: 30 years observing the Gombe chimpanzees*, London: Weidenfeld & Nicolson, p. 13

⁶⁶ E.g. Bekoff, M., (2007), *The Emotional Lives of Animals*, New World Library, Novato, California

Indeed, there has been a raft of experiments carried out on animals over the last five or six decades which have established significant data to suggest that animals can feel a range of emotions including depression, grief, fear and anxiety. Some of these experiments have included giving dogs no means of escaping electric shocks in order to induce “learned helplessness”, leading to the demonstration of emotions such as fear, grief and depression⁶⁷. Beginning in the 1950s, Harlow’s now infamous work on the emotional effect of social deprivation and isolation involved removing rhesus monkeys from their mothers at one day old and replacing their mothers with a cloth doll. The cloth doll would, at intervals, shoot sharp brass spikes out of its “body” as the infant clung to it. Harlow’s other experiments put individual monkeys in bare wire cages and monitored their development. It was found that both the monkeys with the doll ‘mothers’ and the wire cage monkeys developed “severe persistent psychopathological behaviours similar to those seen in autistic children”⁶⁸.

On the other hand, those such as Frey continue to deny animals emotions and feelings, and consider anthropomorphism misguided. In fact, he suggests that those people who, for example, anthropomorphise their pets with statements such as “he loves me” are usually “lonely people” who want to believe that their pets are “lesser human beings”⁶⁹. However, despite Frey’s view, it would seem that there is reasonable evidence to suggest that animal suffering, like human suffering, is not limited to the experiencing of pain but can extend to a range of mental and emotional states as well.

⁶⁷ Seligman, Martin E.P., (1975) *Helplessness: On depression, Development and Death*

⁶⁸ Text accompanying photographs taken of test subjects circa 1970, University of Wisconsin, US.

⁶⁹ Frey, R. (1980). *Interests and rights: The Case Against Animals*. Oxford: Clarendon Press

So far, we have accepted that at least some sentient animals can experience physical, emotional and psychological suffering. The ability to experience suffering is largely agreed to indicate that those individuals should be granted some form of moral consideration in order for them to avoid experiencing suffering. What will now be considered is the principle of the ability to suffer alongside discussion surrounding the possession of interests.

1.2 What Are Interests?

Interests can be defined in a number of different ways. An interest might be considered to simply mean a curiosity in a particular thing or subject. One might, for example, have an interest in world history or sport. The term interest can also be found in legal terminology whereby having a legal interest in property means that one has a tangible legal claim on that particular property. Finally, there are interests which relate to individuals' needs or desires which might be considered more fundamental than those outlined above. Fundamental interests often attributed to humans might include an interest in avoiding suffering pain or an interest in continued life. What all of these uses of the term have in common is that the individual in possession of an interest is likely to suffer a disadvantage (or avoid a benefit) if a situation or turn of events compromises their interests or likely to receive a benefit (or avoid a disadvantage) if a situation or turn of events works out, or is maintained, in favour of their interests.

For example, a world history enthusiast may take great pleasure in reading or watching documentaries on their subject of choice. The pleasure experienced is the benefit which results from pursuing the interest in world history. A person who stands to inherit a property receives the benefit of the interest when the property title is transferred to them. A person who has an interest in avoiding pain but falls from their bike and suffers a painful

fractured arm is disadvantaged as their interest in avoiding pain has been compromised by the accident. A person who is free of pain avoids the disadvantage (of suffering pain) as long as the freedom from pain is maintained and thus, the interest is met.

The examples given above suggest that humans are possessors of interests and, indeed, it is universally accepted that this is the case. It should be noted though, that there is significant discussion as to whether *all* humans can be considered to possess interests⁷⁰ but, for the purposes of this section, we can assume that most humans are considered to be in possession of at least some interests.

Before moving on to consider whether or not animals possess interests, the final point to make is that, whilst the most fundamental interests, such as an interest in continued life and an interest in avoiding suffering, might reasonably be considered to be shared by most individuals, it should be noted that interests more generally are likely to differ from one individual to the next. This is particularly the case when considering those interests which might not be considered fundamental, such as an interest in watching football, or an interest in taking a holiday. Some interests which might be deemed fundamental within a particular section of society or part of the world, such as an interest in receiving a university education, might be deemed less important in another section of society or part of the world. As the type of interests in question (ie: those which have an impact upon the wellbeing of any one individual) are, by their very nature, focused on the individual, these differences are arguably inevitable.

⁷⁰ See: Singer, P. (1995). *Animal liberation*. 2nd ed. London: Pimlico, p.18. for exploration of this concept.

Defining and identifying interests is important because it is interests that the law generally seeks to protect. As such, and having considered briefly what interests *are*, notwithstanding the fact that animals can suffer, it is essential to understand whether or not animals, like (most, if not all) humans, are also possessors of interests. If it can be concluded that animals are possessors of interests, then it is equally important to identify what those interests might include in order to decide how our actions towards them should be regulated and, to what extent animals might require legal protection.

1.3 Do Animals Have Interests?

The importance of sentience (which will be used henceforth in this thesis as interchangeable with “the ability to suffer”) in the debate on interests is based around the widely-accepted principle that the ability to suffer implies that the individual in question has a life which can go well or badly for them or, put differently, sentient beings can all be considered to have a ‘welfare’, a term defined by Fraser and Broom as follows: “Welfare defines the state of an animal as regards its attempts to cope with its environment”⁷¹.

The connection between having a welfare and having interests is often taken for granted, and is summed up by Cochrane, who suggests that “the capacity for wellbeing is synonymous with the possession of a welfare, a good of one’s own, and interests”⁷². However, just as Frey argues that experiencing pain is not synonymous with suffering, others argue that sentience does not necessarily indicate the possession of interests.

⁷¹ Broom DM., (1991), *Animal welfare: concepts and measurements*. J Animal Science. 1991;69:4167–4175.

⁷² Cochrane, A., (2012), *Animal Rights Without Liberation*, Columbia University Press, p. 25

Whilst it is largely agreed that sentience is one important criterion in deciding who or what possesses interests, inasmuch as anything that is not sentient tends to fall outside of the debate altogether, there is ongoing dispute over whether or not sentience alone can be considered a sufficient indicator. Some theorists, such as Francione, argue that sentience *is* the only relevant consideration⁷³ and, despite their differing views in other areas, Garner tends to agree with him that sentience (and thus, the possession of a welfare) is the indicator that a being is the possessor of interests⁷⁴. As outlined above, Cochrane is in agreement that sentience, or the possession of a welfare, is important⁷⁵. All three of these theorists agree that sentient animals all have some interests, although they do not necessarily agree on the specific nature of those interests.

Some theorists, such as Frey, believe that animals have no interests at all⁷⁶. In line with his view that animals do not experience feelings, he argues that nor can they have interests, as interests require the possession of desires, beliefs and self-awareness. Since Frey published his work on this issue, however, psychologists such as Gallup⁷⁷ and Pepperberg⁷⁸ and primatologists such as De Waal⁷⁹, among a host of others appear to prove that, at least some non-human animals almost certainly do have beliefs, desires and self-awareness. For

⁷³ Francione, G. (2012). Sentience – Animal Rights The Abolitionist Approach. [online] Abolitionistapproach.com. Available at: <http://www.abolitionistapproach.com/sentience/> [Accessed 24 Dec. 2017].

⁷⁴ Francione, G. and Garner, R. (2010). *The animal rights debate*. New York: Columbia University Press, pp.106.

⁷⁵ Cochrane, A., (2012), *Animal Rights Without Liberation*, Columbia University Press, pp. 36-38

⁷⁶ Frey, R. (1980). *Interests and rights: The Case Against Animals*. Oxford: Clarendon Press, p.2

⁷⁷ Gallup, G. (1970). *Chimpanzees: Self-Recognition*. *Science*, 167(3914), pp.86-87.

⁷⁸ Pepperberg, I., (2000), *The Alex Studies: Cognitive and Communicative Abilities of Grey Parrots*. Harvard University Press

⁷⁹ De Waal, F., (1982), *Chimpanzee Politics: Power and Sex among Apes*, John Hopkins University Press

example, Pepperberg's work with Alex, an African Grey Parrot, appeared to demonstrate that Alex was capable of experiencing complex emotions such as jealousy⁸⁰ as well as the demonstration of complex cognitive function. As such, it would appear that even by Frey's standards, it is logical to conclude that these animals, at least, have interests.

Indeed, it is now largely accepted that most animals have at least some interest in not suffering (in both a physical and psychological capacity). However, even those that believe it to be undeniable that animals have interests find it difficult to agree on the specific detail of those interests. One of the main disputes in this regard centres around whether or not an animal needs to be consciously aware of an interest in order to possess it.

An example can be found in the discussion on whether animals have an interest in continued life, with some arguing that, whilst animals have an interest in not suffering pain or mental distress they cannot possibly have an interest in continued life as they lack the cognitive ability to understand the concept of death⁸¹. Those who hold this view might argue that animals can be killed for human use as long as the death does not cause unnecessary suffering. Others argue that animals have as much of an interest in continued life as humans do, regardless of their ability to conceptualise their existence⁸² and make the point that, to deny this interest to animals would also deny an interest in continued life to

⁸⁰ Pepperberg, I. (2008). *Alex and me*. New York: HarperCollins Publishers, FAQs.

⁸¹ Regan, T., (2001), *Defending Animal Rights*, University of Illinois Press

⁸² Francione, G., (2008), *Animals as Persons: Essays on the Abolition of Animal Exploitation*, Columbia University Press

infant humans who are too young to have yet developed any concept of death and those with serious psychological illnesses who are also unable to conceptualise their existence⁸³.

For the purposes of this section, it is important to acknowledge the main thrust of this dispute, which is that cognitive ability may or may not be important when ascribing interests. If sentience is deemed a sufficient stand-alone criterion for ascribing interests, then it follows that most animals are in possession of some interests. If cognitive ability, such as the ability to conceptualise an interest, is required in order to ascribe interests, then accepting animals as interest holders becomes far more problematic and might limit interest holders to a very small number of species for whom the criteria can be deemed to have been met. Wise's work on this exact issue has suggested that, dependent on criteria used to assess the possession of interests, there are compelling arguments to conclude that not only great apes – largely recognised as cognitively advanced animals – and other more cognitively-developed animals may be in possession of interests which require protection in law, but that animals such as bees – largely considered to be cognitively limited - may also fulfil criteria to allow us to attribute interests to them⁸⁴.

Our purpose in this section was to establish whether or not animals have interests at all and it would appear that, employing even the narrowest criteria for assessment, such as Frey's, which demand that only those with (or with potential for) sufficient cognitive ability and self-awareness can be considered to be in possession of some interests would result in at least some non-human animals being considered interest holders. Furthermore, the wider

⁸³ See: Singer, P. (1995). *Animal liberation*. 2nd ed. London: Pimlico, p.18. for exploration of this concept.

⁸⁴ Wise, S. (2013). *Drawing the line*. Cambridge, Mass: Perseus Books.

criteria employed by those such as Francione, who ascribe interests to *all* sentient individuals, allows that *most* animals have interests. Finally, even if we conclude that animals have no interests at all, there remain (arguably outdated) arguments such as those advanced by Kant that it is in our own interests to treat animals well and thus we should do so in order to protect our own humanity. For the purposes of this work, it is enough at this point to conclude that either animals do have at least some interests that might require protection by law or (though a rather less compelling and arguably outdated viewpoint) that the protection of animals by law may have the effect of upholding public morality and humanity and therefore is in our own (human) interests to do so. All of this taken together allows us to conclude that animals *should* be protected by law. The means by which this protection is achieved will be considered next.

1.4 Balancing Our Interests with Those of Animals

So far, we have progressed under the widely-accepted principles that sentient animals can suffer both physically and psychologically and that animals can have an interest in not suffering. We have accepted that there may be limitations and objections to these principles but, for the purposes of this work, it is unnecessary to explore them further. Now we move on to how suffering, interests and the balancing of those interests interact with each other to decide if, and to what extent, the use of animals should be regulated by law.

Most acts or omissions do not exist in isolation but have consequences which may affect a number of different things in a number of different ways. In fact, it is the recognition of this fact that drives the development of the law in the first place – we cannot act on our interests without taking into consideration the interests of others and this is, for the most

part, the theory which underpins the law and other non-legislative but morally-accepted frameworks.

The balancing of interests is something which is accepted in day-to-day life, even without many of us realising that we do it. If I see a ten-pound note drop from someone's pocket, I might have an interest in picking it up and keeping it for myself. However, the person that dropped that ten-pound note also has an interest in retaining it. Most reasonable people would agree that, even if I gain a benefit from keeping the ten-pound note myself, I have a moral obligation to catch up with the person that dropped it and hand it back. Indeed, the law recognises the interest of the rightful owner of the ten-pound note as the Theft Act 1968⁸⁵ protects against this sort of action. As such, I do not just have a moral obligation not to keep the money for myself, but I have a legal obligation not to keep the money for myself too. In this way the interest of the rightful owner of the money is legally protected. The moral obligation that a reasonable person feels to return the money can be set within a number of moral frameworks; perhaps most effectively that of Kant's "Moral Absolutism"⁸⁶. This school of thought is based on the ancient premise of "do unto others as you would have them do unto you" and believes that certain things are, by definition, morally right or morally wrong. Stealing would be one such act and therefore, the morally correct thing to do would be to return the money, irrespective of the consequences.

⁸⁵ S. 3(1) of the Theft Act 1968 defines "appropriation" as including "where he has come by the property (innocently or not) without stealing it". The test in the Theft Act is that the property must be appropriated "dishonestly", which would include knowingly keeping the money mentioned above while knowing that it belonged to someone else.

⁸⁶ Plato.stanford.edu. (2016). Kant's Moral Philosophy. [online] Available at: <https://plato.stanford.edu/entries/kant-moral/> [Accessed 24 Dec. 2017].

We can use a similar interest-based approach to apply to the aforementioned situation of burying the kitten alive. I may have an interest in burying the kitten alive in order to amuse myself. I could argue that it would make me happy to bury the kitten alive and therefore I have a right to do what I want to the kitten in pursuit of my happiness. Most reasonable people would argue that my interest in amusing myself was of lesser importance than the pain (in both a physical and moral sense) I would create if I were to bury the kitten alive. Indeed, the law would agree; the burying of a kitten alive would almost certainly be construed as a breach of s. 4 (1) of the AWA 2006 which prohibits the infliction of unnecessary suffering. In this way, the interest of the kitten in not suffering unnecessarily is legally protected. However, as will become clear as the discussion progresses, this protection is not absolute.

Debate quickly arises when the interests in question are not quite so easy to weigh against one another as the examples given above. For example, what if the kitten in question was in a laboratory and the suffering I planned to inflict was necessary in order to conduct an experiment which might help medical science better understand the development of cancer cells in human children? Would a reasonable person argue that the kitten's interest in not suffering outweighs my interest, or indeed the interests of all humanity, to further work in finding find a cure for cancer in humans? What if there were a 100% guarantee that the research would provide important results? What if there was no guarantee that the research would provide any useful results at all?

What if, instead of a kitten, the animal in question was a pig in a factory farm and I was a mother who had a low income and a number of children to feed? Are my interests in feeding my family cheap and easily available meat, more important than the interests of the pig not to live and die in a factory farm in order to feed my family? Would the situation be

different if the pig were kept on a 'free range' farm? What if we accept that a person can live healthily on a vegetarian diet which renders the "need" to eat meat obsolete? Can we suggest that our interest in eating meat, while not necessary for our survival, is sufficient to warrant the death of the animal; a conundrum likely to be contingent on one's individual view on whether or not animals have an interest in continued life.

If Bentham's aforementioned question "can they suffer?" forms the starting point for the debate surrounding the extent to which animals should be afforded legal protection, and the attribution of interests to animals develops the debate, it is the balancing of interests in situations such as those outlined above that form the substance of it. From this discussion come the two principal schools of thought surrounding our treatment of animals: the rights theory and the welfare theory. These two schools are, in themselves, multi-faceted and different theorists present different approaches but it is fair to say that differences between the two theories in very general terms can be clearly identified.

1.5 Animal Welfare Theory Vs Animal Rights Theory

Animal rights theory and animal welfare theory are often confused in mainstream public discourse but, from an ideological and legal perspective, there are fundamental differences between them. The difference can be broadly summed up in the following well-used phrase:

"Animal rights theorists advocate for no cages, animal welfare theorists advocate for bigger cages"⁸⁷.

⁸⁷ Origin Unknown. Example of use: Bbc.co.uk. (n.d.). BBC - Ethics - Animal ethics: Introduction to animal rights. [online] Available at: <http://www.bbc.co.uk/ethics/animals/rights/introduction.shtml> [Accessed 24 Dec. 2017].

Some proponents of animal rights theory argue that use (and ownership) of animals by humans *inevitably* results in exploitation and/or suffering and is therefore unacceptable⁸⁸. Proponents of animal welfare theory might argue that animal use by humans is acceptable as long as the animal's needs are provided for and they are treated humanely or not made to suffer unnecessarily⁸⁹.

In between the purist rights and welfare theory camps, a number of other scholars have developed their own position on the matter, taking parts from both theories. An example is Cochrane, who believes that animals can be considered to be rights holders without necessitating total liberation (ie: he does not agree that animals have an inherent interest in liberty, as many rights advocates do who subscribe to the 'no cages' approach⁹⁰).

Notwithstanding the recognition that different versions of the rights and welfare theories exist, for the purposes of this thesis, and for simplicity, the two 'purist' positions will be used in order to further the current discussion. The animal rights stance holds that, contrary to Kantian theory, animals can never be "means to be arbitrarily used by this or that will"⁹¹. It is argued that animals are ends in themselves⁹² and thus, their lives are not given value by the importance that humans ascribe to them (as individuals or species) but that they have inherent value of and for their own distinct purposes. Animal rights advocates therefore oppose the use of animals for their flesh, milk and eggs, as well as their use in medical research. They also oppose the use of animals in entertainment and the principle of animals

⁸⁸ E.g. Francione in Francione, G. and Garner, R. (2010). *The animal rights debate*. New York: Columbia University Press, p.15.

⁸⁹ E.g. Garner in Francione, G. and Garner, R. (2010). *The animal rights debate*. New York: Columbia University Press, p.122.

⁹⁰ Cochrane, A. (2012). *Animal rights without liberation*. New York: Columbia University Press., P. 210

⁹¹ Immanuel K., (1785), *Groundwork for the Metaphysics of Morals*

⁹² Regan, T. (2010). *The case for animal rights*. 2nd ed. Berkeley: University of California Press

as chattel under the law⁹³. The rights theory argues that the law should recognize that animals, like people, have fundamental rights which, cannot simply be ignored or overridden arbitrarily for human (or any other) benefit.

In the lab kitten situation, the rights theory would reject the purported benefit to humanity as a valid interest as the kitten's interest in not being experimented upon should be considered fundamental and protected, in the same way that (in modern society) a human being's right not to be experimented on is protected. The same would apply to the pig who, from a rights perspective, should not be raised in a farm and killed for her flesh, regardless of how many children I have to feed and regardless of whether she can conceptualise her own death and has an interest in continued life.

From a legal perspective, animal rights advocates tend to seek to prohibit (abolish) practices which use animals and move towards fundamental legal rights for animals similar to those fundamental rights generally recognised (if not always enforced) for human beings. These rights might include the right to life, the right to liberty, the right to freedom from torture, the right to bodily integrity, amongst others. While it is recognised that these rights are not absolute, in the case of humans (those in the armed forces, for example, are killed in the line of duty and it is not considered to be a human rights breach *per se*), these rights are recognised and (should be) upheld when all other things are equal. For animals, no such benchmark exists.

⁹³ Francione, GL., (1995), *Animals, Property and the Law*, Philadelphia: Temple University Press

For humans, the United Nations Declaration on Human Rights was adopted in 1948 as setting out “fundamental human rights to be universally protected”⁹⁴. The main driving force behind the establishment of the United Nations and the Declaration itself was the desire to ensure that the human rights atrocities carried out during the Second World War could never be allowed to happen again. The overall principle underpinning the declaration was that the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”⁹⁵.

While it is recognised that human rights, even those fundamental ones outlined in the declaration, are rarely, if ever, absolute, the principle of seeking to establish similar (if not identical) rights for animals is a major focus for animal rights advocates. Of course, some rights deemed fundamental for human beings, such as the right to marry or the right to freedom of religion, will be irrelevant for animals and therefore animal rights advocates do not seek to implement, arbitrarily, the *same* rights as those granted to humans but rather focus upon those in which animals can be considered, like humans, to have an *interest*. For example, freedom from torture is likely to be as important to an individual cat, dog or elephant as it is to an individual human; regardless of whether or not the individual could conceptualise the treatment in advance.

The welfare theory, as opposed to the rights theory, is the predominant basis for UK legislation which regulates animal use (with some notable exceptions). The welfare theory

⁹⁴ Description used by the United Nations of the Declaration’s purpose. See: Un.org. (n.d.). Universal Declaration of Human Rights. [online] Available at: <http://www.un.org/en/universal-declaration-human-rights/> [Accessed 24 Dec. 2017].

⁹⁵ Preamble, Universal Declaration of Human Rights (1948)

accepts that animals are used by humans for our own benefit, such as for food, for experimentation or for entertainment. Suffering is used as a key indicator in animal welfare assessment and, as a general rule, animal welfare advocates seek change which mitigates or prevents all *unnecessary* suffering. One of the main challenges to this approach is that the term 'unnecessary suffering' is subjective; there is no firm agreement on what level of suffering might be deemed 'necessary' and thus legislating to ensure that only 'necessary' suffering is permitted becomes inherently problematic. For example, the case of *Stuart Bandeira and Darren Brannigan v. Royal Society for the Prevention of Cruelty to Animals 2000*⁹⁶ turned on this exact point. The argument put forward by the RSPCA was that a dog who had been injured as a result of being sent into the earth of a fox or the sett of a badger by his owners when he was attacked by a fox or a badger, had been made to experience unnecessary suffering. The main thrust of the appellant's argument was that causation was very difficult to prove as animals tend to get themselves into "scraps" without being forced to do so by people. It was argued that the act of the appellants was simply "no more than putting a dog's nose and feet at the beginning of a hole in the countryside"⁹⁷ and this, in and of itself, could not be regarded as causing unnecessary suffering. The appellants lawyer argued that "it is wrong for the law to leave a wide spectrum of uncertainty as to what amounts to ill-treatment and what can be described as causing unnecessary suffering and suchlike, because this leaves the citizen with no idea of where he stands"⁹⁸. Indeed, while RSPCA did win the case, the Court of Appeal judge cautioned that the judgment should not be used as "as a flag to wave at those who hunt with dogs or any other animals"⁹⁹. While the

⁹⁶ *Stuart Bandeira and Darren Brannigan v. Royal Society for the Prevention of Cruelty to Animals* (2000) LTL 28 February 2000

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

facts of this case suggested that unnecessary suffering had been caused in this particular instance, the judge suggested that the magistrate in future cases should be mindful of the risk posed to the animal as a deciding factor, saying: “[a]s it seems to me, if the risk of injury is very high, then a finding of causation by the Magistrates is very likely. If the risk of injury is very low, then a finding of no causation by the Magistrates is very likely.”¹⁰⁰

In his paper, *Unnecessary Suffering*,¹⁰¹ Mike Radford charts the development of the concept from its first inclusion in the Prevention of Cruelty to Animals Act in 1849 and its application in case law. He quotes Hawkins J in *Ford v Wiley*¹⁰², highlighting that: “*the amount of pain caused, the intensity and duration of the suffering, and the object to be attained, must, however always be essential elements for consideration*” in cases which require a conclusion on the matter. In effect, proportionality plays a key role in reaching judgment – a position which was echoed in the later RSPCA case cited above. A wider discussion of the intricacies of decision-making with regard to what may or may not constitute unnecessary suffering is not required in the context of the present thesis and it is enough, therefore, for our present purposes to accept that there continue to be no clear-cut rules with regard to the application of the expression, “unnecessary suffering”, despite its having been a foundational principle in animal law since its inception. In practice, the expression is interpreted on a case-by-case basis, informed by precedent.

The animal welfare theory would seek to improve conditions for animals used by humans by implementing standards of care (via both legally binding rules and non-binding guidance)

¹⁰⁰ *Ibid.*

¹⁰¹ Radford, M. (1999). “*Unnecessary suffering*”: *the cornerstone of animal protection legislation considered*. *Criminal Law Review*, 702-13.

¹⁰² Hawkins J in *Ford v Wiley* (1889) 23 QBD 205 at [219]

and laws which seek to regulate the use of animals. An animal welfarist might deem it acceptable to use a kitten in a lab to test for a cure for cancer, as long as the kitten was cared for according to particular standards but may not agree for the same kitten to be used to test a brand of cosmetics (which may be seen as a more frivolous or unnecessary use of the animal). An animal welfarist might accept that a pig can be raised and killed in order to provide food for my family as long as she was kept in particular conditions and killed in a way which did not cause her excessive (or unnecessary) pain or suffering. The welfare approach is often criticised by advocates for animal rights on the basis that it, on the one hand, it legitimises the ongoing use of animals for human gain and, on the other, achieves reforms too slowly and ineffectively to make any meaningful positive impact upon animals. Garner has challenged this view, notably in the book *The Animal Rights Debate*¹⁰³, in which he and Francione go 'head-to-head' on the issue. Garner bases his argument in large part on pragmatism, separating out what might be ultimately desirable in the long-term from what is realistic and achievable within current political and legislative parameters. He notes that, while he largely agrees with much of the arguments put forward by animal rights theorists (and particularly those such as Francione who argues for the abolition of animal use for human benefit), the approach is fundamentally flawed as it is not taking into account the very real and prevalent interests (of people, businesses or wider societies) which act to maintain animal use. The major difference between Garner's and Francione's approach in practice is that Garner's position does not see the right to life for animals as of fundamental importance¹⁰⁴. Arguing that death (so long as it does not include suffering) is of less moral

¹⁰³ Francione, G. and Garner, R. (2010). *The animal rights debate*. New York: Columbia University Press, pp.103-170.

¹⁰⁴ Francione, G. and Garner, R. (2010). *The animal rights debate*. New York: Columbia University Press, p 125

importance for animals (and “marginal humans”¹⁰⁵) than it is for humans generally, Garner subscribes to the view highlighted previously that, due to human’s perceived greater cognitive capacity and ability to both conceptualise death and maintain hopes and aspirations for the future during life, in a way that most other animals (to our knowledge) cannot, the death of a person will inevitably count for more (morally) than the death of an animal. He notes that death will prevent future opportunities from being realised in both people and animals but that the range of opportunities available to people is richer and more complex than those available to animals¹⁰⁶. That said, he recognises that death also takes away opportunities for animals, and so advises caution in accepting the argument that animal deaths have no moral significance. Garner goes on to suggest that a similar argument could be made with regard to animal liberty – another fundamental call of animal rights theorists¹⁰⁷. Garner argues that an animals’ lack of autonomy means that liberty *per se* is not “the same denial of autonomy [as in the case of humans] through depriving animals of their liberty”¹⁰⁸. In other words, Garner is suggesting that denying an animal his or her freedom and autonomy is of lesser consequence to denying a human being his or her liberty. This view on liberty is also held by Cochrane and outlined in his book *Animal Rights Without Liberation*¹⁰⁹. Ultimately, Garner argues that the welfarist approach is predominantly focused not upon abolishing human use of animals, but in abolishing – or at least mitigating

¹⁰⁵ See: Singer, P. (1995). *Animal liberation*. 2nd ed. London: Pimlico, p.18. for exploration of this concept.

¹⁰⁶ Francione, G. and Garner, R. (2010). *The animal rights debate*. New York: Columbia University Press, p 117

¹⁰⁷ Francione, G. and Garner, R. (2010). *The animal rights debate*. New York: Columbia University Press, p 129

¹⁰⁸ Francione, G. and Garner, R. (2010). *The animal rights debate*. New York: Columbia University Press, p 118

¹⁰⁹ Cochrane, A. (2012). *Animal rights without liberation*. New York: Columbia University Press.

– animal suffering to the extent possible. He argues that while animals can be considered to have an interest in avoiding suffering, they do not generally have as strong (if any) interest in continued life or liberty¹¹⁰.

As mentioned previously, it is the animal welfare theory model, not the animal rights theory model, which forms the basis of animal welfare legislation. This legislation is increasingly based around the aforementioned concept of Brambell's Five Freedoms; which are a set of needs animals are deemed to possess, as follows:

1. Freedom from Hunger and Thirst
2. Freedom from Discomfort
3. Freedom from Pain, Injury or Disease
4. Freedom to Express Normal Behaviour
5. Freedom from Fear and Distress¹¹¹

To use the terminology under consideration in this chapter, these five needs could be construed as the 'interests' of the animals in question. According to the model, when these interests are met, the animal's 'welfare' is considered to be provided for. It is perhaps noteworthy that, in keeping with welfarist theory, animal needs within this framework are not deemed to include either the right to life or liberty. Since the development of the Five Freedoms in the mid-1960s, the needs have been incorporated into many pieces of modern animal welfare legislation worldwide, including s.9 of the overarching AWA 2006 in England

¹¹⁰ Francione, G. and Garner, R. (2010). *The animal rights debate*. New York: Columbia University Press, pp. 117 and 129

¹¹¹ The Farm Animal Welfare Council [Foundation, Internet. "[ARCHIVED CONTENT] UK Government Web Archive – The National Archives". National Archives (UK). Web. 6 June 2016.]

and Wales, where the five needs are included, with very little amendment from their original form, as follows:

Section 9

(1) A person commits an offence if he does not 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.

(2) For the purposes of this Act, an animal's needs shall be taken to include—

(a) its need for a suitable environment,

(b) its need for a suitable diet,

(c) its need to be able to exhibit normal behaviour patterns,

(d) any need it has to be housed with, or apart from, other animals, and

(e) its need to be protected from pain, suffering, injury and disease.

This chapter has explored the commonalities and differences between animal rights theory and animal welfare theory. Despite differing views with regard to approach and desired end-goals, it is safe to say that one point which proponents of an animal rights theory, those supporting an animal welfare approach and those who perhaps do not fall clearly into either camp appear to agree upon is that, given the sheer magnitude of animal use currently being employed in this country, the regulation of their use under the law is not just desirable, but absolutely necessary. The way in which this regulation plays out and the impact it may have on the animals themselves is considered in the next chapter.

Chapter Two: How Is Animal Use Regulated and How Does This Protect Them?

The previous chapter concluded that, while there remains debate surrounding the extent to which animals should be protected by law, and the best approach to achieve protection, it has now become a majority-held belief that animals should be afforded some protection under the law. In practice, animals are protected by law in a variety of ways. Some legislation has the protection of animals as its main purpose and other legislation might offer some level of protection to animals as a consequence (whether intended or otherwise) of some other goal or aim. This chapter seeks to lay out the history of animal law in England and then consider the various mechanisms and frameworks by which the use of animals is regulated by legislation.

2.1 History of the Regulation of Animal Use in England

Since the introduction of ‘Martin’s Act’ to prevent the “wanton... and cruel... beating, abuse, or ill-treatment [of] any Horse, Mare, Gelding, Mule, Ass, Ox, Cow, Heifer, Steer, Sheep, or other Cattle” in 1822¹¹², legislation specifically concerned with, or including provision for, the protection of animal welfare in the UK has increased to become a significant body of law in its own right. In 2001, there were over 3,500 individual pieces of legislation relating to animal welfare in force in the UK¹¹³, and that number is on the increase, with at least 200 legislative measures that include the term “animal welfare” having been introduced in the UK since that time.

¹¹² The Cruel Treatment of Cattle Act 1822 (3 Geo. IV c. 71)

¹¹³ Radford, M., *Animal Welfare Law in Britain*. Oxford University Press, 2001

Animal law is shaped by a great number of factors, including political influences (domestic, European and global), public opinion, industry stakeholders and pressure groups. The first legislation concerned with the protection of animals was ostensibly focused upon preventing overt cruelty towards animals, rather than assuming the more modern approach of protecting welfare. It should be noted that some scholars have questioned whether or not this early anti-cruelty legislation was, in fact, introduced with the aim of protecting the animal as an individual possessing of, at least some, intrinsic worth, or if the rationale was rooted in other concerns. For example, it has been suggested that, in cases such as bull baiting, which was outlawed in 1835 following the introduction of the Cruelty to Animals Act 1835 (later repealed by the Protection of Animals Act 1911), the reasoning had *something* to do with concern for the animals themselves but that societal factors also had significant influence. For example, in the initial attempts to see bull baiting banned, discussion in Parliament centred not exclusively around cruelty to animals. Sir William Pulteney, who sponsored the Bill gave his reasoning for its proposal as follows:

“The practice was cruel and inhuman; it drew together idle and disorderly persons; it drew also from their occupations many who ought to be earning subsistence for themselves and families; it created many disorderly and mischievous proceedings, and furnished examples of profligacy and cruelty. In short, it was a practice which ought to be put a stop to”¹¹⁴.

It is clear from Pulteney’s description of bull baiting that his concern was not limited to the cruelty inflicted on the bulls themselves. He was also concerned that the practice increased nuisance and public disorder and he implied that it encouraged people to become idle and shun work. The extent to which his view was founded is irrelevant for the purposes of this research, but it could certainly be concluded that at least some stakeholders in this early

¹¹⁴ Cobbett, W. (1806). *Cobbett's parliamentary history of England*. London: Published by R. Bagshaw, p.103.

piece of animal welfare law had motives other than, or in addition to, the protection of animals in mind when supporting its implementation.

Whether motivated in part or full by the desire to bring an end to overt cruelty to animals, these early statutes made no attempt to impose duties upon those responsible for animals to promote and protect their welfare, beyond refraining from specific cruel acts, in a more holistic way and the development of the concept of 'animal welfare' as it is now understood came much later. Over time, the justification for legislation designed to protect animals, both from cruelty and, increasingly, to promote or protect their welfare, has been given significant weight by an ever-expanding understanding of the sentience of animals and their myriad needs; needs which go far beyond simply avoiding being beaten as well as going beyond simply needing to be fed, watered and provided with veterinary care. Work in the fields of animal welfare science and ethology have explored the behavioural, social, psychological and environmental needs of animals which, in turn, has served to inform policy makers on the development of the law.

As society's view of animals changes and, importantly, as its use of animals changes, law has been developed to reflect this. The first laws were concerned largely with cattle and horses but today, whilst our general concern for animals might be heightened, our use of them has grown immensely. Industries using animals in enormous numbers, such as vivisection (3.94 million scientific procedures with live animals were employed in 2016¹¹⁵) and farming (every year in the UK approximately 2.6 million cattle, 10 million pigs, 14.5 million sheep and

¹¹⁵ Statistics of Scientific Procedures on Living Animals Great Britain 2016, Home Office, 2017 [Available: <https://www.gov.uk/government/statistics/statistics-of-scientific-procedures-on-living-animals-great-britain-2016>]

lambs, 80 million fish and 950 million birds are slaughtered for human consumption¹¹⁶) expanded rapidly following the end of World War II¹¹⁷. This, in turn, led to growing concerns surrounding the treatment of animals used by such industries. For example, the boom in the intensive farming industry in the 1950s and 1960s led to the publication of the book *Animal Machines* by Ruth Harrison in the mid 1960s¹¹⁸. Harrison's book highlighted the major welfare concerns for animals used in the factory farming industry, which grew as a response to food shortages and what was deemed to be an overreliance on import of foreign meat following the Second World War. Subsidies were given to farmers who increased production using new technology and this led to animals increasingly being raised and killed in "production line" style farms with higher stocking densities than traditional farms¹¹⁹. While these farms increased production significantly, they also severely jeopardised animal welfare. In part as a result of Harrison's publication, the Government commissioned a study whose outcome would contribute towards the development of a framework within which animal welfare standards could be assessed, initially with a specific focus upon farming. This study resulted in the formulation of the aforementioned "Brambell's Five Freedoms". The Five Freedoms outlined the five fundamental welfare needs that animals were deemed to possess. By assessing the extent to which these needs were provided for, an assessment of welfare standards could be carried out using the new framework. The freedoms were defined as follows:

¹¹⁶ Hsa.org.uk. (n.d.). Frequently Asked Questions. [online] Available at: <https://www.hsa.org.uk/faqs/general#n1> [Accessed 22 Oct. 2017].

¹¹⁷ See: Environmental Challenges in Farm Management. (n.d.). Post War Agriculture. [online] Available at: <http://www.ecifm.rdg.ac.uk/postwarag.htm> [Accessed 28 Dec. 2017].

¹¹⁸ Harrison, R. (1966). *Animal machines*. New York: Ballantine Books.

¹¹⁹ See: Environmental Challenges in Farm Management. (n.d.). Post War Agriculture. [online] Available at: <http://www.ecifm.rdg.ac.uk/postwarag.htm> [Accessed 28 Dec. 2017].

1. Freedom from Hunger and Thirst
2. Freedom from Discomfort
3. Freedom from Pain, Injury or Disease
4. Freedom to Express Normal Behaviour
5. Freedom from Fear and Distress¹²⁰

While it would take some time for the Five Freedoms to become fully entrenched in law, this framework provided a foundation upon which welfare assessment could be based and, soon afterwards, the first piece of legislation which explicitly empowered the relevant minister to introduce regulations with a view to protecting animal welfare - The Agriculture (Miscellaneous Provisions) Act 1968 – was introduced. S. 2(1) of the Act gave powers to the relevant minister(s) to introduce regulations which may in particular include provision:

- (a) with respect to the dimensions and layout of accommodation for livestock, the materials to be used in constructing any such accommodation and the facilities by way of lighting, heating, cooling, ventilation, drainage, water supply and otherwise to be provided in connection with any accommodation;*
- (b) for ensuring the provision of balanced diets for livestock and for prohibiting or regulating the use of any substance as food for livestock and the importation and supply of any substance intended for use as food for livestock;*
- (c) for prohibiting the bleeding of livestock and the mutilation of livestock in any manner specified in the regulations, and for prohibiting or regulating the use of*

¹²⁰ The Farm Animal Welfare Council [Foundation, Internet. "[ARCHIVED CONTENT] UK Government Web Archive – The National Archives". National Archives (UK). Web. 6 June 2016.]

any method of marking or restraining livestock or interfering with the capacity of livestock to smell, see, hear, emit sound or exercise any other faculty.

Around the same time, the growing concern for animals in general led to other establishments, such as zoos and aquaria, having industry-specific regulations imposed upon them¹²¹. While the ZLA 1981 as it was originally enacted contained no explicit reference to “animal welfare”, Hansard records show that the rationale behind its introduction was deeply rooted in a concern for animal welfare¹²². Even more recently (2002), the ZLA 1981 was updated to include the provisions of the EC Zoos Directive¹²³ which imposed further regulation on zoos and extended protection of animals to include an obligation to provide an environment suited to the species’ specific biological and behavioural needs as well as a further obligation for the zoo to make a contribution to conservation or education¹²⁴. This appeared to be a move towards recognition in law that animals should not be kept in zoos for purely entertainment purposes, but that their captivity is justifiable only on the basis that the zoo makes a contribution to conservation of biodiversity. The British Government’s 2012 announcement that it intends to pursue a ban on the use of wild animals in travelling circuses on ethical grounds, despite a purported lack of scientific evidence to categorically prove suffering occurs¹²⁵, is an interesting development which suggests that more consideration than ever is being given to an animal’s implicit “right” not to be used without justifiable cause.

¹²¹ The Zoo Licensing Act 1981

¹²² See Chapter 4.2 of this thesis for further information.

¹²³ COUNCIL DIRECTIVE 1999/22/EC

¹²⁴ ZLA 1981 (as amended by SI 2002/3080) s.1A)

¹²⁵ See Chapter 7.2 of this thesis for further information.

Whilst the law has developed to recognise that animals should be protected from certain types of suffering and some, albeit limited, policy decisions are made based on ethical reasoning rather than on pure welfare considerations, animals are still classed as property in law and do not have enforceable legal rights of their own. Instead, the way in which animal welfare law operates is by regulating the actions of the people that engage in practices encompassed by the legislation. Following is more detailed consideration of how these various approaches to animal law play out in practice.

2.2 Animals as Property

“There is no question that animals are regarded as property under the law and have held the status of property for as long as anyone can remember”¹²⁶. This property status is something which advocates of animal rights theory have sought to change – with animal rights theorists such as Francione arguing that the property status of animals results in the outcome that “the regulation of animal use does not, as a general rule, transcend that level of protection that facilitates the most economically efficient exploitation of the animal”¹²⁷. However, the ownership of property confers on the owner certain rights which, in turn, provide some limited protection to the animal when that property happens to be an animal. Statutes which impact upon animals as property include the Theft Act 1978 which provides, in s.1 that “A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it”. An offence under this Act carries a maximum sentence on conviction of seven years imprisonment¹²⁸. The Criminal Damage Act 1971 provides in s.1 (1) that “A person who without lawful excuse destroys or

¹²⁶ Francione, G. (1995). *Animals, property, and the law*. Philadelphia: Temple University Press, p.34.

¹²⁷ *Ibid.*, p.5.

¹²⁸ S.7 Theft Act 1978

damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence” with an offence under this section carrying a maximum prison sentence of ten years on conviction¹²⁹.

On the surface, it would appear unlikely that these acts offer any meaningful protection to animals, but may offer a remedy to the owner of the animal in the event of theft, injury or death caused to the animal. However, they may also have the practical impact of acting as a deterrent to those thinking of injuring an animal or stealing an animal from his or her owner and, in this way, may provide a modicum of protection to the individual animal in question as a result. Perhaps a good example of this can be found in *Hamps v Darby* 1948¹³⁰, where a pigeon fancier’s birds flew onto the neighbour’s land and fed on his crop of peas. The neighbour shot and killed four of the birds and injured another. While any court verdict could do nothing to protect the birds from harm or death after the event, in finding the for the plaintiff, it is perhaps reasonable to assume that the neighbour would be unlikely to kill or injure birds again if they were to stray onto his land in future¹³¹.

2.3 Prevention of Cruelty

As highlighted in the introduction to this chapter, the original laws dealing with the protection of animals in England sought to protect animals from cruelty by prohibiting specific practices. Bear baiting, cock fighting and beating of cattle were all outlawed. These laws created a negative duty for people to abide by: they must not carry out certain

¹²⁹ S. 4(2) Criminal Damage Act 1971

¹³⁰ *Hamps v. Darby* [1948] 2 K.B. 311 (C.A.).

¹³¹ S. A. C., (1949). Tort—Homing Pigeons—Right of Farmer to Kill in Defence of Crops—Property in Pigeons. *Cam. Law. J.*, 10(02), p.270.

prohibited acts and generally these involved the infliction of deliberate or wanton cruelty to an animal.

The very first piece of legislation focused specifically on the protection of animals was the aforementioned 'Martin's Act' of 1822. The statute was concerned with the prohibition of "wantonly and cruelly beat[ing], abus[ing], or ill-treat[ing]" the animals most used in that day (cows, horses, mules etc.). It was not until the following century, and the introduction of the Protection of Animals Act 1911, that the first overarching statute concerned with the prevention of cruelty in a more holistic sense came into force. Section 1 of the Act referred to "Offences of Cruelty" but there was no mention at this stage in history of the word 'welfare' anywhere in the Act. Indeed, concepts of welfare for animals were not developed until some five decades after the introduction of the 1911 Act. It is clear, therefore, that this early legislation was concerned with cruelty and the creation of negative duties, rather than welfare, and the creation of positive duties. The underlying principle of the Act was that animal use is permitted unless the practice was deemed cruel and thus explicitly prohibited or it was deemed to cause 'unnecessary suffering' (howsoever defined – the concept of unnecessary suffering is considered in Chapter 1.5 of this thesis).

The Protection of Animals Act 1911 was repealed and replaced by the AWA 2006 in 2007 and the older statute's main provisions in relation to cruelty were carried over to the AWA 2006, with some practices (using animals in fighting, poisoning animals, etc) remaining explicitly outlawed in the new law. In addition to these clauses, the principle of 'unnecessary suffering' was maintained in s. 4 of the AWA 2006.

2.4 Ensuring the Welfare of The Individual Animal

A more modern approach to animal protection law has been to move away from the simple responsibility to not inflict unacceptable harm on animals (via the principle of unnecessary suffering) towards a demand for people responsible for animals to take active responsibility to attempt to ensure the *welfare* needs of the individual animal are met. As previously noted, a working definition of the term “welfare” can be found in the work of Fraser and Broom, as follows: “Welfare defines the state of an animal as regards its attempts to cope with its environment.”¹³²

Good welfare might, therefore, be considered to represent not just an animal who is free from suffering (whether unnecessary or otherwise) but an animal who is coping well with their environment. In layman’s terms, the promotion of welfare might be considered to seek to provide an animal with a ‘good life’ or a ‘life worth living’. The way in which animal welfare has been measured in modern legislation in England is via assessment against the Five Freedoms, which are incorporated into s. 9 of the AWA 2006 and were discussed in Chapter 1.5 of this thesis.

Protection of welfare under the AWA 2006 is only considered an obligation in relation to those animals who might be considered to be “under control of man”¹³³ as people do not have an overarching responsibility to ensure the welfare of animals living in a wild state. As such, no-one has a responsibility to ensure that the birds in their garden are well-fed during the winter, nor to provide them with an environment in which to live, nor to provide them with veterinary care. Obligations to animals living in a wild state are focused much more

¹³² Broom, DM., (1991), *Animal welfare: concepts and measurements*. J Anim Sci 1991;69:4167–4175.

¹³³ S. 2 Animal Welfare Act 2006

around ensuring that they are not interfered with and are predominantly found within the Wildlife and Countryside Act 1981. The Act provides in s.1(1)(a) that wild birds should not be taken [from their natural habitat], intentionally or recklessly killed or injured and in s. 9(1) that the same restrictions should apply to the treatment of the wild animals listed in Schedule 5 of the Act. When animals that would normally be living in a wild state come under the control of man, the person responsible for them becomes responsible for their welfare. This might include a wild animal caught in a trap or a wild animal that is being cared for during a period of rehabilitation after sustaining an injury, for example. Wild mammals are protected from specific abuses by the Wild Mammals (Protection) Act 1996 which states that an offence is committed if a person: *“mutilates, kicks, beats, nails or otherwise impales, stabs, burns, stones, crushes, drowns, drags or asphyxiates any wild mammal with intent to inflict unnecessary suffering”*¹³⁴.

It is unclear at what stage a wild mammal would be deemed to come “under the control of man” as it could be argued that a wild mammal who has been burned, nailed, impaled, crushed, drowned or asphyxiated would practically have to be under the control of a person in order for the action to be carried out. Further consideration of this point is not relevant to the present discussion but it can be noted that, as a general rule, free-living wild animals are not generally considered to be protected by animal welfare laws. Indeed, according to the Countryside Alliance (who are a major lobbying group in support of fox hunting), *“The five freedoms do not and cannot apply to animals in the wild”*¹³⁵.

¹³⁴ S. 1 Wild Mammals (Protection) Act 1996

¹³⁵ Source: <http://www.countryside-alliance.org/ca/article/law-commission-consultation-on-wildlife-law-the-alliances-response> [Accessed 1.8.2013]

2.4.1 The Animal Welfare Act 2006

Since 2007, the main statute concerned with the protection of the welfare of individual animals in England is the AWA 2006. The term '*protected animal*' is defined by s.2 of the Act as follows: *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 [see discussion above], or (c) it is not living in a wild state.* This definition effectively captures a huge number of animals within its remit including pets, farm animals, animals in zoos, animals in circuses and, with some exceptions¹³⁶, animals used in other industries.

As already discussed, the Act also includes the more traditional protection against deliberate cruelty, as outlined in s. 4, which deals with the prevention of unnecessary suffering. S. 9 ensures that people responsible for a protected animal promote his or her welfare, to the extent required by good practice, in line with the Five Freedoms, which are outlined in S.9(2) of the Act. Having said this, animals used in scientific procedures under ASPA 1986 are expressly excluded from protection under some sections of the Act¹³⁷ and nothing which occurs during the normal course of fishing falls under the Act¹³⁸.

Furthermore, there are specific exemptions found in The Mutilations (Permitted Procedures) (England) Regulations 2007 (made under the AWA 2006) which outline which mutilations can be carried out on animals as exemptions to the broad prohibition of mutilation found in s. 5 of the AWA 2006. These exemptions speak to the prior discussion of balancing of interests in Chapter 1.4 of this thesis. Returning to the case of the kitten and his or her interest in not being used in painful experiments, as a matter of law the interests of

¹³⁶ E.g. Section 59 of the AWA 2006 expressly states that "Nothing in this Act applies in relation to anything which occurs in the normal course of fishing".

¹³⁷ S. 58 Animal Welfare Act 2006

¹³⁸ S. 59 Animal Welfare Act 2006

scientific research may take precedence over those interests should the experiments in question meet the criteria demanded within ASPA 1986¹³⁹ and therefore the protection of the kitten from suffering is not absolute – *some* suffering might always be deemed necessary. A similar observation can be made with regard to the mutilations of animals that are allowed due to exemptions included in the AWA 2006. Many of these exemptions relate to practices involved in farming – for example the ‘de-beaking’ of chickens (a process whereby part of the beak of a young bird sliced off, without the use of anaesthetic). The purpose of this mutilation, despite “induc[ing] pain and physiologic stress in birds”¹⁴⁰, allows the birds to be kept in high density farming conditions, where they would likely resort to attacks on one another and/or cannibalism if they had their beaks intact. The mutilation is therefore permitted in the interests of the birds only to the extent that it does not impact the proper functioning of the farming industry in that it is designed to prevent the (unnatural) cannibalism behaviour which occurs as a direct result of keeping birds in these conditions. As with the case of the kitten, protection of otherwise “protected animals” is not absolute.

Theoretically then, the AWA 2006, if effective, should ensure that the welfare of all animals which fall within the definition of “protected animal” and are not subject to exceptions, should have their needs met to the extent required by good practice¹⁴¹. However, given the

¹³⁹ The criteria for what kind of project will be permitted a licence is outlined in Section 5 (3) of ASPA 1986

¹⁴⁰ AVMA (2010). *Welfare Implications of Beak Trimming*. Literature Reviews - American Veterinary Medical Association (Animal Welfare Division). [online] American Veterinary Medical Association, p.4. Available at:
https://www.avma.org/KB/Resources/LiteratureReviews/Documents/beak_trimming_bgnd.pdf
[Accessed 22 Oct. 2017].

¹⁴¹ S. 9 (1) Animal Welfare Act 2006

huge variation in species, environments and uses of animals that the Act covers, combined with the fact that each individual animal will potentially have her own specific individual needs, it seems reasonable to conclude that one piece of legislation could not possibly encompass all of the relevant needs.

In recognition of this, it is largely accepted that the AWA 2006 forms the foundation for protection of animal welfare but additional legislation or guidance which puts the Act into context with regard to a particular use or type of animal is often necessary¹⁴². With this in mind, the Act includes powers for the relevant national authorities to introduce secondary legislation which serves to place specific obligations upon those using animals for particular purposes or on those keeping particular species of animals¹⁴³. Since its implementation, regulations of this type have been introduced under Section 12 or Section 13 of the Act to provide specific protection to farm animals and wild animals in circuses.

Furthermore, non-binding codes of practice have also been introduced under s.14 of the Act to further clarify the law. Whilst these have no legal force in and of themselves, their purpose is to give meaning to the provisions of s. 9 of the Act with regard to the needs of the individual animal or use of the animal in question. Non-compliance with the codes cannot lead to prosecution¹⁴⁴ but they can be used to support a prosecution in order to show that needs have not been met with a view to establishing liability¹⁴⁵. The codes contain information relating to the welfare needs of the animals in question and outline actions an

¹⁴² E.g. Gov.uk. (2013). Animal welfare - GOV.UK. [online] Available at: <https://www.gov.uk/guidance/animal-welfare> [Accessed 22 Oct. 2017].

¹⁴³ Ss. 12 and 13 Animal Welfare Act 2006

¹⁴⁴ S. 14 (3) Animal Welfare Act 2006

¹⁴⁵ S. 14(4) Animal Welfare Act 2006

owner might take in order to meet the obligations laid out in s. 9 of the AWA 2006. For example, in the case of dogs, the relevant code demands that, in order to meet your dog's need for a "suitable environment" (S.9(2)(a) of the Act) one must carry out, *inter alia*, the following actions¹⁴⁶:

- *Provide your dog with a safe, clean environment. Make sure that you provide adequate protection from hazards.*
- *Provide your dog with a comfortable, clean, dry, quiet, draught-free rest area.*
- *Provide your dog with somewhere it can go to avoid things that frighten it.*

The animals for which codes have been established to date are horses and other equidae, cats, dogs, and privately kept non-human primates (the Primate Code) and their efficacy remains a subject of debate. For example, the Codes of Practice for dogs, cats and equidae have not been formally reviewed but an inquiry carried out by the Environment, Food and Rural Affairs Committee in 2014 asked stakeholders to submit feedback on the efficacy of the Primate Code. The author of the present thesis, along with a number of NGO and academic representatives, raised concerns at this time with regard to the efficacy of the primate code, highlighting, among other concerns, that the code lacked specificity and was not easily interpreted in line with legal obligations outlined in the AWA 2006 (despite being implemented specifically to interpret the Act)¹⁴⁷.

Notwithstanding the exemptions already noted, whereby it is clear that the protection of the welfare of otherwise "protected animals" is not absolute, whether or not the AWA 2006

¹⁴⁶ S. 1 Code of Practice for the Welfare of Dogs

¹⁴⁷ Tyson, E., (2014)., Written Evidence: Primates as Pets. [Available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environment-food-and-rural-affairs-committee/primates-as-pets/written/4982.html>]

succeeds in adequately protecting animal welfare in practice logically hinges upon the interpretation of what is considered “good practice” in the context of s. 9. As no demand is ever made of responsible persons to meet *all* of the animals’ welfare needs in full, and instead the Act demands only that needs are met “to the extent required by good practice”¹⁴⁸, the definition of “good practice” is a vital point for consideration.

2.4.2 “Good Practice” Considered

Good practice can be considered in a number of different ways. Recognising that individual animals belonging to the same species share generally the same welfare needs, the concept of good practice with regard to provision of animal welfare would lend itself to establishment of some kind of universal minimum welfare standards for a species or taxa of animals. These universal standards could then be used to assess whether or not welfare needs are met for the animals in practice, regardless of the circumstances in which they are used or kept.

For example, if it could be agreed that a capuchin monkey (*Cebus spp.*) requires a social group, a specific amount of space, a particular diet and particular climate, *inter alia* in order to have their welfare needs met, it stands to reason that anyone keeping a capuchin monkey should have to provide for those needs, regardless of what use the animal might be put to. It makes little sense that demands in relation to welfare provision for individuals belonging to the same species should differ in accordance with the situation which they happen to be kept in: a capuchin monkey kept in a zoo, a capuchin monkey kept in a circus and a capuchin monkey kept as a pet will share the same physical, behavioural and

¹⁴⁸ S. 9 (1) Animal Welfare Act 2006

psychological needs as those of his or her free-living counterparts. However, in practice, it would appear that policymakers responsible for the introduction of animal welfare legislation in the UK do not use any kind of universal minimum standards based on the needs of the species as their benchmark for good practice and, instead, use the parameters of the specific industry as the measure of good practice. For example, best practice in zoos will be used to devise welfare standards for zoos, best practice in circuses will be used to devise welfare standards for circuses. The result of this is what O’Sullivan refers to as the “internal inconsistency”¹⁴⁹, whereby the same animals are given different levels of protection according to the use they have been put to.

A good example of how this “internal inconsistency” plays out can be found in two pieces of Government guidance, published just a few months apart and by the same government department (DEFRA) in 2012. The guidance in question pertained to the welfare of animals in zoos (the Secretary of State’s Standards of Modern Zoo Practice (SSMZP)) and the welfare of animals in circuses (Guidance on WWATC 2012). The zoo standards seek to provide guidance to how to apply the provisions of the ZLA 1981 but also “also provide practical guidance in respect of provisions made by or under the Animal Welfare Act”¹⁵⁰. The circus guidance specifically seeks to interpret the WWATC, which were introduced under s.13 of the AWA 2006. As such, each guidance document seeks to interpret the same piece of legislation.

¹⁴⁹ O’Sullivan, S. (2011). *Animals, equality and democracy*. Houndmills, Basingstoke, Hampshire: Palgrave Macmillan. 31

¹⁵⁰ *The Zoo Expert Committee Handbook*, DEFRA, 2012, p.3

Despite seeking to interpret the same legislation, the welfare standards set out in the two guidance documents differ from one another. For example, the welfare guidance for zoos demands that elephants not be chained by the leg unless in exceptional circumstances¹⁵¹. In circuses elephants can be chained by the leg every single night of their lives¹⁵². This discrepancy in standards suggests, therefore, that policy makers do not consider good practice to be universal and based on the animals' needs, but to be defined by the parameters of the particular use. From a practical perspective, if elephants are to be kept in circuses, they must be kept in such a way which prevents them from escaping. The temporary nature of accommodation in a travelling circus (often a tent) requires that chaining is used to hold the animals for much of the time. In zoos, which have permanent structures in which elephants would live, there should be no need to chain the elephants unless in exceptional circumstances.

This outcome of these varying standards which are arguably based upon the limitations of the industry in question, rather than the needs of the animals themselves, is that animals kept in conditions which might be deemed illegal under the AWA 2006 in one place can be kept in the same conditions elsewhere and the person responsible for them be deemed compliant with the same law. What should be emphasized at this point is that, unlike the exceptions in relation to mutilation and animal experimentation described above, the different welfare standards mandated for elephants in zoos and elephants in circuses are not the result of explicit exemptions included in the Act. The situation occurs in the interpretation of the same clause for the same animals who share the same welfare needs.

¹⁵¹ The SSSMZP, DEFRA, p.58

¹⁵² Guidance on the WWATC 2012, DEFRA, p.50

With the forgoing in mind, many people may assume 'good practice' within the context of the AWA 2006 references the implementation of universal minimum/best practice standards for the treatment of animals (based on species or kind) but the foregoing discussion makes it clear that this is not the case. For the purposes of this section, it is important to recognise that the AWA 2006 makes no demand upon persons responsible for animals that they ensure that the animals' welfare needs are met in full, or even in part. They are simply required to meet them to the extent required by 'good practice', where the term 'good practice' refers to good practice within the specific industry in question which is using the animals, rather than using as a starting point the needs of the animals themselves. This is in keeping with the spirit of the original Five Freedoms upon which the "needs" referred to in s. 9(2) of the 2006 Act are based. The Farm Animal Welfare Council's noted explicitly in its introduction of the Five Freedoms that:

*"They form a logical and comprehensive framework for analysis of welfare within any system together with the steps and compromises necessary to safeguard and improve welfare **within the proper constraints of an effective livestock industry**"¹⁵³.
[My emphasis]*

Fundamental to the interpretation of the Five Freedoms, therefore, is that they are only required to "safeguard" and "improve" welfare within the "proper constraints of an effective livestock industry". In other words, the Five Freedoms seek to provide a framework within which animal welfare can be improved, but not to the extent that it interferes with industry productivity. As such, and perhaps contrary to popular belief, in introducing the term "to the extent required by good practice" clause into s. 9 of the AWA 2006 and understanding that policymakers interpret "good practice" as having its basis on standards

¹⁵³ Webarchive.nationalarchives.gov.uk, (2009). [ARCHIVED CONTENT] Farm Animal Welfare Council - 5 Freedoms. [online] Available at: <http://webarchive.nationalarchives.gov.uk/20121007104210/http://www.fawc.org.uk/freedoms.htm> [Accessed 30 Jan. 2016].

of good practice within the particular industry being regulated, it becomes apparent that there is unlikely to be any demand placed upon any person responsible for an animal to meet his or her welfare needs in full. Instead, the extent to which needs are required to be met is relative to the extent to which it is possible to meet needs without impacting upon the effective (one assumes that this can be interpreted as profitable) operation of that particular business or industry. If it were possible to fully meet animal welfare needs without the proper functioning of industry being constrained, it is theoretically possible that an animal could have his or her welfare effectively protected in full. The extent to which this happens in practice will be explored as part of this research.

2.5 Trade Restrictions and Conservation of Biodiversity

Some legislation has as its aim not the protection of animals, *per se*, but the conservation of biodiversity. If implemented effectively, such legislation protects animals by requiring humans to refrain from harming them in various ways rather than by requiring humans to look after them. One of the focuses of this type of legislation is the protection of members of a particular species – particularly those belonging to threatened species, in place of the individual-focused welfare laws outlined previously. The overarching legislation for the restriction of trade in such species can be found in the various Control in Trade in Endangered Species regulations, implemented as secondary legislation from 1985 onwards and in order to ratify the terms of the Convention on International Trade in Endangered Species (CITES). The CITES convention's aim is "to ensure that international trade in specimens of wild animals and plants does not threaten their survival"¹⁵⁴.

¹⁵⁴ Cites.org. (2017). What is CITES? | CITES. [online] Available at: <https://www.cites.org/eng/disc/what.php> [Accessed 28 Dec. 2017].

Some legislation has a wider focus than individual species and, via the protection of habitat, arguably has the potential (if properly enforced) to support the conservation of living ecosystems (including animals). For example, the Town and Country Planning Act 1990 and its provisions on restriction on building on conservation areas may have the effect of protecting animals that make their home in these restricted areas. S.28 of the Wildlife and Countryside Act 1981 grants permission to Natural England to notify land owners that any piece of land of particular geological or ecological interest should be considered a “Site of Special Scientific Interest (SSSI)”. While a notification is in effect, the land owner is not permitted to carry out certain actions in relation to that land, as outlined in the notification, without gaining explicit permission in writing from (in England) Natural England. These actions might include (but are not limited to): *Cultivation, including ploughing, rotovating, harrowing and re-seeding; Grazing and alterations to the grazing regime, including type of stock, intensity or seasonal pattern of grazing; and Stock feeding and alterations to stock feeding practice*¹⁵⁵. The Wildlife and Countryside Act implements the Bern Convention which was established to protect European Wildlife by imposing “legal obligations on contracting parties, protecting over 500 wild plant species and more than 1,000 wild animal species”¹⁵⁶.

2.6 Abolition of Practices

Abolition of practices may come about as a result of the fact that certain practices cannot be carried out without seriously compromising the welfare of animals. In other words, acts

¹⁵⁵ Non-exhaustive example taken from notification issued under s.28 of the Wildlife and Countryside Act 1981 to SSSI “Chasewater and the Southern Staffordshire Coalfield Heaths” in 2010. Notification available: <http://www.sssi.naturalengland.org.uk/Special/sssi/old/OLD2000693.pdf> If you’re describing the effect of the Wildlife and Countryside Act why is your source a particular notification?

¹⁵⁶ Jncc.defra.gov.uk. (n.d.). *Bern*. DEFRA. [online] Available at: <http://jncc.defra.gov.uk/page-1364> [Accessed 20 Nov. 2017].

which inevitably cause unnecessary suffering, are so cruel as to be unacceptable or which are considered to be wholly incompatible with the ability to make provision for welfare needs, may be banned outright, rather than allowed to continue under regulated conditions. As has already been recognised, the approach of outlawing cruel practices was one of the earliest approaches to animal welfare law and examples include the historic (and ongoing) prohibition of bear baiting and dog fighting, fox hunting and fur farming.

Proponents of animal rights argue that abolition of animal use in its entirety, not the outlawing of specific cruel practices, is the only way to truly confer rights on animals¹⁵⁷. Only one piece of legislation relating to animals in the UK statute book currently prohibit practices relating to animals not on welfare grounds, but on grounds of ethical opposition, namely the ban on fur farming (Fur Farming Prohibition Act 2000). Whilst this law arguably could have been introduced on welfare grounds, due to research demonstrating the negative welfare impact of fur farming on at least some species (ie: mink)¹⁵⁸, it was instead introduced in response to public opposition to the practice. In other words, its introduction was based on a moral judgement of what is right and wrong. The decision was taken that it is wrong to farm animals for their fur, regardless of the absence or presence of welfare issues.

Speaking in the House of Commons on the subject, the Minister at the time, Baroness Hayan said:

“The Government are, of course, conscious of the concern that many have for the welfare of farmed mink. We share that concern and so we have sought to ensure that the highest possible standards are applied as long as fur farming continues. But this Bill is introduced on

¹⁵⁷ E.g. Francione in Francione, G. and Garner, R. (2010). *The animal rights debate*. New York: Columbia University Press

¹⁵⁸ E.g. Mason, G., Cooper, J. and Clarebrough, C. (2001). *Frustrations of Fur-Farmed Mink*. *Nature*, 410(6824), pp.35-36.

*wider grounds and on the basic philosophy that animals should not be killed simply for the business of stripping their skins off their backs. That is, we believe, quite simply inappropriate in the 21st century*¹⁵⁹.

At the time of writing in October 2017, there is potential for two more pieces of legislation pertaining to the treatment of animals to be introduced on ethical grounds in the UK. The first of these is the draft Bill to ban the use of wild animals in travelling circuses in England. In 2012, the Government committed to introducing this law, despite the perceived lack of evidence to show that the welfare of wild animals in travelling circuses is any more compromised than in other captive environments¹⁶⁰. This legislation, once passed, will be distinctly rights-based in nature given that it has responded on ethical and not welfare concerns. In fact, the ethical basis for the ban is described succinctly by Government in the draft Bill's accompanying explanatory note:

*"We should feel duty-bound to recognise that wild animals have intrinsic value, and respect their inherent wildness and its implications for their treatment"*¹⁶¹.

The Bill's implementation remains to be seen (and indeed, at the time of writing the Bill has not yet been introduced to parliament), much to the frustration of campaigners.

The second piece of legislation due to be introduced on ethical grounds is the Scottish Bill to ban the use of wild animals in travelling circuses. In October 2017, the Bill began to proceed through the parliamentary process in Holyrood and is expected to become law in 2018¹⁶².

¹⁵⁹ HL Deb 19 July 2000 vol 615 cc1130-56

¹⁶⁰ Radford, M., (2007), The Report of the Chairman of the Circus Working Group (The Radford Report)

¹⁶¹ DEFRA. (2013)., *Wild animals in circuses*. London: HM Stationery Office. [Available at: <http://www.official-documents.gov.uk/document/cm85/8538/8538.pdf>]

¹⁶² Gov.scot. (2017). *Circuses*. Scottish Government. [online] Available at: <http://www.gov.scot/Topics/farmingrural/Agriculture/animal-welfare/AnimalWelfare/Circuses> [Accessed 22 Oct. 2017].

2.6.1 Ethical and Welfare Approaches to Legislation

The above discussion of welfare or ethical grounds may appear arbitrary and, indeed, law introduced on welfare grounds and ethical grounds have little to tell them apart once enacted and one may only be aware of the ethical basis of a piece of legislation after its implementation by researching Hansard records and government archives. The very fact that animal welfare is deemed important is *because* we make ethical assessments of our treatment of animals and so the two concepts are logically and inextricably linked. Indeed, the entire foregoing discussion on interests and how they may (or may not) give rise to moral consideration hinges on this specific point. However, the UK Government has been insistent that the two approaches (the welfare approach and the ethical approach) to legislation are mutually exclusive with the strong implication that animal welfare law introduced on the basis of empirical scientific evidence is preferable to legislation based on ethical decision-making. A major part of this reason is that the Government states that irrefutable empirical evidence that animal welfare suffers in a particular situation (for example, in a travelling circus environment) will form a stronger basis for legislation which will be less open to legal challenge, than legislation based on ethical or moral grounds alone which are, at best, subjective and, at worst arbitrary. What any individual may find morally or ethically acceptable will differ from person to person, culture to culture, country to country and at different points in history.

The Government's clear distinction between legislation introduced on the grounds of welfare and that introduced on grounds of ethics was made clear during the long period of debate and lobbying surrounding the issue of wild animals in travelling circuses. The then Animal Welfare Minister, James Paice MP, expressed concern that a ban implemented ostensibly on welfare grounds but without empirical scientific evidence that animal welfare is irrevocably compromised by their use in travelling circuses "*might well be seen as*

disproportionate action under the European Union services directive and under our own Human Rights Act 1998” and thus open the UK Government up for legal challenge¹⁶³. Having clearly and explicitly rejected the possibility of introducing a ban on welfare grounds under the Animal Welfare Act 2006 due to this perceived lack of evidence of welfare compromise, the same Government promised to begin work on a ban on ethical grounds early the following year¹⁶⁴. Their preference for legislation based on welfare grounds is evident from the fact that the potential for a ban on welfare grounds was examined and exhausted before a ban on ethical grounds was considered.

In addition to the belief that legislation based upon sound scientific evidence is more watertight than legislation based on, potentially moveable, ethical principles – the wider context of animal welfare legislation must be understood to be able to properly understand the apparent aversion to legislation based on ethical grounds. It comes back to the principle of the ‘good practice’ approach (outlined in detail in Chapter 2.4.2 of this thesis) which applies different levels of protection to the same animals when kept in different situations. While empirical scientific evidence is used as the basis to decide how animals are treated, it is possible to consider their treatment and welfare provision in any specific industry or practice independently of any other. The result of this is that one industry might be subject to stricter controls than others. If these controls are based upon an ethical premise that, for example, “the use of animals in circuses is immoral”, then lawmakers are forced to make a distinction between the morality of using wild animals in circuses and why, for example, it is unacceptable in comparison to animals kept in zoos, which is deemed morally acceptable. In reality, there might be little difference between the lived experience (and thus the welfare)

¹⁶³ HC Deb, 19 May 2011, c497

¹⁶⁴ HC Deb, 1 March 2012, c41WS

of the animals in a circus or a zoo and so the ethical stance tends to appear somewhat shaky, and thus, open to challenge. If, however, there is evidence of welfare provision being consistently less in circuses than in zoos based on an animal welfare science approach, then this evidence can be used to rebut challenges that zoos and circuses provide the same level of welfare provision as one another. Examples which would support the contention that animal welfare is inevitably compromised in circuses might include testing stress levels (via cortisol testing), documenting what are known as stereotypic behaviours, which are repetitive behaviours such as pacing or self-harming and are recognised as a sign of mental distress in animals. High instances of illnesses or high mortality rates in circuses might provide further concrete evidence as to the way in which animal welfare might be compromised in circuses in comparison to zoos.

2.7 The Extent to Which Regulation of Animal Use Protects Animals

As concluded in Chapter 1, there seems that there is little argument to support the idea that the use of animals should not be regulated at all. It is widely accepted in public opinion, scientific research and also in legal terms that animals can suffer and have at least some interest in not experiencing suffering. There is a whole raft of legislation which regulates animal use with a view to preventing harm to animals on the UK statute book, some of which dates back centuries.

As outlined above, traditional animal protection laws sought to prohibit “wanton” or “cruel” treatment of animals and this principle remains entrenched in modern legislation. In more recent years there has been a move towards creating positive duties towards animals under the AWA 2006. It is not enough to simply refrain from causing an animal deliberate harm, but there is a need to actively protect and promote their *welfare* if one is responsible for an animal.

If we consider the extent to which regulating the use of animals protects them, it would appear that, in the context of protecting welfare, current legislation demands this is met “to the extent required by good practice”¹⁶⁵, with good practice being defined by the limitations of the industry or practice itself rather than by the fundamental needs of the animals. Other statutes, such as those dealing with curbing trade in endangered species or wildlife protection, may grant more fundamental protection (ie: non-interference) to animals according to their species or their status as free-living, as opposed to captive. This concept will be explored as part of this research due to the fact that one of the two pieces of legislation under consideration as part of this research, the ZLA 1981, was initially conceived with a view to protect animal welfare but has since been updated to incorporate the demands of the EC Zoos Directive (Directive 1999/22-EC) whose major concern is the conservation of biodiversity. As such, the overarching aim of the ZLA 1981 is not animal welfare, but conservation of biodiversity. This allows for comparison between the efficacy of this, and WWATC 2012, which has no conservation element to it, but is introduced directly under the AWA 2006.

This chapter has provided a broad overview of the various ways in which animals might be protected by the law, as well as considering the historical and theoretical bases for these laws. The next chapter will provide a more detailed exploration of the specific legal mechanism under examination in this thesis: the regulatory licensing regime.

¹⁶⁵ S. 9 (1) Animal Welfare Act 2006

Chapter Three: Regulatory Licensing Regimes as a Legislative Framework

3.1 The Circumstances in Which Regulatory Licensing Regimes Are Employed

Regulatory licensing regimes are employed in various circumstances. They may be implemented in cases whereby a widespread activity is considered to present the potential for risk if allowed to continue without any control, but for which it is believed that risk can be mitigated by the imposition of regulation. For example, s.4(2) of the Licensing Act 2003, dealing with, *inter alia*, the regulation of sale of alcohol outlines the licensing objectives as follows:

- the prevention of crime and disorder;
- public safety;
- the prevention of public nuisance;
- the protection of children from harm.

If the licensing regime were not in place, the implication is that the unrestricted sale of alcohol may result in crime and disorder, a threat to public safety, public nuisance and a risk to children. By subjecting the business selling alcohol to scrutiny and licensing, it both identifies those businesses carrying out the sale of alcohol and imposes duties upon the licensee which, if complied with, should have the practical effect of mitigating or avoiding the risks identified. Importantly, when balanced against the option of prohibiting the sale of alcohol altogether, it has clearly been deemed that the sale of alcohol in and of itself is not so inherently dangerous so as to warrant such action. The mechanism by which control is (theoretically) achieved is by creating offences under the Act which, if not complied with, will result in sanctions. For example, under s. 145 of the Act, the sale of alcohol to children is

punishable on summary conviction to a fine not exceeding level 3 on the standard scale¹⁶⁶.

In addition, s. 129 mandates that a licence can be suspended or forfeited on demand in the case of conviction for a relevant offence, of which any offence under the Act is categorised as a relevant offence¹⁶⁷.

Other licensing regimes, such as that implemented under The Motor Vehicles (Driving Licences) Regulations 1996 (as amended), seek to ensure that a level of competency is achieved prior to an individual being able to carry out a particular activity (in this case, driving a vehicle) which could pose a risk if carried out by incompetent individuals. In addition, the regime provides a mechanism for revoking licences and disqualifying those individuals who do not comply with the law from driving in the future. In this way, incompetent, dangerous or reckless drivers can be prevented from driving, while competent and safe drivers can continue without unnecessary or burdensome interference. Like the Licensing Act 2003, the mechanism by which licence conditions are enforced is by making it an offence to drive particular classes of vehicles without a licence¹⁶⁸ or to drive in a particular way which could be considered reckless or dangerous (e.g. driving under the influence of drugs or alcohol¹⁶⁹). Offences, depending on severity and circumstance, can lead to “points” being added to a licence (for offences requiring “obligatory endorsement” such as exceeding the speed limit) which have a cumulative effect and, if 12 points are received, the licence is revoked for the minimum period¹⁷⁰, which can be six months, one year or two years, depending on whether previous disqualifications apply and are to be

¹⁶⁶ S. 145(9)

¹⁶⁷ Schedule 4, Clause 1

¹⁶⁸ S. 87 of the Road Traffic Act 1988

¹⁶⁹ S. 4 of the Road Traffic Act 1988

¹⁷⁰ S. 35 of the Road Traffic Offenders Act 1988

taken into account. Alternatively, more serious offences, such as causing death by dangerous driving¹⁷¹, can result in a maximum prison term of 14 years¹⁷² on indictment. As with the sale of alcohol, legislators have clearly decided that driving, if carried out within the constraints of the regulations, is not so inherently dangerous so as to warrant outright prohibition.

The Dangerous Wild Animals Act 1976 implements a licensing regime for those people who keep animals classed as “dangerous” in the schedule of the same. The purpose of the Act is to mitigate safety risks (both risk to the individual owner and the wider public) inherent in keeping dangerous animals. S. 3 of the Act outlines the conditions under which a licence should be granted, including ensuring the secure nature of the animal’s enclosure, ensuring that provisions are put in place in the event of accidental release or escape and that the person responsible for the animal is a suitable person. S. 3 (c) includes some provision for basic welfare needs for the animal and demands that a licence cannot be granted if the accommodation is unsuitable or if adequate bedding, food and water are not provided.

As highlighted in the three examples above, while licensing regimes are introduced across a broad range of activities, including sale of alcohol, driving and the keeping of animals, they generally share a number of common elements. These include:

- The licensable activity presents some risk. This may be a risk to public safety generally (in the case of alcohol licensing or driving licensing), a risk to a specific group or class of individuals (children, the owners of dangerous animals, etc.), a risk

¹⁷¹ S. 1 of the Road Traffic Act 1988

¹⁷² Schedule 2, Part One of the Road Traffic Offenders Act 1988, amended by s. 235 of the Criminal Justice Act 2003

to non-human animals (in the case of licensing introduced to protect animal welfare – to be explored in detail later in this thesis).

- It is believed that it is possible to mitigate the risks to such an extent that prohibition is unnecessary or disproportionate. In effect, the risk exists if the practice is carried out badly/recklessly, but the risks are mitigated (or even removed altogether) if the practice is carried out to a defined standard. For example, the most obvious way to remove any risk related to the keeping of dangerous wild animals would be to prohibit the keeping of wild animals. It is clearly believed by legislators that the risk posed is high enough to warrant oversight and regulation to ensure standards are met, but not so high that the practice should be outlawed altogether.
- The actions required in order to mitigate the risk are measurable and relatively uniform across an activity and may be carried out on a widespread basis. For example, in order to gain a driving licence, every person must demonstrate the same minimum level of competency in both driving and theory. This level of competency must be measurable in order for the regime to be effective.
- The grant and retention of a licence is subject to certain conditions and, where necessary, periodic assessment against conditions is carried out to ensure ongoing compliance. If compliance is unsatisfactory, the licence can be amended, suspended or revoked. This has the effect of ensuring that those people who do not (or cannot) carry out the actions required to mitigate the risks identified as arising from the activity are prohibited from taking part in that activity, while those who meet the requirements can continue without undue interference.
- Carrying out a licensable activity without a licence is deemed an offence and carries sanctions under the relevant regime. Whilst (as with any law) this will not guarantee that nobody carries out the activity without a licence, it gives an automatic means of

redress in law if an individual or business is found to be operating without a licence and acts as a deterrent for those considering operating outside of the law.

- Potential benefits of licensing regimes might include the following:
 - Systems of licensing allow for a standard benchmark to be understood and adhered to. It allows for a central core of inspectors to compare standards 'like-for-like' across an industry rather than subjective decisions being made on each and every establishment by a number of different people based on their own opinion as might be the case if industries were assessed on an *ad hoc* basis as a result of complaints or concerns and which may, in turn, lead to private prosecution. With a licensing regime with defined standards and assessment criteria, it means that there can be certainty and consistency, with everyone knowing where they stand and what is required of them.
 - Licensing, accompanied by inspection, theoretically allows for issues to be noted and action to be taken to remedy problems, or potential problems, before they become too serious and without potentially lengthy, costly and protracted court proceedings which might be required if the licensing regime and accompanying standards were not in place.

3.2 Licensing Regimes and Animals

Licensing regimes which relate to activities involving animals may be implemented, as noted in relation to the Dangerous Wild Animals Act 1976, in the interests of public safety. Others might be implemented with a view to safeguard the public and provide for the welfare of the animals. An example of this is WWATC 2012, which is one of the two pieces of legislation under consideration as part of this thesis. Other systems of licensing may have additional aims such as monitoring and assessing contribution to conservation of

biodiversity and education, as in the case of the ZLA 1981, the other piece of legislation being considered in this work. Whether or not the possession of a licence in relation to activities involving animals provides guarantees that animal welfare needs are being met, is a point which will be explored in detail in this research. It is worth noting at this stage, however, that the possession of a licence is often seen as an indicator that animal welfare needs are being met in full.

With regard to the types of licensing regime under consideration – those which seek to mitigate recognised risks inherent in particular activities - it should be noted that the absence of a licence does not necessarily imply that the business or individual in question is carrying out the activity in a way which would be automatically be deemed unacceptable if a licence were to be sought for the first time. Indeed, it may well be that an unlicensed zoo provides the exact same standards of care, the exact same contribution to conservation or education that a licensed zoo does, for example. Notwithstanding this fact, it would seem that the purpose of regulation is not only to ensure standards are met, but that those carrying out the activities are identified and monitored for compliance. In effect, the activity has been deemed unsuitable for self-regulation and, for this reason, regardless of the standards being delivered by the business, to operate without a licence is considered an offence. Conversely, as we will see later in this research, the possession of a valid licence does not necessarily indicate that standards *are* being met.

3.3 Secondary legislation and the Animal Welfare Act 2006

In the presentation of the draft Animal Welfare Bill (now the AWA 2006), the rationale behind incorporating the ability to introduce secondary legislation under the mantle of the Act was outlined as follows:

“The Bill will also provide powers to introduce secondary legislation and codes of practice to protect the welfare of non-farmed animals kept by man. This enabling power is already available for farmed animals and our aim is to ensure that in future all domestic and captive animals will be protected by legislation that can be easily revised to take account of changing welfare needs and increased scientific knowledge”¹⁷³.

It is recognised that the AWA 2006 effectively seeks to protect the welfare of each and every species of animal (and individuals belonging to those species) in each and every situation where they could be considered to be “under the control of man”, as long as they fit the description of “protected animal” and they are not subject to exemptions (such as those animals used in scientific research, as previously discussed). This means that the Act covers billions of individual animals in a diverse range of situations; from farming, to pet ownership to use of animals in sports and entertainment. To attempt to create a piece of primary legislation which encompassed all eventualities would have been a gargantuan task and any future amendments would have been cumbersome. By allowing the relevant Secretary of State (usually the DEFRA Minister) wide powers to introduce secondary legislation under the parent Act, this allows (via consultation) for expert input into specific animal species or uses and it allows for secondary legislation to be amended and improved relatively easily as knowledge relating to animal welfare increases and expands. From a purely practical perspective, if it were necessary to find parliamentary time to introduce new primary legislation each time it was found a specific practice was not adequately covered by the AWA 2006, this would be likely to hinder the progress of animal welfare law due to the likely lower priority animal welfare legislation is given when compared to laws relating to people, the economy and national security, for example. A prime example of this point is the proposed English ban on the use of wild animals in travelling circuses. The initiative was deemed inappropriate for introduction as secondary legislation under the

¹⁷³ HL Deb, 14th July 2004, cWS61

AWA 2006 and thus was drafted as new piece of primary legislation. That law has remained in draft form since 2013 and the government has argued since that time that it has been unable to find parliamentary time to introduce it.

Secondary legislation under the AWA can be introduced under a number of sections including s. 1, s. 5 and s. 6 for reasons including extending the definition of “animal” under the Act, exempting certain procedures from the blanket prohibition on mutilations and defining inspectors’ functions.

S. 12 grants a broad power to the appropriate national authority (currently DEFRA) to introduce regulations for the purposes of promoting the welfare of animals and their progeny. This might include, but is not limited to, the implementation of specific requirements to ensure welfare is met, the facilitation or improvement of coordination between people carrying out different functions in relation to animal welfare or the creation of bodies which advise on animal welfare. Regulations can create offences, confer post-conviction powers (such as deprivation or disqualification orders), provide for payment of fees, make provision for different cases, provide exemptions and make incidental provision or savings. The authority may provide that an offence may be a relevant offence for the purposes of s. 23 (search of premises under warrant).

To date, the only regulations that have been introduced under s. 12 are the Welfare of Farmed Animals (England) Regulations 2007. These regulations outline welfare standards that are required to be met. Failure to comply with the provisions of the regulations is an offence and renders the offender liable for prosecution. Possible penalties under the regulations include imprisonment of not more than 51 weeks and/or a fine not exceeding level four on the standard scale (currently set at £2,500).

Regulations introduced under s. 12 are not a focus of this research as, instead, we are concerned with the introduction of regulations under s. 13 of the Act. These are, regulations which facilitate the introduction of schemes of licensing or registration. Anyone carrying out an activity governed by s. 13 automatically commits an offence if they are not in possession of a valid licence or have not registered (whichever is relevant).

3.3.1 The Introduction of Licensing Regimes Under s.13 of the Animal Welfare Act 2006

As previously noted, licensing regimes can be introduced under both primary and secondary legislation. The ZLA 1981 is an example of a piece of primary legislation which creates a system of licensing and inspection. The purpose of this type of licensing regime is to govern a particular activity – in this case, the operation of a zoo – and licensing conditions include conservation obligations, public safety and animal welfare demands. Licensing regimes introduced under the Animal Welfare Act as secondary legislation, on the other hand, can only be introduced for the purposes permitted by the parent act; that is, to promote animal welfare. As such, a licensing regime introduced under s.13 of the AWA 2006 must focus exclusively on animal welfare and cannot include conditions or obligations relating to other concerns (such as public safety or conservation for example). The way in which licensing regimes can be implemented under s.13 is described below.

As outlined previously, s. 13 of the Act provides that the relevant national authority may introduce licensing regimes, or systems of registration, in order to regulate or better monitor certain activities involving animals. According to government guidance, “*The*

registration procedure would be used in cases where it is necessary for the enforcement authority to know of the existence and location of organisations or individuals who are keeping specific animals or carrying on particular activities, but where the additional controls and costs of a licensing regime are either unnecessary or would be unduly burdensome”¹⁷⁴.

Whilst registration will not be considered in any detail, the reason for its mention at this point is to recognise that, from its description in relation to registration, licensing is apparently deemed a more stringent measure by virtue of its “additional controls and costs”. It is unclear whether “costs” in this instance refer to costs imposed on the industry or on the government/authority costs in administering a scheme.

Interestingly, while it is clear from the above that registration is deemed by Government officials to be a less stringent measure than licensing, there is, in fact, very little to tell the two types of scheme apart in practice. Much like a licensing regime, a scheme of registration could be underpinned by a scheme of inspection and monitoring whereby a premises must be inspected prior to registration being permitted. Registration could be made contingent on the business meeting certain requirements, much like licensing, and it would be possible to create legislation which saw a business refused registration for failure to meet obligations. Under the AWA 2006, sanctions available for failure to register or licence a business are the same. As such, while the government clearly envisaged that activities requiring registration were those which required lesser oversight and monitoring, it is entirely feasible that a scheme of registration could be made equally as stringent as a scheme of licensing.

¹⁷⁴ Animal Welfare Act 2006, Explanatory Notes, Chapter 45, s. 69

As no schemes of registration have yet been implemented under the Act, it is unclear where the line may be drawn with regard to which practices require licensing and which may be subject to the, ostensibly less stringent, measure of registration.

3.3.2 The Scope of Regulations Introduced Under S.13 Of The Animal Welfare Act 2006

The purpose of s. 13 is to allow for the relevant national authority to introduce systems of licensing or registration for activities involving animals. As a general rule, these regulations can only be introduced for the purposes of promoting animal welfare. The promotion of animal welfare is one of two major principles embodied in the Act, with the other being the prevention of unnecessary suffering. These two principles and their development have been discussed in some detail in Chapter 1.5 of this thesis.

The infliction of unnecessary suffering, outlined in s.4 of the Act, is deemed a more serious offence than failure to promote welfare (outlined in s. 9). As such, the sanctions for the offence of infliction of unnecessary suffering are more stringent under the Act than those for failure to promote welfare. This is demonstrated by the fact that breach of s. 4 can result in a maximum of 51 weeks imprisonment or a fine of £20,000. Breach of s. 9, on the other hand, can result in a maximum of 51 weeks imprisonment and a fine of no more than 5 on the standard scale (currently £5,000)¹⁷⁵.

¹⁷⁵ In October 2017, it was reported that the Government intends to consult on increasing potential prison terms relating to certain animal welfare offences from the current maximums to five years but, at the time of writing, these measures had not yet been published.

Furthermore, failure to meet the provisions of s.9 can result in the issuing of an improvement order in place of immediate prosecution. This allows the owner of the animal to come into compliance with the Act prior to the instigation of legal proceedings against them. If they comply within the timescale, which is decided at the discretion of the inspector, then it will be deemed that no offence has been committed. There is no equivalent of an improvement order for an offence under s. 4. It is clear that the legislators deem the infliction of unnecessary suffering a more serious offence than failure to promote welfare and this is clearly reflected in the available sanctions and enforcement mechanisms under the Act.

When devising regulations under s.13 of the AWA, the appropriate authority is limited to the sanctions that may be applied to any offence committed to a fine not exceeding level five on the standard scale (currently £5,000) or a term of imprisonment not exceeding 51 weeks. These are the same limits set for offences committed under s.9 of the Act (failure to promote welfare) rather than the more stringent sanctions available for contravention of s.4 (the infliction of unnecessary suffering) which allows for a fine of up to £20,000. It seems clear that regulations introduced under s.13 of the Act can be introduced for the purposes of promoting welfare but, due to the lesser sanctions available to legislators when drafting regulations under s.13, it can be inferred that offences related to the infliction of unnecessary suffering fall outside of the scope of regulations introduced under s. 13.

To date the only regime introduced under s. 13 of the Act is the WWATC 2012. It was stated at the time of their introduction that the regulations would: "*fulfil undertakings given by the Government to Parliament to introduce secondary legislation under the Animal Welfare Act*

2006 to protect further the welfare of wild animals in travelling circuses”¹⁷⁶. What is clear is that, whilst animals are generally protected by the Act, the introduction of a licensing regime is explicitly intended to “protect further” [than the basic provision of the Act] the welfare of animals. Arguably, this “further protection” does not mean that those circuses governed by licensing are expected to exceed the provisions of the Act, but are given specific obligations, usually in the form of binding licence conditions, which aim to ensure that the provisions of the Act are effectively delivered. Failure to meet licence standards may lead to the suspension or revocation of a licence. In this way, and via the enforcement of licence conditions, licensing can be argued to help clarify and uphold the law.

The WWATC 2012 were the first licensing regime to be introduced using powers granted to the appropriate national authority (DEFRA) under s.13 (7) of the Act. While, at the time of writing, only this licensing regime has been introduced using powers granted under the AWA 2006, as noted previously, it has been indicated that existing businesses or practices involving animals, such as riding schools, boarding kennels and pet shops, will be governed under this type of legislation in the future. In October 2017, the UK Government confirmed that it was developing draft regulations to license these types of establishments and have stated that it intends to introduce them into law during 2018¹⁷⁷.

In addition to the option of licensing regulations, Codes of Practice are one of the other tools available under the AWA 2006 to aid interpretation, and thus clarify and uphold the law. Codes of Practice are introduced under s.14 of the Act, and have already been

¹⁷⁶ HC Deb, 1 March 2012, c41WS

¹⁷⁷ At the time of writing, these draft regulations have not been made public but the author of this research has had sight of them and confirmation in personal correspondence with DEFRA lawyers of the proposed implementation timetable.

described in Chapter 2.4.1 of this thesis. If it is deemed that a particular activity requires further scrutiny or specific regulation, secondary legislation requiring registration or licensing might be introduced as well as or instead of a Code of Practice, which have been referred to as a “light touch” by DEFRA officials in the past. In the Impact Assessment published following consultation on the way in which the trade in primates as pets in England might be managed, DEFRA stated *“The code is light touch as it is advisory and, coupled with targeted publicity when it is launched, will have a better chance of reaching the intended audience. There is not enough evidence to justify formal regulations”*¹⁷⁸. In addition to putting demands to meet welfare on a more formal footing, regulation via licensing and registration may also serve to clarify the specific steps which the owner of an animals or the proprietor of a business might need to take in order to ensure that welfare needs are met. This potentially serves the important purpose of seeking to ensure that legal standards are met consistently, and to reduce the potential of offences being committed as a result of ignorance, or lack of understanding of the law.

If all animal owners and business proprietors were required to follow their own interpretation of the needs outlined in s.9 of the Act, it is likely that interpretation, and thus delivery of welfare standards for animals, would differ drastically from place to place as any one individual’s understanding of which is required will invariably differ to a greater or lesser extent from another’s. This could lead to some animals being afforded extremely high standards of welfare provision but also to other animals being afforded extremely low ones. In addition, open interpretation of the demands of Section 9 would mean that decisions

¹⁷⁸ DEFRA (2009). Impact Assessment of the Code of Practice on the Welfare of Privately Kept Non-Human Primates. [online] London: DEFRA, p.1. Available at: <http://webarchive.nationalarchives.gov.uk/20100713195239/http://www.defra.gov.uk/corporate/consult/welfare-cop-primates/ia-primates.pdf> [Accessed 24 Nov. 2017].

relating to whether legal obligations have been breached would be left to the courts. It has already been suggested that secondary legislation is beneficial as it allows the involvement of experts in technical areas on which MPs might not be qualified to make decisions, as well as expediting the implementation process. The clarity provided by secondary legislation also holds benefits if and when cases come to court. Given that judges, like MPs, are unlikely to have the requisite knowledge to draw conclusions on the point at which an offence is committed in any and all situations relating to animals, delivering judgments on the basis of provisions contained in detailed secondary legislation in place of the broad principles of the AWA 2006 theoretically helps to avoid inconsistencies in enforcement and sanctions across different cases.

The introduction of licensing regimes as secondary legislation under s.13 of the AWA 2006 can therefore be considered not only to provide oversight, monitoring and assessment, but also to offer clarity to allow individuals to understand how to meet the requirements of the Act in the first instance. This should, in turn, result in fewer offences being committed as those responsible for animals understand the parameters within which they must operate. One of the main questions which this thesis seeks to answer is whether or not it necessarily follows that the implementation of a licensing regime will necessarily improve animal welfare provision or even, as has been suggested by those under regulation, that the possession of a licence under such a regime demonstrates that animal welfare needs *are* being met¹⁷⁹.

¹⁷⁹ E.g. Penarth Times. (2016). Animal charity raises concerns over wild animals as circus comes to the Vale. [online] Available at: http://www.penarthtimes.co.uk/news/14424591.Animal_charity_raises_concerns_over_wild_animals_as_circus_comes_to_the_Vale/ [Accessed 17 Jun. 2016].

As already noted, however, the most important consideration for any licensing regime is that the standards imposed, if met, are high enough to guarantee the proposed outcome (in this case, compliance with s. 9 of the AWA 2006). If standards are set too low, then compliance with the regime may not result in the protection of animal welfare in practice. This issue is rooted in the concept of 'good practice' outlined previously and which will be discussed further in due course. On the other hand, if standards are set so high as to be impossible for a particular industry to meet, this may lead to a licence or the conditions it contains being quashed as *ultra vires*.

3.4 Licence Conditions

Licences are usually issued with a series of conditions which must be complied with in order for the licence to be retained. If the licensing regime employs a system of inspection, it is against these conditions that compliance is assessed on inspection. Licence conditions may be generalised, individual, statutory or imposed under powers granted to particular authorities. One licence might be subject to one type of condition or a variety of different types of condition. For example, a licence held under the ZLA 1981 must be issued subject to the statutory provisions of s. 1A of the Act¹⁸⁰ therefore guaranteeing that certain mandatory conditions are imposed on each and every licensee. In addition, the licence can also be subject to such additional conditions specific to that establishment "as the local authority think necessary or desirable for ensuring the proper conduct of the zoo during the period of the licence"¹⁸¹. These are examples of individual conditions.

Failure to comply with licence conditions may constitute a breach of the law or may give rise to discretionary or mandatory action on behalf of the relevant authority in order to

¹⁸⁰ S.5(2A) Zoo Licensing Act 1981

¹⁸¹ S. 5(3) Zoo Licensing Act 1981

encourage or enforce compliance. A thorough examination of licence conditions pertaining to the statutes under consideration and their enforcement will be carried out in Chapters 6 and 8 of this thesis.

3.5 Systems of Inspection

In addition to licence conditions, most licensing regimes involve a system of inspection. The increased scrutiny which results from inspection regimes which monitor the conditions in which animals are kept or used arguably places the animals held under licensing regimes in a position of better oversight and protection than those animals whose keeping is not governed by such a system. This is because failure to meet welfare needs is more likely to be recognised when industries are subject to scrutiny via inspection than when animals are kept or used in activities which have not been deemed to present a risk requiring monitoring and assessment. It should be recognised, however, that simple identification of failure to meet animal welfare does not automatically lead to an increase in animal welfare or to the meeting of required standards in the future. Indeed, enforcement of sanctions when and if failure to meet welfare needs has been identified during inspection or monitoring is vital to ensure that standards are raised and maintained at the level required by the licensing regime. Simply recognising failure will not solve animal welfare problems.

Licensing regimes vary with regard to the regularity of inspection. For example, the inspection under the ZLA 1981 are carried out annually (albeit formal inspections by government officials are only required once every three years), The Dangerous Wild Animals Act 1976 mandates an inspection once every two years and the Welfare of Wild Animals in Travelling Circuses (England) Regulations, currently imposes three inspections each year on licensed businesses.

Theoretically, it is via a combination of licensees having clear conditions to meet, regular inspections being carried out and effective enforcement of licence conditions being carried out in the event that they are not met that the licensing regimes might be able to achieve their objective of ensuring that animals used in licensable activities are better protected than if licensing were not in place. This should not be conflated with the assumption that welfare needs are met in full (or in part) simply because the practice in question is subject to licensing and inspection as that depends whether or not the implementation of the standards in question has the practical effect of protecting animal welfare. As we have already seen, there is never a demand that welfare needs are met in full under the AWA 2006 as the Act merely demands that animal welfare needs are met “to the extent required by good practice”¹⁸² so, while we can be certain that inspection regimes increase scrutiny (on the proviso that inspections are properly utilised and executed, as will be shown, it does not automatically follow that welfare provision is increased to the standard required (or even if it is, that animal welfare needs are met in practice) as a result of a system of licensing and inspection being in place. This point will be explored in detail in later parts of this thesis.

Having provided a broad overview of the circumstances in which licensing regimes might be implemented to regulate the use of animals, when implemented as both primary and secondary legislation, we will now continue to consider the statutes in question, beginning with the ZLA 1981.

¹⁸² S. 9 (1) Animal Welfare Act 2006

Chapter Four: The Regulation of Zoos

The preceding chapter considered regulatory licensing regimes in both broad terms and in the context of their application in the interests of animal welfare. This chapter will examine the way in which one of the industries under consideration as part of this research (the zoo industry) is comprised and the history of its regulation in England.

4.1 The Size and Shape of The Zoo Industry in England

There are estimated to be 465 zoos¹⁸³ in the UK, with 299 currently listed in England alone¹⁸⁴, including those businesses which have been granted a dispensation under section 14(1)(a) of ZLA 1981 which exempts certain zoos which hold either very few animals or are of a very small size from the provisions of the Act. There are 233 zoos which are currently operating with licences granted under the Act in England¹⁸⁵. Zoos range from small farm parks with a handful of wild animals to safari parks covering multiple acres and traditional city centre zoos with a huge variety of species and individuals.

Most recent figures suggest that there are more than 200,000 individual animals in zoos in England with an average of 700 animals per establishment. Fully licensed zoos (those which have been granted no dispensation under s. 14) hold an average of 2,145 animals. The

¹⁸³ Draper, C. and Glanville, G. (2013). Application and enforcement of the Zoo Licensing Act 1981 by local authorities. [online] Horsham: The Born Free Foundation. Available at: http://www.bornfree.org.uk/fileadmin/user_upload/files/zoo_check/publications/enforcement-of-the-zoo-licensing-act.pdf [Accessed 24 Nov. 2017].

¹⁸⁴ AHVLA (2012). AHVLA list of zoos operating in England (November 2012). [online] Bristol: DEFRA. Available at: <http://webarchive.nationalarchives.gov.uk/20140708225757/http://www.defra.gov.uk/ahvla-en/files/cites-zoo-list-england.pdf> [Accessed 24 Nov. 2017].

¹⁸⁵ *ibid.*

largest zoo in terms of numbers of animals in England is Regent's Park Zoo (London Zoo) in London. The zoo houses over 18,500 individuals¹⁸⁶.

Exact numbers of establishments and animals held therein are difficult to ascertain due to a variety of factors, including the fact that licensing of zoos is governed by individual local authorities and there is no central register held of all zoos in the UK. The animal health section of the Government's Department of Environment, Food and Rural Affairs (DEFRA), The Animal Health and Veterinary Laboratories Agency (AHVLA), holds a list of zoos in England but monitoring has shown that this is not always accurate with evidence of licensed zoos not being included on the list and zoos that are no longer operating remaining on the list. According to the AHVLA "the list will be reviewed annually"¹⁸⁷ but, in practice, is usually updated sporadically (and sometimes only at the request of researchers). Furthermore, a disclaimer published as part of the list confirms that "AHVLA cannot guarantee that the information will be absolutely complete or up to date". Indeed, the list has not been updated by DEFRA since November 2012.

Finally, there is some evidence that not all establishments which fall under the legal definition of a zoo as outlined in s. 1(2) of the Act are correctly licensed, or indeed licensed at all. Most recent estimates based on research carried out by NGO researchers suggest that there are up to 465 establishments which meet the definition of "zoo" operating in the UK

¹⁸⁶ Casamitjana, J. (2012). *Inspecting Zoos: A study of the official zoo inspection system in England from 2005 to 2011*. The Captive Animal's Protection Society, Manchester

¹⁸⁷ Source: <http://www.DEFRA.gov.uk/ahvla-en/imports-exports/cites/zoos-inspectorate/> [accessed 6.5.2013]

(either licensed or unlicensed)¹⁸⁸. Of the 26 newest zoos listed in the most recent AHVLA list, published in November 2012, at least four of those zoos were operating without a licence for some time prior to being brought to the relevant local authority's attention¹⁸⁹. Only upon the local authority becoming aware of the zoo's existence was the licensing process carried out. It is thus possible that there are a number of zoos operating without a licence at any one time. This could be due to ignorance of the law on the part of the zoo operators or the relevant local authority or a result of a deliberate attempt to avoid the rigours (and related costs) of licensing on the part of the business.

An example of apparent ignorance of the law can be found in the case of 'The Tortoise Sanctuary', a rescue centre which operated for a number of years under the mistaken belief that as it considered itself to be a 'sanctuary', rather than a zoo, it did not require a licence under the ZLA 1981. Following an enquiry made by an anonymous person, the local authority investigated the establishment and concluded that a licence was in fact required as it met the legal definition of a zoo outlined in the Act. The sanctuary started a publicity campaign, which was supported by the local MP, against the local authority's decision. The sanctuary argued that it should be granted a complete exemption under the Act on the basis that it was a 'sanctuary' and not a 'zoo'. While there might be considered to be differences between well-run sanctuaries and zoos – largely in that sanctuaries are places of rehabilitation, offer animals a home for life and will rarely breed animals and zoos are largely places which exhibit animals as their primary purpose - there exists no legal

¹⁸⁸ Draper, C. and Glanville, G. (2013). Application and enforcement of the Zoo Licensing Act 1981 by local authorities. [online] Horsham: The Born Free Foundation. Available at: http://www.bornfree.org.uk/fileadmin/user_upload/files/zoo_check/publications/enforcement-of-the-zoo-licensing-act.pdf [Accessed 24 Nov. 2017].

¹⁸⁹ Pers. Corr. between author and Local Authorities

differentiation between the terms 'sanctuary' and 'zoo'. The particular business in question fell firmly within the definition of zoo within the Act. The Council maintained its position and insisted a licence was required. The sanctuary did not apply for the licence, subsequently closed and the animals were rehomed¹⁹⁰.

A further example of a business which sought to avoid zoo licensing can be found in the case of Tropical Inc., which had run for a number of years as a 'mobile zoo'. This type of business is not currently deemed to fall within the jurisdiction of the ZLA 1981 due to the fact that its premises are not open to the public in the same way that traditional zoo premises are. In 2012, the business applied for planning permission to establish a permanent centre which would be open to the public. Permission was granted. The author, in her then capacity as Director of the Captive Animals' Protection Society (CAPS) contacted the council to request information on the progress of the zoo licence which would be required for the business to operate as a zoo and was told that it was understood that a licence was not required. This was queried with the council as it was not clear why the decision had been taken that a licence would not be required given that the proposed site and business operation appeared to meet all of the criteria necessary for a zoo. CAPS was told that the business owner had informed the council planning committee that a licence was not required and they had simply taken his word for it. Following a complaint, the council reconsidered the position and agreed that a licence would be required in order for the permanent site to operate and thus began to pursue licensing with the owner¹⁹¹. No evidence of a zoo opening on the site

¹⁹⁰ BBC News. (2012). Tortoise sanctuary given 24 hours. [online] Available at: <http://www.bbc.co.uk/news/uk-england-cornwall-15019104> [Accessed 24 Nov. 2017].

¹⁹¹ Pers. Corr. between the author and the local authority.

is available so it can be assumed that the proposed zoo never opened and/or the application was never pursued.

In light of these two case studies, it is possible that there are more businesses such as The Tortoise Sanctuary and Tropical Inc. which are currently operating (whether deliberately or ignorantly) in contravention of the ZLA 1981.

Given the difficulties in establishing the number of zoos operating at any one time, it is perhaps not surprising that there are further issues in establishing the number of individual animals held in those zoos. To attempt to understand these figures, the only source of information is the animal stocklists compiled by the zoos themselves. These stocklists should show all animals held at the zoo over a period of 12 months, including all births, deaths, arrival and departures. Stocklists relating to the previous 12 months should be provided by the zoo to the relevant local authority by the 1st April each year. Indeed, if the local authority has followed guidance from DEFRA with regards to implementation of s. 1A of the Act and attached the relevant mandatory conditions to the zoo's licence, this requirement to provide the stocklist before the 1st April becomes a legal obligation for the zoo¹⁹². In practice, research¹⁹³ has shown that local authorities do tend to attach this condition to licences and so most zoos are obligated to provide the stocklist information or be found to be in breach of their legal obligations, risking a direction being issued against them under s. 16 and committing an offence under s. 19 of the ZLA 1981.

¹⁹² DEFRA (2012). Zoo Licensing Act 1981: Guide to the Act's Provisions. London: DEFRA., p. 53

¹⁹³ Casamitjana, J. (2012). Inspecting Zoos: A study of the official zoo inspection system in England from 2005 to 2011. The Captive Animal's Protection Society, Manchester., p. 96

Zoos are private institutions and are not therefore governed by FOIA 2000 obligations. As such, the zoos themselves have no obligation to provide stock information to interested parties on request. However, the fact that zoos are required to provide stocklists to local authorities (who are governed by the FOIA 2000), the stocklists can subsequently be made available by the local authority to interested parties as long as it is deemed 'in the public interest' to do so. The local authority is under no obligation to retain a copy of the stocklist once it has been seen and ongoing monitoring by NGOs suggests that those councils that do retain copies tend to discard them when an updated version is provided. As a result, at the point of making the Freedom of Information request, as both part of this research and previously, it has sometimes been found that no list is held by the council – having been satisfied on sight of the list that it was not required to be held on record - or there is only the current list on file, which makes year-on-year comparisons impossible unless monitoring is carried out over a number of years. Examples can also be given of the zoo failing to provide stocklists to the council which, in turn, means the information is not available under the FOIA 2000. Finally, there are instances whereby stocklists have been withheld by the local authority following a Freedom of Information Act 2000 request using exemptions outlined in s. 43(2) of the Act, which is concerned with the protection of commercial interests but refusal of requests on these grounds are rare and at least some have been deemed to be erroneous when challenged¹⁹⁴.

In addition to difficulties that can be encountered in gaining access to stocklists, the way in which the stocklists are compiled may cause additional problems. If compiled according to s. 1A(f)(ii) of the Act, stock lists should include: acquisitions (of animals not born at the zoo), births, deaths, disposals (transfer or sale of animals from the zoo but transferred there

¹⁹⁴ Pers. Corr. between author and local authorities

during the year from elsewhere) and escapes. In addition, and in line with s. 1A(i) the overall number of animals held must also be recorded. The Secretary of State's Standards for Modern Zoo Practice (SSSMZP) offer guidance on the format of these records in section 9, with an example of the column format preferred in section 9.6 of the same¹⁹⁵. There are a number of problems posed by using stocklists to establish numbers of animals who have been born or died during the course of a single year. The first being that, until recently, animals "culled" (euthanized) by zoos were sometimes recorded in the "disposals" section of a stocklist along with those living animals sent to other zoos or sold to private collections, making it impossible to differentiate between them. It has been suggested that this particular anomaly has been addressed during training sessions led by industry body, the British and Irish Association of Zoos and Aquaria (BIAZA), and that individuals culled will now be listed in the deaths section of the list so that mortality rates in zoos can be accurately calculated and disposals only contain animals that left the zoos alive¹⁹⁶.

An obstacle to understanding the movement of animals between zoos is that animals listed as "arrivals" in one zoo's stocklist may also be included in the "disposals" section of another zoo's stocklist during the same period as livestock is moved around from collection to collection. If transfers only happened between licensed zoos within the same country, this issue would be rectified by disregarding the "arrivals" for all zoos, or the "disposals" for all zoos as all animals within the collective zoo industry should, theoretically, appear in the fixed population columns of the industry's stock lists when taken together. Given that animals may be transferred to and from other zoos outside of the country, be bought (or

¹⁹⁵ DEFRA (2013). Secretary of State's Standards of Modern Zoo Practice. London: DEFRA., p. 22

¹⁹⁶ Pers. Corr. between author and representative from a major UK zoo (anonymous)

sold into) private collections or businesses¹⁹⁷ or to zoos which are not licensed under the Act, then it is impossible to establish which animals in the arrivals and disposals sections of zoo stocklists might be duplicated. As such, the figures relating to the movement of animals in and out of zoos in England remains impossible to establish with any certainty under the current system.

With regard to the total number of animals in zoos at any one time, calculations should, in theory, be simpler. According to s. 1A(f)(i) zoos must keep records of the total number of animals and 1A(f)(ii) should include a total number of animals in the collection at the end of the period which should allow an overall number to be established by simply adding the totals for each collection and ignoring other columns. Unfortunately, zoos do not always provide stocklists for the *same* 12-month period. Most run from 1st January – 31st December, as is demanded by s. 9.5 (b) and 9.5 (g) of the SSSMZP but some run for other periods. Some periods covered are for less than 12 months (50.3% of a sample of 181 zoos provided a stocklist which referred to a period of less than a year¹⁹⁸). Without being able to total the exact number of animals in all zoos on the same day each year, the problem of ascertaining accurate numbers is further compounded.

Finally, concessions are made within the stocklist-keeping procedures for animals that are difficult to count, such as fish or invertebrates. London Zoo staff have stated that “fish do not stop swimming to be counted so the keepers take a photograph of the tank and base

¹⁹⁷ Edwards, A. (2012). Fury as rare white lion cubs born in UK safari park are sent to a Japanese circus. [online] Mail Online. Available at: <http://www.dailymail.co.uk/news/article-2239043/Fury-rare-white-lion-cubs-born-UK-safari-park-sent-Japanese-circus.html> [Accessed 4 Nov. 2017].

¹⁹⁸ Draper, C., (2017). Zoo Licensing and Inspection: Using Legislative Requirements to Assess Animal Welfare and Conservation in British Zoos. Unpublished PhD thesis.

their count on that"¹⁹⁹ and counts of invertebrates which live in large colonies, such as leaf cutter ants, are based purely on estimates. A press officer for London Zoo confirmed that, when it comes to ant colonies "We cheat... we think we have about 10,000, but we just count them by colony"²⁰⁰. This further skews our ability to establish number of animals. Having said this, stocklists list animals by species and so it would be relatively simple to separate those animals whose numbers are based on estimates and those animals whose numbers are accurate if zoos were to flag on the lists which numbers are estimated. At present there is no evidence of this happening.

To conclude, the size and shape of the zoo industry in England appears to be in constant flux. The absence of any up-to-date central register of number of establishments and number of animals held therein in the UK more generally, means that there will inevitably be a margin of error in any estimations. This problem is further compounded by issues regarding stocklists and by evidence of businesses wilfully or ignorantly operating without a licence. For the purposes of this research, knowing the number of individual animals in zoos is not essential but the 2012 CAPS study suggested that it was around 190,000²⁰¹. The number of zoos currently operating in England has been calculated using the data gathering procedure outlined in Chapter 6.4 of the present thesis.

¹⁹⁹ Moss, S. (2013). London zoo opens gates to colony of snappers for annual animal census. [online] the Guardian. Available at: <http://www.guardian.co.uk/uk/2013/jan/03/london-zoo-annual-animal-census> [Accessed 4 Nov. 2017].

²⁰⁰ *Ibid.*

²⁰¹ CAPS., (2012). *Licence to Suffer: A Critical Analysis of Regulatory Protection of Animals in Zoos in England*, The Captive Animals' Protection Society, Manchester, England.

4.2 The Development of Zoo Regulation in Great Britain

Prior to 1981, there was no specific legislation which governed the operation of zoos in England. When the move towards zoo regulation, and the subsequent implementation of the ZLA 1981, is considered in its historical context, the desire that any statute should have animal welfare at its heart was clearly indicated during the debate and discussion in Parliament which led to its introduction. Indeed, Hansard records show that the purpose of its enactment was largely in response to concern for animal welfare.

In 1970, the first suggestion of a specific Act to protect animals in zoos was mooted by the Earl of Mansfield who asked the House of Lords to consider a licensing regime for zoos in order to protect animal welfare. He suggested that inaction was not an option, saying:

“Do not Her Majesty's Government realise that if they persist in this attitude of cynical indifference many hundreds, and probably thousands, of interesting wild animals will eke out a miserable existence and come to a premature death”²⁰².

At the time, the Government was satisfied that the Federation of Zoological Gardens of Great Britain and Ireland (now known as the British and Irish Association of Zoos and Aquariums - BIAZA), which had been established in 1967, was sufficient to monitor and control the conduct of zoos in conjunction with the Protection of Animals Act 1911. The Earl of Mansfield pointed out that the Federation was a voluntary organisation and so zoos that did not want to be regulated by it could simply choose to refrain from joining²⁰³. In addition, BIAZA is also an industry trade body; whose membership is made up predominantly of zoos and their committees staffed predominantly by management-level zoo staff. As such, it

²⁰² HL Deb 20 May 1970 vol 310 cc1049-52

²⁰³ *ibid.*

could be argued that any level of regulation imposed by BIAZA is not only just effective on those zoos which choose to join, but would also quite clearly be a form of self-regulation.

It took another decade to see the introduction of the ZLA 1981, but the ongoing assertion by those who supported legislative measures in both Houses of Parliament was that the welfare of animals in zoos must be protected by regulation²⁰⁴. It should also be noted that, at this stage, there was no legal basis for the promotion of animal welfare in law as we understand it today as the duty to promote welfare was introduced on the implementation of the AWA 2006. This is certainly not to suggest that the ZLA 1981 (or other animal-related legislation prior to 2006) contained no provisions which might benefit animal welfare in practice, but that the introduction of the 2006 Act “*created a new offence of failing to take reasonable steps to ensure an animal’s welfare (the so-called “duty of care” clause)*”²⁰⁵. In effect, this new offence raised the demands placed upon those caring for animals and gave those demands legal basis.

4.3 The Original Zoo Licensing Act 1981

The legislation’s stated purpose is “to regulate by licence the conduct of zoos”²⁰⁶ and, interestingly, and in spite of the strong focus on the need to protect animal welfare in zoos during the debates which led to the implementation of the Act, the original statute contained no specific welfare provisions. There was opportunity to introduce standards (presumably, including those relating to animal welfare) by virtue of powers granted to the

²⁰⁴ HL Deb 21 March 1972 vol 329 cc634-68 and HL Deb 15 June 1973 vol 343 cc986-1013

²⁰⁵ House of Commons Library (2005). Research Paper 05/87: The Animal Welfare Bill. London: House of Commons Library.

²⁰⁶ Introductory Text, The Zoo Licensing Act 1981

Secretary of State under s. 9 to devise standards for the management of the zoo or the animals as s/he saw fit. Indeed, the detailed Secretary of State's Standards of Modern Zoo Practice are updated at intervals, most recently in 2012, and contain comprehensive guidance relating to animal welfare. Importantly, these Standards are not, and never have been, directly enforceable. The original text also made reference to the grant of a licence being subject to the local authority being satisfied that the wellbeing of the animals would be met at the zoo but no further clarification on what standards might ensure that wellbeing was met were included.

As a result, the welfare of animals in zoos at the time that the Act was introduced was dependent on a number of factors. The first was the good judgement of the team of inspectors, who were required, under ss. 10 – 12 of the original Act, to inspect the zoo at intervals, and in special circumstances. A report was required after each periodical inspection which:

"...may include advice on the keeping of records and recommendations for any practicable improvements designed to bring any features of the zoo up to the normal standards of modern zoo practice; and for this purpose the inspectors shall have regard to any standards known to them which have been specified by the Secretary of State under section 9"²⁰⁷.

If standards were found, during inspection, to fall below those required of the zoo, the inspectors could outline the problems, and the action required to remedy them, in the relevant report. The local authority could then obligate the zoo to meet welfare (and other) standards by attaching a condition outlining the relevant requirements, and the timescale in which they must be met, to the zoo's licence by virtue of powers granted by s. 16 of the Act. It was by this mechanism of transposition into licence conditions that it was possible for the

²⁰⁷ S. 10 (5) The Zoo Licensing Act 1981

Secretary of State's Standards of Modern Zoo Practice to be enforced. Failure to comply with a condition without good reason was an offence under s. 19 of the Act and could lead to a licence being revoked under s. 17, among other sanctions.

The arguable weaknesses of the original system were that a zoo could not commit an offence under s.19 the ZLA 1981 until a condition had been attached to the licence and the business had subsequently failed to comply (without good reason) within the agreed timescale. This could sometimes mean problems persisting for a number of years before the zoo could be sanctioned. The inspection regime only required formal inspection once every two to three years, which tended to have the effect of exacerbating potential delay in rectifying issues. Furthermore, as there were no mandatory licence conditions outlined in the Act, there was a wide degree of discretion on the part of the local authority as to which of the Secretary of State's Standards to enforce, and to what extent. This led to a degree of uncertainty for the zoos in question with licence conditions (and thus their obligations under the law) varying between zoos depending on who inspected the premises (which differs between zoos and from year-to-year within the same zoo) and which local authority's jurisdiction the zoo fell within.

A licence could be revoked under s. 17 of the Act for reasons other than breach of licence conditions; namely as a result of the zoo being conducted in a 'disorderly manner' or in such a way as to cause a nuisance or following the conviction of the owner or one of the keepers under other relevant legislation listed in s. 4 (4). All of the legislation listed in s. 4 (4) relates in some way to animal welfare and a conviction under any of the statutes listed also gives rise to grounds to refuse a licence application in the first instance. In this way, it could be argued that the original Act protected animals from being exposed to people that might

cause them harm or fail to provide for their welfare by preventing these people from running, or working for, zoos.

A benefit of the flexible nature of the enforcement mechanisms within the Act was that it was possible to accommodate businesses of varying size and make-up; from small collections to city centre zoos to safari parks within the regime by virtue of the wide discretion discussed above. Indeed, the necessity for a level of flexibility and discretion is still recognised today within the current SSSMZP which states: “due to the widely differing nature of zoo collections, not every Standard will apply equally to all zoos”²⁰⁸.

4.4 The EC Zoo Directive

It was only with the transposition of European Council Directive 1999/22/EC into the amended Zoo Licensing Act in 2003 that duties on zoos directly related to welfare were included in the body of the statute. As it was the EC Directive that prompted the inclusion of what can be interpreted as welfare provisions into the Act, it is important to consider the purpose of the Directive itself.

The aim of the Directive is outlined in Article 1 of the same, as follows:

“The objectives of this Directive are to protect wild fauna and to conserve biodiversity by providing for the adoption of measures by Member States for the licensing and inspection of zoos in the Community, thereby strengthening the role of zoos in the conservation of biodiversity”.

It is clear that the Directive is concerned, as its primary purpose, not with the promotion or protection of animal welfare, but with zoos’ role in the conservation of biodiversity. In fact,

²⁰⁸ DEFRA (2013). Secretary of State's Standards of Modern Zoo Practice. London: DEFRA. p.1

the term “welfare” appears nowhere in the EC Directive. Despite this, the wording from Article 3 of the Directive concerned with housing of animals and provision of veterinary care, which is reproduced with only minor textual amendments in s. 1A(c) of the ZLA 1981, can be recognised as dealing directly with factors which impact on animal welfare. S. 1A(c) reads as follows:

The following are conservation measures to be implemented in zoos in accordance with this Act—

S. 1A (c) accommodating their animals under conditions which aim to satisfy the biological and conservation requirements of the species to which they belong, including—

- (i) providing each animal with an environment well adapted to meet the physical, psychological and social needs of the species to which it belongs; and*
- (ii) providing a high standard of animal husbandry with a developed programme of preventative and curative veterinary care and nutrition*

It would appear from the wording used that the effective delivery of the provisions outlined in s. 1A(c) should have the practical effect of ensuring that the animal welfare needs are met in zoos.

Not only did the Directive introduce welfare provisions into the Act but, importantly, made compliance with the provisions of s. 1A mandatory. Failure to comply was subject to new sanctions introduced under the new sections 16A – 16G of the Act. Zoos which persistently failed to comply with licence conditions relating to the delivery of s. 1A provisions would be subject to closure, or partial closure.

Finally, provisions were included for the welfare and disposal of the animals following zoo closure for the first time²⁰⁹. Prior to this amendment, whilst a zoo licence could be revoked,

²⁰⁹ The Zoo Licensing Act 1981 s.16E

thus preventing the ongoing operation of the zoo, no provisions were in place to protect the welfare of the animals in the event of the revocation of a licence.

The transposition of the Directive into the amended Act in 2003 thus had the effect of incorporating animal welfare standards, albeit without explicitly labelling those standards as being concerned with animal welfare, into the main body of the Act for the first time.

4.5 The Zoo Licensing Act (as Amended)

The ZLA 1981 (as amended) has been described by the government department currently charged with its oversight, Department of Environment, Food and Rural Affairs (DEFRA), as follows:

“The Zoo Licensing Act 1981 sets out how zoos in Great Britain are inspected and licensed. This ensures that zoos are safe for the public to visit, that high standards of welfare are maintained and that zoos make a contribution to conservation of wildlife. It also implements European Council Directive 1999/22/EC in the UK”²¹⁰.

It would thus appear that the purpose of the Zoo Licensing Act 1981, in the view of the government, is now threefold:

1. It ensures that zoos are safe to for the public to visit;
2. It ensures that high standards of animal welfare are maintained; and
3. It ensures that zoos make a contribution to the conservation of wildlife.

The areas of consideration for this research will focus predominantly on the ability of the legislation to “ensure high standards of animal welfare” but will also consider the

²¹⁰ Defra.gov.uk. (n.d.). Biodiversity and ecosystems - GOV.UK. [online] Available at: <http://www.DEFRA.gov.uk/wildlife-pets/zoos/> [Accessed 24 Nov. 2017].

contribution to conservation of wildlife as a related matter. The public safety element of the Act is not relevant to the current research and so will not be considered in any great detail.

4.6 The Secretary of State's Standards of Modern Zoo Practice (SSSMZP)

The stated purpose of the SSSMZP is to specify “standards with respect to the management of zoos and the animals in them”²¹¹. No more is said in the Act as to what the standards might contain and so the Secretary of State is granted wide discretion as to their contents. Indeed, given that s. 9 states that the Secretary of State “may” (as opposed to “must”) specify standards, included in that wide discretion is the option to deem standards altogether unnecessary.

Notwithstanding this discretion, and as mentioned previously, a version of the standards has been in place for a number of years and is updated periodically. The earliest version of the SSSMZP held by DEFRA at present dates to 2004 and no information is held by the government department on when the first standards were published, or what their contents may have entailed. Notwithstanding this, it is understood that a version of the SSSMZP has been in existence since at least 1984, when their publication was referred to during a debate in the House of Commons²¹². In practice, the current standards offer detailed guidance to zoos with regard a number of areas of management. A strong weighting towards animal welfare is apparent, with sections 1 – 5 dealing specifically with the “five freedoms²¹³” and section 6 dealing with the transport of animals, with a specific focus on

²¹¹ The Zoo Licensing Act 1981 s.9

²¹² HC Deb 02 July 1984 vol 63 cc121-8

²¹³ See Chapter 1.5 for background on the Five Freedoms

welfare during transport and related legislation. Conservation and Education is dealt with in section 7, Public safety in section 8, Stock Records in section 9, Staff and training in section 10, Public facilities in section 11 and rules on display of the zoo's licence in section 12. There are a series of appendices dealing in more detail with some of the provisions already outlined and with the demands of the EC Zoos Directive specifically. The document as a whole runs to 94 pages.

In addition to specific guidance with regard to the ZLA 1981, the standards "also provide practical guidance in respect of provisions made by or under the Animal Welfare Act"²¹⁴.

Section 14 of the AWA 2006 allows for the Secretary of State to devise and implement codes of practice to fulfil the exact aim outlined above. Section 14 (3) confirms that "A person's failure to comply with a provision of a code of practice issued under this section shall not of itself render him liable to proceedings of any kind" but section 14 (4) concedes that failure to comply with any code "may be relied upon as tending to establish liability" in the event of legal proceedings. Given that the SSSMZP have been devised and implemented under powers granted by section 9 of the ZLA 1981, rather than under section 14 of the Animal Welfare Act, it is unclear whether or not the standards could be treated in the same manner as part of legal proceedings as those codes that have been introduced under s. 14 (i.e.: to be used to establish liability). Consequently, whilst the SSSMZP may be used to inform zoo operators on how to meet the provisions of the AWA 2006, there does not appear to be a way of directly enforcing those standards that relate to the provisions of the AWA 2006. As such, any failure to meet welfare standards would be dealt with separately under the AWA 2006.

²¹⁴ DEFRA (2012). The Zoo Expert Committee Handbook. London: DEFRA. p.3

There have been very few prosecutions brought against zoos under the ZLA 1981 since its implementation, and those that have been brought have been conducted in the Magistrate's Court. As a result, there are no detailed judgements available on record to understand judicial opinion on the interplay between the SSSMZP and the Act itself. One of the few cases for which information on the court's handling of breaches of the ZLA 1981 is available involved the 2013 prosecution of the proprietors of Pets Corner Petting Zoo by Waveney District Council for breach of existing zoo licence conditions. The defendants were found guilty on six counts and issued with a fine. It was reported that "Waveney District Council inspectors found Pets Corner in Oulton Broad lacked proper veterinary care, had poor record keeping and contaminated water"²¹⁵ but no further detail is available on the specific breaches committed.

Notwithstanding the SSSMZP's dual purpose of providing guidance on both the ZLA 1981 and, since 2007, the AWA 2006, a number of practices outlined in the standards appear to conflict with the provisions of one or the other of these pieces of legislation.

An apparent conflict between the ZLA 1981 and the AWA 2006 can be found in section 5 of the standards and deals with the feeding of live vertebrates to animals in a zoo, a practice which is accepted as part of the SSSMZP. The standards state that "*Although the Animal Welfare Act 2006 does not prohibit the feeding of animals with live prey, the live feeding of vertebrate prey should be avoided save under exceptional circumstances, and only under veterinary advice*"²¹⁶. It is the case that very few practices are explicitly outlawed in the Animal Welfare Act²¹⁷ and, instead, practices are generally considered under the lens of s.4

²¹⁵ BBC News. (2013). Zoo owners fined over breaches. [online] Available at:

<http://www.bbc.co.uk/news/uk-england-suffolk-20910877> [Accessed 4 Nov. 2017].

²¹⁶ DEFRA (2013). Secretary of State's Standards of Modern Zoo Practice. London: DEFRA., p. 4

²¹⁷ With the exception of those acts outlined in ss. 5-8 of the AWA 2006.

and or s. 9 on a case-by-case basis. As such, the implicit suggestion that, because a practice is not explicitly outlawed, it is legal, makes little sense. By the same logic, one could argue that the act of putting a dog in an oven and switching it on is not explicitly outlawed either and is thus legal. It was argued by the author during the most recent revision of the SSSMZP in 2012 that the feeding of live vertebrate prey should be considered to constitute a breach of s.4 or, at the very least, s.9 but the standards were not amended in line with this view. It remains unclear how this practice can be legally justified given that causing a protected animal²¹⁸ to be eaten alive would certainly be detrimental to the animal's welfare and could easily be conceived as 'unnecessary suffering'. Of course, this would need to be tested in the courts but the Government's pre-emptive statement advising zoos that the practice is not illegal appears to be ill-advised.

An apparent conflict with the provisions of the ZLA 1981 can also be found within the standards in that the 'pinioning' of birds is explicitly allowed in zoos²¹⁹. The practice of pinioning involves the amputation of the end of a bird's wing at the carpal joint a few days after birth in order to prevent the bird from ever experiencing flight. Whilst the practice is legal by virtue of the fact it is included within the permitted procedures listed in the Mutilations (Permitted Procedures) Regulations 2007, it is unclear how permanently removing a bird's ability to fly can be considered to meet the requirement of s.1A (c) (i) of the Act which demands that animals should be provided with "an environment well adapted to meet the physical, psychological and social needs of the species to which it belongs".

²¹⁸ Defined by s. 2 of the Animal Welfare Act 2006

²¹⁹ DEFRA (2013). Secretary of State's Standards of Modern Zoo Practice. London: DEFRA. pp. 10, 24,

Notwithstanding the conflicts noted above, the standards offer comprehensive guidance on animal welfare and specific information for animals that have either been recognised as having very specialised welfare needs (such as elephants²²⁰) or animals that belong to a particular taxonomic class that share some similar characteristics (such as reptiles²²¹).

No explanation as to the legal status of the SSSMZP is offered in the Act itself, the standards, the Zoo Expert Committee Handbook (see below) or the Guidance to the provisions of the Zoo Licensing Act (see below). Reference is made in s. 5 of the Act that local authorities should “have regard” for any standards specified by the Secretary of State under s. 9 and s. 10 demands that inspectors “have regard” for them in considering their recommendations for improvements during and following inspections. What is clear from the Act is that the standards are not directly enforceable against zoos and so non-compliance does not constitute an offence under the ZLA 1981 *per se*. Indeed, until a condition detailing what is required of the zoo is attached to the zoo’s licence, standards contained within the Act cannot be directly enforced against a zoo at all.

4.7 The Zoo Expert Committee Handbook

The SSSMZP are “supplemented by the Zoo Expert Committee Handbook which provides further detail and guidance”²²², but the Zoo Expert Committee Handbook does not form part of the standards. It is explicitly stated that the handbook is a “non-statutory and simply contains guidance with recommendations that all zoo stakeholders...should find helpful”²²³. Inspectors need not ‘have regard’ to the handbook and neither do local authorities in the

²²⁰ *Ibid.*, p. 55

²²¹ *Ibid.*, p. 45

²²² DEFRA (2013). Secretary of State's Standards of Modern Zoo Practice. London: DEFRA. p.4

²²³ DEFRA (2013). The Zoo Expert Committee Handbook. London: DEFRA. P. 1.

same way that they need to 'have regard' for the standards. The handbook has no independent legal force and derives none from the Act. It therefore acts as guidance which may be followed voluntarily. As a result of its non-statutory nature, the handbook will not be considered in any detail as part of this work.

4.8 Guidance to the Provisions of The Zoo Licensing Act 1981

In addition to the SSSMZP, the ZLA 1981 is supplemented by legal guidance to the Act's provisions produced by DEFRA and targeted towards local authorities, which are the bodies responsible for the enforcement of the legislation²²⁴. As with the SSSMZP and the Zoo Expert Committee Handbook the guidance is explicitly recognised as a non-statutory document. It is noted within the introduction that "this guidance should not be taken as an authoritative statement of the legal effect of the Act"²²⁵. This is interesting when considering the explicit statements relating to feeding of live vertebrate prey and pinioning, already discussed. In these instances, DEFRA appear confident in making explicit statements over the application of the law, despite interpretation falling outside of the department's jurisdiction.

Most recently updated in late 2012, the guidance explains the Act, provision-by-provision, and seeks to clarify any ambiguous areas with regard to, for example, how to distinguish whether or not a collection falls within the definition of a zoo or how to distinguish whether or not a species of animal can be classed as "wild" for the purposes of the Act.

²²⁴ DEFRA (2012). The Zoo Licensing Act 1981: Guide to the Act's Provisions. [PDF] London: DEFRA.

Available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69595/zoo-licensing-act-guide.pdf [Accessed 4 Nov. 2017].

²²⁵ *Ibid.*, p. 5.

The guidance also includes flowcharts for local authorities to use to understand the licensing process and model documents which can be used as templates.

Relevant sections of the guidance will be considered in the chapter(s) examining the practical enforcement of the legislation.

4.9 The Extent of The Welfare Provisions Under The Zoo Licensing Act 1981

Following the detailed consideration of the Act and, as noted previously, it would appear that s. 1A is the key provision through which welfare standards are understood and delivered. The mandatory nature of s. 1A, and the corresponding sanctions for failure to comply with it suggest that zoos which persistently fail to provide adequate standards of care will be either fully or partially closed. The broad provisions of s. 1A are supplemented by detailed (and sometimes species-specific) guidance contained within the Secretary of State's Standards of Modern Zoo Practice. This is, in turn, supplemented by further guidance contained in the Zoo Expert Committee Handbook. Enforcement of the Act is supplemented and supported by the Guidance to the Act's Provisions. The Act is underpinned by a system of inspection which seeks to assess and further advise on compliance with the Act.

When we compare the welfare provisions included in the ZLA 1981 with those outlined as part of the Animal Welfare Act, it would appear the demands on zoos are more rigorous. While there is a caveat in s. 1A of the ZLA in that zoos are asked to "aim to satisfy" the biological needs of the animals, which suggests that no explicit demand to meet needs in full is placed upon the zoos, the criteria by which zoos are measured use the needs of the animals, rather than the limitations of the industry as their starting point. The 'good

practice' caveat incumbent on any assessment of animal welfare made under s.9 of the AWA 2006 does not apply in the context of the ZLA 1981.

For example, zoos "must" implement the following measures:

"accommodating their animals under conditions which aim to satisfy the biological and conservation requirements of the species to which they belong, including—

- (i) providing each animal with an environment well adapted to meet the physical, psychological and social needs of the species to which it belongs; and*
- (ii) providing a high standard of animal husbandry with a developed programme of preventative and curative veterinary care and nutrition;*

Whereas the AWA 2006 demands that needs are met to the "extent required by good practice" within that particular industry. For zoos, then while recognising that they are asked to "aim" to satisfy needs, rather than simply satisfy needs, the demand placed upon them still appears more stringent than those made under the AWA 2006.

This means that, in zoos, there is constant room for improvement in that there is no upper limit to the standard of care – an animal kept in a zoo could, theoretically, have all of their biological needs met which would, theoretically be close (if not equivalent to) having all of their welfare needs met. On the other hand, as will be explored in Chapter 7 on the regulation of circuses, standards of welfare based in the limitations of the circus industry as their starting point are assessed only in relation to other circuses due to the 'good practice' caveat. As such, the circus regulations do set an upper limit of welfare standards (whatever constitutes good practice within the travelling circus industry) which could, theoretically, be exceeded, but there is no demand placed upon businesses that they should do so. It would seem, therefore, that the potential for protection under the ZLA 1981 – law not specifically focused on animal welfare - appears (somewhat ironically) to be greater than under legislation introduced under the overarching animal welfare statute in England and Wales.

This chapter has explored the history and current structure of zoo regulation in England. The next chapter will consider exemptions to the ZLA 1981 for businesses which, in some form or another, may appear to resemble zoos in their structure and operation and how these exemptions may impact upon animal welfare.

Chapter Five: Exploring Exemptions to The Zoo

Licensing Act 1981

In this chapter, exemptions to regulation under the ZLA 1981 will be explored and critiqued. Where it is considered by the author that the exemption of businesses is erroneous, suggestions are put forward as to how businesses which it is believed *should* be regulated as zoos might be brought under the mantle of the ZLA 1981 (or other relevant legislation) effectively.

While the efficacy of regulatory licensing regimes as a means to regulate the use of animals is by no means concluded at this stage in the thesis, it has been established that, theoretically, animals for whom licensing regimes (and associated inspection regimes) are in effect, are subject to more scrutiny, oversight and monitoring than those animals for whom no such system is in place. It therefore stands to reason that (as long as it can be agreed that licensing regimes properly enforced and applied do not, in and of themselves, create a harmful situation for animals), then those animals whose use is not covered by licensing regimes must be subject to a lower level of scrutiny and monitoring. This means that the identification of harmful or unacceptable practices involving those animals is more likely to go unrecognised than for those animals for which licensing is in place. If it can be recognised that certain species of animal, kept in certain situations, are under no identifiable welfare threat as a result of their proposed use then it seems reasonable to conclude that additional oversight is unnecessary, and that licensing will not improve welfare in any meaningful way in those cases. For example, the simple act of keeping a dog as a pet does not present inherent risks if the dog is kept well. Of course, if the dog is not kept well or is deliberately mistreated then his or her welfare will be compromised. The English legal system starts from

the presumption that people should be free to do as they wish, and therefore while there are many examples of dogs being abused when kept as pets (and indeed calls for licensing to be introduced²²⁶), at present, the Government clearly does not believe that the practice of keeping dogs as pets presents sufficient risk to the animals to warrant stricter regulation. In other cases, the very use itself, presents a significant risk to welfare and it is these activities that licensing seeks to regulate.

This chapter is therefore not suggesting that all practices involving animals should be subject to licensing or further scrutiny. Instead, it is focused upon highlighted uses of animals which are so similar to those singled out for licensing (in terms of the use of the animals themselves and the species of animal used) that there seems to be no logical reason for these practices to escape regulation via licensing, which zoos (and as we will see, travelling circuses) are currently subject to. It is argued that the failure to license the businesses discussed below (as either zoos or circuses) creates a false division between industries whereby the practical use that the animals are put to (thus the welfare risk and thus the perceived need for scrutiny and monitoring) of animals is similar or identical, but the regulation of these activities can differ in that some are subject to licensing and others escape the rigours of licensing altogether. This chapter seeks to explore practices which appear to meet the criteria for zoo licensing yet have been deemed to fall outside of the remit of the legislation.

²²⁶ Malnick, E. (2013). License all pet owners, top RSPCA vet suggests. [online] Telegraph.co.uk. Available at: <http://www.telegraph.co.uk/lifestyle/pets/10540819/License-all-pet-owners-top-RSPCA-vet-suggests.html> [Accessed 28 Dec. 2017].

As outlined in Chapter 4.1, which offers some explanation as to the difficulties in establishing accurate numbers of businesses operating as zoos and numbers of animals held therein, there are various exemptions to zoo licensing which will be explored here. In some cases, a business may appear to fit the legal definition of a zoo²²⁷, but is treated as something else under the law. This section explores the way in which these exemptions come about and how the legal protection of animal welfare might be impacted by these exemptions. Finally, where relevant, the ways in which any lacunas identified in relation to these exemptions might be addressed are considered. This chapter does not seek to consider exemptions by virtue of dispensations granted under s. 14 of the ZLA 1981 (ZLA 1981) but only those businesses which have been deemed to be exempt from the Act on the basis that they are not considered to fall within the definition of a zoo.

5.1 Static Circuses and The Zoo Licensing Act 1981

Pleasurewood Hills and Pleasure Island (based in Suffolk and Cleethorpes respectively) are theme parks with a number of rides and attractions²²⁸. In addition, both businesses hold sea lion and parrot shows during their open season. Correspondence with the relevant local councils²²⁹ has confirmed that the animals are housed at the premises permanently and are on show to the public during the performances, following which they are put back in their accommodation which is 'off show'. The two establishments do not have a zoo licence

²²⁷ As defined by s. 1(2) of the Zoo Licensing Act 1981

²²⁸ Pleasure Island closed to the public at the end of 2016 but the case study is still relevant to the current discussion thus has been retained as part of the thesis.

²²⁹ Pers. Corr. between E Tyson and council representative, April 2013

despite appearing to satisfy the following criteria in the ZLA 1981 which defines a zoo as follows:

“an establishment where wild animals (as defined by section 21) are kept for exhibition to the public otherwise than for purposes of a circus (as so defined) and otherwise than in a pet shop (as so defined); and this Act applies to any zoo to which members of the public have access, with or without charge for admission, on more than seven days in any period of 12 consecutive months”

In answer to a query as to why they did not consider zoo licences necessary the councils within whose jurisdiction the businesses fall confirmed that both establishments are considered to fall within the definition of a circus. As such, both establishments had been registered under the Performing Animals (Regulation) Act 1925 (PAA 1925) but were deemed to fall outside of the jurisdiction of the ZLA 1981. The definition of a circus is as follows:

“a place where animals are kept or introduced wholly or mainly for the purpose of performing tricks or manoeuvres at that place²³⁰”

Accepting this interpretation, which appears to be reasonable, these two establishments nonetheless represent something of an ‘elephant in the room’ with regard to policy that is currently being worked upon by Government. The policy seeks to ban the practice of using wild animals in travelling circuses; something which is discussed in more detail in Chapter 7. For the purposes of this section, it can be recognised that a small number of businesses appear at first glance to fit the definition of a zoo but are classified as circuses. The fact that the circuses do not travel means that they are not regulated under the WWATC 2012 – as

²³⁰ As defined by s. 21(1) of the Zoo Licensing Act 1981 and s. 7(4) of the Dangerous Wild Animals Act 1976

this applies only to circuses which travel - nor will they be included in the promised upcoming ban on the use of wild animals in travelling circuses²³¹ (for the same reason).

5.2 Pet Shops and The Zoo Licensing Act 1981

Wickid Pets was a business which closed down in October of 2012, reportedly for financial reasons²³². The operation can be used as a relevant case study for the grey area between pet shop licensing and zoo licensing.

The establishment in question was founded as a pet shop in 2009. It subsequently expanded to include an area of wasteland at the side of the shop which was developed into what was referred to as an “exotic animal park”²³³. It appeared from monitoring that the pet shop still ran in the traditional sense, but the animal park was marketed as the business’ primary venture for some time prior to its closure.

The animal park was advertised by the company as a visitor attraction, which promoted animal encounters. The proprietor advertised visitor opening times and charged for entry into the animal park area of the business. In fact, on the (now deactivated) social media page which appeared to serve as the company’s online presence in the absence of a

²³¹ HC Deb, 1 March 2012, c41WS

²³² Expressandstar.com. (2013). Wolverhampton animal park hit by blaze. [online] Available at: <https://www.expressandstar.com/news/emergency-services/2013/01/29/wolverhampton-animal-park-hit-by-blaze/> [Accessed 24 Nov. 2017].

²³³ Expressandstar.com. (2012). Wickid Pets Exotic Animal Park at Risk of Closure. [online] Available at: <https://www.expressandstar.com/news/2012/08/04/wickid-pets-exotic-animal-park-in-wolverhampton-at-risk-of-closure/> [Accessed 24 Nov. 2017].

website, Wickid Pets was promoted purely as a visitor attraction, with no mention of the pet shop in the description. As such, it appeared that what was perhaps once simply a pet shop, had diversified to become a business whose operation would appear to fall clearly within the remit of the ZLA 1981. Despite this, the business continued to operate under a Pet Animals Act 1951 (PAA 1951) licence, rather than a licence under the, arguably, more appropriate, and certainly more rigorous, standards and licensing regime put in place by the ZLA 1981.

As established above, Section 1 (2) of the ZLA 1981 (ZLA 1981) offers the following definition of “zoo”:

*“In this Act “zoo” means an establishment where wild animals (as defined by section 21) are kept for exhibition to the public otherwise than for purposes of a circus (as so defined) and **otherwise than in a pet shop (as so defined)** and this Act applies to any zoo to which members of the public have access, with or without charge for admission, on more than seven days in any period of 12 consecutive months”. [My emphasis]*

It is clear from the definition that pet shops are exempt from regulation under the Act.

Section 21 (1) of the ZLA 1981 defines “pet shop” as:

“premises for whose keeping as a pet shop a licence is in force, or is required, under the Pet Animals Act 1951”.

The act of keeping a pet shop is defined by s. 7(1) of the PAA 1951 and is:

“...construed as references to the carrying on at premises of any nature (including a private dwelling) of a business of selling animals as pets”.

Taking the two statutes together, it becomes clear that any local authority carrying out an assessment of a business in order to decide whether or not it falls under the auspices of zoo licensing must look to the PAA 1951 to establish whether or not a licence is required under this Act in the first instance. If it is deemed that a licence is required under the PAA 1951

(even if that licence is not in force) the business *becomes* a pet shop for the purposes of the ZLA 1981 and thus is automatically exempt from zoo licensing obligations. This creates the, somewhat absurd, situation whereby a zoo of any size could, theoretically, run a business of selling animals to the public from the same premises and effectively exempt itself from zoo licensing provisions.

In practice, and for the most part, zoos are clearly zoos and pet shops are clearly pet shops and the licensing of these businesses causes few problems. However, as is apparent in the case of Wickid Pets, it is possible that some businesses in operation in England could be classed as both pet shop and zoo. Some licensed pet shops may have animals living on site permanently and the business may be actively promoting their venture as a visitor experience as opposed to (or in addition to) a traditional retail outlet. In addition, a number of traditional zoos may also sell animals to members of the public²³⁴.

The main cause for concern with regard to the fact that classification as a pet shop exempts an establishment from classification as a zoo is that the welfare standards dictated by the PAA 1951 are far less comprehensive than those for the ZLA 1981. Presumably this is because animals in a pet shop are, in theory, only there for a short period of time – by the very nature of the business, animals are not supposed to spend their entire lives in pet shops. As such their accommodation, for example, is likely to be (and is, in practice) much more rudimentary than that of animals kept in most zoos. If an establishment which is, in practice, a zoo is licensed as a pet shop, these lower standards dictate the permanent living conditions for the animals involved. In addition, pet shops are under no obligation to fulfil

²³⁴ Casamitjana, J. (2012). *Inspecting Zoos: A study of the official zoo inspection system in England from 2005 to 2011*. The Captive Animal's Protection Society, Manchester. P. 99

the conservation or education demands placed on zoos; demands which also include important provisions for animal welfare as already discussed previously.

Despite the aforementioned situation, numerous zoos do operate with both zoo and pet shop licences as local authorities appear to have taken a pragmatic approach to the issue; granting both licences to businesses with dual purposes²³⁵. Of course, when zoos are in agreement that two licences should be held, then there is no-one that is likely to challenge the decision and therefore the less-than-ideal, but practically workable, two-licence system continues to operate in zoos up and down the country. However, the problem comes if either the local authority follows the law to the letter or the business itself highlights that a zoo licence is not applicable when animals are for sale, as has occurred in the case study discussed above. Situations may arise whereby the operation of such a business is a zoo in everything but name and the proprietor or the council use the fact that a pet shop licence is in force to avoid zoo licensing (either wilfully or ignorantly). While this point may appear somewhat unimportant when considering that just one business has been outlined as avoiding zoo licensing measures by virtue of its classification as a pet shop, it is important to remember that such businesses may house hundreds of animals at any one time. The difference in terms of welfare provision and associated legal protection for the animals in question when held in for their entire lifetimes by a business governed by regulations intended to oversee only the temporary keeping (and subsequent sale) of animals is not academic but has the potential to impact legal welfare provision significantly and in the long term.

²³⁵ *Ibid.*

5.2.1 Closing the Loophole

Given that the PAA 1951 predates the ZLA 1981 by some 30 years, it should be borne in mind that the licensing of pet shops was not devised as an *alternative* for zoo licensing. Zoos did not require licences at the time the PAA 1951 was introduced and so there was no reason to create allowances within the PAA 1951 for the eventuality of a zoo which sold animals as the only relevant licence at that time was for the sale of pets. However, the wording of the newer ZLA 1981 has created a problem whereby the two pieces of legislation are pitched against one another – apparently for no good reason. Arguably, if a zoo is selling animals, it should abide by the provisions specifically designed to control the sale of animals. In particular, the clause which is present in the PAA 1951 which is not present in the ZLA 1981 is section 3(c), which ensures that animals are not sold too young. With the exception of this clause, any zoo which is selling animals and complying with the provisions of the ZLA 1981 will already be meeting or surpassing the other welfare criteria laid down by the PAA 1951 s. 3 (a), (b), (d) and (e) (in the form of the more stringent measures in the ZLA 1981). The same cannot be said if a business operating as a zoo is in possession of a PAA 1951 licence but not a zoo licence. When considered in this way, it seems to make sense that animals are better protected if a zoo licence is issued than if a pet shop licence is issued in times of doubt. Ideally, both should be issued, as has been documented by Casamitjana and others²³⁶.

It is suggested that the solution to the apparent conflict in question could be resolved by a simple amendment of S. 1(2) of the ZLA 1981, as follows (text with emphasis demonstrates proposed amended text):

²³⁶ Casamitjana, J. (2012). *Inspecting Zoos: A study of the official zoo inspection system in England from 2005 to 2011*. The Captive Animal's Protection Society, Manchester. P. 99

*“In this Act “zoo” means an establishment where wild animals (as defined by section 21) are kept for exhibition to the public otherwise than for purposes of a circus (as so defined) and otherwise than, **or in addition to, the purposes of a pet shop** (as so defined); and this Act applies to any zoo to which members of the public have access, with or without charge for admission, on more than seven days in any period of 12 consecutive months”.*

This simple change of wording would make clear that a pet shop will not normally fall within the remit of zoo licensing but, if a business has dual function (pet shop and zoo) then the local authority would be able to look to the purpose of the business and act accordingly, issuing both licences if necessary. In practice, this is what is generally happening and so this minor change would serve the purpose of bringing the law in line with standard practice. Importantly, it would also resolve the issue of zoos, such as Wickid Pets, operating under a less stringent pet shop licence simply because the business also sells animals. The same discretion granted to authorities to decide when exemptions or dispensations might be applied would still be applicable following this change and so this would not create an untenable situation whereby every pet shop which held animals either permanently or long-term would automatically require a zoo licence, but would allow the local authorities the discretion which is not granted to them under the current legislation (even though some councils have issued dual licences having apparently adopted a more pragmatic approach). Even if the closure of this loophole were to impact upon just a small handful of, arguably unscrupulous, businesses keen to avoid the rigours of zoo licensing, as noted above, it has the potential to better protect hundreds of animals housed at any one establishment.

A perhaps obvious response to the suggestion above would be to put the issue before the courts for a decision on how the two pieces of legislation should be enforced in cases such as that of Wickid Pets, and to establish a precedent to be followed going forward, however it is vital to acknowledge the constraints in cases such as these reaching the court in the first

instance. In the instance that a case with regard to animals would be brought before a court, the vast majority of these cases are brought by the registered charity, the Royal Society for Prevention of Cruelty to Animals (RSPCA). Indeed, in respect to the AWA 2006, 80% of prosecutions are brought by the RSPCA²³⁷. In the words of the charity's Head of Prosecutions "...we continue to fill the gap where the public service does not act"²³⁸. As the statement suggests, public services (including the CPS in criminal cases and relevant local and national authorities in civil or administrative cases) rarely bring cases relating to animals before the courts and so both cruelty cases and challenges to administrative decisions such as the one under discussion at present tend to fall to charities and not-for-profit groups who work to advocate change. These groups are, much like the local authorities themselves, limited in terms of resources as well as being answerable to their members, who fund the organisation's operations via donation or grants. Additionally, they may also be regulated by the Charity Commission if they are a registered charity. All of these factors influence the ability of those organisations and individuals who would like to see these legal issues brought before the courts to act as they are required to balance the cost/benefit of such activities. Invariably, using donors' contribution to seek clarity from the courts on legal points such as the one under discussion is unlikely to be considered either a priority or a justifiable expenditure (if resources are indeed available) for a small not-for-profit organisation. Put simply, cases to clarify such legal points as that which is under discussion simply will not come before a court for a decision to be taken.

²³⁷ Meyjes, T. (2016). Should RSPCA be stopped from prosecuting animal cruelty cases?. [online] Metro. Available at: <http://metro.co.uk/2016/04/10/should-rspca-be-stopped-from-prosecuting-animal-cruelty-cases-5807149/> [Accessed 3 Sep. 2017].

²³⁸ RSCPCA (2016). Prosecutions Annual Report 2016. RSPCA. Available at: <https://view.pagetiger.com/RSPCAProsecutionsAnnualreport2016> [Accessed 3 Sep. 2017]

For the reasons outlined above, a common approach to seek change is for campaigners to lobby government to amend legislation and/or policy as this is a means to achieve the same end as taking the question to court but without the small, resource-poor, NGO becoming responsible for expensive legal and court fees. Throughout this thesis, various other suggestions to amend legislation are made in cases where it might be feasible to bring the same issue before a court for a decision. The same principle applies in those cases and thus the preferred approach to seek change or improvement is to ensure that the legislation itself is as clear and unambiguous as possible in the knowledge that disputes with regard to interpretation and enforcement are highly unlikely to be brought before a court to be resolved.

5.3 Mobile Zoos and the Zoo Licensing Act 1981

The case of Tropical Inc., mentioned previously in relation to its attempt to establish a permanent zoo premises without a zoo licence, presents a sobering case study for the growing trend of mobile zoos in the UK. In January 2013, following a tip-off to staff at a UK-based animal protection charity²³⁹ by one former and one current employee, 74 animals were confiscated by the RSPCA and police from the premises belonging to Tropical Inc. for alleged breaches of the AWA 2006²⁴⁰. According to the employees, some of the animals had been kept for up to two years in the conditions in which they were found. In November 2013, the owner of Tropical Inc. was convicted of 34 offences under s.9 of the Animal

²³⁹ The Captive Animals' Protection Society (CAPS)

²⁴⁰ BBC News. (2013). Exotic animals seized by RSPCA. [online] Available at: <http://www.bbc.co.uk/news/uk-england-hereford-worcester-20908636> [Accessed 28 Dec. 2017].

Welfare Act²⁴¹. He was, however, not banned from keeping animals and continues to run his mobile zoo company today. The case raised serious concerns over the lack of effective regulation for this and similar businesses, as well as the need to address this problem as a matter of urgency in the interests of animal welfare.

5.3.1 Mobile Zoos in England

A mobile zoo is a business which usually operates from a permanent base and takes animals to events so that they can be exhibited to the public and, more often than not, be used in handling sessions. The businesses may take animals to schools, fayres, parties or corporate events. Most mobile zoos claim to deliver educational and/or conservation goals as part of their work. The animals used by mobile zoos tend to be small in size (for ease of transport) and belong to both wild and domesticated species of animal. Numbers of animals used by each business varies from a small handful of individuals to over a hundred animals. All businesses must comply with the provisions of the AWA 2006 for animals fitting the description of “protected animal” kept but there is no associated licensing or inspection regime imposed on these businesses at the current time. This is despite the fact that mobile zoos impose a specific set of circumstances on the animals, such as regular transportation and handling, which presents recognised welfare concerns, particularly for wild animal species.

²⁴¹Mail Online. (2013). TV wildlife expert kept 70 exotic animals in 'unspeakable' conditions. [online] Available at: <http://www.dailymail.co.uk/news/article-2507986/Wildlife-expert-appeared-Alan-Titchmarshs-chatshow-kept-70-exotic-animals-unspeakable-conditions.html> [Accessed 28 Dec. 2017].

Research carried out throughout 2013 and 2014 and updated in 2016 suggests that there are over 187 mobile zoos in the UK, housing a minimum of 3,500 individual animals²⁴². These businesses are not currently licensed under the ZLA 1981 but, until recently, were theoretically subject to regulation under the Performing Animals (Regulation) Act 1925 (PAA 1925). Whilst the PAA 1925 does not impose explicit animal welfare obligations upon those using animals in performance (beyond restricting infliction of cruelty during performance), it does impose a number of measures which should allow the extent of the use of animals to be ascertained if properly applied and enforced. For example, those animals used in performance must be entered onto a register, which includes basic details about the company or individual, the animals used and the way in which they are used. However, for various reasons (lack of renewal obligations and the absence of any associated regime of inspection or licensing, amongst other things), it has been widely agreed for some time that the PAA 1925 serves no meaningful purpose in the protection of animal welfare and Government officials have confirmed that it “... is not, however, intended to promote welfare and its provisions are widely regarded to be ineffective”²⁴³. In addition to the inadequacy of the legislation itself, of the 169 businesses operating as mobile zoos in 2014, 67% of them were not registered with any local authority and therefore had failed to comply with even these minimal legal obligations placed upon them²⁴⁴.

²⁴² Captive Animals Protection Society. (2016). Travelling zoos on the rise and animals increasingly at risk says animal protection charity. [online] Available at: <http://www.captiveanimals.org/news/2016/03/travelling-zoos-on-the-rise-and-animals-increasingly-at-risk-says-animal-protection-charity> [Accessed 4 Sep. 2016].

²⁴³ Radford, M., (2007), The Report of the Chairman of the Circus Working Group (The Radford Report)

²⁴⁴ Mobile Zoos. (2013). An unregulated industry - Mobile Zoos. [online] Available at: <http://mobilezoo.org.uk/unregulated/> [Accessed 4 Sep. 2016].

Despite its limited regulatory impact, one benefit in relation to the application of the PAA 1925 to mobile zoo businesses is that it grants powers of inspection to the local authority. This is regardless of whether or not the business has registered under the PAA 1925 and therefore could be used in relation to businesses which had failed to register. Unfortunately, legal advice issued in 2014²⁴⁵ to a local authority by a DEFRA lawyer and subsequently circulated widely has suggested that registration under the PAA 1925 is no longer deemed necessary by the government department for mobile zoo businesses. This is a worrying prospect for those concerned about the current lack of regulation in place for this industry. If councils follow this advice, the powers of entry and inspection granted to them by the PAA 1925 would no longer be applicable and inspection of mobile zoo premises would be restricted to those carried out with a warrant under the AWA 2006. Warrants are granted under the AWA 2006 only if there is reason to believe that an offence has been committed (in comparison to the spot-check inspections permitted under businesses which fall within the remit of the PAA 1925). If mobile zoos no longer have to register with local authorities and these powers of inspection are taken away, both the identification of businesses using animals in this way, and the ability to scrutinise them is severely limited by DEFRA's legal analysis. Hundreds of businesses, housing thousands of animals, may effectively fall 'below the radar'. At the time the advice was released by DEFRA, queries were raised by the author surrounding the Government department's jurisdiction to interpret legislation as this role falls to the judiciary. It was confirmed by DEFRA in correspondence that, despite their legal advisor's views, "it is for the Courts to provide an authoritative interpretation of the legislation. DEFRA's view is not conclusive and, clearly, local authorities should reach their own view as to how the law applies to their regulatory activities"²⁴⁶. Thus, whilst the DEFRA

²⁴⁵ Confirmed in correspondence between the author and DEFRA official in January 2014.

²⁴⁶ Pers. Corr. between the author and DEFRA.

opinion may be persuasive to local authorities seeking guidance, it should not be considered to provide a definitive interpretation of the law. That said, it is worth reiterating that, whether DEFRA's interpretation of the law is correct or incorrect, it is unlikely to be decided one way or another in the courts for the reasons outlined previously with regard to challenging decisions relating to pet shop licences. That is, that the organisations and individuals raising concerns over these practices are largely NGOs or charitable organisations which do not have the resources or expertise to bring these cases before a court with a view to establish precedent.

Despite the confusion surrounding the applicability or otherwise of the PAA 1925 to mobile zoos, as a result of the lack of regulation, mobile zoos are set apart from most other animal-use industries which, as a general rule, are subject to some form of control above and beyond the general provisions of the AWA 2006. This is in spite of the fact that the mobile zoo industry uses many animals of wild species which would be subject to zoo licensing regulations if the businesses using them were classified as zoos in the traditional sense.

5.3.2 Why Are Mobile Zoos Not Subject to Specific Legislation?

At the time that the ZLA 1981 was introduced, mobile zoo businesses were largely unheard of. Following the introduction and subsequent widespread use of the internet, hobbyists with animal collections began to seek commercial recompense by hiring out their animals as part of educational or recreational activities, with many using the internet as a means to advertise and promote their new ventures. Some of these businesses have now developed into sophisticated operations which offer a large number of activities to a range of different audiences. As noted above, research carried out in 2013/2014 and updated in 2016 suggested that there were at least 187 individual mobile zoo businesses operating in the UK.

That there is no evidence to suggest that mobile zoo businesses were in widespread operation when the ZLA 1981 was introduced suggests that these businesses were not assessed and then deliberately excluded from regulation, but that they are newly developed operations which were simply not in existence when the law was introduced. Absence in Hansard records of discussion surrounding mobile zoo operations during the passage of the ZLA 1981 supports this theory, as does the fact that, unlike circuses and pet shops, no explicit exemption is granted to mobile zoos in the legislation. It is argued that the lack of regulation for mobile zoos represents a failure in law to protect animals whose welfare is offered protection in other, similar, circumstances. In order to remedy this gap in legislation, it is suggested that the operation of these businesses should be brought under regulatory scrutiny. It is further maintained that, due to the similarities between mobile zoos and traditional zoos, the ZLA 1981 can be interpreted as encompassing mobile zoo business without need for amendment.

5.3.4 The Potential for Application of The Zoo Licensing Act 1981 to Mobile Zoos Businesses

Mobile zoos have arguably been considered to fall outside of the definition of a “zoo” (as defined by s. 1 (2) of the ZLA 1981) by virtue of the fact that their premises are not open to the public. Instead, the animals are taken from the premises to different locations around the country in order to facilitate their displays and events. Other than this, mobile zoo businesses house many of the same wild animals that zoos hold, they make claims that they serve both educational and conservation purposes and, in some instances, explicitly refer to

themselves as zoos; for example: Zoo2U²⁴⁷, ZooLab²⁴⁸, Kimmy's Mobile Zoo²⁴⁹, among others.

As previously noted, s. 1(2) of the ZLA 1981 defines a zoo as follows:

“In this Act “zoo” means an establishment where wild animals (as defined by section 21) are kept for exhibition to the public otherwise than for purposes of a circus (as so defined) and other than in a pet shop (as so defined); and this Act applies to any zoo to which members of the public have access, with or without charge for admission, on more than seven days in any period of 12 consecutive months”

The EC Zoos Directive (1999/22/EC), from which the definition in the ZLA 1981 is derived is as follows:

“ ‘zoos’ means all permanent establishments where animals of wild species are kept for exhibition to the public for 7 or more days a year, with the exception of circuses, pet shops and establishments which Member States exempt from the requirements of this Directive on the grounds that they do not exhibit a significant number of animals or species to the public and that the exemption will not jeopardise the objectives of this Directive”.

The EC Directive mandates that establishments should be permanent and does not explicitly demand that the public “have access” to the establishment, but merely that the animals are kept by the establishment for the purpose of exhibition to the public for seven days a year or more. The relevance of this will be explored shortly.

In s. 1 of the ZLA and the EC Directive definition, the term “establishment” is not defined.

The common definition of the word “establishment” is “an organisation, institution or hotel²⁵⁰”. Elsewhere in the ZLA 1981, the terms “zoo premises”²⁵¹ and “premises of the zoo”

²⁴⁷ More information: <http://zoo2u.co.uk>

²⁴⁸ More information: <http://www.zoolabuk.com>

²⁴⁹ More information: <http://www.kimmyszoo.co.uk/>

²⁵⁰ Oxford English Dictionary, 10th Edition

²⁵¹ Eg. S.1(2)(c), S1A and others.

are referred to with “premises” given its ordinary meaning of “the building or land occupied by a business”²⁵². If a zoo is an “establishment” then it stands to reason that the legislature did not intend for the word “zoo” to relate specifically to “premises” otherwise the use of the terms “zoo premises” or “premises of the zoo” would be superfluous as they would be one and the same thing.

The zoo is, therefore, presumed to be something more than the premises itself. Indeed, when we consider s. 1A of the ZLA 1981, it becomes clear that the zoo cannot be considered to be simply the premises of the business as the zoo is required to take part in conservation programmes and education programmes. It is required to keep records and it is recommended that it is involved in the release of animals, amongst other things. It is of course, not possible for a premises to do such things but it is possible for an organisation or institution to do these things. It stands to reason, therefore, that references to a “zoo” under the ZLA 1981 refers to the organisation itself and extends beyond the static premises of the zoo. This theory is supported by the fact that this interpretation would give the term “establishment” as used in the legislation its ordinary meaning.

With the above analysis in mind, when considering s. 1(2) of the ZLA 1981 and the demand that members of the public must have access to the zoo for seven days a year or more for a business to fall within the zoo definition, we can interpret this to mean that members of the public must have opportunity to see the animals exhibited by the zoo for seven days a year or more, but not necessarily the physical premises where the animals are kept as access is required to the “establishment”, not the premises. This view is supported by the definition within the EC Zoos Directive, upon which the definition within the current ZLA 1981 derives

²⁵² Oxford English Dictionary, 10th Edition

its meaning. The EC Zoos directive demands that the establishment (already defined as something more than simply the zoo premises) must keep animals for exhibition to the public for seven days a year or more. The EC Directive is silent upon the need for members of the public to access the premises in order to see those animals exhibited.

Of course, some static zoos are assessed and found to be eligible for a s.14(1)(a) dispensation which exempts the business completely from licensing (but nonetheless requires both initial assessment and ongoing monitoring to ensure that the dispensation continues to apply) or a 14(2) dispensation. These might apply to collections which are not made up of wild mammals (and do not exceed 120 individuals (potential 14(1)(a) exemption) or those which have no more than 50 conservation sensitive wild mammals in the collection (14(2) dispensation). Alternatively, collections which contain non-conservation sensitive, non-hazardous wild species (not including wild mammals) that do not exceed 200 individuals might be granted a 14(1)(b) dispensation. In practice, a number of mobile zoos would be likely to fall under some form of dispensation, but it seems unlikely that all of them would.

When interpreted in this manner, it stands to reason that mobile zoos keep animals for exhibition to the public for more than seven days a year and the public are given access to the establishment's services in that the animals are transported to the events on request. It could be argued that only a small number of the animals in the mobile zoo are accessed by the public at any one time, but this is of no concern. There is no stipulation in the legislation that the public need access to all of the animals in the zoo and, in fact, it will regularly be the case that members of the public visiting a static zoo will not have access to all the animals on site. For example, a sanctuary for ex-pet primates, The Monkey Sanctuary in Cornwall, is licensed as a zoo but some of the animals, due to traumas that they suffered in the past, are

kept 'off show' in order to meet their welfare needs²⁵³. That some of the animals are permanently 'off show' does not exempt the sanctuary from the rigours of zoo licensing.

S.2(c) refers to references to closure of the zoo to the public but this can also be read in line with the interpretation above even if the premises themselves are not open to the public in that s. 2(c)(ii) allows for "ceasing to exhibit animals of a particular description to the public" can be read so as to include the exhibition of animals off the zoo premises.

It is suggested that the current absence of specific regulation for the expanding mobile zoo industry can be remedied in part by clarifying the interpretation of the existing ZLA 1981 in such a way that the term "zoo" is understood to refer to the wider organisation, of which the premises where the animals are normally kept form just one part. The ZLA 1981 and the EC Directive from which the amended version of the Act derives, both allow for this interpretation and, indeed, in parts rely on this interpretation in order for the zoos to deliver upon their licensing obligations.

Of course, it must be accepted that, on inspection for compliance with the standards of the ZLA 1981, it may be found that due to the very nature of mobile zoos, some mobile zoos are simply unable to meet the relevant legal requirements. If this is the case then those businesses would fail to gain a licence to operate and thus be forced to end operation. If it were found that the welfare concerns for the animals used by mobile zoo businesses could not be remedied by regulation, there is the possibility of prohibiting the operation of mobile zoos under either primary legislation or regulations introduced under powers granted by S.

²⁵³ Monkeysanctuary.org. (n.d.). FAQs | Monkey Sanctuary. [online] Available at: <http://www.monkeysanctuary.org/plan-your-visit/faqs/> [Accessed 4 Nov. 2017].

12 of the AWA 2006. Failure to take any action at all to regulate mobile zoo business could reasonably be considered to fall within the scope of “*jeopardising the objectives*”²⁵⁴ of the EC Zoos Directive. Given its aims, there seems to be no logical reason why mobile zoo businesses should be given a blanket exemption because the animals are moved around. Indeed, many would agree that the regular transport of animals and the regular handling of them by members of the public (something not normally carried out in traditional zoos) presents both animal welfare and public safety concerns that might not be relevant in the traditional zoo environment.

5.3.5 Conclusion

This chapter has considered businesses which use animals in very similar ways to those which are subjected to regulatory licensing, and yet are under no regulatory obligations (beyond the general provisions of the AWA 2006) themselves. The only way in which a licensing regime can protect animals used in ways which present a risk to the wellbeing of those animals is if the licensing regime is applied to *all* businesses which use animals in the same way. If animals, such as those used in static circuses or mobile zoos are exempt from regulation despite their use being almost identical to other, regulated, uses, then it is undesirable for those animals not to be protected to the extent that those under regulation are. Dealing with these discrepancies would allow for better monitoring and oversight, at the very least, and the potential for improved welfare at best.

This chapter has explored exemptions to zoo licensing for businesses which, to a greater or lesser extent, resemble zoos in their structure and operation. Suggestions have been made regarding how these businesses might be better-regulated via minor amendment of existing legislation or amending the way in which the law regarding these businesses is currently

²⁵⁴ Article 2, Council Directive 1999/22/EC

interpreted and applied. The chapter which follows will look at the practical enforcement of the ZLA 1981 with a view to establishing its practical efficacy in regulating animal use in zoos.

Chapter Six: Enforcing the Zoo Licensing Act 1981

Notwithstanding the foregoing discussion with regard to exemptions and loopholes, it is unarguable that the majority of businesses operating as zoos do indeed fall under the practical control of the ZLA 1981. This chapter will therefore consider its practical application and the impact upon animal welfare it has.

6.1 The Operation of the Zoo Licensing Act 1981²⁵⁵

Any business which meets the definition outlined in s. 1(2) of the ZLA 1981 (a definition discussed in some detail in the foregoing chapter) must either be in possession of a licence issued by the relevant local authority in order to operate²⁵⁶ or be granted a dispensation under s. 14(1)(a) of the Act which exempts the business from licensing obligations. The application for a licence must be made in line with the requirements of s. 2 of the Act. The local authority must then consider the licence in light of the requirements outlined in s. 3 and the decision to grant or refuse the licence is governed by s. 4. Under s. 4, the local authority is obligated to refuse a licence if it is believed that the grant of a licence would “injuriously affect the health or safety of persons living in the neighbourhood of the zoo, or seriously affect the preservation of law and order” or if it is believed that the mandatory provisions of s. 1A²⁵⁷ will, not be met. A licence must also be refused, or the grant of a licence postponed, if planning decisions remain outstanding.

²⁵⁵ Unless otherwise stated, reference to the Zoo Licensing Act 1981 from this point onwards refers to the Act in its current form.

²⁵⁶ S. 1 (1)

²⁵⁷ Outlined in Chapter 3.4

The local authority has discretion to refuse to grant a licence if the applicant (or a keeper at the zoo) has been convicted under relevant animal welfare-related legislation or if “they are not satisfied that the standards of accommodation, staffing or management are adequate for the proper care and wellbeing of the animals or any of them or otherwise for the proper conduct of the zoo”²⁵⁸.

Under s. 14, the local authority²⁵⁹ or the zoo itself²⁶⁰ has the ability to apply to the Secretary of State for a dispensation for the zoo if the zoo is particularly small, has few animals or animals of few species. If granted, a dispensation may have the effect of exempting the zoo from the provisions of the Act altogether²⁶¹, limiting the number of inspectors required during inspections²⁶² or limiting the number and type of inspections required under the Act²⁶³. DEFRA guidance states, while each case is considered on its merits, zoos that have more than 50 ‘conservation-sensitive’²⁶⁴ or ‘hazardous’²⁶⁵ animals in their collection should not normally be granted a dispensation²⁶⁶.

²⁵⁸ S. 4 (3)

²⁵⁹ S. 14(1)

²⁶⁰ S. 14 (2)

²⁶¹ S.14(1)(a)

²⁶² S.14(2)

²⁶³ S.14(1)(b)

²⁶⁴ Defined as: “any species listed in Appendix I of CITES and/or listed in the following categories of the IUCN Red List of Threatened species (Extinct in the wild; Critically Endangered; Endangered; Vulnerable). (Zoo Licensing Act 1981: Guide to the Act’s Provisions, DEFRA, 2012)

²⁶⁵ Defined as: “any species listed in categories 1 and/or 2 of Appendix 12 of the Secretary of State's Standards of Modern Zoo Practice” (DEFRA (2017). Zoo Licensing Act 1981: Guide to the Act’s Provisions. London: DEFRA. Annex C)

²⁶⁶ DEFRA (2017). Zoo Licensing Act 1981: Guide to the Act’s Provisions. London: DEFRA.

Local authorities are responsible for the enforcement of the Zoo Licensing Act²⁶⁷, supported by guidance from DEFRA²⁶⁸ and advised periodically by Government-appointed inspectors²⁶⁹. Acts or omissions which constitute offences under the Act are outlined in s.19 (1), (2) and (3) as follows: operating without a licence, failing without reasonable excuse to comply with a licence condition and intentionally obstructing an officer acting pursuant to the Act. Ss. 19 (3A) - (3G) outline offences for failure to comply with directions issued under s.16 of the Act (see below) and other related offences, including failure to display the zoo licence at the entrance to the zoo. At the time of writing, offences under ss. 19 (1), (2), (3A), (3B), (3C), (3E) or (3F) are liable on summary conviction to a fine of no more than level four (currently £2,500) on the standard scale. Offences under subsections (3), (3D) or (3G) are liable on summary conviction to a fine of no more than level three (currently £1,000) on the standard scale.

S. 1A of the Act incorporates the provisions of the EC Zoos Directive²⁷⁰, compliance with which is mandatory for all zoos. Despite their mandatory nature, failure to comply with the provisions of s.1A does not constitute an offence under the Act. Instead, the obligation is placed upon the local authority to ensure that the zoo is licensed in accordance with the provisions of s.1A, rather than the legislation itself making a direct demand on the zoo that the provisions of s.1A be met. As seen above, failure to comply with conditions without reasonable excuse is an offence under s.19 (2) of the Act and failure to comply with conditions within an agreed timescale can lead to zoo closure under section 16A of the

²⁶⁷ S.1(3)

²⁶⁸ E.g. Secretary of State's Standards of Modern Zoo Practice and Zoo Licensing Act 1981: A Guide to the Act's Provisions, DEFRA (2012)

²⁶⁹ S.8

²⁷⁰ European Council Directive 1999/22/EC

same. As such, it is therefore by adding conditions to the zoo's licence that the provisions of s.1A (and other sections which are not directly enforceable) are given legal force. In order to fulfil their obligation under the Act, local authorities must attach conditions to the licence of every zoo which demand compliance with s. 1A. As outlined in previous chapters, it is s. 1A (c) whose provisions impact most upon animal welfare.

In order to encourage the inclusion of the mandatory conditions in zoo licences, DEFRA included suggestions for wording of the relevant conditions in a circular issued in 2003 to all local authorities²⁷¹. Zoos found to be non-compliant with any one of these licence conditions at the time of inspection must be issued with a 'Direction'²⁷² and given a timeframe within which they must meet the required standard. That timeframe can be up to, but not exceeding, two years²⁷³. If the zoo continues to fall below standard after the agreed timeframe, the local authority must close the zoo (or the relevant part of it) permanently to the public²⁷⁴.

Local authorities have the discretion to add conditions to zoo licences which do not relate to the provisions of s. 1A but they cannot include any conditions which relate solely to the health, welfare and safety of persons working at the zoo²⁷⁵ or any condition which is inconsistent with the provisions of s. 1A²⁷⁶.

²⁷¹ DEFRA. (2003). Government Circular 02/2003 – Zoo Licensing Act 1981, London: DEFRA [Available at: (<http://archive.DEFRA.gov.uk/wildlife-pets/zoos/documents/zoo-gc022003.pdf>)]

²⁷² S.16A

²⁷³ S.16A(2)(c)

²⁷⁴ S.16B

²⁷⁵ S.5(7)

²⁷⁶ S.5(5A)

Failure to meet conditions other than those relating to the delivery of provisions outlined in s. 1A also leads to consequences for the zoo but, in the case of failure to comply with a non-s. 1A condition, the local authority has some discretion to decide timeframes for compliance and can choose whether to close the zoo or not in the event of failure to comply²⁷⁷. With s. 1A conditions, the local authority does not have this flexibility due to the mandatory nature of enforcement action required by local authorities in the event of a s. 1A condition being breached²⁷⁸.

6.2 The Inspection Process

In order to assess compliance, the standards outlined in the Act are underpinned by a system of inspection which can be broadly summarised as follows:

Zoos are inspected by inspectors from both the local authority and from two lists which are drawn up and maintained by DEFRA, on advice from the British and Irish Association of Zoos and Aquaria (BIAZA) and the British Veterinary Association (BVA)²⁷⁹. One DEFRA list is made up of government-appointed (DEFRA) inspectors with expertise on managing zoos and the other is made up of government-appointed (DEFRA) inspectors who are qualified vets. DEFRA inspectors (accompanied by local authority inspectors) carry out what are known as ‘formal’ inspections. These comprise first inspections for new zoos, periodical inspections at around the midway point of the zoo’s licence and renewal inspections prior to the licence

²⁷⁷ S. 16B(4)

²⁷⁸ S. 16A(2) demands that the authority **shall** make a direction in the event that a condition is breached and s. 16B demands that the authority **shall** make a zoo closure direction if the original direction is not complied with [my emphasis]. Other parts of the legislation clearly state that the authority “may” take enforcement action. The use of the word “shall” makes it clear that the authority is required to act on breaches of conditions.

²⁷⁹ S.8(1)

expiration²⁸⁰. The local authority carries out what are known as ‘informal’ inspections unaccompanied by a DEFRA representative in each intervening year when a formal inspection is not carried out²⁸¹. If a specific concern has been raised with regard to the operation of the zoo, a ‘special’ inspection might be carried out in addition to, or instead of, an informal inspection²⁸². The process of inspection is what leads to the grant, refusal, amendment or confirmation of compliance with conditions of a licence. Specific details regarding each type of inspection are as follows:

1. First Inspections²⁸³ are carried out to assess whether a new zoo meets the standards laid out in the Act. If it is deemed that the zoo is likely to meet the standards (which is often a hypothetical decision at this point because the zoo should apply for the licence before it starts to operate as such), then it will be recommended that the licence is granted. When a licence is granted for the first time, it lasts for four years²⁸⁴. Subsequent licences are granted for a period of six years²⁸⁵.

²⁸⁰ S.10(3)

²⁸¹ S.12

²⁸² S.11

²⁸³ S.9A

²⁸⁴ S.5(1)

²⁸⁵ S.5(2)

2. Periodical Inspections²⁸⁶ are carried out during the first year of a new licence (a four-year licence)²⁸⁷ and during the third year of a renewed or fresh licence (a six-year licence)²⁸⁸.
3. Renewal Inspections²⁸⁹ are carried out no later than six months before the expiry of a licence²⁹⁰.
4. Informal Inspections – must be carried out in every year that no other type of inspection is carried out²⁹¹. They are carried out by the local authority only, with no DEFRA representative in attendance. Special inspections sometimes (but not always) replace an informal inspection.
5. Special Inspections²⁹² – usually carried out to assess a specific issue or concern, which has arisen outside the normal inspection timetable. This might include a complaint or concern raised about the zoo in question, it might be carried out to

²⁸⁶ Legally, a Renewal Inspection is a type of Periodical Inspection and therefore is governed by S10 (3) of the ZLA. Practically, and in relation to inspection reports, DEFRA splits this type of inspection into two. For the purpose of this report, and for ease of interpretation of the data, any referral to a “Periodical Inspection” is made in reference to the inspections carried out during year one (for a four year licence) and year three (for a six year licence) and any referral to a “Renewal Inspection” is made in reference to the inspection carried out no later than six months before the expiry of a licence. This differentiation has no bearing on the interpretation of the data or legal consequences flowing from them.

²⁸⁷ S.10(3)(a)

²⁸⁸ S.10(3)(b)

²⁹⁰ Either 10(3)(a) or 10(3)(b), dependent on the duration of the licence to which it relates

²⁹¹ S.12(1)

²⁹² S.11

confirm compliance with existing licence conditions or for any other reason as the local authority sees fit. These inspections can be carried out without giving the zoo proprietor notice, unlike formal inspections, which are arranged in advance. These inspections can be carried out by the local authority inspectors alone or can be accompanied by DEFRA inspectors. If the issues to investigate are related to animal welfare, a vet must be in attendance.

In order to assist inspectors in their assessment of zoos, a number of forms have been devised by DEFRA, which can be filled in during an inspection. The forms differ slightly, depending on whether the inspection is for a first licence (form ZOO3²⁹³), or for a renewal or periodical inspection (form ZOO2²⁹⁴) but, as a general rule, the forms ask specific questions, which relate directly back to the legislation.

The forms are designed to offer a Yes/No/Not Applicable answer in relation to legal standards, with an area for notes, recommendations and comments, an area to include any additional licence conditions which the DEFRA inspector believes should be attached to the zoo's licence, a check to see if existing licence conditions have been met and a tick box to say whether the inspector recommends that a licence is granted, granted with additional conditions, amended or refused. The majority of formal inspection reports are completed using the DEFRA forms. See Figures One and Two below for excerpts from form ZOO2.

²⁹³ Available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408849/zoo3-licence-inspection-report.pdf

²⁹⁴ Available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408848/zoo2-inspection-report-form.pdf

1. Provision of food and water	Marking Yes No N/A	Comments/clarification
Section 1A(c)(ii) ZLA 1981:		
1.1. Are animals provided with a high standard of nutrition?	Select	
1.2. Is food and drink that is supplied appropriate for the species/individual?	Select	
1.3. Are supplies of food and water:	Select	
(a) kept hygienically?	Select	
(b) prepared hygienically?	Select	
(c) supplied to the animal hygienically?	Select	
1.4. Has natural feeding behaviour been adequately considered to ensure that all animals have access to food and drink?	Select	
1.5. Are feeding methods safe for staff and animals?	Select	
1.6. Is feeding by visitors permitted?	Select	
(a) if 'yes', is it properly controlled?	Select	

Figure 1: Column 1 = Assessment criteria and relevant section of the Act, Column Two: Answer area, Column Three: Notes

Inspecting team's recommendation to the local authority

Having inspected (name of zoo)

on:

the inspecting team make the following recommendation: *Please tick appropriate box*

- it is recommended that a licence be refused.....
- it is recommended that the above collection be licensed in accordance with the ZLA 1981 subject to the conservation measures in section 1A
- it is recommended that the above collection be licensed in accordance with the ZLA 1981 subject to the conservation measures in section 1A and the following Additional Conditions (N.B Additional Conditions must be clearly worded so as to be enforceable and a timescale applied for compliance)
- it is recommended that the following alterations be made to the above collection's licence conditions

Additional Conditions (if appropriate)

Figure 2: Recommendation to Local Authority and Suggested licence conditions

The ZOO2 form, which was subject to some minor changes in 2012, is made up of 100 questions to be answered by the inspector. Of those 100 questions, 63 questions relate to compliance with s.1A of the Act (made clear by the inclusion of a reference to the relevant s.1A subsection next to the relevant question, see Fig. 1), one question relates to compliance with s.19 (3G) of the Act (regarding public display of licence) and one question helps to inform understanding of compliance with s. 19 (2) (regarding failure to comply with conditions without reasonable excuse) as well as indicating a need for action under s.16A (1) (the need for a direction to be issued in the event of non-compliance with a licence condition). The remaining questions help to inform compliance of the zoo with other important standards; including animal welfare and safe transport of animals. Unlike the provisions of s.1A, it is not mandatory for conditions in relation to these other standards to be attached to the licence. Thus, while the local authority is advised that, in deciding what conditions to attach to a licence, it must have regard to the standards outlined by the Secretary of State in the Standards of Modern Zoo Practice, it is not subject to any absolute requirement to add licence conditions other than those relating to s. 1A.

Formal inspection rules include a requirement for a report to be completed and submitted to the local authority²⁹⁵, as do special inspections (albeit an abridged version)²⁹⁶. Legally, reports do not need to be completed following informal inspections, but it is strongly recommended in DEFRA guidance that a report is completed regardless²⁹⁷.

²⁹⁵ S.10(5)

²⁹⁶ S. 11(5)

²⁹⁷ DEFRA. (2003). Government Circular 02/2003 – Zoo Licensing Act 1981, Annex to Circular, Clause 75. [Available at: <http://archive.DEFRA.gov.uk/wildlife-pets/zoos/documents/zoo-gc022003.pdf>]

Issues or concerns identified during an inspection and recorded in inspection reports do not create any legally binding obligations on the zoo as it is the local authority and not the inspector, which has jurisdiction to impose licence conditions. As such, the reports act as guidance and offer recommendations to the local authority as to what, if any, conditions the inspectors believe should be attached to the zoo's licence and what, if any, improvements might need to be made. As a general rule, and with the exception of those acts or omissions which constitute an offence under s.19 of the Act, it is only when the local authority adds conditions to the licence of the zoo that the inspector's recommendations become legally binding upon the zoo.

As the DEFRA inspector acts in an advisory capacity, the local authority must choose whether to act on the advice given and must refer to the legislation to ensure that any amendment to the licence is in line with what the Act says the authority must do. If the condition relates to a failure to meet s. 1A provisions²⁹⁸, the local authority must also issue a direction under s. 16A of the Act. If the condition relates to a non-s. 1A provision, then a direction is only necessary if the zoo has already been notified of the issue and it already has a condition attached to its licence. As well as giving rise to action under s. 16A, failure to comply with a condition is also an offence under s. 19 of the Act.

If a direction has been issued and not complied with, the zoo (or part of it) must be closed (if the condition relates to s. 1A) or can be closed, (if the condition relates to something other than s. 1A) at the local authority's discretion.

²⁹⁸ On the proviso that the original licence was correctly issued subject to the mandatory S1A conditions.

6.3 Assessing the Extent to which The Zoo Licensing Act 1981 is Enforced with Respect to Non-Compliant Zoos

As outlined in the previous section, there are two main mechanisms by which enforcement action can be carried out against zoos found during inspection to be non-compliant with the provisions of the ZLA 1981. The first is by identifying that an offence has been committed for the purposes of s.19 of the Act and bringing charges against the zoo; for example, for failing to comply without reasonable excuse with a condition attached to the licence or failing to display the licence and conditions at the public entrance. If found liable on summary conviction of an offence under s.19, the zoo (both the body corporate and individuals acting in the relevant capacity) may be fined in line with the penalties outlined earlier. In practice, prosecution of zoos under s.19 are rare and no data was provided relating to evidence of prosecution under s.19 of the Act by local authorities as part of this research. That said, the case study discussed in Chapter 4.6 of this thesis demonstrates that at least one prosecution has occurred under the Act but very little information is available regarding proceedings as the council in question (Waveney Council) failed to provide responses to the Freedom of Information request issued as part of this research with regard to prosecutions.

The second mechanism for enforcement is the addition of conditions to the zoo's licence and, in the event that the zoo is found non-compliant with such conditions within the agreed timeframe, the issuance of a direction under s.16A of the Act. The direction will outline a clear timeframe by which action needs to be taken and, in the event that the terms of the condition are still not met within this timescale, all or part of the zoo must be closed to the public.

These two approaches combined, if properly applied, provide remedies which see non-compliant zoo operators fined for failure to meet standards under s.19 and a process, via s.16A and associated sections of the Act, which provides a long-term solution for the animals held by the zoo should the establishment persistently fail to meet standards and the zoo be mandatorily closed (as outlined in s. 16E of the Act).

In order to assess the extent to which enforcement action is carried out against non-compliant zoos it is therefore essential to establish the extent to which the enforcement tools available to local authorities are used when non-compliance is recognised.

6.4 Data Collection

Data was collected relating to the period 1st January 2008 to the 10th July 2014 (the date on which the Freedom of Information request was made to councils).

Only zoos in England were considered because, while the Zoo Licensing Act 1981 applies to England, Scotland and Wales, other parts of this research consider interplay between various pieces of legislation²⁹⁹ which apply only in England.

As outlined in Chapter 4.1 on the Size and Shape of the Zoo Industry, the list held by DEFRA of zoos in England is not kept up to date and so data collection had to include ensuring that zoos currently in operation were effectively captured for assessment. In order to do this, the requests included in Appendix 1 were sent via email to the relevant Freedom of Information officer/department of every local council which had a zoo listed in relation to it on the

²⁹⁹ E.g. The Welfare of Wild Animals in Traveling Circuses (England) Regulations 2012

DEFRA list of zoos, 2012 (the most recent list available of registered zoos in England)³⁰⁰. A second email was sent to councils with no zoo listed in order to see if new establishments had opened in the last two years. Requests were made for inspection reports, licences, correspondence, stock lists and copies of any directions issued to the zoo during the period. A third email was sent at a later date to all councils requesting information relating to prosecutions carried out under s.19 of the Act.

In total, emails were sent to 326 English councils. 318 councils responded to the request for information relating to Emails One and Two (see Appendix One), a 98% response rate. Three councils refused to provide information on grounds of exemptions to Freedom of Information requirements. These refusals were challenged and pursued to internal review stage in the ground that the information had been erroneously withheld. One complaint was upheld, and the information subsequently released, the other two were not.

Of the 218 known licensed zoos (classified as establishments licensed under the ZLA 1981 and excluding those establishments granted a full dispensation under s.14(1)a of the Act so that the provisions of the Act are not deemed to apply) operating currently in England, relevant information was received in relation to 185 of them (representing 85% of all English zoos). Of the remaining 33, no information at all was received from councils with regard to 27 of the zoos, for one zoo no formal inspection reports were provided and the remaining two zoos had opened very recently and so there were no formal inspection reports available for them.

³⁰⁰AHVLA (2012). AHVLA list of zoos operating in England (November 2012). [online] Bristol: DEFRA. Available at:
<http://webarchive.nationalarchives.gov.uk/20140708225757/http://www.defra.gov.uk/ahvla-en/files/cites-zoo-list-england.pdf> [Accessed 24 Nov. 2017].

In response to a follow-up Freedom of Information request enquiring about prosecutions carried out under the ZLA 1981 sent to all English councils with zoos operating within their jurisdiction and included in the study, 103 councils provided information in relation to 170 zoos. Eleven councils provided no information despite having zoos in their area. This included Waveney Council, where we know that a prosecution had been brought under the Act.

6.5 Data Entry

Only formal inspection reports (using the DEFRA ZOO2 form), excluding those for first inspections, were used in the data input stage as it is the formal inspection which are completed by government officials and it is formal inspections which generally give rise to licence renewal, new conditions being added to the licence and alteration of the licence. First inspection reports, as noted previously, provide predictions as to whether standards will be met when the zoo is opened in the future and therefore cannot be considered to be assessing compliance with the legislation at that time. Informal inspection reports provide useful supplementary information but follow no specific format and do not necessarily inspect all elements of the zoo's operation or its compliance with the legislation. As such, informal inspection reports are not deemed to be reliable indicators of compliance with the legislation.

As noted above, the ZOO2 form used by inspectors to assess zoos was updated in late 2012 and came into use proper during 2013 (though some inspectors continued to use the old form throughout 2013). Relevant adjustments have been made in the data input stage of this research in order to ensure that changes in the form, and the potential impact upon the

data, have been properly accounted for. The changes to the form did not significantly alter its meaning, but a clear explanation of how the old and new forms have been interpreted for the purposes of this study is outlined in Appendix Two.

In total, 307 formal inspection reports relating to 185 zoos located across 113 different local authorities were analysed. The maximum number of reports provided for any zoo was three (17 zoos), two reports were provided for 88 zoos and one report was provided for 80 zoos. As such, it should be noted that adding up the number of zoos in each year will not give the total number of zoos, but the total number of reports, as some zoos are represented in more than one year.

The reason that numbers of reports per zoo varied can be attributed to a number of factors. With the exception of the four-year licence issued when a zoo opens for the first time, zoo licences normally last for six years. During the period of the licence, the zoo should be subject to two formal inspections (a periodical inspection at around the midway point of the licence and a renewal inspection prior to the licence's expiration). As such, and given the approximately 6.5-year period under examination, a period longer than the full term of either the four year or six year licence, one would expect to receive at least one periodical inspection report and one renewal inspection report for all zoos which were already in existence prior to 2008. In some cases, for example for zoos whose licences expire approximately midway through the study period (2011), one might expect to see three inspections as the zoo may have had a periodical and renewal inspection carried out during the previous licence and a periodical under the new licence within the period covered by this study.

Just one report might be expected from zoos whose known formal inspection was carried in the middle of the study period. This is because, in this instance, the previous report could have been carried out just before the beginning of the study period and the subsequent report might be due just after the end of the study period. On analysis of the relevant date information provided in the available reports, this situation appears to apply to 12 zoos. The other circumstances in which only one report would be expected is in the case that the zoo opened during the period of the study and therefore has not been subject to a full complement of formal inspections yet. On analysis of relevant reports, this was found to apply to 15 zoos.

Of the remaining 54 zoos for which only one report was received, analysis of the date information provided in the available reports showed that 30 zoos had had previous inspections carried out during the study period, but the council had not provided them in response to the Freedom of Information request. As the councils were asked to provide all reports which they had in their possession, it can be concluded that these councils do not hold historical reports for the zoos in their area. It should be noted that there is no legal obligation to hold historic reports but, in practice, most authorities appear to do this regardless. In the case of 13 zoos, the date information on the available reports suggested that a formal inspection should have been carried out later in the study period but no evidence of these inspections being carried out was provided.

Finally, for the remaining 11 zoos, the date information on the available reports was partially missing, and it was therefore not possible to ascertain whether or not the provision of just one report for that zoo was correct or not.

The reports provided by local authorities were distributed across the years as follows:

	2008	2009	2010	2011	2012	2013	2014
# of zoos per year/reports	32	44	50	54	38	62	27

Figure 3: Reports used as part of this study.

All data from all formal inspection reports provided was entered into a Microsoft Excel workbook. Each zoo was allocated its own sheet within the Excel workbook and all data for each zoo was recorded on the same sheet. Data was inputted by noting whether the inspector answered “Yes”, “No”, “N/A”, or provided no answer to questions with regard to compliance with standards (both legal and otherwise).

Where a “No” answer was recorded by the inspector, this was deemed to indicate non-compliance with the criteria to which the question related. Where a “Yes” answer was noted by the inspector, this was deemed to indicate compliance with the criteria to which the question related. This was the case even when the accompanying notes suggested that the “Yes” answer was incorrect. For example, if an inspector marked “Yes” to the question: “Do animals on display to the public appear to be in good health?” before going on to list a number of animals with physical ailments which needed treatment, it would appear that despite the “Yes” answer, the zoo is, in fact non-compliant with the criteria to which the question corresponds. This issue relating to interpretation of inspection reports has been identified in other studies (ie: CAPS/Casamitjana 2012³⁰¹, Draper 2012³⁰²) and was labelled by Casamitjana in 2012 as the “Yes, but” problem. For the purposes of this study, the

³⁰¹ Casamitjana, J. (2012). *Inspecting Zoos: A study of the official zoo inspection system in England from 2005 to 2011*. The Captive Animal’s Protection Society, Manchester., p. 7.

³⁰² Draper, C & Harris, S. (2012), ‘The Assessment of Animal Welfare in British Zoos by Government-Appointed Inspectors’. *Animals*, vol 2., p. 507

tendency towards answering “Yes, but” is recognised as a recurring phenomenon but, given the need of this research to identify recognised non-compliance and action taken to remedy that non-compliance, “Yes, but” answers have been classed as “Yes” and therefore deemed compliant with the legislation to avoid introducing elements of speculation into the research. As such, only “No” answers have been considered to indicate non-compliance. Answers of “N/A” or no answer provided were also discounted for the purposes of establishing compliance (or otherwise) with standards.

Comments made in relation to the answers given were recorded only when it was felt that they offered important information with regard to compliance. This included instances where the notes made appear to contradict the answer given (for example, the “Yes, but” tendency noted above) or when the comments served to elaborate on why the “No” answer had been given. For example: In answering “No” to the question “Are post mortem examination arrangements satisfactory?” the inspector goes on to note that “No post mortems have been carried out”. Whilst analysis of notes did not form a major part of the analysis following data input, they were recorded in order to support any subsequent qualitative analysis of zoos chosen as case studies to understand where and why enforcement action is either being carried out effectively or otherwise.

In two cases, the giving of a “No” answer to a question on the form was not treated as indicating non-compliance. Firstly, the giving of a “No” answer to the question “Is feeding permitted by visitors?” was treated as a simple statement of fact rather than an indication of non-compliance. Secondly, a zoo was only treated as being non-compliant with the conservation measures outlined in Question 7 of the ZOO2 form if all five of questions 7.1(i) – 7.1(v) received a “No” answer (the zoo is only required to fulfil one of the five measures in

order to be considered compliant with the relevant section³⁰³ of the ZLA 1981). Data analysis took this into account following the input phase.

Using the “Yes” and “No” answers as key indicators of perceived legal compliance in the view of the inspector and discounting “N/A” or no answer, the data was then analysed for overall compliance with the legislation. Evidence of non-compliance was then cross-referenced with information provided by local councils with regard to carrying out of enforcement action under s.16A of the Act and prosecutions brought for offences committed under s.19 of the Act.

A simple analysis which considered the number of times non-compliance which should give rise to action under s.16A and/or constitute an offence under s.19 was met with the correct enforcement action was carried out. This gave rise to the main quantitative results.

6.6 Interpretation: When Does a “No” Answer Indicate Non-Compliance with the Law?

There are two questions on the form for which a “No” answer indicates clearly that an offence under s.19 of the Act may have been committed. Those are questions 12.1 (Is the current licence or a copy on public display at each public entrance?) and 12.3 (Have any Additional licence conditions been met?). An answer “No” to either of these questions has been deemed to be indicative of an offence under s.19 of the Act.

³⁰³ S. 1A (a) Zoo Licensing Act 1981

With regard to the need for action under s.16A of the Act (the issuance of a direction to enforce licence conditions, after giving the operator an opportunity to be heard), the interpretation is slightly more complex. Section 5(2A) of the Act confirms that “A licence under this Act shall be granted subject to conditions requiring the conservation measures referred to in section 1A to be implemented at the zoo”. This means that all licences correctly issued will already be subject to licence conditions relating to compliance with s.1A of the Act. Consequently, any recognition during inspection that any area of s.1A of the Act has not been met would constitute a failure to comply with a licence condition and thus give rise to action under s.16A of the Act. The need for action under s.16A may also indicate an offence under s.19; this will be explored in more detail below.

As noted above, the criteria which are deemed to relate to s.1A of the Act are easily recognised in the ZOO2 form, as the relevant s.1A subsection is clearly listed against the question which the inspector is answering (see Figure One). 63 of the 100 questions in the ZOO2 form relate to compliance with S.1A. With this in mind, any instance in which the inspector, during the inspection process, has noted a “No” answer next to a question which relates to the implementation of s.1A, suggests that the inspector considers the zoo to be non-compliant with an element of s.1A of the Act.

Unlike the interpretation of questions 12.1 and 12.3, for which a “No” answer appears to clearly constitute an offence under s.19 of the Act, the need for enforcement action under s.16A (and any offences under s.19 which flow from that need) cannot be determined by considering the answers on the form alone. This is because action under s.16A is only required if the mandatory conditions have been correctly attached to the licence. If the licence has not been issued subject to the mandatory conditions contained within S1A in the

first instance, then there is no requirement for action under s.16A, nor does the non-compliance with standards included in the form constitute an offence under s.19.

Further, even if the correct conditions have been added to the licence, it cannot be assumed that each instance of non-compliance with s.1A should result in the making of a direction under s. 16 A nor that it constitutes an offence under s.19. This is because the conditions may be worded so as to incorporate a number of different criteria from the form.

Consequently, multiple “No” answers on the form may relate to just one condition and thus one single “No” response might not equate to a clear cut and easily identifiable breach of a condition. With this in mind, it is important to recognise that the analysis carried out below recognises non-compliance with s.1A which *could* give rise to both action under s.16A and offences under s.19 but the extent to which action is required can only be determined properly by further analysis of the licences themselves and the conditions attached to them. This matter is explored via a series of case studies in Section 6.8.3 of this chapter and it is for this reason that clear and quantifiable offences under s.19 and potential action being required under s.16A resulting from non-compliance with s.1A provisions have been dealt with as separate concerns.

For those questions which do not relate directly to compliance with s.1A or for which a “No” answer recognises an offence under s.19 of the Act, a “No” answer only implies non-compliance with the law (and thus the potential for enforcement action to be taken) if the criteria under question are already included in an additional condition attached to the zoo licence. Given that non-compliance with additional licence conditions is explicitly addressed in question 12.3 of the form, then any non-compliance with conditions relating to sections other than s.1A should be captured by the answer to this question. For this reason, the only “No” answers taken into account in the research besides answers to questions concerning

compliance with s.1A are answers to questions 12.3 and 12.1 (which deals with display of an establishment's licence at its public entrance).

Of the 307 reports analysed, 17,804 individual answers to questions were considered relevant for this part of the research.

6.7 Results

Between 2008 and 2014, 783 instances of non-compliance which should (if licenses are correctly administered) give rise to enforcement action being carried out under s.16A were noted by inspectors. Zero directions were issued by local authorities under s.16 during the same period. One local authority provided one zoo with "an opportunity to be heard" as an apparent preliminary to issuing a direction in 2008 but no direction was subsequently issued and no evidence of the zoo's response to the "opportunity to be heard" was made available.

Instances of non-compliance indicating potential for action under s.16

	2008	2009	2010	2011	2012	2013	2014	Total
# reports/zoo's per year	32	44	50	54	38	62	27	306
# of zoo's non-compliant with s.1A (thus giving rise to potential for action under s.16A)	24	32	23	29	25	37	19	189
% zoo's found to be non-compliant	75%	73%	46%	54%	68%	60%	70%	63.7% (Avg.)

# of instances of non-compliance potentially requiring action under s.16	104	151	77	116	89	158	88	783
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Figure 4: Instances of non-compliance indicating potential for action under s.16

Offences committed under s.19

	2008	2009	2010	2011	2012	2013	2014	Total
# reports/zoos per year	32	44	50	54	38	62	27	306
# of zoos committing an offence under s.19 per year	4	11	10	10	7	6	5	53
% of zoos committing an offence per year	13%	25%	20%	19%	19%	10%	19%	17.9% (Avg.)
# of instances of non-compliance considered an offence under s.19 (3)(g) of the Act	1	3	3	2	1	2	3	15
# of instances of non-compliance considered an offence under s.19(2) of the Act (also warranting action under s.16)	3	9	8	10	7	5	3	45

Total # of offences under s.19	4	12	11	12	8	7	6	60
% of zoos committing offences under s.19	12.5%	27.2%	22%	22.2%	21.6%	11.3%	22.2%	19.9% (Avg.)

Figure 5: Offences committed under s.19

For four zoos for which an offence was noted under s.19 of the Act, no information with regard to whether or not prosecution was carried out as a result was provided by the councils. Those four zoos represent 8.2% of all the zoos for which an offence under s.19 was noted, meaning that responses regarding prosecution action were received in relation to 91.8% of zoos for which an offence under s.19 was noted. Those four zoos had a total of five offences noted against them, accounting for 8.3% of all offences noted. This means that responses regarding what (if any) prosecution action was taken in relation to 91.7% of offences were received.

For a further six zoos for which non-compliance warranting action under s.16A was noted, indicating that an offence under s. 19 may have been committed, no information was provided by the councils. This accounts for 4.4% of zoos for which non-compliance was noted meaning that responses were received for 93.6% of zoos for which non-compliance was noted. Those six zoos had a total of 14 instances of non-compliance for the purposes of s. 16 which accounts for just 1.8% of all instances of non-compliance for the purposes of s.16. Responses regarding enforcement action were therefore received in relation to 98.2% of all instances of non-compliance for the purposes of s. 16.

According to the information provided, zero prosecutions under s.19 were carried out by responding local authorities against zoos included in this study during the period 1st January

2008 – 10th July 2014 despite the fact that the 783 instances of non-compliance warranting action under s.16A noted in the zoos to which the responses relate might also indicate associated offences under s.19 of the Act. Explicit failure to comply with conditions (determined by an answer “No” to question 12.3 “Have any additional conditions been met?”) which is considered an offence for the purposes of s.19(2) of the Act, were noted 41 times for the zoos for which responses were received with regard to prosecutions. An offence under s.19(2) of the Act also warrants action being taken under s.16 and so is both an offence and a trigger for enforcement action under s.16A.

A further 14 offences were noted under s.19(3)(g) of the Act for zoos for which responses were received with regard to prosecution failing to publicly display their licence. This offence does not correspond with the need for action under s.16A of the Act unless a condition has been attached to the licence requiring that the licence be displayed.

Non-compliance	2008-2014
# zoos non-compliant for purposes of s.16 between 2008 – 2014	135
% zoos non-compliant for purposes of s.16 between 2008 – 2014	72%
# zoos committed offences under s.19 between 2008 - 2014	49
% zoos committed offences under s.19 between 2008 - 2014	26%

Figure 6: Non-compliance with ss. 16 and 19 of the ZLA 1981

Of the 185 zoos analysed, 135 zoos should have been faced with action under s.16A of the Act at some stage during the six-year period; some more than once. This represents 73% of all zoos. Of the 185 analysed, 49 zoos were noted to have committed offences under s.19 of the Act, some more than once. This represents 26% of all zoos. Of the 49 zoos which had

committed offences under s.19 of the Act, all but one of these zoos were also found to be non-compliant, at some stage during the period, for the purposes of s.16A. Thus, a total of 136 zoos were found to be non-compliant, either for the purposes of s.16A and/or for the purposes of s.19 between the 1st January 2008 and the 10th July 2014. Despite this, there is evidence of just one local authority giving one zoo an “opportunity to be heard” for the purposes of s.16A and no evidence of any other enforcement action being taken under either s.16A or s.19 of the Act. It is clear from these results that there is an almost complete lack of formal enforcement action being carried out against zoos under the ZLA 1981, despite widespread and explicitly recognised non-compliance with statutory standards.

6.8 Discussion

6.8.1 Considering the Extent to Which Animal Welfare is Impacted by Recognised Breaches

As outlined previously, it was the inclusion of s.1A in the ZLA 1981 which imposed statutory animal welfare demands on zoos, with the subsections of s.1A having varying degrees of impact upon animal welfare. S1A (c) is the subsection of the Act which deals specifically with animal welfare demands and therefore breaches of this particular subsection are likely to indicate that harm to animal welfare is occurring. Almost half of the breaches noted as part of this research do, in fact, relate to S1A (c) (380 noted instances of non-compliance) – more than found in relation to any other subsection of the Act. S1A requires a number of measures to be implemented which do not have a bearing on animal welfare namely those required to be implemented under S1A (a) and 1A (b). 69 instances of non-compliance were of failure to implement such measures. The other parts of S1A have an indirect bearing on animal welfare in that, if they are not met, it is likely that poor welfare will be the knock-on

effect (S1A (d), 1A(e)and 1A(f)). 289 instances of non-compliance in the results were of failure to implement the measures which these subsections require. S. 16A may have a bearing on animal welfare, dependent on which conditions have been breached, but this can only be found by considering each instance of non-compliance against the conditions. In any case, failure to meet existing licence conditions is also an offence under s. 19 of the Act. In total, there were 669 instances of non-compliance which appeared to have either a direct or indirect impact on animal welfare (or are strong indicators of harm to animal welfare) and a further 45 instances which may have a bearing on animal welfare, depending on what conditions were attached to the relevant licence.

While it appears, therefore, that the majority of instances of non-compliance can be considered to have, in theory, a direct or indirect impact on animal welfare, the extent to which animal welfare may be impacted in practice by these breaches will be considered in this section.

The five questions³⁰⁴ on the form with the highest level of non-compliance were as follows:

Section		2008	2009	2010	2011	2012	2013	2014	Total
1A(c)(ii)	3.10 Is there a system for the regular review of clinical and pathological records?	8	10	2	5	7	10	5	47
16(1)	12.3. Have any Additional licence	3	9	8	10	7	5	3	45

³⁰⁴ A full list of non-compliance with criteria can be found in Appendix Three

	conditions been met?								
1A(c)(ii)	3.9 Are the animals provided with a documented and maintained programme of preventative and curative veterinary care and nutrition?	5	9	2	6	5	10	7	44
1A(c)(ii)	3.15 Are post mortem examination arrangements satisfactory?	4	9	2	4	4	10	2	35
1A(c)(ii)	3.11 Are appropriate veterinary records kept?	2	8	4	4	5	5	5	33

Figure 7: The five questions on the form with the highest level of non-compliance

The most common breach noted relates to the review of veterinary records. Non-compliance with this criterion suggests a lack over veterinary oversight and monitoring of health, but does not necessarily indicate an animal welfare problem in itself.

The second most common breach - failure to meet additional licence conditions - relates to a clear offence under the Act as failure to meet conditions is an offence under s.19 and also a reason to take action under s.16A. This may or may not impact upon animal welfare, depending upon what the breached conditions relate to.

The third most common breach relates to the provision of a documented programme of veterinary care and nutrition. As veterinary care is one of the major influences on animal welfare, failure to meet this criterion suggests possible failure to meet animal welfare needs. That said, lack of vet care will only have a direct impact upon welfare if an animal requires treatment but that treatment is not provided. A healthy animal will not suffer poor welfare simply because he or she is not seen by a vet.

The fourth most common point of non-compliance relates to arrangements for post mortems. Again, of course, once an animal is dead then there can be no welfare concerns for that animal but if deaths are occurring and no attempts are being made to understand why, then there may be welfare concerns within the zoo which are not being properly identified or addressed. If deaths are being caused by disease or poor husbandry, the failure to carry out post mortems could mean that preventable deaths continue to occur.

Finally, the fifth point with the highest level of non-compliance related to veterinary records. Again, the failure to keep veterinary records will not impact upon welfare *per se* but will provide vital medical background to individual animals and can therefore be considered to be an important part of the welfare provision for animals. Failure to keep records can lead to poor care or failure to monitor or identify problems as they develop.

Animal welfare-related questions which saw ten or above instances of non-compliance over the study period included:

Criteria	Instance of non-compliance
2.1 Are the animals provided with an environment well adapted to meet the physical, psychological and social needs of the species to which they belong?	12
2.5 Do enclosures provide sufficient space?	12
1.3(b) Are supplies of food and water prepared hygienically?	11
2.6 Are backup facilities for life support systems adequate?	11
1.3(a) Are supplies of food and water kept hygienically?	11
2.4 Do animal enclosures have sufficient shelter and refuge areas?	10

Figure 8: Question on the form with more than ten instances of non-compliance found as part of this study.

If we consider the ‘top five’ (Figure 7) breaches across the industry, it can be concluded that these instances of non-compliance have potential to impact negatively upon animal welfare in the long term if not satisfactorily addressed but do not necessarily indicate (in and of themselves) that animal welfare is not being met at the time of inspection. However, when we consider those breaches which have more than ten instances of non-compliance across the industry (Fig. 6), these appear to have potential to have a negative impact upon animals currently. Thus, from the information provided, the breaches reported in the highest numbers appear to have little more than potential for indirect impact upon animal welfare (Figure 7), but there also significant numbers of breaches whereby fundamental animal welfare needs appear not to be being met adequately (Figure 8).

It is perhaps worth noting that the nature of the breaches, and their potential to impact upon animal welfare are not necessarily relevant given the almost complete absence of enforcement action. If it were the case that very few breaches which impact upon animal

welfare were occurring but, when they did, correct enforcement action was being taken, it might be reasonable to conclude that, even in the absence of effective overall effective enforcement, animal welfare needs were being prioritised and met. As there appears to be no difference in the way breaches which impact upon animal welfare are treated compared to those that do not, or only impact upon animal welfare indirectly, then it can be inferred that the lack of enforcement persists regardless of whether the breaches impact upon animal welfare or not.

6.8.2 Corroborating Evidence and Potential Reasons for Non-Compliance

This research has, so far, identified a significant number of instances of non-compliance with the legislation and a complete absence of formal enforcement action to aid compliance. The extent to which this non-compliance (and subsequent failure to take action to remedy breaches) affect animal welfare is difficult to ascertain but it is reasonable to conclude that must be some impact on animal welfare due to the context of some of the breaches and the almost absolute absence of enforcement action. The findings of this research are corroborated to a greater or lesser extent by previous research into compliance with the ZLA 1981. A number of studies (for example Draper 2012³⁰⁵, CAPS/Casamitjana 2012³⁰⁶ and ADAS 2010³⁰⁷) have been carried out in the past which considered the way in which the ZLA

³⁰⁵ Draper, C. and Harris, S. (2012). The Assessment of Animal Welfare in British Zoos by Government-Appointed Inspectors. *Animals*, 2(4), pp.507-528.

³⁰⁶ Casamitjana, J. (2012). *Inspecting Zoos: A study of the official zoo inspection system in England from 2005 to 2011*. The Captive Animal's Protection Society, Manchester.

³⁰⁷ ADAS (2010). *Review of the implementation of the Zoo Licensing Act 1981 in local authorities in England and Wales*. [online] London: DEFRA. Available at: <http://randd.defra.gov.uk/Document.aspx?Document=ADASReviewoflocalauthorities%27implementationoftheZooLicensingAct.pdf> [Accessed 4 Nov. 2017].

1981 is implemented. Some, such as Draper's work, uses formal inspection report data to assess the delivery of welfare standards, rather than enforcement of the Act *per se*.

The ADAS report, which was commissioned by Government and published in 2010 considered enforcement of the Act from the perspective of the local authorities charged with delivering it. Findings were based on questionnaires filled in by local authority officials answering questions on how well they felt the Act was being delivered. No empirical evidence of enforcement action was gathered as part of the ADAS study. Finally, the CAPS report considered enforcement in a broad sense (among other elements of the system) but did not carry out detailed analysis surrounding legal compliance and enforcement.

Notwithstanding the fact that none of the aforementioned research focused specifically on empirical evidence of compliance and enforcement action being carried out with regard to the ZLA 1981, every one of the reports on this issue recognised, to some extent, concerns over either compliance of zoos with standards or enforcement of the Act itself. Specific concerns, taken from the aforementioned reports, are reproduced below:

"We highlight a number of concerns about the inspection process itself, and identify areas where changes would lead to improvements in both the inspection process and our ability to monitor animal welfare standards in zoos"³⁰⁸.

³⁰⁸ Draper, C. and Harris, S. (2012). The Assessment of Animal Welfare in British Zoos by Government-Appointed Inspectors. *Animals*, 2(4), pp.507-528.

“The zoo licensing system in England does not work and, in its present form, is both unreliable and unworkable; therefore rendering the effective guarantee of protection of all animals held in zoos impossible”³⁰⁹.

“The initial review provided some evidence for a number of issues raised in connection with the implementation of the Act, particularly prior to 2008, such as missed or late inspections, incomplete inspection teams and licence conditions not being enforced. However, there was also evidence of significant improvements in these areas in recent years”³¹⁰. In addition, “Inspectors commented that while they had seen improvement in local authorities’ management of the inspection process, there was room for further improvement”³¹¹.

The ADAS report went on to discuss local authority and inspector views with regard to the efficacy of the legislation and a key finding was that local authorities and inspectors suggested that more enforcement powers, in addition to licence refusal, should be made available to them³¹². They suggested powers equivalent to “enforcement notices” which are available under the AWA 2006. In fact, directions issued under s.16A operate in almost exactly the same way as improvement orders under s.10 of the AWA 2006, with the exception that improvements notices under the AWA 2006 can be effectively extended

³⁰⁹ Casamitjana, J. (2012). *Inspecting Zoos: A study of the official zoo inspection system in England from 2005 to 2011*. The Captive Animal’s Protection Society, Manchester. P. 9

³¹⁰ ADAS (2010). *Review of the implementation of the Zoo Licensing Act 1981 in local authorities in England and Wales*. [online] London: DEFRA. p. i Available at: <http://randd.defra.gov.uk/Document.aspx?Document=ADASReviewoflocalauthorities%27implementationoftheZooLicensingAct.pdf> [Accessed 4 Nov. 2017].

³¹¹ *Ibid.*, p. 27

³¹² *Ibid.*, p. ii

indefinitely, whereas directions under s.16 are subject to a maximum of two years when associated with breaches of S1A. One of the report's final recommendations was that these "extra" enforcement powers should be added to the Act. This report was written in conjunction with BIAZA and commissioned and published by the Government. The fact that the powers proposed already exist for local authorities suggests that, in 2010 at least, there was a clear lack of understanding among key stakeholders of what enforcement measures were available to local authorities under the existing legislation under consideration when dealing with non-compliant zoos. This pointed towards poor understanding of the existing legislation on the part of the local authorities, BIAZA and, the government itself.

The lack of understanding (and thus failure to apply) enforcement measures under s.16A appeared to be corroborated by the CAPS study in 2012. In order to explore this issue further, in 2012, the author of this thesis carried out a brief study of the implementation of s. 16A of the Act, using data gathered by Casamitjana as part of the 2012 CAPS study. The study collated "No" answers given in relation to questions relating to compliance with s.1A of the Act from formal inspection reports for 124 zoos examined between 2005 and 2011 (using similar, but less rigorous, methodology to that employed in this research). The study found 1,003 instances of non-compliance with elements of s.1A across 124 English zoos and just one instance of action being taken under s.16A. The study, which remains unpublished, formed the basis of a formal complaint made to the European Commission over the apparent failure of the UK Government to ensure the correct enforcement of the EC Zoo Directive (EC 1999/22) and was also used to support discussions with Government department, DEFRA, to discuss ways in which the apparent lack of enforcement action could be addressed. In addition, it was the results of this pilot study from which the proposal for the present research surrounding licensing as an effective regulatory framework arose.

In May 2012 the author of this research met with DEFRA officials specialising in zoo policy. Concurring with the results of the pilot study presented to them, the DEFRA team agreed to update Government guidance³¹³ to local authorities with regard to their obligations under s.16 of the Act and to make clear the mandatory nature of the action to be taken where non-compliance is found. This guidance was published in late 2012 and information, including a letter specifically outlining the mandatory nature of enforcement action³¹⁴ under s.16A in the event of non-compliance was sent to local authorities in November 2012. This letter effectively confirmed to local authorities that they did have an enforcement tool available to them which was very similar to the “improvement orders” which had been raised in the past as potentially useful (particularly as part of the aforementioned ADAS report) and were erroneously believed to not form part of the legislation.

In November 2013, the complaint which had been raised by the author of this work with the EC with regard to compliance was answered by way of the relevant EC officials forwarding a letter written by DEFRA to the EC in response to a different, but similar complaint on the issue. The letter stated that it was now DEFRA’s belief that there was no failure to use enforcement powers under s.16A and, instead, powers were being used to effectively resolve issues.

The section of the letter, which was made public by DEFRA following a Freedom of Information request, dealing with the previous failure to use powers of enforcement under s.16A of the Act stated:

“The UK authorities do not accept that analysis of the documents alone gives an accurate or complete picture of the operation of the zoo licensing system. The legislation provides that before a local authority makes a direction specifying which

³¹³ The aforementioned “Guidance to the Act’s Provisions”

³¹⁴ Confirmed in a meeting between the author and DEFRA officials in late 2012.

condition has not been met (and the section of the zoo to which it relates, and the action to be taken to comply, and by when (section 16A(2)), and before it issues a zoo closure direction (section 16B(1)), it must give the zoo operator an opportunity to be heard. The Government would expect the majority of non-compliance incidents to be resolved quickly between the local authority and the zoo, which could obviate the need for the formal compliance procedures provided for in the Act. The prompt resolution of compliance problems in this way may not be captured through the analysis of documents alone”³¹⁵.

Whilst the point that all relevant information in all cases might not be captured by inspection reports is a valid one, it is clear from the information contained within them that instances of non-compliance range from minor (for example, minor repair works) to major (failure to implement a programme of veterinary care) with varying degrees of seriousness in between. Arguably, some of the simpler problems could perhaps be both recognised and solved on the day of the inspection or shortly afterwards but, it is abundantly clear from the reports that this does not always occur. This letter also suggests that, in being given an “opportunity to be heard” (the necessary precursor to a direction being issued), the zoos would be able to explain their failure to comply with conditions, or prove the inspector’s initial assessment to be incorrect. If it were the case that all breaches noted could be remedied simply by giving the zoo an “opportunity to be heard”, that would suggest that there are serious deficiencies in the inspectors’ understanding of the law and breaches were being identified where, in fact, they were not in fact occurring (or reasonable excuse could be provided for them on each occasion). This seems somewhere unlikely, given the 783 instances identified as part of this research when s.16 sanctions potentially should have been imposed. If it is true, it raises concerns over the expertise of the inspectors.

³¹⁵ Letter available in full as part of FOI disclosure documents on DEFRA website:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/283424/6109-doc1.pdf

It is thus unclear why the Government believes that the “majority of non-compliance incidents to be resolved quickly between the authorities and the zoo”³¹⁶ and, indeed, via what mechanism this informal resolution would be carried out, given that there are clear guidelines for how to deal with non-compliance and the legislation does not grant discretion to local authorities to deal with breaches in any way other than that outlined within the statute. It does not appear that the Government has carried out its own research into compliance or the nature of non-compliance following the publication of its 2010 report (commissioned to ADAS and mentioned previously), so it is understood that this statement represents a matter of opinion which contradicts the findings of both the 2012 pilot study and the present research. It is difficult to believe that the 783 instances of non-compliance requiring action under s.16 identified as part of the current research were, in fact, misunderstandings, and were all resolved without recourse to formal enforcement action.

In fact, as directions are issued in the first instance in tandem with licence conditions (indeed, they are issued in order to enforce licence conditions) then if DEFRA’s view were true that issues were resolved swiftly without recourse for formal action, we would expect to see a significant drop in licence conditions being added to the licences of zoos as a result of this swift, informal resolution process; and particularly those conditions which relate to s.1A (as if they become conditions attached to the licence, they should always necessitate a direction too, as long as the original licence was correctly issued subject to the S1A provisions). If there are a high number of licence conditions being added to licences, then it follows that there should be a high number of directions. If the operators have been given opportunity to be heard and convinced the local authority that formal compliance action is

³¹⁶ *Ibid.*

unnecessary under s.16A, then they would be issued with *neither* licence conditions nor directions.

In the aforementioned letter with regard to the EC complaint, the government department also made the point that the data relating to the 2012 complaint covered 2005 – 2011 and the majority of it was therefore not reflective of improvements in compliance. The Government suggested that they expected there to be significant improvements in enforcement from 2008 onwards, (though this was not found to be the case in the 2012 pilot study). In addition, it seems reasonable to assume that, as a result of the specific instructions sent to local authorities in late 2012 as a result of the work of the present author via her role in CAPS, that whatever reason there was for the lack of enforcement being carried out prior to that date, an improvement should be seen beyond that date.

The Government letter stated:

*“The Government has, however, already taken action to clarify and strengthen its published guidance relating to the compliance and enforcement provisions of the Act (see paragraph 10 and Annex E: flowchart 12. See also Annexes J-M of the guidance relating to compliance and enforcement issues). We believe that the amended guidance **removes any possible doubt about the compliance and enforcement provisions of the Act**”.* [My emphasis].

Given the Government’s apparent acceptance that there was a need for clarification of the law in 2012 and its subsequent statement in 2013 that it felt its clarification had removed “any possible doubt” with regard to the way in which the law should be applied, one would expect to see that enforcement in 2014 meeting the standards required or, if not, the Government taking action to remedy this.

While questions remain over the government's position, it is important to explore the suggestion that enforcement is being carried out informally, as suggested. In order to establish whether this was indeed the case, the 27 reports relating to 2014 used as part of this analysis were revisited. An assessment was carried out to consider non-compliance and the theory put forward by DEFRA – that compliance had improved in recent years and that issues were being resolved informally, was tested. This was done by considering the number of instances of non-compliance noted during inspection, the conditions subsequently added to licences (if DEFRA's view was founded, we would expect to see few conditions added to licences as issues were being resolved informally). If licences had been correctly issued and conditions relating to s. 1A of the Act were correctly attached to the licence at the outset, then any non-compliance with s.1A should lead to a condition *and* a direction.

6.8.3 Case Studies

Of the 27 zoo inspection reports completed in 2014, 18 of them noted non-compliance with areas of s.1A or offences under s.19.

These 18 zoos were assessed in order to consider DEFRA's assertion that s.16 action was not being taken because issues noted on the day of inspection were being dealt with informally (thus negating the need for formal action, and without the need to add conditions to licences or implement formal enforcement action by way of issuing a direction).

Inspection reports for the 18 zoos were considered and it was found that there were 104 instances of non-compliance recorded against those zoos during 2014. 75 of the instances of

non-compliance should have given rise to action under s.16 of the Act. Five of the instances of non-compliance noted constitute offences under s.19 of the Act. If issues were noted during inspection but then not added as licence conditions subsequently, this may support DEFRA's suggestion that issues were dealt with informally. It may also support other interpretations, which will be explored in this section.

Of the 18 zoos for which instances of non-compliance were noted, the most recent licence was also provided by the relevant councils for three of the zoos. One would expect the licence to be amended following an inspection where conditions were recommended and in the event that conditions relating to S1A were added to the licence following the inspection, one would expect to see accompanying S16A directions if the law is being properly enforced. These licences provided had 23 conditions attached (combined) in order to remedy the issues noted during the previous inspections. It should be noted that 23 conditions do not necessarily equate to 23 separate instances of non-compliance. Indeed, between the three zoos, one zoo showed 8 instances of non-compliance which would give rise to action under either s.16 or s.19 and had 13 new conditions added to the licence. One zoo had one instance of non-compliance which would give rise to action under s.16 and one instance of non-compliance which would not give rise to action under s.16 (unless the non-compliance involved breach of an existing condition). One condition was added to the licence following inspection. The non-compliance with S1A was not dealt with by this condition, yet the minor non-compliance was. The report on the final zoo noted one area of non-compliance with S1A and suggested 9 conditions added to the licence, none of which addressed the recognised failure to comply with s. 1A. The licence that was issued following this inspection included the 9 suggested conditions and none implementing s.1A or other standard conditions. As licences must be issued subject to the provisions of s1A, it is clear that the licence was issued incorrectly.

The case of these three zoos highlights that, at least in these cases, it is not true that all issues are dealt with informally, thus doing away with the need to add formal conditions and take action under s.16. As these conditions have been added to the licence, and some relate to s.1A, they should be accompanied by a direction under s.16. This is simply not happening. However, with just three zoos in this sample, it is important to consider whether or not this means that DEFRA's position is supported by the other 15 zoos under consideration.

As with the three already considered, there does not appear to be evidence that the reason conditions are not being added to licences is as a result of swift compliance with concerns. One zoo (Mainsgill Farm) had 23 instances of non-compliance with s.1A noted during 2014. This inspection followed a period of two years during which, according to council correspondence, the zoo had been operating without a licence at all. Rather than use the enforcement tools available within the ZLA 1981 (i.e.: directions under s.16 or prosecution under s.19), prior to 2014, the council sent repeated letters to the zoo, demanding compliance. No legal action was taken and, ultimately, the licence issued in 2014 simply added the pre-existing conditions as part of a new licence. Under the question "have existing licence conditions been met?" it was answered that this was inapplicable as this was a "first licence". The two years of operating in contravention of the law and clear breach of licence conditions from previous reports were not acknowledged and the new licence served the purpose of 'wiping the slate clean' for the zoo.

A similar situation occurred with the Yorkshire Dales Falconry and Wildlife Centre, whose licence lapsed. The local authority first attempted to backdate the licence before realising, following advice from DEFRA, that this was not possible. They then asked the zoo to reapply for a new licence. This was treated as a new licence inspection and the non-compliance

noted in 2014 was not connected to the previous licence and therefore does not appear to be deemed a breach of condition. No action was taken against the zoo for operating without a licence – an offence under s.19 of the Act.

Another zoo (York Bird of Prey) was noted to have failed to meet existing conditions (an offence under s.19 of the Act and a trigger for action under s.16) in 2014. Rather than take the relevant action, the council extended the timescale allowed for both conditions and took no other enforcement action to remedy non-compliance.

Local authorities failed to provide a licence for three of the zoos under consideration (Porfell, The Owl and Falconry Centre and National Marine Aquarium) and so action taken with regard to noted non-compliance post-inspection could not be ascertained.

For the remaining ten zoos under consideration, the licences provided all pre-dated the inspection reports, suggesting that no update had been made to the licence following the inspection and no new conditions had been added. This may support DEFRA's view that the majority of issues are dealt with without the need for new conditions and action under s.16. However, the nature of some of the instances of non-compliance make it difficult to see how this could be the case. For example, for one zoo (Kirkleatham Owl Centre), a condition recommended during the inspection was included in the report as follows:

“A programme of preventative and curative veterinary care must be developed and recorded. This must include two recorded routine visits annually and must include a programme for the regular review of clinical and pathological records”.

This condition seeks to remedy noted non-compliance with the need to provide veterinary care and the need to have in place a system to review pathological and clinical records. Both

of these points relate to s.1A of the Act and failure to comply would be a trigger for action under s.16.

In this instance, it would be impossible for this issue to be remedied informally without need for the condition (and direction under s.16) to be issued on because the condition demands action to be carried out over a period of twelve months. This cannot be remedied quickly between the zoo and the local authority and so this would suggest that the failure to add the condition to the licence (and failure to issue the direction) was less a recognition of the non-compliance being dealt with, but a failure to carry out the necessary enforcement action on behalf of the local authority. A further three zoos (Avon Valley, Beale Park, Rutland Falconry) were found to not be providing a “programme of preventative or curative veterinary care” and, in the inspection reports, it was recommended that a condition requiring that they do so be added as a condition to the licence. No conditions mandating the provision of a programme of preventative and curative veterinary care were added to any of the licences (despite this being a mandatory S1A condition) and no direction was issued to any of the three zoos. The absence of a veterinary programme is not something which could be considered a minor infraction and is not something which could be resolved informally between the zoo and the authority as it would require assessment and monitoring once implemented. As such, these three case studies do not support DEFRA’s view that enforcement is adequate.

Other conditions recommended during the Kirkleatham 2014 inspection could feasibly have been dealt with quickly and therefore, as there is a lapse in time between the inspection being carried out and the final report (and any subsequent changes to the licence) being issued, some minor issues could have been remedied. For example, it was demanded that risk assessments were produced for certain activities, a relatively simple exercise on paper

which could be done immediately following the inspection. It seems highly feasible that risk assessments could have been provided to the council and the condition recommended in the inspection report be rendered irrelevant.

For Avon Valley, one of the areas of non-compliance with S1A was that it was found that the conservation efforts for the collection were inadequate. Again, it is difficult to envisage how this point could be remedied quickly and easily on the day of inspection, or after giving the proprietor an “opportunity to be heard” as it is something which would need to be demonstrated and assessed again over a period of time.

Blue Reef Aquarium had a recommended condition that “running hot and cold water to be supplied in the vet room” which was not then added to the licence, despite the lack of running water being deemed, by the inspector, as a breach of s. 1A. As this would require plumbing work to be carried out, it stands to reason that this is, again, not a point which could simply be remedied informally on the day of inspection, but something which would require planning, work and assessment afterwards for compliance. The condition in question was a pre-existing condition which the zoo had already failed to meet at the time of the 2014 inspection. Despite this, no enforcement action was taken when the non-compliance was found and no changes were made to the licence to reflect the failure to meet the condition.

Pensthorpe zoo inspection report noted two instances of non-compliance with s.1A, indicated by the inspector marking “No” in response to two separate questions relating to s. 1A on the ZOO2 form. However, no notes, recommendations or suggested conditions were then added to the form by the inspector and it did not appear that the local authority

followed the issue up. No conditions were added to Pensthorpe's Zoo's licence in order to either clarify the breaches or to bring the zoo into compliance.

The final two zoos in this sample were noted to have breached s1A with regard to failing to document animal escapes. Again, as compliance with this could only be tested over time, then it seems illogical to issue the licence without this condition as it is not something that the inspector could assess on the day of inspection as it relates to events that have not (and indeed may not) happen until a future date.

From these 18 case studies, which represent just a small handful of all of those zoos and reports considered, it becomes clear that the suggestion from DEFRA that the lack of enforcement action being carried out against non-compliant zoos cannot be attributed to non-compliance being dealt with quickly and informally is not borne out in evidence. Instead, there appear to be a number of different reasons for the lack of enforcement action. In some cases, it seems that the local authority is confident in adding conditions to licences but does not either understand or comply with the obligation to also take action under s.16; much less even consider taking action under s.19. There is no suggestion in correspondence which would support the idea that issues noted during inspection were being remedied before the issuance of the new/amended licence – and instead it appears that, in many cases, no changes are made to licences over a number of years, despite recognised breaches which logically could not be remedied quickly as compliance would require assessment after a period of time. For example, demanding that four vet visits are carried out each year can only be assessed for compliance after the year has passed. The failure to amend the licences means that no binding timescale is placed on the zoo to enforce the standards.

There is some evidence to show that, when licences are allowed to expire, the local authorities do not take action to either prosecute or close the zoo down and, instead, allow for a new licence to be issued, which has the effect of “wiping the slate clean” for the zoos in question with regard to previous instances of non-compliance as happened with Mainsgill Farm.

Overall, there is no conclusive evidence which supports DEFRA’s assertion that local authorities understand and are delivering their enforcement obligations under the Act. There is a lack of consistency in application of the Act across local authorities and sufficient evidence that the Act is poorly understood.

It seems clear that, on the one hand, there is a lack of understanding of the mandatory nature of action under s.16 of the Act, or at least this was the case historically. Since 2012, the local authorities have been explicitly informed of the operation of s.16 and yet there is no evidence of it being used whatsoever. The Government’s suggestion that directions are not being issued as a result of problems being resolved following local authorities giving zoo operators an opportunity to be heard does not stand up. If it were the case that all issues noted during inspection were resolved without the need for a direction, this would also mean that conditions were not being added to licences, a theory not borne out in the evidence considered as part of the 18 case studies discussed above.

6.9 Conclusion

Having considered in detail the operation, application and enforcement of the ZLA 1981, a number of weaknesses have been noted with lack of enforcement and understanding of the

Act on the part of local authorities being the most conspicuous. It appears that reassurances made by Government officials in 2013, that the Act is being adequately enforced, are not borne out in evidence. Should enforcement be improved, the impact upon animal welfare might be significant. Zoos that persistently fail to meet legal standards would be held accountable and forced to meet standards or otherwise face closure. As a result of this, the standards of the industry should, theoretically, improve as the worst performing businesses either improve or cease to operate. The animals in the case of zoo closure become the responsibility of the local authority, which would then take on the duty to ensure that they are properly cared for, rehomed or otherwise disposed of³¹⁷.

³¹⁷ S. 13(8) Zoo Licensing Act 1981

Chapter Seven: The Regulation of the Use of Wild

Animals in Travelling Circuses in England

Having considered the regulation of zoos in England and how licensing of zoos via primary legislation might serve to protect animal welfare, this chapter provides an introduction to the second piece of legislation under consideration as part of this research – The Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012 (WWATC 2012), beginning with the history of the industry itself and the move towards its regulation in recent years.

The tradition of using animals in circuses in England dates back over 200 years. The “heyday” of the travelling circus was around the 1950s and 60s. At this time, there were dozens of circuses travelling the country with menageries of animals totalling an estimated 200 individuals. Animal species included elephants, lions, tigers, bears, monkeys, zebras and camels³¹⁸.

As a result of lobbying by animal welfare advocates, the use of wild animals in circuses came under scrutiny as it was claimed that the conditions in which the animals were kept, coupled with the training and performance elements of circus life for them, compromised their welfare to the extent that their use in these businesses should be prohibited³¹⁹. The first attempt see animal circuses outlawed was in 1965, when Lord Somers, then the president of the Captive Animals’ Protection Society (CAPS), brought forward a Private Member’s Bill to ban the use of wild animals in circuses. The proposal was defeated at the time by 45 votes

³¹⁸ Captiveanimals.org. (n.d.). Our history. [online] Available at: <http://www.captiveanimals.org/about-us/our-history> [Accessed 24 Nov. 2017].

³¹⁹ *Ibid.*

against to 31 in favour. The Undersecretary of State said at the time that an investigation had been carried out in 1951 which showed no evidence of cruelty³²⁰. It should perhaps be noted at this point that the law at this stage, which was still the Protection of Animals Act 1911, did not make demands of those responsible for animals that they provide for the welfare of those animals. This only became law in 2007, on the introduction of the AWA 2006.

The parliamentary process which led to the introduction of the current legislation governing wild animal circuses began in 2005, triggered by the passage of the Animal Welfare Bill. A public consultation carried out in 2009/2010 saw 94.5% of respondents support an outright ban on the use of wild animals in circuses³²¹. In March 2012, a ban was promised by the Government but has not been implemented at the time of writing (October 2017), despite the deadline for implementation being set by Government for the end of 2015. Whether or not the ban will be implemented remains to be seen but it is perhaps important to note that the regulations under examination were developed as a temporary measure while work on the outright ban was being developed and finalised. With the ongoing failure of the Government to implement the outright ban as promised, it has to at least be considered that the licensing regime which was ostensibly implemented as a temporary measure in 2013, may remain in force for some time to come or even become permanent.

³²⁰ The Age. (1965). *Anti-Circus Bill Rejected*. London. Available at: <http://news.google.com/newspapers?nid=1300&dat=19650218&id=GBwRAAAAIBAJ&sjid=SpUDAAAIBAJ&pg=5043,3091196> [Accessed 1 Sep 2014]

³²¹ See: House of Commons Library., (2016), Research Briefing Number CBP05992, House of Commons Library: London., Available at: <http://researchbriefings.files.parliament.uk/documents/SN05992/SN05992.pdf> [Accessed 1 Nov 2017]

7.1 The Size and Shape of the Travelling Circus Industry

Over the years, campaigning for a ban continued and demonstrations and falling visitor numbers to shows with wild animals led to the lowest ever number of circuses using wild animals (4) and the lowest number of wild animals being used (~30-40) by around 2011, when the proposals for the current legislation were first mooted. Two of the circuses touring in 2012 with wild animals (Gifford's, which employed just one bird of prey in its 2012 season, and the Great British Circus, which toured with up to half of all the animals being used at any one time in English circuses) removed wild animals from their shows before its implementation. By the time the regulations were brought into force in January 2013, the number of circuses operating with wild animals had dropped to two circuses and 21 individual animals however, later the same year, a new wild animal act was moved to England from Ireland, prompting suggestions that numbers of wild animals being used (and numbers of circuses using them) might, in fact, increase as a result of the perceived legitimately regulated status that circuses were now afforded³²². In addition to the animals belonging to the circuses in question, other circuses may enter the UK from Europe or acts which are not affiliated with any particular circus might be hired in for any particular season. It has been the case in the past that circuses have hired in elephant acts, for example³²³. These animals will be brought to the UK by their trainers and travel with the circus for all or part of a season. In this way the number of animals can fluctuate.

³²² Captive Animals Protection Society. (2013). Breaking News: Big cats have joined English circus. [online] Available at: <https://www.captiveanimals.org/news/2013/08/4540> [Accessed 28 Dec. 2017].

³²³ E.g. Courtney Brothers' circus hired Joy Gartner's elephant act in 2013 see: <http://www.irishcircuses.org/wp-content/uploads/2012/08/Ring-of-Cruelty-2-Summary-Report.pdf>.

The English circus season usually begins in around March/April, when the circus will leave their permanent base or 'winter quarters' and travel the country. The season usually ends in around October of the same year when the circus and the animals will return to their winter quarters. The circuses usually visit one (or sometimes two) venues per week and perform twice a day (usually just once on the day of departure). Animals may be employed in the shows as 'acts' where they perform tricks or stunts with the human performers. Big cats might go through routines whereby they sit on pedestals, roll over, jump through hoops etc. Elephants (there are none currently in any English circus) might sit or turn on pedestals, swing performers from their trunks, 'dance' or make formations with other elephants in the show. Other animals might perform no obvious trick and simply be walked around the circus ring while people watch³²⁴. Some animals are used for photos (an elephant which travelled with Bobby Roberts circus until 2011, for example, did not perform for her last years with the circus) or to offer rides for children (e.g. the camel used by Circus Mondao is used for this purpose). Other animals simply travel as part of the menagerie. Up until recently, some circuses would refer to the animal collection as a "zoo" and invite people to come and see the animals after the show for an extra charge

Circus sites vary from town to town and may comprise a large field with amenities or a car park or other hard standing. The differences in location and type of site may have implications for the welfare of the animals involved.

³²⁴ See: <http://www.irishcircuses.org/wp-content/uploads/2012/08/Ring-of-Cruelty-2-Summary-Report.pdf>

7.2 The Introduction of The Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012

Prior to the introduction of the Regulations, wild animals in circuses were protected, in theory, by the AWA 2006 which, broadly speaking, meant that circus owners should take measures to protect and promote the welfare of the animals under their care, and also to ensure that the animals were not subjected to unnecessary suffering. If it were found that the owners were not providing the standard of care required to ensure that welfare needs were properly met to the extent required by good practice, then a prosecution could be mounted under the Act. The person responsible for the animal could be held liable for failure to comply with the provisions (s.9), as would they and any other person who inflicted unnecessary suffering on an animal (s.4).

Two arguments were levelled against the suggestion that animals in circuses were effectively protected by the AWA 2006 prior to the introduction of the regulations. The first was that, by its very nature, the travelling circus environment compromises the welfare of animals (and particularly wild animals) to the extent that their welfare needs could not be met in a travelling circus, regardless of standards imposed. This argument speaks to concerns already raised in Chapter 2 with regard to the demand that animal welfare needs are met only to the extent required by good practice. The fundamental argument posed by those opposed to the regulations was that, even the very best practice within the circus industry still imposed inevitable conditions upon animals which run contrary to their welfare need being met (predominantly the lack of appropriate living conditions, lack of natural

social groupings, regular transport and training and performance to carry out unnatural behaviours – all of which are necessary parts of life for wild animals in circuses)³²⁵.

The second argument to refute the suggestion that animals in circuses were adequately protected by the AWA 2006 was that it was near impossible to know whether the welfare needs of the animals were being met in travelling circuses due to the fact that the businesses operated as a 'closed shop'. Whilst animals may be seen by the public during the daily performances for the short period of time that they appeared in the circus ring, the lives of the animals at all other times, and their treatment, was carried on predominantly behind closed doors and away from the public eye.

The 'closed shop' argument was fuelled by at least some evidence of animals being treated badly in circuses being released following undercover investigations into the industry. A number of investigations have been carried out by animal protection groups over the last few decades and have uncovered evidence of poor practice and some deliberate animal abuse in some circuses (in the UK and abroad). For example, undercover filming carried out in 2011 by one animal protection group in the UK showed that an elephant in a circus was shackled continuously by the ankles for up to three weeks and beaten on numerous occasions by a member of staff³²⁶. The cruel treatment was carried out at the circus' winter quarters and the treatment would not have come to light had it not been for the

³²⁵ For example, see:

https://www.bva.co.uk/uploadedFiles/Content/News,_campaigns_and_policies/Policies/Ethics_and_welfare/circuses_joint_briefing_on_draft_Regs_Oct2012.pdf

³²⁶ Wilkes, D. (2012). Owners of Britain's last circus elephant Anne accused of chaining her up for 24 hours a day and allowing staff to beat her with a pitchfork. [online] Mail Online. Available at: <http://www.dailymail.co.uk/news/article-2235309/Owners-Britains-circus-elephant-Anne-accused-chaining-24-hours-day-allowing-staff-beat-pitchfork.html> [Accessed 24 Nov. 2017].

investigation. Charges were brought against the owner of the circus and he was convicted of three offences under s.4 of the AWA 2006 (causing unnecessary suffering)³²⁷.

It should be noted that the arguments put forward by those who were advocating the ban were not based around the accusation that all circuses were cruelly beating their animals or inflicting suffering, as prohibited by s.4, on their animals. Instead, the argument was that the welfare needs of the animals set out in s.9 could not be met, regardless of the level of care that the animals were offered and even in the absence of overt, deliberately inflicted, cruelty.

In response to the case of the elephant and a number of years of concerted campaigning by other groups, the Government announced, in March 2012, that they would introduce a ban on the use of wild animals in travelling circuses by the end of 2015. In the meantime, they planned to develop an interim licensing regime which would “protect wild animals in circuses”³²⁸

The WWATC 2012 were introduced in January 2013 using powers granted to the Secretary of State under s. 13 of the AWA 2006. Wild animals in travelling circuses in England are still protected by the provisions of the Act generally, and parts of the licensing regime introduced in early 2013 impose additional obligations upon circus proprietors which, arguably, have the potential to improve welfare provision. For example, circus owners are now required to develop and deliver care plans for each animal and group of animals, they

³²⁷ BBC News. (2012). Elephant abuse circus boss guilty. [online] Available at: <http://www.bbc.co.uk/news/uk-england-20464605> [Accessed 24 Nov. 2017].

³²⁸ HC Deb, 19 May 2011, c27WS

are required to keep daily records, they must provide tour itineraries to the authorities, formally identify which people look after the animals and devise detailed retirement plans for the animals in question. Whilst failure to comply with these provisions will not, in itself, result in poor animal welfare, it seems clear that introducing these aspects of planning, monitoring and increased scrutiny may help to better predict and manage potential shortcomings and thus help to prevent welfare offences occurring in the first instance.

The regulations came into force on the 20th January 2013 with their stated purposes as follows:

“[To] introduce a set of minimum welfare standards for all ‘wild’ animals (meaning an animal belonging to a species which is not normally domesticated in Great Britain) used by travelling circuses in England. These standards will be enforced by DEFRA through a licensing scheme”³²⁹.

It was confirmed in detailed correspondence between CAPS, Born Free, BVA, RSPCA and government officials that the intention of the legislation is to ensure the welfare of animals both on the road and in winter quarters³³⁰. This was formally confirmed again in September 2012, in a meeting with CAPS, Born Free and the BVA³³¹. The importance of winter quarters being included is that this is where the animals are away from the public eye, and this is where the training is carried out. Some of the worst documented abuses of animals in circuses have been carried out in winter quarters and exposed by undercover investigation³³².

³²⁹ Welfare of Wild Animals in Travelling Circuses (England) Regulations, Explanatory Memorandum

³³⁰ Pers. Corr. between author and government officials in her then capacity as Director of CAPS.

³³¹ A meeting attended by the author in her then capacity as Director of CAPS.

³³² E.g. The Anne the Elephant case mentioned previously.

The Secretary of State for the Environment at the time the regulations were introduced, Caroline Spelman, stated that the intention was: a tough licensing regime which introduces additional safeguards to protect wild animals in circuses³³³

7.3 Schedule of Conditions

A schedule of conditions follows the main body of the regulations, and lists ten criteria relating to the use of wild animals in circus which must be met if a licence is to be granted, as per s. 4(1)(a) of the regulations. These criteria range from record-keeping to the provision of veterinary care and welfare of animals during transport.

7.4 Guidance on the Welfare of Wild Animals in Travelling Circuses (Regulations) 2012

The conditions laid out in the schedule are relatively broad, arguably because they must apply to any and all species of wild animal kept by any travelling circus which may range from reptiles such as snakes to mammals such as elephants. The guidance is intended to offer more information on the application of the regulations and “is intended to help the operator of a travelling circus that has wild animals, or any other interested party, understand the action that should be taken to comply with licensing conditions”³³⁴.

The guidance also includes specific guidance for certain animals deemed to have specific requirements when kept in circuses. Specific guidance is provided for big cats³³⁵,

³³³ HC Deb, 19 May 2011, c27WS

³³⁴ DEFRA (2012). *Guidance on the Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012*. London: DEFRA. p.1

³³⁵ *Ibid.*, p. 47

elephants³³⁶, reptiles³³⁷, sea lions³³⁸ and ungulates³³⁹. Information is provided under the headings Environment, Diet, Healthcare, Display, Training and Performance, Behaviour and Transport. Not all areas of interest are covered for each type of animal. Specific instruction on display, training and performance, for example, is only provided for elephants.

7.5 Exploring Exemptions to the Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012

7.5.1 Travelling and Static Circuses

When discussion began with regard to the potential for outlawing the use of wild animals in circuses, there was no mention of static circuses, such as Pleasure Island (since closed down) and Pleasurewood Hills, mentioned previously and already established as falling outside of the jurisdiction of the ZLA 1981 by virtue of being classed as circuses. Instead, the debate focused explicitly and exclusively on travelling operations. This was arguably because it was not known to the Government that any businesses were operating as static circuses at this time. This view appears to be corroborated by a statement contained within the explanatory document to the current Government's proposals to ban wild animals in travelling circuses which, mistakenly, states:

*"If the prohibition contained in the draft Bill comes into force, there should be no dangerous vertebrate animals, as listed in the [Dangerous Wild Animals Act 1976], remaining in circuses"*³⁴⁰.

³³⁶ *Ibid.*, p. 49

³³⁷ *Ibid.*, p. 52

³³⁸ *Ibid.*, p. 54

³³⁹ *Ibid.*, p. 46

³⁴⁰ Section 11 of the Explanatory Document, p. 8

In fact, at the time this statement was made, there were two static circuses using wild animals which would be classed as falling within the definition of 'Dangerous Wild Animal' in operation in England. Initial proposals for prohibition of the use of wild animals in travelling circuses centred around the introduction of a ban using powers granted under s. 12 of the AWA 2006, which allow regulations to be introduced by the appropriate national authority in order to promote animal welfare. It was this mechanism by which, it was suggested by the Government of the time and supportive lobbyists, that any ban should, could and, ultimately, would be introduced³⁴¹. The travelling nature and temporary accommodation which animals in travelling circuses were subjected to were highlighted as major factors for welfare concern. In addition, concerns regarding allegedly cruel training methods, unnatural social groupings, exposure to crowds and performance of tricks which could cause long-term physical health problems for the animals in question were also cited as problematic³⁴². Travelling was, therefore, just one of a number of factors which were considered to impact on the welfare of the animals used in circuses but was, by no means, the only concern.

The policy issue which, until that point had focused clearly upon animal welfare, was complicated in March of 2012 when the Government announced that a ban would not be introduced on welfare grounds. The lack of empirical scientific evidence that animal welfare was more or less compromised in a circus in comparison to any other captive situation³⁴³, it

³⁴¹ Hansard HC Deb, Vol 449, 2 Oct 2006, Column 2557

³⁴² E.g. Harris, S., *et al.*, (2006), *A Review of the Welfare of Wild Animals in Circuses*, Bristol University/RSPCA.

³⁴³ As concluded by the aforementioned Radford Report

was maintained, would leave a ban introduced under s.12 of the AWA 2006 open to legal challenge³⁴⁴.

Despite this, the Government did promise to ban the use of wild animals in travelling circuses but on ethical grounds, and via primary legislation, not by the powers conferred by the AWA 2006³⁴⁵. In the words of the then Minister, Lord Taylor: “There is no place in today's society for wild animals being used for our entertainment in travelling circuses. Wild animals deserve our respect”³⁴⁶.

The announcement was a cause for celebration for proponents of animal rights who had argued for decades that this is not just an issue of welfare but one of ethics and morality. It seemed that the Government was of the same mind; that regardless of any welfare concerns, the use of wild animals in travelling circuses was unacceptable on a more fundamental moral and ethical level. One problem this view presented, however, is that if it is unethical to use wild animals in *travelling* circuses then there seems little justification for allowing the continued use of wild animals in *static* circuses such as Pleasurewood Hills and Pleasure Island.

The Performing Animals Act 1925 (PAA 1925), which is the legislation that currently covers static circus establishments, demands little more than a register is kept of those businesses which use performing animals. Monitoring has shown that this register is often not up-to-

³⁴⁴ HC Deb, 23 Jun 2011, c583

³⁴⁵ HC Deb, 12 July 2012, c43WS

³⁴⁶ Gov.uk. (2012). Circuses to be banned from using performing wild animals - GOV.UK. [online] Available at: <https://www.gov.uk/government/news/circuses-to-be-banned-from-using-performing-wild-animals> [Accessed 24 Nov. 2017].

date and that, even so, it contains no meaningful welfare provisions for the animals, nor any regime of inspection other than granting power to enter premises on an *ad hoc* basis under s. 3 of the Act. It was recognised by the Chair of the Government-initiated circus working group that the PAA 1925 "... is not, however, intended to promote welfare and its provisions are widely regarded to be ineffective"³⁴⁷.

It is perhaps important to note at this stage that the Government's consideration of the welfare concerns relating to travelling circuses specifically discounted examination of welfare during training and performance. This was due to the fact that the Government of the time was "committed to repealing the Performing Animals (Regulation) Act 1925 which is ineffectual in setting and maintaining standards in the wider performing animal industry"³⁴⁸. In its place, it was stated, would be introduced "an open and auditable regulatory system that clearly addresses issues such as training, trainer competences and the way that animals across the whole spectrum of performance are looked after"³⁴⁹. To date no repeal of the legislation has been carried out and thus no examination of animal welfare during training and performance has been carried out at Government level. As such, there is arguably scope to still introduce a ban using powers granted under s. 12 of the AWA 2006 using new evidence in this area, if training and performance are found to be particularly damaging practices. However, it was also confirmed by the previous government that there were no plans to carry out further research on this subject and so any development in this area is unlikely at this stage³⁵⁰.

³⁴⁷ Radford, M., (2007). The Report of the Chairman of the Circus Working Group (The Radford Report)

³⁴⁸ HC Deb, 24 Oct 2007, c305

³⁴⁹ *Ibid.*

³⁵⁰ HC Deb, 17 July 2012, c620

While the Government has already promised a ban on ethical grounds, it could be argued that the requirement for such research is a moot point. However, due to the fact that the draft legislation to ban on ethical grounds has been on the shelf since 2012, and it is firmly believed that the training and performance elements of circuses are the ones which present the most animal welfare concerns, welfare groups argue that this should be looked into. In addition, while the licensing regime remains in place and, for example, Wales is now considering incorporating circuses under an updated PAA 1925 Act, the need to properly understand the welfare implications of the training and performance elements of the industry is, in the opinion of the author, vital. In addition, the Government's insistence that the ban cannot be introduced under the AWA 2006 is concerning for campaigners. The purpose of the AWA 2006 was to provide a framework under which secondary legislation could be introduced swiftly and effectively, without needing to resort to the more time-consuming and resource-intensive introduction of primary legislation. The circus ban is a good example of this. The proposed primary legislation ban has been in draft form for almost five years and there has been no sign of finding the parliamentary time to introduce it. On the other hand, the circus licensing regime, which was introduced as secondary legislation under the AWA 2006 was implemented within a year and has now been in place for five years. If the ban could be introduced with such ease, it would not only be preferable but would also be using the AWA 2006 for the purpose that it was introduced. Concern has been raised that, given the ban on the use of wild animals in circuses was one of the key policy issues which was earmarked to be introduced under the Act, the Act is not fit for purpose due to the fact the government have concluded (arguably erroneously) that the Act cannot be used for that purpose.

In the absence of a new process to consider welfare during training and performance in circuses, and to avoid the need to engage in further public consultation and stakeholder engagement, it is suggested that the simplest solution to the ethical and welfare issues identified would be to include static circuses in the upcoming ban on wild animals in travelling circuses. As mentioned above, if it has been recognised that the practice of using wild animals in such shows is unethical for travelling circuses, it seems unlikely that there would be any compelling argument that this type of animal use should continue simply because the businesses remain in one place. This would have the effect closing the loophole and meaning that, if attractions such as Pleasure Island or Pleasurewood Hills wanted to continue keeping animals and exhibiting them to the public, either now or in the future, they would be obligated to change their main purpose for keeping the animals and meet zoo licensing standards in order to do so.

Including static circuses within the new legislation would not impact on zoos which host animal shows whilst meeting the requirements of the ZLA 1981. If the purpose of the business is a zoo, and not a circus, then some performance is still permitted. This means that sea lion and parrot shows at these types of business could continue if the theme parks also met the other standards outlined in the ZLA 1981 and could show that the training and performances met the requirements outlined in Appendix 7 of the Secretary of State's Standards of Modern Zoo Practice. This does not address the wider question of whether or not *any* performances of this kind can be justified within zoos, but that issue falls outside of the scope of this chapter.

This chapter has explored the development of regulation for circuses which use wild animals in England, as well as exemptions to regulations which may be problematic. In the next chapter, the way in which the regulations are enforced will be considered.

Chapter Eight: Enforcing the Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012

The previous chapter considered the wider purpose and application of WWATC 2012, including the historical background to their introduction and exemptions. The following section will consider the practical application of the regulations with a view to understand their regulations' efficacy in practice.

8.1 The Operation of the Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012

Interpretations of terms are dealt with by s. 2 of the regulations with "travelling circus" defined as:

- (a) 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*

S. 3 identifies the use of wild animals in travelling circus as an activity which is licensable under s. 13 (1) of the AWA 2006.

S. 4 outlines the process for application and grant of a licence. A travelling circus which intends to use wild animals in its shows must first apply to Secretary of State, providing all relevant information. The Secretary of State will grant or renew the licence only if satisfied that all licensing conditions will be met and payment of fees has been received. No licence can be granted before the circus has been inspected.

Any licence may be granted for up to three years. The decision to refuse a licence must be given in writing and must explain the reasons for refusal as well as grounds of appeal. In the guidance to the regulations, it states that first licences will be granted for one year. In practice, no licence of more than one year has been granted to date.

S. 5 outlines a list of people who are not entitled to apply for a licence by virtue of disqualification under different statutes. If a licence is granted to a person disqualified under the relevant statutes, it automatically becomes invalid.

S. 6 deals with temporary transfer of a licence following the death of a licence holder, allowing three months for the licence to be formally transferred and 28 days for the Secretary of State to be notified of the death.

S. 7 states that the Secretary of State can take such steps as considered necessary to ensure compliance with licence conditions. What these steps might be, other than suspension of licence and eventual revocation in the case of ongoing non-compliance, are not made clear here or in the accompanying guidance to the regulations.

S. 8 outlines fees payable for the licence and for the inspections, whose costs are borne by the circus.

S. 9 to 12 deal with licence suspension and reinstatement and s. 13 deals with full revocation of a licence. S. 14 offers licence holders the opportunity to appeal against refusal to renew a licence or suspension or revocation of an existing licence.

S. 15 states that the regulations must be reviewed before the end of a five year period.

8.2 The Ability to Enforce the Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012

Given that, as mentioned above, one of the major concerns of animal protection advocates and vets lobbying for stricter controls over circuses (and in most cases an outright prohibition on the use of wild animals in circuses) was that any measures taken to regulate circuses must ensure that winter quarters were effectively captured, the way in which the WWATC 2012 were drafted appear problematic. Concerns were raised during the passage of the draft regulations that the proposed method of suspension was unenforceable as there was no way in which a circus proprietor could comply with the suspension without finding him/herself in breach of the regulations. The issue with enforcement relating to process of licence suspension and can be outlined as follows [taken from Government briefing document authored by E Tyson in September 2012]:

In the event that a licence is suspended, the circus proprietor is not permitted to “operate a travelling circus” unless and until the suspension is lifted. The process for suspension is outlined in sections 9-15 of the regulations but it would appear that suspensions cannot be practically enforced for the reasons outlined below.

Considering the definition of “travelling circus” in the regulations (below), it is clear that the activity of operating a travelling circus includes both taking animals on tour and presenting them in shows and also simply keeping animals associated with the circus at any site, such as in winter quarters.

Interpretations of terms are dealt with by s. 2 of the regulations with “travelling circus”

defined as:

- (a) 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*

With this in mind, when a licence is suspended, it is unclear what action a circus proprietor could take in order to ensure that they are compliant with the suspension. Common sense suggests that, if a licence is suspended, there are a number of potential steps that could be taken to put the suspension into practice:

1. If the circus is on tour at the time, it stops performances until the licence is reinstated. The animals remain where they are.
2. If the circus is on tour at the time, it continues performances but does not use wild animals in the show.
3. If the circus is on tour at the time, the animals are returned to winter quarters
4. If the circus is on tour at the time, the animals are moved somewhere else during the term of the suspension
5. If the circus is not on tour, the animals are removed from winter quarters and held somewhere else during the suspension

This creates a cyclical situation as options 1 – 3 all constitute “operating a travelling circus” for the purpose of the regulations and thus allowing any of these options to be fulfilled in the event of a suspension would either put the circus proprietor immediately in breach of the suspension or would render the suspension meaningless. Cognoscente of the fact that, any place where an animal associated with a travelling circus is kept also requires a licence under the regulations, it would also appear that options 4 and 5 are equally unworkable as

while the licence is suspended, the circus proprietor is effectively disallowed from keeping any animal associated with the travelling circus in any place without that activity being interpreted as operating a travelling circus and, thus, placing the proprietor in breach of the regulations (by virtue of 'operating a travelling circus' during a suspension).

The only apparent option available to the circus proprietor in the event of a suspension would be to move the animals to the site of another licensed circus. The Secretary of State is required to have 14 days' notice if a wild animal is introduced to any circus. This would mean that moving animals from one circus to another would require notice – particularly if the circus that is holding the animals temporarily does not currently have provision for the specific species. Given that suspensions come into effect immediately, this is not a practical solution. In addition, and given that there are currently only two licensed travelling circuses in the UK, the practical likelihood of the other circus taking on the animals of another in the case of a suspension would likely be fraught with complications and most probably unworkable.

In effect, this means that during suspension, unless the circus removes the animals permanently from the business (so that they can no longer be considered to be 'animals associated with the circus') the circus cannot put itself in a position whereby it is not "operating a travelling circus" and thus is likely to find itself in breach of the regulations and liable for prosecution under section 13(6) of the AWA 2006.

Revocation of licence would not have the same implications because, once the licence is revoked, the circus is no longer a travelling circus with wild animals. However, revocation can only happen after suspension and so the problem outlined above remains.

During the data collection and analysis process for the present thesis, there were no suspensions enforced against the circuses and so the practical implications of the problems identified during the passage of the Bill were not tested as part of data analysis. It was highly possible that the poorly-drafted suspension clause may have little practical impact upon the animals or the circus proprietors and that a pragmatic solution might be found which would render the concerns raised moot. However, in early 2016, information was released which confirmed one of the two circuses operating under a licence in England had had its licence suspended while in winter quarters in December 2015. This provided a case study to properly examine the weaknesses in the legislation. This case study is discussed in Section 8.7.1 of the current chapter.

8.3 The Inspection Process

In order to assess compliance, the standards outlined in the WWATC 2012 are underpinned by a system of inspection. Legally, only one inspection per licence term is required under the regulations. At present, this represents a statutory obligation on the part of the relevant authority (in this case, DEFRA) to inspect the circus prior to the grant of a new licence. As licences can theoretically be granted for up to three years at a time, this means that circuses might in future be inspected just once every three years, prior to the issue of a new licence. In practice, the Secretary of State has outlined a more rigorous inspection regime in the guidance which accompanies the Act and is implemented at present. The regime as it is currently applied is summarised below.

Travelling circuses are inspected at least three times per year by a government-appointed inspector³⁵¹. Two inspections are announced (ie: the circus is given notice of the upcoming assessment) and one is unannounced (ie: the circus is given no advance warning). At least one inspection must be made of the circus' winter quarters and the unannounced inspection should be carried out when the circus is on tour.

The Government-appointed inspector may be accompanied by an animal health officer from the AVHLA. The inspection will be assisted by a member of staff from the circus – usually the licence-holder.

In order to assist inspectors in their assessment of a circus, a form (DEF-WATCIR³⁵²) has been devised by DEFRA, which can be filled in during an inspection. The form follows a similar format to those used under the ZLA 1981 inspection regime, but is comparatively simple and does not contain as many questions.

The form is split into two parts. The first deals with seven specific topics relevant to licence conditions³⁵³ and which all appear to have a direct impact on animal welfare, health or safety. There are 26 questions relating to these seven topics. These include questions such as “Do all licensed animals appear to be in good health?” and “Do animals have sufficient access to exercise and enrichment?” For the most part, it seems that a “No” answer to

³⁵¹ DEFRA (2012). Guidance on the Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012. London: DEFRA. p. 4

³⁵² An example of the form can be found here:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/509834/rfi8126_cm_renewal_inspection_report.pdf

³⁵³ Staff, Healthcare, Environment, Diet, Display Training and Performance, Breeding and Transport

questions in this section may indicate poor animal welfare provision. The second part of the form contains a further ten topics (21 questions) which have a strong focus on record-keeping and logistics. They include questions surrounding the presence of the animals listed on the stock list, the keeping of daily records and evidence of accurate journey plans. As a general rule, a “No” answer to a question in this section may demonstrate a breach of a licence conditions but, in and of itself, is unlikely to be indicative of poor animal welfare provision. The exception to this is that assessment of provision of veterinary care and administration of medication is also carried out in this part of the form. Arguably, failure to provide appropriate vet care or treatment may negatively impact animal welfare. The section on veterinary care contains five questions in total. The form thus contains a total of 31 questions for which a “No” answer may be indicative of poor animal welfare provision and 16 questions for which a “No” answer will not, in and of itself, indicate poor animal welfare provision. It should be noted that, for the purposes of the regulations, no differentiation is made between conditions for which non-compliance may have a direct and immediate negative impact on animal welfare and those which do not.

Unlike the form used to assess zoos for compliance with the ZLA 1981 which, for the most part, contains direct reference to the relevant clause of the legislation to which each question applies, the questions included in the circus inspection form do not make direct reference to the conditions to which they relate. The exception is the second part of the form which largely paraphrases or repeats the terms of the relevant conditions and therefore it is easy to identify which condition these questions relate to. For the topics in the first part of the form, a matrix has been produced by DEFRA as part of the guidance to show which topics relate to which particular licence conditions. The standards required of the circus with regard to each topic are then outlined in the guidance. Most topics contain questions which relate to more than one licence condition. This matrix (and the

accompanying welfare standards in the guidance) allows for both circus operators and circus inspectors to better understand what standards are required and for the latter to be able to assess compliance with the relevant conditions. The matrix has been reproduced for reference below:

Licence condition / Topic	Topic 1: Circus Staff	Topic 2: Healthcare	Topic 3: Environment	Topic 4: Diet	Topic 5: Display, performance and training	Topic 6: Breeding	Topic 7: Transport
Condition 3: Animal Records		x					
Condition 4: Care Plans		x	x	x	x	x	
Condition 5: Persons with Access	x				x		
Condition 6: Veterinary Surgeons		x				x	
Condition 7: Promote Welfare	x	x	x	x	x	x	x
Condition 8: Display, Training and Performance		x			x	x	
Condition 9: Environment			x	x	x	x	
Condition 10: Transport		x				x	x

Figure 9: Condition Matrix for Travelling Circuses

The inspection forms are designed offer a Red, Amber or Green (RAG) rating in relation to each topic (and its relevant questions). DEFRA explains the colour code, on page three of the inspection form, as follows:

- Green = full compliance/minor breach (no action required);
- Amber = breach identified (remedial action recommended); and
- Red = significant breach (action required).

It is unclear how the inspectors differentiate between minor breaches which don't require action, those breaches which simply require recommendations and those that require action. This information is not provided in the guidance which, arguably, introduces a margin of uncertainty for both inspectors and circus proprietors into the system. In addition to the RAG rating, the inspector provides notes next to each question under the relevant topic which serves to explain the rating given and highlight any need for action. There is no mechanism to add new conditions to the licence and so the circus will always be assessed alongside the existing ones. At the end of the inspection, the inspector makes notes in relation to whether or not action is required, but these do not take the form of new conditions. Instead, they might be listed as "items for attention".

In practice, the RAG rating is applied to the topic in the form, rather than each individual question. This means that there are 17 ratings in relation to answers to 46 questions. This may be problematic in that the questions grouped under topics may relate to compliance (or lack thereof) with a number of different conditions. The use of an R, A or G rating in relation to up to ten questions (for example in the case of the topic "Environment") may be problematic as a means to identify specific breaches of conditions. It is argued that it would be more beneficial to group questions in the inspection form into those which relate

specifically to conditions (similarly to the way in which the ZOO2 form, discussed previously, is arranged) so that it is clear whether or not a condition has been breached, and which one it may be.

After the form has been completed a recommendation is made by the inspector as to whether the circus should continue to be licensed with other options being “documentary evidence to demonstrate improvements to be provided”, “Early visit recommended to confirm action has been taken” and “Licence refused/suspended”. The inspector then provides the report to the Circus Licensing Panel, which takes a decision based on the report and recommendations as to whether the circus should be licensed going forward. The options available to the panel are “licence suspension” and the “circus being licensed in accordance with the regulations”.

(1) Staff Is unsupervised access to licensed animals restricted to authorised persons?	NO. The reindeer are in unsupervised close contact during the day with the public at the rear of the garden centre, however, these animals appear very placid & are checked by staff every hour. At week-ends, the camels are brought into this area, but are out of reach of the public.	G
(2) Healthcare Do all licensed animals appear to be in good health?	Yes all the animals appear fit and healthy.	G
(3) Environment Are areas used by licensed animals operated in a way that provides good welfare? Are areas a suitable size? Are areas in good condition and free from hazards? Are areas sufficiently secure? Are areas suited to the social, behavioural and environmental needs of the animals? Do animals have sufficient access to exercise and enrichment? Are areas hygienic and clean? Do areas have a suitable floor? Are environmental factors managed, including shelter from the elements? Is due regard had for species specific guidance?	YES See note re reindeer later YES YES_ apart from Camel paddock_ see later YES YES YES YES YES YES YES	A
(4) Diet Is food stored properly? Is food prepared properly?	Hay of good quality is fed ad lib. All other food was stored appropriately in one of the wagons in vermin & water proof containers	G
(5) Display, training and performance Are the precautions required by the assessment of welfare risks carried out? Are animals fit for the activities expected of them? Are only suitable areas used for display, training and performance?	No training or performance is undertaken during the winter rest period so this was not observed. YES YES YES	A

Figure 10: Column 1 = Assessment criteria and sub questions, Column Two: Notes area, Column Three: RAG rating

Section 3: Inspectors Recommendation to Defra

Having inspected (name of circus)

operated by (name of operator).

on:

Summarise the potential impact of the issues found on the welfare of the wild animals in this travelling circus, noting the involvement of any other authority.

{This text will be transferred to the letter sent to the circus after the inspection}

Recommendation:

- Licence awarded / Continue to be licensed
- Documentary evidence to demonstrate improvements to be provided
- Early visit recommended to confirm that action taken
- Licence refused / suspended

(Please delete as necessary)

Signed:

Dated:

Figure 11: Recommendation made by inspector to DEFRA with relevant comments.

There is no legal requirement under the regulations for a report to be completed, only for the inspection to be carried out. In practice, and to date, a report has been completed for each inspection and, indeed, it is unclear how the inspector would communicate the relevant information required to the Circus Licensing Panel without completing a report.

Issues or concerns identified during an inspection can be noted by the inspector but there is no power to alter or amend the licence. All licences are subject to the same ten conditions and the Secretary of State has powers to “take such steps necessary to ensure compliance with the licensing conditions”³⁵⁴. What these steps might entail is unclear other than the Secretary of State’s ability to suspend a licence if conditions have not been complied with. Problems with this process and questions over whether or not this is possible in practice are outlined earlier in the chapter and examined in detail of Section 8.7.1 of this chapter. If a licence is suspended for 28 days, the Secretary of State *may* (but is not obliged) to revoke it³⁵⁵.

8.4 Assessing the Extent to Which Circuses are Compliant with The Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012

Unlike the ZLA 1981, which has been in place for over thirty years, WWATC 2012 have only been in place for almost five years at the time of writing. There are only two travelling circuses operating in England under the licensing scheme and so the sample of circuses and

³⁵⁴ S. 7 WWATC 2012

³⁵⁵ S.13 WWATC 2012

inspections to establish the efficacy of the legislation is far more limited than the large and long-term sample available with zoos. In addition, unlike evidence of non-compliance with the ZLA 1981 having already been established by studies completed prior to this research being carried out, no such research has been applied to circuses.

This section seeks to establish whether circuses are indeed compliant with the regulations and, if non-compliance is noted, then the extent of enforcement action carried out can then be considered. One of the major challenges from the outset of assessing whether or not the correct enforcement is being carried out against non-compliant circuses is that, unlike the ZLA 1981 which outlines clear steps to be taken to enforce compliance with licence conditions, it is not clear from the circus regulations which steps (if any) shall be taken in the case of non-compliance, in part due to the wide discretion granted to the Secretary of State to ensure conditions are met³⁵⁶.

8.5 Data Collection

Data was collected relating to the period 1st January 2013 to the 30th June 2015.

All circus inspection reports relating to inspections carried out during the relevant period in England have been published on the DEFRA website and so were downloaded from there³⁵⁷. In addition, a Freedom of Information request was made on the 27th August 2015 to request copies of all licences issued and attached conditions, as well as any correspondence relating to non-compliance with conditions. Theoretically, all licences and all conditions should be the same and so these documents are less important than those used in the zoo analysis, where the conditions were specific to the business and whether or not they were attached

³⁵⁶ S. 7 WWATC 2012

³⁵⁷ Source: <https://www.gov.uk/government/collections/DEFRA-foi-eir-releases>

to the licence following inspection impacted on the legal obligations placed on the zoo to comply.

All licensing operation is managed centrally by DEFRA and so only one Freedom of Information request was required to obtain all documentation relating to both circuses. The request included in Appendix Four was sent via email to the relevant Freedom of Information email address at DEFRA. The total number of reports analysed was 15; seven for one circus (Circus Mondao) and eight for the other circus (Peter Jolly's).

8.6 Data entry

All data from all fifteen formal inspection reports provided was entered into a Microsoft Excel workbook. Each circus was allocated its own sheet within the Excel workbook and all data for each circus was recorded on the same sheet. Data was inputted by noting whether the inspector answered "Green", "Amber", "Red" or "N/A" and recording any notes made to document responses to the individual questions. As noted above, the inspectors noted one "RAG" answer under each of the form's seventeen headings and then made notes in relation to the specific questions posed. In this sense, the notes were important to understand compliance with the relevant conditions and understand any elements of non-compliance.

Where an "Amber" answer was recorded, which suggests a breach, this was deemed to represent an element of non-compliance (there were no "Red" ratings utilised by inspectors in the reports). As the RAG rating was given per topic and not per question, rather than a total of 690 instances of compliance to consider (46 questions multiplied by 15 reports), only 255 instances of compliance could be assessed. This will not give a clear picture of number of breaches of specific conditions as one RAG rating might refer to a number of

different questions dealing with compliance with a number of different conditions. As with the analysis of the zoo licensing reports, only the inspector's rating was taken into consideration. Whilst the notes served to inform the rating, if a "Green" rating was given under a heading, this was construed as implying full compliance (even if the notes appeared to contradict this view – see discussion of "Yes, but" phenomenon discussed in relation to zoo in Chapter 6.5). If an "Amber" rating was given, this could not be extrapolated to understand exactly which conditions were being breached. It was simply noted that breach(es) had been noted by the inspector under that topic/heading.

A simple analysis which considered the number of times non-compliance had been recognised was carried out. This gave rise to the main quantitative results.

The notes made on the reports were then used to contextualise and better understand the quantitative results gleaned from the data and to understand how the process of licensing and enforcement was carried out in practice. Due to the small sample, all notes from both circuses were considered.

Unlike the ZLA 1981, where breach of condition has clear consequences (an offence under S.19 and/or action under S.16) breach of a condition does not give rise to specific, pre-determined, action. Instead it provides the Secretary of State with an opportunity to take the steps necessary to ensure compliance³⁵⁸. This means an analysis of what type of enforcement action should be carried out is not possible. There are no offences recognised under the regulations.

³⁵⁸ S. 7 WWATC 2012

8.7 Results

Since the introduction of the regulations, there have been 255 instances of “Green” compliance with the WWATC Regulations and 12 instances of “Amber” non-compliance.

Both circuses demonstrated instances of non-compliance.

Compliance with the Welfare of Wild Animals in Travelling Circuses (England)

Regulations 2012

Circus Name	Number of Reports	Instances of compliance	Instances of non-compliance
Peter Jolly's	8	136	9
Circus Mondao	7	116	3

Figure 12: Compliance/Non-compliance by circus.

Instances of non-compliance

	Inspection Date	Topic	Notes	Direct impact on animal welfare?
Peter Jolly's	28/1/2013	Tour Itinerary	There was no tour itinerary because the inspection was carried out during the winter (non-touring) season.	No
	28/1/2013	Care Plans	The welfare risk assessments did not contain the necessary information.	No
	27/6/2013	Records	Worming treatment had not been recorded in the daily records	No
	8/8/2013	List of Licensed Animals	Unable to check microchips in the big cats.	No
	8/8/2013	Records	Information relating to new animals must be transferred.	No

	8/8/2013	Care Plans	Some elements of the care plans required clarification and detailed emergency procedure must be devised in case of an emergency involving the big cats.	No
	27/2/2014	Environment	The snakes cannot stretch out fully in their vivarium. Humidity must be recorded in the snake's vivarium. No bathing trough for tigers.	Yes
	27/2/2014	List of Licensed Animals	Unable to check microchips in the big cats.	No
	27/2/2014	Records	Snakes died but no records of the cause of death were provided. Worming treatment for fox and raccoon were not recorded in the daily records.	No

Figure 13: Specific instances of non-compliance. Peter Jolly's Circus

	Inspection Date	Topic	Notes	Direct impact on animal welfare?
Circus Mondao	27/2/2014	Healthcare	One of the camels had a hock injury and one of the reindeer's coats was in poor condition. A vet was visiting the next day.	Yes
	10/11/2014	Environment	Reindeer enclosure is only just adequate. Rails are missing on the perimeter of the camel enclosure.	Yes
	10/11/2014	Display, Training and Performance	The public have unsupervised access to the reindeer.	Yes

Figure 14: Specific instances of non-compliance. Circus Mondao.

It appears clear from the reports that, compliance with the regulations is largely deemed satisfactory by the inspectors. All licence inspection reports resulted in a recommendation that the circus should be licensed and both circuses continue to hold a licence at the time of writing. No enforcement action had been taken against either of the circuses during the period under consideration, nor was any enforcement action recommended by inspectors. All of the small number of breaches noted were classed as “Amber”; which are considered to require “recommendations” but not “action” and eight of the total 12 breaches related to administrative or logistical concerns. One instance of “Amber” breach noted against Peter Jolly’s Circus was that the tour itinerary was not provided, but the circus was not on tour at the time and therefore this is arguably not representative of a breach of the regulations, despite being noted as such. Four of the eight breaches noted arguably had a direct impact upon animal welfare but in most cases concerns were largely explained as part of the notes or, in the case of the provision of a branch for the snakes in their vivarium, could be easily remedied.

From this analysis, it was concluded that there is general widespread compliance with the standards of WWATC 2012 from the small samples of data available. Due to level of compliance found during the data gathering and analysis stage, there were no instances identified where enforcement action might have been required and therefore an analysis of enforcement action being carried out was neither possible nor necessary at that stage. However, when further inspection reports and related documentation became publicly available in early 2016, it became apparent that one circus, Circus Mondao, had its licence suspended at the end of 2015. The consequences which flowed from this suspension are considered in the case study below and speak to the concerns raised during the passage of the regulations in relation to the poor drafting of the legislation leading to problems where it comes to enforcement.

8.7.1 Case Study: Attempts to Suspend a Licence – November 2015³⁵⁹

On the 25th November 2015 Circus Mondao was subject to an unannounced inspection by DEFRA officials at its winter quarters in Spalding, Lincolnshire. What is perhaps unusual about Mondao's winter quarters is that they are a garden centre which is open to the public. As such, the animals remain 'on show' to some extent during the winter period, when the circus is not touring. The DEFRA report confirmed that reindeer and a baby camel were able to be accessed (and fed, unsupervised) by members of the public. Normally winter quarters are completely closed to the public and so there is no element of display during the winter months. The relevance of this point in this case becomes clear when officials attempted to suspend the licence.

During the inspection on the 25th November, a number of points were raised. These were:

- Public access to the reindeer and camel were not adequately supervised (this had already been raised as an issue during inspections during previous inspections on 10/11/2014 and again on 18/12/2014 but remained unresolved by the circus the following year).
- The reindeer had insufficient space – their enclosure was smaller than licensing requirements demand.
- The reindeer were given insufficient exercise.

³⁵⁹ All paperwork relating to this case study has been published by DEFRA as part of Freedom of information disclosure and can be found here:
<https://www.gov.uk/government/publications/licence-applications-and-inspections-for-travelling-circuses>

- Care plans did not include risk assessments for display, individual records did not include any record of food being given by members of the public.

As a result of the above, there had been a clear breach of conditions 4, 5, 7 and 9 of the circus' licence³⁶⁰. The DEFRA circus panel recommended immediate suspension of the licence and the circus was informed of this in a letter dated 2nd December. In that letter, DEFRA suggested that, in order for the terms of the suspension to be met "wild animals must be off display and not perform at all times"³⁶¹. If the animals were species whose keeping was regulated by the Dangerous Wild Animals Act 1976³⁶², DEFRA mandated that they must be licensed under that legislation. It should be noted at this stage that the issues with regard to the ability to effectively suspend a licence discussed in Chapter 8.2 of this thesis now come into play. It appears that, perhaps in order to make the suspension practically possible, DEFRA has dramatically narrowed the definition of a "travelling circus" from that which is included in the regulations. By suggesting that simply removing the animals from display and stopping performance for the duration of the suspension would constitute the suspension of "operating a travelling circus", it would appear that DEFRA no longer classifies animals held off-display and at winter quarters as forming part of the travelling circus; something which, as discussed in detail previously, was a major point of concern for animal welfare advocates and vets during the passage of the regulations.

³⁶⁰ Condition 4: Care Plans, Condition 5: Persons with access to licensed animals, Condition 7: Responsibility of the operator to promote the welfare of licensed animals and Condition 9: Specific welfare requirements for environment.

³⁶¹ Letter available as part of Freedom of information disclosure. It can be found here: <https://www.gov.uk/government/publications/licence-applications-and-inspections-for-travelling-circuses>

³⁶² Circuses are explicitly exempt from Dangerous Wild Animal Licensing in s.5

Indeed, this interpretation is in direct conflict with the definition of “travelling circus” utilised by the regulations which explicitly states that animals associated with a travelling circus remain part of that travelling circus anywhere they are kept. The activity of “operating a travelling circus” is an ongoing activity which continues perpetually while the business is travelling *and* while not travelling and while the animals are not on display.

On the 12th December, the Circus informed DEFRA that it would move the wild animals to the home of the owner of the circus – understood to be a farm near the garden centre. This was confirmed as having been carried out on the 14th December³⁶³. It is unclear whether or not the farm was henceforth considered to be part of the travelling circus or whether or not the farm was inspected. No documentation was made available with regard to inspections being carried out, and so it seems reasonable to assume that no inspection occurred and the farm was considered to sit outside of what was considered, by DEFRA, to constitute the “travelling circus”.

8.7.2 Questions Over Oversight of Winter Quarters

With just one case study available with regard to how the regulations might be enforced in the event of a breach, it is difficult to draw concrete conclusions regarding any future implications for the animals and the circus proprietors should further attempts be made to suspend a licence or carry out other enforcement action. The Mondao case does, however, highlight a number of concerns which may come into play in the future if the regulations remain in force in their current form. The first is that DEFRA appears to be using a different working definition of “travelling circus” than is utilised in the regulations; a definition far

³⁶³ Letter available as part of Freedom of information disclosure. It can be found here: <https://www.gov.uk/government/publications/licence-applications-and-inspections-for-travelling-circuses>

narrower than intended by WWATC 2012. By limiting its interpretation of the activity “operating a travelling circus” to the period of time when animals are being displayed to the public and/or used in shows, it would appear that DEFRA have discounted the keeping of animals in winter quarters from the scope of the activity and, furthermore, are satisfied for the animals to be moved to a site not associated with the licence in the event of a suspension.

Similarly, as was the case with Mondao, if a winter quarters themselves are inspected and the circus found to be in breach of standards outside of the touring season when the animals are not usually on display or involved in performances, DEFRA is again apparently satisfied that moving the animals to a site unrelated to the circus (and thus outside of the licensing regime’s jurisdiction) will fulfil the demands of the suspension. There is no reason to suggest that any site unrelated to the licensed circus to which animals might be moved would necessarily be inadequate or that their welfare would be compromised simply by being kept somewhere which fell outside of the licensing regime’s jurisdiction, however it does raise two important points with regard to the regime itself, its extent and its efficacy:

1. First and foremost, the regulations make clear that the **anywhere** that an animal associated with a travelling circus is kept requires a licence so as to avoid breaching the regulations. As such, DEFRA’s satisfaction at animals being moved to an unlicensed site during suspension may be a pragmatic way of enforcing poorly-drafted regulations but is certainly not compliant with the letter of the law.
2. Perhaps more importantly, it would appear that the fears raised by animal welfare organisations and vets during the passage of the regulations that animals would not be adequately monitored and protected in winter quarters may well be founded. In

the case of Mondao, when winter quarters were found to be lacking, the animals were simply sent elsewhere to a site which did not form part of the circus. It is perhaps lucky that the animals who were moved as part of the suspension were zebra and reindeer – animals who can be housed in similar accommodation as some domesticated animals, such as horses. Had the suspension been imposed in relation to wild animals with extremely specialised needs, such as lions, tigers or elephants, it seems unlikely that the circus would be able to provide, at short notice, a second site for the animals to be sent to. It therefore follows that, during the suspension, the animals would have to stay in the sub-standard winter quarters while the breaches were remedied or be removed to a different site, where inspectors have no right of entry other than the normal powers available under the AWA 2006 which would require a warrant, and which may or may not provide an adequate standard of accommodation, husbandry and veterinary care.

Ultimately, the flawed suspension process as outlined in the regulations as they currently stand does not appear, as yet, to have presented barriers to DEFRA taking action to suspend a licence when breaches were found due to the pragmatic approach adopted by DEFRA officials in enforcing the suspension. That said, there are clearly flaws in the approach adopted and there is potential for further problems to arise in the future if a similar suspension is attempted, particularly if the suspension involves animals with highly specialised needs. A view on how the issue of enforcement might be both explained and resolved is outlined below.

8.7.3 Conflating “Use” with “Ownership”

The WWATC regulations were put in place to regulate the activity of using wild animals in travelling circuses. Regulations introduced under s.13 of the AWA 2006 cannot imply power to deprive animal keepers of ownership of their animals. As such, to be enforceable, regulations must be able to differentiate between ownership of animals (which is an ongoing right to keep the animal) and an activity involving that animal. To avoid exceeding powers granted by s.13, it must be possible within the regulations to prevent/regulate the use of the animals in a particular activity without depriving the legal keeper of the animal of their right of ownership in the case that the regulations are breached. This is where, it is argued, the regulations in question fail.

In its definition of “circus”, the regulations sought to capture every aspect of the animals’ lives so that every activity the animal carries out (from sleeping to eating to exercising, whether while the circus was travelling and shows were being delivered or when it is not travelling and animals are housed in winter quarters) has been deemed to fall within the overarching activity of “being used in a travelling circus”. As a licence is required in order for a wild animal to be used in a travelling circus and the regulations have defined “use” to include the simple keeping of an animal in a travelling circus or anywhere else while the animals is still considered “associated” with the circus, then the regulations are effectively regulating the ownership of wild animals by circuses or, by extension, circus employees. To suspend a licence is to effectively demand that the wild animal is no longer able to be associated in any way with a circus. The only way in which to realise this demand is to remove the animals permanently from the site in the event of suspension, thus depriving the circus or individual of ownership. Proper enforcement would therefore clearly suggest that the regulations can be considered *ultra vires* in that they appear to regulate ownership and not activity.

8.7.4 The Impression of Oversight vs the Reality

An interesting, and somewhat concerning point which became apparent from the correspondence in relation to the attempted licence suspension of Circus Mondao relates to the breeding of animals. In the inspections reports included in the data used as part of this research, carried out in August 2014 and November 2014 respectively, the inspector's answer to question 6 on the inspection form, relating to health and welfare during the breeding process being met were as follows:

August 2014: "The camels have been housed together for several years and no breeding behaviour has been recorded. Both appear healthy and there does not appear to be any welfare problem or incompatibility"³⁶⁴.

November 2014: "No breeding has, or is likely to occur (the only entire animals are the camels, & these have been living together for many years & shown no breeding activity)" [sic]³⁶⁵.

Camels have a gestation period of between 12 and 15 months and the female camel at Circus Mondao gave birth on June 15th, 2015. As such, the camel was pregnant during both of the previous two inspections, but this went unnoticed by the vet. The female camel died

³⁶⁴ Inspection report published as part of Freedom of Information disclosure and available here: <https://www.gov.uk/government/publications/inspection-reports-for-2-named-circuses-since-october-2013>

³⁶⁵ Inspection report published as part of Freedom of Information disclosure and available here: <https://www.gov.uk/government/publications/reports-on-2-circuses-between-26-june-2014-and-22-january-2015>

just over a month later (21st July 2015) but post mortem records have not been made publicly available to understand the cause of death.

In the final inspection report made available publicly (6th August 2015), a note made by the inspector at the end of the report with regard to the camel's death reads:

"The background to this event [the death of the female camel] is that the breeding of camels was not specifically planned. Mating behaviour had been seen in previous seasons but had not resulted in pregnancy and it was thus assumed that breeding was unlikely"³⁶⁶.

This statement – that mating behaviour had been witnessed by staff in the past - contradicts previous information provided to inspectors, whereby it appears that inspectors were told that there has never been any such behaviour witnessed. This issue, and the failure to identify the pregnancy, raises questions with regard to the reliability of the inspection process as a means to gain a true indication of animal welfare provision. While it could be argued that with three visits per year and very few animals to be seen, it is perhaps more likely that animals used in circuses, due to their low numbers at this present time, will be subject to more thorough assessment and oversight than animals numbering in their thousands kept in zoos, this is perhaps not the case in reality. Much of the licensing and inspection process necessarily relies on testimony from the staff, rather than direct observation by the inspector, which could be considered problematic if the information provided is not accurate. It is also clear that the inspector's visits do not necessarily identify situations which may demand further scrutiny or specific measures to be implemented in the interests of animal welfare. It is impossible to know, given the available information

³⁶⁶ Inspection report released to author as part of Freedom of Information disclosure but not subsequently published by DEFRA in its disclosure log.

available, whether or not the death of the camel was linked to the unplanned and unnoticed pregnancy, however it is an issue worthy of further consideration when taking into account the licensing regime's ability to "secure the welfare of wild animals"³⁶⁷ as stated by legislators to be its aim on implementation.

8.8 Conclusion

Having considered the development, implementation and enforcement of WWATC 2012, it appears that weaknesses can be found in the make-up of the regulations themselves, which has led to DEFRA departing from the definition of "travelling circus" used in the regulations and, instead, adopting what appears to be a pragmatic approach to their enforcement. Concerns were raised during its passage through Parliament that the highest standards of welfare possible in a travelling circus still fell below standards required to meet the welfare needs of the animals themselves in practice and, as such, welfare simply cannot be met in such an environment. Furthermore, the technical issues surrounding the ability to effectively sanction circuses in the case of non-compliance (highlighted above in Chapter 8.2) which were raised during the passage of the Bill were found to be warranted in early 2016 in light of the attempted suspension of Circus Mondao's licence. While DEFRA found a pragmatic solution to enable the licence suspension to be implemented, the finer details of the process remain unclear and the outcome of any future attempts to suspend or revoke a licence will be subject to the same problems of interpretation and delivery if the regulations remain in their current form.

³⁶⁷ HC Deb, 1 March 2012, c41WS

It was made clear from the outset that regulations, to be effective, must protect animals both while on the road and in winter quarters. While this was explicitly recognised by policymakers and subsequently written into the legislation, the practical application of the legislation has been far less expansive; with DEFRA taking a very narrow definition of what the activity of “operating a travelling circus” entails. In effect, DEFRA have, in attempting to enforce the regulations, discounted keeping animals off-show in winter quarters as being encompassed in the overall activity of “operation a travelling circus”. This creates a two-pronged problem:

1. Proper enforcement of the legislation in the case of a suspension would deprive the animal’s keeper of ownership. This suggests that the regulations are *ultra vires* (exceed the scope of the powers granted by the enabling act).
2. Avoiding proper enforcement of the regulations and taking a pragmatic approach necessitates a far narrower interpretation of the activity of “using a wild animal in a travelling circus”; in turn creating the risk that animals kept in winter quarters or off display fall outside of the licensing regime in practice, if not strictly in law.

Finally, the case study relating to the unexpected birth of a camel and the subsequent death of his mother a little over a month later raises legitimate concerns that the oversight provided by the inspections, for reasons currently unknown, may not be sufficient to properly assess, much less guarantee and protect, the welfare of individual animals.

The next chapter will go on to consider the core question of this research: whether or not the use of regulatory licensing regimes can be considered an effective means of regulating animal use and, particularly, whether such regimes can (and/or do) protect animal welfare.

Chapter Nine: Is Licensing an Effective Means to regulate the Use of Animals?

The primary suggestion with regard to both pieces of legislation under consideration is that the legislation (in and of itself) is designed (and believed) to protect animal welfare. This narrative is strongly promoted within the rationale behind and wording of the legislation itself (see Chapter 4 and Chapter 7), in Government statements with regard to the legislation³⁶⁸ and among industry stakeholders³⁶⁹. This research has suggested that licensing *in and of itself* is unlikely to protect welfare, but it *can* be used as one tool within a wider regulatory framework to achieve a number of aims which certainly have potential to contribute to animal welfare. The specific benefits of a well-designed and implemented licensing regime is that practices which involve animals which might present specific welfare concerns can be monitored and given extra oversight and that standards can be set which allow those using the animals to understand what they need to do to comply. A good licensing regime will be underpinned by a range of enforcement tools, which can be deployed in the case of non-compliance. Whether or not these factors are met within the two pieces of legislation under consideration will be considered shortly. There are very strong assertions from various stakeholders that the very purpose of the two pieces of legislation are to “ensure high welfare standards”³⁷⁰ are met (WWATC 2012) and to “ensure

³⁶⁸ E.g. HC Deb, 1 March 2012, c41WS

³⁶⁹ E.g. Penarth Times. (2016). Animal charity raises concerns over wild animals as circus comes to the Vale. [online] Available at: http://www.penarthtimes.co.uk/news/14424591.Animal_charity_raises_concerns_over_wild_animals_as_circus_comes_to_the_Vale/ [Accessed 17 Jun. 2016].

³⁷⁰ Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012, Explanatory Memorandum

... *that high standards of welfare are maintained*³⁷¹ (among other things) in the case of the ZLA 1981. It is clearly stated that the very purpose of both statutes is to ensure high welfare standards. While it has been concluded this is not necessarily the practical impact of the two pieces of legislation, it is important to attempt to explore why this is the case and, indeed, why under current legislative frameworks, the author believes that it could never be the case. In short, if the aim of the legislation is to ensure high welfare standards, then licensing is not the means by which to achieve this.

9.1 Why Licensing Can Never “Ensure High Standards of Welfare” For Regulated Animals

9.1.1 “Good Practice” Does Not Equal “Good Welfare”

As noted in Chapter 2.4.2, “good practice” in the context of the AWA 2006, does not lay down a universal minimum standard of welfare for any individual species or type of animal. Instead, as has been noted in the foregoing discussion on the development of WWATC 2012, the ‘good practice’ caveat is necessarily interpreted based upon what is considered good practice within the industry itself. As such, existing good practice within the circus industry will act as the benchmark for welfare standards in circuses and existing good practice in pet shops, for example, will act as the benchmark for welfare in pet shops. The result of this is what O’Sullivan has referred to as “the internal inconsistency”³⁷² and practically means that an elephant, for example, can spend her entire life sleeping in a lorry trailer, being chained by the leg each night and in an unnatural social group in England and be deemed to have

³⁷¹ Defra.gov.uk. (n.d.). Biodiversity and ecosystems - GOV.UK. [online] Available at: <http://www.DEFRA.gov.uk/wildlife-pets/zoos/> [Accessed 24 Nov. 2017].

³⁷² O’Sullivan, S. (2011). *Animals, equality and democracy*. Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, pp.6-7.

her welfare needs met under the law governing animal welfare in circuses. Likewise, an elephant can live in a concrete enclosure in a zoo, in a climate very different to that which she is adapted to and in a social group which is unnatural to her and be deemed to have her welfare needs met under the Animal Welfare Act (the extent to which needs might be better catered for under the Zoo Licensing Act itself will be considered shortly).

The result of this is that 100% compliance with the standards may result in animals of the same species and with (largely) the same needs, experiencing living experiences and welfare which are very different, depending on the situation in which they happen to be used. For this reason, it would appear that compliance with the law, without meaningful consideration of the content and demands that law makes, is not a good gauge of whether welfare needs are met in practice from the perspective of the animal themselves. It may be an obvious statement to make but, it would appear that the only way in which a licensing regime might be considered effective with regards to protecting animal welfare is if the standards which that licensing regime imposes on industry would result in good animal welfare if delivered. In the case of circuses, it is widely believed that this is not the case.

To return to the example of shackling elephants explored earlier in Chapter Two, a circus can be found to be compliant with welfare standards for circuses if it keeps elephants shackled by their legs every night of the animals' lives. Conversely, a zoo would be found in breach of welfare standards for zoos if it were to do the same to the elephants under its care. This makes little sense if the two pieces of legislation have as their purpose the protection of the welfare of the (shackled or unshackled) elephants and highlights the clear weakness in relying on the 'good practice' caveat to support the delivery of high welfare standards in practice.

9.1.2 The Limitations Created by the ‘Good Practice’ Caveat Limits Potential

Efficacy of Licensing

As noted, the ZLA 1981 is a piece of primary legislation and WWATC 2012 were introduced as secondary legislation under the AWA 2006. While the zoo industry is also governed by the AWA 2006, the standards laid out in the ZLA 1981 stand apart and can be considered in isolation. On the other hand, the standards outlined for circuses cannot exceed welfare standards mandated by the parent Act due to the aforementioned caveat of ‘good practice’ incumbent on the interpretation of any regulations introduced under the AWA 2006. In addition, while the ZLA 1981 must incorporate the demands of the EC Zoos Directive (Directive 1999/22 EC), member states are not precluded from implementing standards which exceed those of the Directive. As such, the EC Zoos Directive theoretically acts as a minimum standard which must be met but can be built upon. Having already considered that the AWA 2006 never makes a demand upon those responsible for animals to meet their welfare needs in full, the wording of the ZLA 1981 suggests more stringent controls. In place of the “to the extent required by good practice” caveat found in the AWA 2006 which, in turn informs the standards outlined in WWATC 2012, the ZLA 1981 demands that zoos must aim to “provide each animal with an environment well adapted to meet the physical, psychological and social needs of the species to which it belongs”³⁷³ and “provide a high standard of animal husbandry with a developed programme of preventative and curative veterinary care”³⁷⁴. As such, there is potential for the very highest welfare standards to be delivered under the ZLA 1981 which are based upon the very specific physical, psychological and social needs of the species of animals held by the zoo. When we compare the demands of the ZLA 1981 with those of the licensing regime for circuses, it becomes clear that the

³⁷³ S. 1A(c)(i) Zoo Licensing Act 1981

³⁷⁴ S. 1A(c)(ii) Zoo Licensing Act 1981

potential to meet animal welfare needs are constrained when interpreted in the context of the AWA 2006 in a way that they are not when the legislation in question seeks to further the aims of conservation of biodiversity, rather than animal welfare *per se*. It would appear from this that, somewhat ironically, if the true aim of the legislation were to introduce the highest welfare standards possible, policymakers might be better to introduce legislation outside of the constraints of the AWA 2006, such as under the banner or “conservation of biodiversity” which is the focus of the ZLA 1981. While this suggests that the ZLA 1981, properly interpreted and enforced, could therefore go a long way towards protecting animal welfare to a very high standard, what needs to be further understood is the real-life demands placed on licensees with regard to the extent to which they must meet those standards. High standards on paper are all well and good, but if no demands are placed on licensees that the standards outlined by the law have to be met, then this arguably reduces the legislation’s ability to guarantee animal welfare needs are met in practice.

9.1.3 Possession of a Licence Does Not Indicate Compliance with Standards

If the standards mandated as part of the licensing regime were adequate to ensure that compliance with them meant that animal welfare needs were met in practice, then this might go some way towards guaranteeing effective animal welfare protection. However, the next important point to note is that neither piece of legislation under consideration, if properly enforced, demands that licence holders meet the standards required of them on a consistent basis. In fact, a zoo or circus may theoretically hold a licence yet be non-compliant with the standards outlined by law for long periods of time.

For example, the ZLA 1981 (properly enforced) makes the demand that zoos meet certain standards. If those standards are not met, then a condition must be attached to the licence and a direction issued. If the condition relates to one of the demands made by s. 1A of the

Act, the zoo must comply within two years or it may face closure. This means that, in theory (and as has been found in practice) zoos can retain a valid licence while failing to meet fundamental legal standards for a period of up to two years (or more if the condition in question does not relate to demands made by s1A). In practice, it has been seen that, due to poor enforcement, zoos have retained licences for far longer than two years whilst being non-compliant with at least some standards [see: Chapter 6.8.3]. In addition to this, zoos are only inspected by a Government appointed inspector once every three years. The two-year timeframe allowed for compliance only begins to run against the zoo once the issue has been noted upon inspection and a condition attached to the licence (and a direction issued). Given that there may be a three-year gap between inspections, this further extends the time during which a zoo may be non-compliant with the law without being asked to take any remedial action. With the forgoing in mind, this means that zoos can hold a valid licence while failing to meet at least some legal standards for up to five years if the law was correctly followed and enforced. This issue is further exacerbated by the systemic lack of enforcement action against non-compliant zoos.

In the case of circuses, there appears to be less potential for non-compliance to go unnoticed given that, at present, circuses are inspected three times a year. Theoretically then, problems should only go undetected for a maximum of four months (on average). Notwithstanding the concerns that compliance with the standards does not equate to delivery of welfare needs in practice, the way in which non-compliance might be dealt with in circuses is unclear from the legislation. S. 7 of the regulations makes the, somewhat vague, suggestion that: “The Secretary of State must take such steps as the Secretary of State considers necessary to ensure compliance with the licensing conditions”. Chapter 8.7.1 has explored how sanctions have been delivered in practice and the process (and result) was found that the government department responsible for enforcement have had to adopt a

narrow (and from a strictly legal point of view, erroneous) definition of circus to allow them to carry out enforcement action. The long-term impact of applying this narrow definition suggests that the protection for animals held in circuses' winter quarters may be limited (something which was a grave concern to campaigners during the passage of the regulations). Unlike for zoos, in the case of circuses, there is no minimum or maximum timescale by which compliance must be achieved before formal enforcement action is implemented and, instead, the timescale appears to be dependent on the will of the Secretary of State. As such, as with the ZLA 1981, there appears to be potential for circuses to hold a licence while practically being non-compliant with the standards outlined in the legislation.

In effect, in both cases, businesses can be in operation over long periods of time, be non-compliant with standards outlined in the legislation, yet their licence still be considered valid. The possession of a valid licence is not, therefore always an accurate indicator of welfare needs being met, but merely that welfare needs are being periodically assessed and, theoretically, the business is being encouraged (via the use of conditions, sanctions and other enforcement tools) to come into compliance.

9.1.4 Licensing Is Not Individualistic, Welfare Is

It is not just the specific make-up of the two statutes under consideration which do not lend themselves to guaranteeing animal welfare needs are met, but the fundamental principles upon which licensing regimes are conceived that suggest that they are an unsuitable vehicle to guarantee the welfare of any individual animal, unless the practice in question is carried out on a very small scale or large-scale investment in infrastructure allows for assessment of individuals within any one system subject to regulatory licensing. Welfare, by its very

nature, is individualistic. Unlike licensing relating to driving, for example, whereby people are thoroughly assessed on the basis of individual competency, the licensing regimes under consideration are not, by their very nature, individualistic. Instead, the regimes largely consider processes and practices which impact upon the individual, rather than the individual themselves. For example, rather than providing a health check for all individual animals in a zoo, the vet inspector is, instead, asked to confirm whether the animals collectively “appear to be in good health” and to confirm that a veterinary care programme is in place. Rather than accompany wild animals in circuses as they are moved from site to site, the inspector is required to confirm that an acceptable plan for movement of the animals is in place. This suggests, therefore that licensing may be valid for considering ‘inputs’ and processes within businesses by virtue of being able to examine systems, process and routines with regard for how the animals are cared for but it does not, by its very nature, consider ‘outputs’ in the sense of the way in which the various processes, routines and practices actually impact upon animals as individuals. It could be argued, therefore, that licensing of the type under consideration is simply not an appropriate tool to use to assess welfare, and yet it is used increasingly to do so.

Licensing regimes could, in practice, assess the individual in the same way as the aforementioned driving licensing regime. The issue with this is that assessing the welfare of each individual animal used as part of a licensed practice would be prohibitively expensive, unless the practice only involves a very small number of animals. The reason that aspiring drivers can be assessed individually is because it is the drivers themselves who pay the costs of their assessment. While the zoo industry does pay the costs of the inspection they are subject to, if those costs were to include sufficient funds for each and every animal to be individually assessed, the costs for zoos would likely be completely unviable. The practical implications of this point become clear on closer examination of the two specific licensing

regimes in question. For the circus licensing regime, there are presently only two businesses with only around 19 animals under consideration. It is clear from the notes in the inspection reports that the inspectors see each and every animal on the list, verifying each one. When businesses are dealing with such a small number of animals, then it seems reasonable that personal, individual assessment can be carried out for each one as part of the inspection process. The assessments are carried out three times a year and a clear timeline of treatment of animals, on an individual basis, can be followed using the reports. It seems reasonable that the animals' welfare can be properly assessed against the standards required. Contrary to this view, however, it became clear when analysing the case study relating to Circus Mondao (Chapter 8.7.1) that the pregnancy of a camel who later died shortly after giving birth was completely missed by inspectors (and, apparently, by staff too).

In the case of zoos, which may house thousands of animals, the ability of inspectors to properly assess welfare becomes more difficult. The individual nature of welfare is lost when animals (often who might not be able to be identified individually by inspectors and, in some cases, staff) are kept in large groups and seen once every three years, often by a different inspector. Carried out over the course of one working day in most cases³⁷⁵, the inspectors may spend just a few seconds at best looking at each animal³⁷⁶ – the reality is that many, or even most, animals in the zoo will not be seen at all by the inspectors. This leads to the, somewhat counterintuitive, outcome that the larger the business and the more animals being used by that business, the lesser the ability for inspectors to assess individual

³⁷⁵ Draper, C.; Harris, S. (2012). The assessment of animal welfare in British zoos by Government-appointed inspectors. *Animals* 2012, 2, 507–528.

³⁷⁶ Casamitjana, J. (2012). *Inspecting Zoos: A study of the official zoo inspection system in England from 2005 to 2011*. The Captive Animal's Protection Society, Manchester. p. 87

welfare. To conclude, and notwithstanding the foregoing concerns with regard to standards and demands for compliance, the non-individualistic nature of the licensing regimes applied to zoos (and to a lesser extent, circuses) further challenges claims that the licensing regimes, in and of themselves, guarantee or ensure high standards of animal welfare. Indeed, any such claim made in relation to zoos must be qualified by the fact that it would be impossible for a proper assessment of individual animals to be made during a one working day visit, once every three years, to a collection of animals, often numbering in their thousands.

It is argued that the, necessarily, collective view of the licensing regimes in question is what leads to a tendency towards what Casamitjana referred to as the “yes, but”³⁷⁷ problem in assessing standards in zoos, as well as a tendency towards considering compliance in a holistic sense, rather than on an individual basis. What this means is that, when an inspector is assessing a zoo and the vast majority of animals that he or she sees that day are considered to be healthy and kept in an appropriate environment, the inspector will tend to answer questions as to whether or not the animals were in good health by responding “yes, but” – whereby it is noted that most animals are catered for well except for a few who are not. While these “yes, but” answers were not considered as part of the data analysis in this research, the principle remains worthy of discussion. As a general rule, industry representatives and government officials will point to the fact that most zoos are mostly compliant with the law, with the implication that ‘generally compliant’ or ‘mainly compliant’ is sufficient. This occurs on both an individual zoo basis (leading to the “yes, but” phenomena described above) and also on a wider industry basis, where the failing of parts of an industry are dismissed on the basis that the majority of the industry is compliant. An

³⁷⁷ Casamitjana, J. (2012). *Inspecting Zoos: A study of the official zoo inspection system in England from 2005 to 2011*. The Captive Animal’s Protection Society, Manchester. p. 7

example of this can be found in public statements issued following an investigation carried out by the Born Free Foundation which found that zoos were not meeting welfare standards. The public response from the British and Irish Association of Zoos and Aquariums (BIAZA) was: “83 per cent of the 192 zoos were graded as meeting the standards for animal welfare assessments, which suggest[s] that the inspection system is working”³⁷⁸. Of course, this means that 32 zoos, which may collectively house tens of thousands of animals, did not meet welfare standards. BIAZA’s conclusion is clearly that “mostly compliant” or “mainly compliant” is sufficient to establish the system as successful.

If individual animals kept in zoos were considered under the AWA 2006 then and the welfare of the individual animal was found to be unacceptable, there is no demand made on the person inspecting the animal to compare the living conditions of the animals living alongside the animal whose welfare is compromised in order to draw a conclusion. In the same way, an individual animal owner should not escape legal action if he or she keeps five dogs but only neglects one of them. There would be no argument which would allow the cruel or poor treatment of one animal simply because other animals kept by the same person were treated well. This tendency towards accepting that compliance has been achieved when *most* standards are met further compounds the problem under consideration. Licensing therefore would appear to lend itself to interpretations that limit scrutiny on the individual and diffuse issues when instances of non-compliance are noted by pointing to the acceptable levels of compliance elsewhere in the business. To conclude, the collective, process-based assessment approach which the type of licensing regime under

³⁷⁸ Mail Online. (2012). British zoos 'failing' on animal welfare standards. [online] Available at: <http://www.dailymail.co.uk/travel/article-2215044/British-zoos-failing-animal-welfare-says-new-Born-Free-report.html> [Accessed 17 Jun. 2016].

consideration lends itself to, as opposed to the individualistic approach required to carry out a meaningful assessment of any individual animal's welfare, suggests that licensing as an approach is not best suited to assessing, much less "guaranteeing" high standards of welfare for the individuals.

9.1.5 Conclusion: Licensing is an Inappropriate Legal Mechanism for the Guarantee of High Animal Welfare Standards

In light of the above, it is argued that great care should be taken in interpreting the application of licensing regimes as a means, in and of themselves, to protect animal welfare, as well as noting that the possession of a licence does not indicate that standards outlined in the relevant regulations are being met in practice. Indeed, while regimes of licensing and inspection may serve to add (sometimes extremely limited, sometimes extremely useful) scrutiny to practices involving animals which, in turn may allow for the identification of welfare problems, the issues identified with regard to scope, enforcement and practical application raise concerns that these systems may provide a false impression that they are meeting animal welfare needs.

As noted previously, strong narratives surrounding the effectiveness of the zoo and circus licensing regimes are promoted by Government officials and industry representatives alike. For example, in response to welfare concerns raised by the RSPCA at Circus Mondao in early 2016, the circus responded in a public statement by saying: "We are licensed and inspected by the government and if anything was not up to standard we wouldn't have this licence"³⁷⁹.

³⁷⁹ Penarth Times. (2016). Animal charity raises concerns over wild animals as circus comes to the Vale. [online] Available at:

Not only does this statement refrain from any mention that the business had its licence suspended due to animal welfare concerns just four months previously (see Chapter 8.7.1 for case study), but it also makes the clear suggestion that possession of a licence is synonymous with welfare standards being met. The result of this is that industry representative and government officials may claim that animal welfare is well protected by the schemes but, in practice, the regimes may serve to legitimise – while largely failing to properly assess and scrutinise – activities which harm animals. It is often asserted that the legislation in place “guarantees” or “ensures” high standards of welfare. A more truthful description of a licensing regime which regulates animal use is that it provides an added level of monitoring and scrutiny which makes the identification of welfare concerns more probable than for those uses for which no such scheme is in place. It is clear from the above that the possession of a licence neither confirms (nor does the law demand) that standards are met in full, something which is important to note as it runs contrary to the strong narrative promoted within the industry and from officials.

9.2 Licensing as a Mechanism to Enhance Monitoring and Scrutiny of Practices Which Impact Upon Animal Welfare

Having argued that licensing regimes do not *in and of themselves* guarantee that animal welfare standards are met, but that they can (and do) play a role in the monitoring and scrutiny of practices which may impact animal welfare, it is important to now consider how licensing can be put to best effect. Clearly, at present, it is unlikely that the zoo industry will be prohibited from operating, although the same cannot be said of the animal circus

http://www.penarthtimes.co.uk/news/14424591.Animal_charity_raises_concerns_over_wild_animals_as_circus_comes_to_the_Vale/ [Accessed 17 Jun. 2016].

industry as a ban on the use of wild animals has been promised by Government for a number of years and remains on the agenda, according to most recent statements³⁸⁰. While circuses might not be subject to licensing for years to come, the model of using licensing regimes to regulate animal use is here to stay. This is evident from the government's recent consultation on the issue of bringing other regulated industries under licensing regimes via secondary legislation introduced under the AWA 2006³⁸¹. It is therefore worth exploring recommendations which might help to make existing (and future) licensing regimes as effective as possible. This research has highlighted a number of problems in relation to the two pieces of legislation under consideration which, in turn, can allow us to make a number of broad conclusions regarding what makes an effective licensing regime and what makes an ineffective regime. These findings will be explored in the following section.

9.2.1 Responsive Regulation

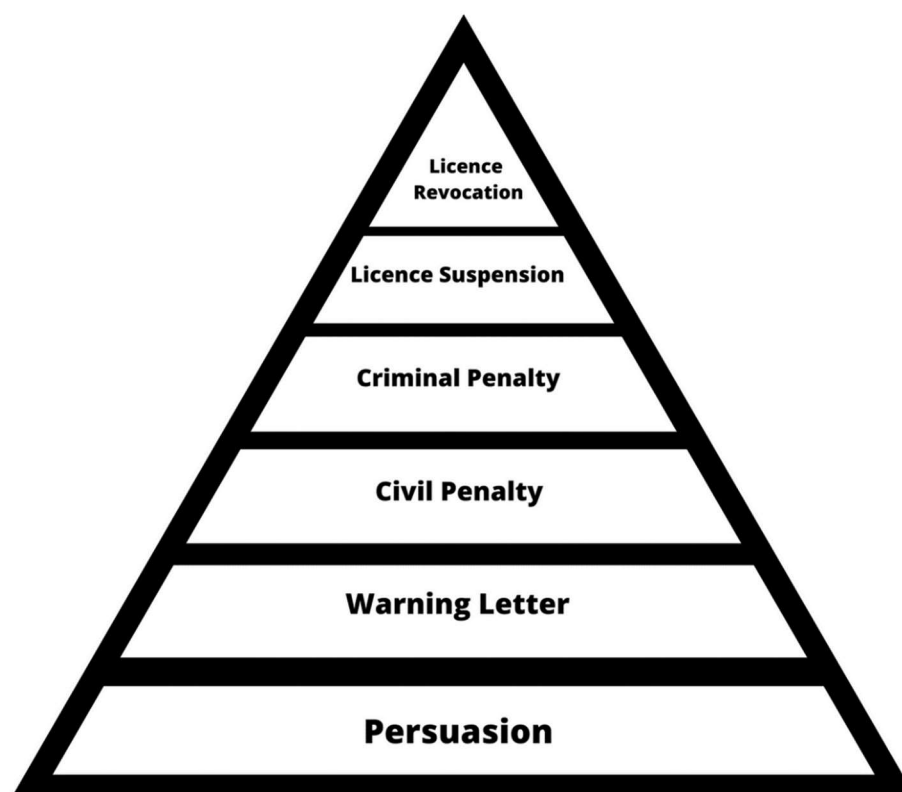
Before considering the specific problems identified as part of this research, it is worthwhile to consider whether or not the statutes in question meet the broad requirements of "good regulation". In the last three decades, and particularly under conservative, capitalist government rule, countries around the world have seen increasing conflict between a 'command and control' approach to regulation where regulatory demands are placed on industry by the state and a desire to see a move towards deregulation, ostensibly to allow

³⁸⁰ Sky News. (2017). Pressure grows for UK to ban wild animal circuses. [online] Available at: <https://news.sky.com/story/pressure-grows-for-uk-to-ban-wild-animal-circuses-11125902> [Accessed 24 Nov. 2017].

³⁸¹ Consult.DEFRA.gov.uk. (2015). Consultation on the review of animal establishments licensing in England - DEFRA - Citizen Space. [online] Available at: <https://consult.DEFRA.gov.uk/animal-health-and-welfare/consultation-on-the-review-of-animal-licensing> [Accessed 4 Sep. 2016].

for industry competition and growth³⁸². In the early 1990s, work carried out by Ayres and Braithwaite saw the development of the concept of “responsive regulation”³⁸³; an approach which considered the pros and cons of traditional state-led, prescriptive legislation compared to a deregulation view and brought parts of each approach together to maximise efficacy in the development of regulation going forward. While the model created has been amended and expanded upon in recent years, it offers a logical means of assessing whether or not regulation has the potential to be effective, taking into consideration both social and legal elements.

The fundamental basis of responsive regulation can be demonstrated in the pyramid below:



³⁸² Lodge, M. and Wegrich, K. (2012). *Managing regulation*. Palgrave MacMillan, p.8.

³⁸³ Ayres, I. and Braithwaite, J. (1992). *Responsive regulation*. New York: Oxford University Press.

Figure 15: The Responsive Regulation Pyramid

The system works on a basis of increasing intervention in the case of non-compliance with regulation. Coined as the “benign big gun”³⁸⁴, the principle is that it is neither helpful nor necessary to use harsh sanctions each time non-compliance is noted but that there needs to be the opportunity to escalate sanctions for persistent non-compliance. This is, in part, because regulatory resources are limited and therefore the cost of regulation would rise significantly if each instance of non-compliance was met with court sanctions or licence revocation (and the subsequent actions that would have to be taken at that stage which may include redundancy, relocation of animals etc). In short, using harsh punishment in every instance of non-compliance is not possible – financially or practically. The principle of the ‘benign big gun’ is that if industries are aware that the harsh sanctions can and will be used against them if they do not make efforts to comply at earlier stages, this acts as an effective deterrent, which will drive up standards in the longer term.

The system is not just driven by the need to limit the financial cost of regulation – although considering increasing cuts to local authorities and government departments across the UK³⁸⁵, in relation to the pieces of legislation in question, this is no small consideration. Instead, the system recognises that the best way in which to encourage long-term and sustainable internalisation of standards within industry is to work *with* industry to encourage them to improve, rather than sanction every instance of non-compliance. If industry is more concerned with avoiding punishment, this is thought to lead to either a

³⁸⁴ Ayres, I. and Braithwaite, J. (1992). *Responsive regulation*. New York: Oxford University Press. pp. 19-53

³⁸⁵ Local Government Association (LGA), (2014). *Under Pressure: How Councils are Planning for Future Cuts*. [online] LGA, p.1. Available at: <http://www.local.gov.uk/documents/10180/5854661/Under+pressure.pdf> [Accessed 4 Sep. 2016].

focus on very specific practices and a narrow attempt to simply avoid punishment, rather than an interest and attempt to achieve good standards across the board³⁸⁶. Taking into account the social context of regulation and recognising that people simply respond better to encouragement and feeling that they are trusted rather than punishment and feeling they are not trusted, is another key reason that the responsive regulation model is thought effective³⁸⁷.

For the purposes of this research, it is not necessary to explore the rationale behind Responsive Regulation further but the reason for bringing it into the discussion is to consider whether or not the two statutes in question are compatible with, or capable of facilitating, responsive regulation.

9.2.1.2 The Zoo Licensing Act 1981 as responsive regulation

The Zoo Licensing Act 1981 provides a set of standards which zoos are required to follow in order to avoid sanction. The enforcement tools available to the local authorities charged with implementing the Act are as follows:

1. Inspection of premises and identification of non-compliance
2. When non-compliance is noted, a condition is added to the licence and a Direction is issued in order to clarify the timescale by which the demands of the condition must be met.
3. If the condition relates to S1A of the Act, the timescale for compliance with the condition cannot exceed two years.

³⁸⁶ Ayres, I. and Braithwaite, J. (1995). Responsive regulation. New York [etc.]: Oxford University Press, p.21.

³⁸⁷ Ayres, I. and Braithwaite, J. (1995). Responsive regulation. New York [etc.]: Oxford University Press, p.19.

4. If the demands of the condition are met within the timescale, the condition is removed from the licence and no further action is taken.
5. If the demands of the condition are not met, then all or part of the zoo will be closed.
6. If conditions are not met, the Local Authority has discretion to bring criminal charges under s.19 of the Act.

The enforcement tools available appear to meet the criteria for responsive regulation well, with persuasion and long timescales being provided to zoo operators initially, along with conditions being removed from licences once compliance was achieved. Only when non-compliance persists despite initial measures being implemented does the “benign big gun” come out. Zoos operate under the threat of closure if they do not comply with standards, but closure can never be imposed without first following the process of escalation. This allows for improvements to be made and allows for zoos to ensure that they avoid the “big gun” being used against them.

As such, in principle, the Zoo Licensing Act 1981 does appear to be structured in such a way as meets the criteria of responsive regulation and so issues with the structure of the Act do not seem to be the cause of the issues noted. If the Act was not structured in such a way, the complete absence of enforcement action might be explained. For example, if there was no escalation process for enforcement and local authorities were required to close a zoo on the first instance of non-compliance, it seems reasonable to assume that local authorities would seek to avoid this. Not just because this would seem somewhat unfair to the zoo operator, who is not given a chance to rectify the problems, but also as the local authority is ultimately responsible for the animals in the zoo in the event of closure. It is therefore understandable that local authorities would want to pursue zoo closure as an absolute last

resort. However, the legislation makes no demand of local authorities to make immediate closure orders and, instead, offers a whole series of actions that can be taken before this becomes necessary. It seems reasonable to conclude therefore that the structure of the legislation is not to blame for the lack of enforcement action found as a result of this research.

9.2.1.3 The Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012 as Responsive Regulations

The Welfare of Wild Animals in Travelling Circuses (England) Regulations provides a set of standards which travelling circuses with wild animals must follow to avoid sanction. The enforcement tools available under the regulations are as follows:

1. Standard conditions are attached to every licence upon its issue.
2. The Secretary of State is empowered to “take such steps as the Secretary of State considers necessary to ensure compliance with the licensing conditions”. No clarification is provided as to what those steps might be.
3. The Secretary of State may suspend a licence at any time if satisfied that the licensing conditions have not been complied with.
4. Upon suspension, the circus must be informed of the grounds for suspension, what is needed in order for compliance to be reached and highlight the right of appeal to a magistrate’s court (and the timescale within which an appeal must be brought).
5. The licence must be reinstated when the conditions have been (or the SoS is satisfied they will be) complied with.
6. At the time of reinstatement, the term of the licence can be varied.
7. The licence may be revoked if it has been suspended for more than 28 days (unless an outstanding appeal is awaiting hearing at a magistrate’s court).

Unlike the escalating sanctions which form the enforcement tools available to the local authorities administering the Zoo Licensing Act, WWATC 2012 do not appear fit the criteria of responsive regulation. The reference to the Secretary of State being able to take “such steps as necessary”³⁸⁸ is ambiguous and gives circus operators no indication of what will happen to them and their business in the case of non-compliance. In addition, it is clear that a licence can be suspended (and thus a business prevented from operating at all) at any time non-compliance is noted. This is far stricter than the zoo licensing regime which only prevents the operation of the business after various other steps, with potential for long timescales for compliance, have been carried out. After 28 days, the Secretary of State has powers to revoke the licence completely, suggesting that a circus can be closed permanently after just 28 days of non-compliance, in comparison to two years (in the case of non-compliance relating to s.1A) or even longer in the case of non-compliance with the ZLA 1981.

Notwithstanding the concerns that the regulations cannot be properly enforced, it is clear that these regulations do not employ an escalating system of sanctions and, instead, have the potential to operate on a ‘one strike and you’re out’ approach.

9.2.1.3 Is Responsive Regulation Good for Animal Welfare?

It can be recognised that responsive regulation may offer a longer term and sustainable means of industries improving and internalising good standards and provide a more equitable outcome for operators who are keen to improve and do not perhaps deserve to have their business closed down (either temporarily or permanently) for one infraction. It

³⁸⁸ S. 7 WWATC 2012

also helps to ensure that regulators can direct resources and time to the 'real offenders' by only using tough sanctions when all else has failed. However, this raises questions over how responsive regulation serves (or not, as the case may be) animal welfare. Certainly, the ZLA 1981 provides a fairer system for the zoo operators and long lead times for improvement whereas the circus regime operates with the potential to implement a 'one strike and you're out' principle which could be deemed unfair from the point of view of the circuses, whose operators could find their licence suspended immediately following an inspection and subsequently revoked entirely if the issues are not resolved within 28 days. But for the animals, the (potentially) swift-acting circus regime has the potential to tackle welfare problems almost immediately in that very real sanctions are placed on the business which forces the business to comply swiftly or simply not be able to continue. Animals in zoos, on the other hand, may have to wait up to two years in order to see changes made which may impact their welfare before any stricter measures are employed by the authorities.

On the one hand, responsive regulation appears to be a sensible approach with regard to ensuring that responsible businesses are supported, and long-term change effected, as well as reducing the burden on regulatory authorities. This suggests that, if properly applied over the long term, this might lead to industry-wide improvements. On the other hand, the disadvantage of using responsive regulation in place of more traditional 'command and control' regulation is that the animals involved may be required to endure longer periods in which the business is non-compliant, and this could impact upon welfare in the short to medium term.

To conclude, and to come back to the conclusion that licensing should not be used as a means, in and of itself, to protect welfare and therefore should never be implemented in order to solve an identified animal welfare problem, then it would seem responsive

regulation would be the best approach to achieve long-term change. This would require that licensing is only applied to practices which are 'benign' in terms of animal welfare if carried out properly, but which might need additional oversight to ensure high standards are being met consistently. It is argued that the problem comes when the benchmark for animal welfare provision or 'good practice' within the meaning of the AWA 2006 falls below the threshold required to meet basic animal welfare needs so that non-compliance with the legislation automatically implies the existence of an immediate animal welfare problem. For example, if a licensing condition whose purpose is to ensure that animals are not trained in such a way as to cause suffering is broken, the animal will already be suffering at the time that the condition is breached. A responsive regulation approach would favour giving the circus operator time to improve or change before sanctions were brought against the business, thus allowing for the suffering to be prolonged. Likewise, if a licensing condition such as "providing each animal with an environment well adapted to meet the physical, psychological and social needs of the species to which it belongs"³⁸⁹ is breached in a zoo, this suggests that the physical, psychological and/or social wellbeing of the animal(s) are not being met. The application of a responsive regulation model allows for these needs to remain unmet for long periods of time while the use of the 'big gun' is avoided and more benign persuasion techniques are employed in the first instance.

On the other hand, breach of conditions such as demand to keep stringent veterinary records in circuses and zoos do not necessarily equate to an animal welfare problem but suggests that, in the long term, this could cause problems if that condition continues not to be met. It can thus be concluded that a responsive regulation approach is appropriate and helpful for dealing with breaches which do not directly or immediately compromise welfare

³⁸⁹ S. 1A(c)(i) Zoo Licensing Act 1981

or cause suffering, whereas to use a responsive regulation approach to deal with breaches which either compromise welfare or cause suffering is likely to lead to those compromises or suffering being prolonged.

It should be noted that, within the AWA 2006 there are elements of responsive regulation. For example, on identifying an offence under s.9 of the Act, the inspector is empowered to serve an improvement notice upon the person responsible for the animal. There is significant flexibility in how these improvement notices can be applied, with the inspector being able to specify what steps must be taken to comply with the Act, as well as the timescale for compliance. In addition, the inspector also has powers to extend, or further extend, the compliance period. Where this differs from the ZLA 1981, while there is significant discretion to employ persuasion and more benign sanctions prior to using the 'big gun' (prosecution or zoo closure), inspectors are not *required* to use the more benign options first. If the offence is serious enough, they can choose to forgo the improvement order and move straight to prosecution, with powers to confiscate animals prior to trial if required in the interests of stopping or preventing suffering from occurring. S. 18 (5) and (6) of the Act allows for an inspector or constable to take an animal into possession if that animal is suffering or likely to suffer if circumstances do not change. Action can thus be taken to remove the animals before suffering occurs.

With the ZLA 1981, the relevant authorities are not empowered under the legislation to close a zoo before the various, more benign, sanctions have been employed. There is no legal means of overriding the process, nor powers to take animals into custody on welfare grounds using the ZLA 1981. In circuses, while the Secretary of State can choose to suspend a licence and then revoke a licence if the suspension remains in place for 28 days, this still requires a 28-day delay before being able to revoke a licence altogether. Not just that but

there are no specific powers granted under the WWATC 2012 to confiscate the animals. As such, if confiscation were to be required on welfare grounds, independent action would have to be taken under the AWA 2006, which does allow for confiscation of animals as part of post-conviction powers granted to the relevant authority in certain circumstances³⁹⁰.

As already noted, the AWA 2006 still applies to animals in zoos and circuses and therefore the relevant authority could choose to use powers under the AWA 2006 instead. It is argued that the licensing regimes create conflict and confusion in that they provide a raft of measures to deal with animal welfare problems which are different to those measures provided for dealing with the same or similar problems under the AWA 2006. It seems that the authorities are therefore in a position to choose which legislation to apply, allowing for the lesser sanctions of the licensing regimes to be implemented in place of the more flexible and immediate sanctions available under the AWA 2006.

In conclusion, a responsive regulation approach may be in the interests of animal welfare as long as it is used to support processes and practices which do not have the potential to cause immediate or direct suffering or compromised welfare if breached. However, for standards which, if breached, will impact directly on welfare or cause suffering, either a 'control or command' approach should be used or the ability to bypass benign sanctions and move straight to the 'big gun' should be employed. It is suggested that the best way of delivering this in practice is by removing conditions from licensing regimes which, if breached, have a direct impact upon animal welfare and ensuring that licensing deals only with those conditions which support good processes and practices.

³⁹⁰ S. 33 AWA 2006 (Deprivation) and S. 35 (Seizure in Relation to Disqualification).

9.2.2 Drafting of Legislation

As highlighted in detail earlier in this thesis, issues have arisen with regard to the drafting of legislation. In respect of the circus regulations, the enforceability of the regulations remain under question and, in the opinion of the author, exceed the powers granted to the Secretary of State under s.13 of the AWA 2006. The key element to the enforcement problem is that the Secretary of State has attempted to create regulations which apply to wild animals kept by circuses in every aspect of their life. This has created a situation whereby, rather than licensing a defined activity involving the animals, the regulations have the, apparently unintended, consequence of licensing the keeping of the animals. This not only exceeds powers granted to the Secretary of State and renders the regulations, in the opinion of the author, *ultra vires*, but it is also the factor which creates the problems when it comes to enforcement.

With regard to the Zoo Licensing Act, and notwithstanding the concerns raised above about the available sanctions in relation to breach of conditions with regard to animal welfare, there do not appear to be any major flaws in the drafting of the legislation itself, other than the issue of exemption of pet shops which, to be rectified, would require minor amendment to the Pet Animals Act 1951, not to the ZLA 1981 itself.

What is clear from this research is that when licensing of the use of animals, using secondary legislation introduced under the AWA 2006, it is vital that the activity which is being licensed is clearly defined and a clear line can be drawn between the activity and the normal ownership or keeping of the animal. If there is a wider welfare concern with the keeping of the animal and it is believed that the mere keeping of animals in a particular situation (such as a travelling circus) has the potential to seriously impact animal welfare negatively in a way which cannot be resolved, it is suggested that licensing is therefore not an appropriate

solution and policymakers instead consider prohibition of keeping animals in specific settings or circumstances.

Chapter Ten: Making Licensing More Effective: Recommendations for Change

As outlined in detail in Chapter 5.2.1, in developing, implementing and enforcing animal welfare legislation, the lack of resources available to those who might be minded to bring challenges in relation to the pieces of legislation under consideration before a court (in most cases, small NGOs), means that failures in implementation or enforcement of these laws are unlikely to be met with formal legal challenge. With this in mind, it is vital that these laws are as well constructed as possible from the outset, with clear guidance for relevant authorities responsible for enforcement, if they are to achieve their aim. The debate and consensus around how, when, where and why the various elements of the legislation under question are implemented and enforced will not be carried out and resolved in a court room but via ongoing discussion, negotiation and lobbying between animal advocates, government bodies and industry representatives (and their relevant legal departments or individual counsels) in the policy development and lobbying process which has been in progress since the first piece of animal welfare legislation was passed. With this in mind, the author of this thesis does not recommend that flaws identified as part of this research are remedied by bringing legal challenge, but by seeking improvement, amendment and clarity to the legislation itself.

As the application of licensing regimes introduced as secondary legislation under the AWA 2006 and those introduced as primary legislation will necessarily differ in scope and structure, the recommendations which follow are split into those relating to secondary legislation (and particularly regulations introduced under S.13 of the AWA 2006) and those relating to primary legislation.

10.2 Effective Licensing as Secondary Legislation under S.13 of The Animal Welfare Act 2006

The way in which effective licensing can be introduced as secondary legislation under S.13 of the Animal Welfare Act 2006 is considered below in the form of a decision-making flow chart. Further detail is then discussed and practical examples provided.

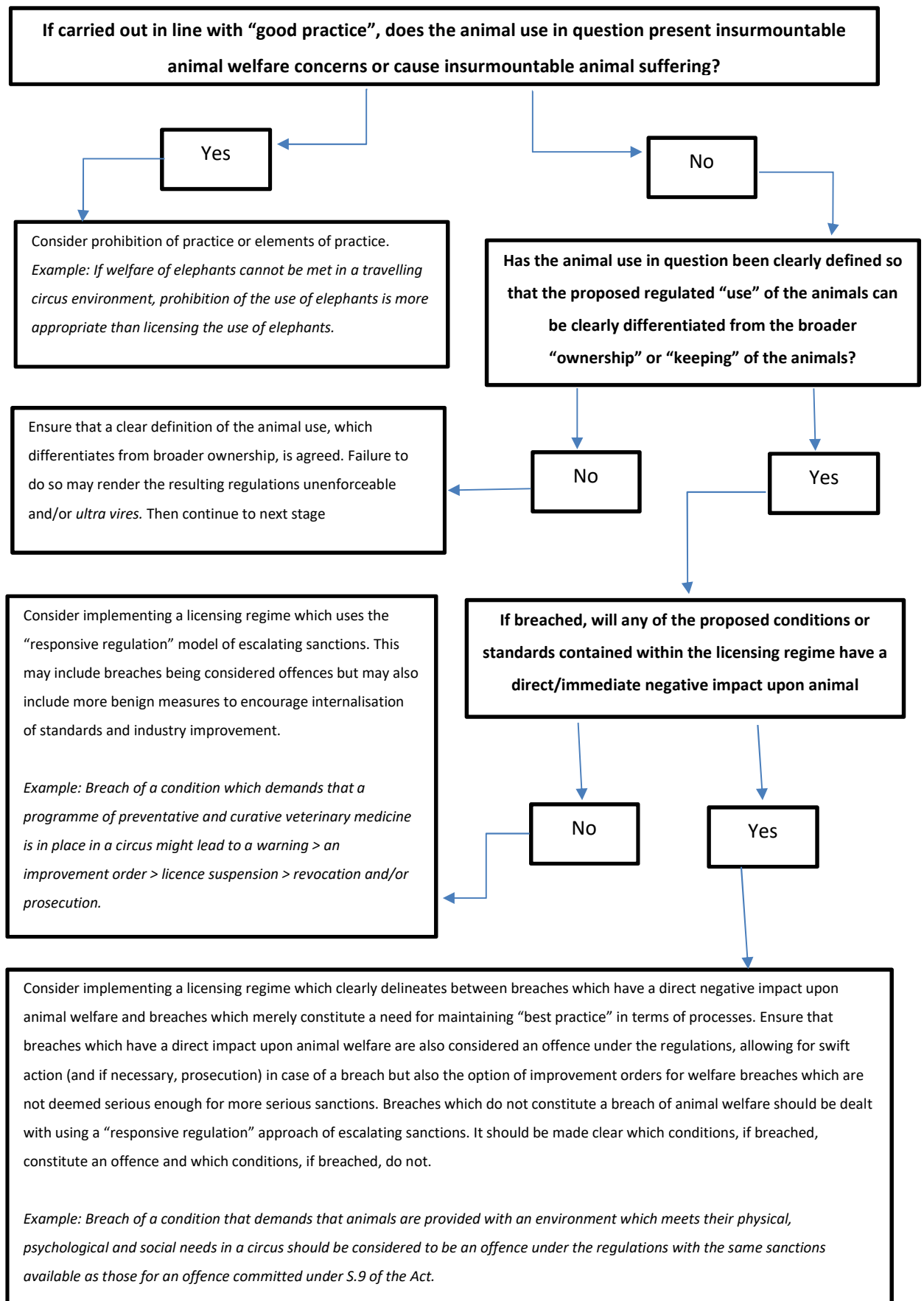


Figure 16: Decision-making model for licensing

10.2.1 Insurmountable Welfare Problems? Licensing is Not the Answer

The case of the use of wild animals in circuses was hugely controversial due to the fact that all leading animal protection organisations and the leading veterinary association in the UK (The British Veterinary Association) maintain that the complex welfare needs of wild animals simply cannot be met in a travelling circus environment³⁹¹. If this is the case, then no amount of monitoring of processes will serve to support the delivery of animal welfare objectives. As such, the first question that policymakers should address when considering the introduction of a licensing regime as secondary legislation under the AWA 2006 is whether or not the practice or use of animals in question is fundamentally or inherently damaging to animal welfare. If it is concluded that it is inherently damaging then prohibition of the use (or particular elements of the use) might be a more appropriate approach to take in place of licensing.

10.2.2 Ensuring that the Regulated Activity is Clearly Differentiated from Ownership

As explored in the case of the WWATC 2012, the fact that the regulations failed to clearly differentiate the activity which was to be regulated (operating a travelling circus with wild animals) and the broader ownership of the animals created problems in interpretation when it came to attempts to suspend a licence. In drafting new regulations, it should be possible to define the regulated activity in such a way as to ensure that suspension of a licence does not necessitate deprivation of ownership, which would render the regulations *ultra vires* (as is believed to be the case with the circus regulations).

³⁹¹ Born Free Foundation, Captive Animals' Protection Society, RSPCA and British Veterinary Association, (2013). *The Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012: unethical, ineffective and unenforceable.*

10.2.3 Standards and Conditions Relating to Processes to be Implemented Using Response Regulation Model

Finally, if the licensing regime contains conditions which relate purely to processes and practices, sanctions available for breach of these conditions should follow the “responsive regulation” model of escalating sanctions. This may or may not include breach being considered an offence. For example, a licensing regime might provide for warning, followed by improvement order, followed by licence suspension, followed by licence revocation and/or prosecution. This will ensure that, in relation to the processes that support the delivery of animal welfare objectives, but which do not impact directly upon animal welfare, inspectors have more flexibility and discretion and give operators a chance to internalise and improve standards in the long term.

10.2.4 How the Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012 can be made Effective

A number of amendments could be made to the WWATC 2012 would make them both enforceable and better placed to support animal welfare objectives. It should be noted that the initial question “does the use in question present insurmountable welfare problems?” remains unanswered and providing an answer to this question falls outside of the scope of this thesis. As such, any recommendations are made in order to allow for the regulations to function correctly, while making no claim that the standards which the regulations mandate are adequate in terms of supporting the delivery of animal welfare objectives.

At present, the definition of a “travelling circus” used by the regulations is: “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 (iii) any place where a wild animal associated with such a circus is kept". As already noted, this definition is problematic as it effectively means that the activity of "operating a travelling circus" includes simply keeping wild animals for the purpose of using them in performances (regardless of where they are kept or whether they are, in fact, used in performances). Simply by housing animals associated with the circus, the place in which the wild animals are kept *becomes* part of the operation of the travelling circus. As discussed in detail in Chapter 8.2, this makes licence suspension problematic without depriving the owner permanently of their animals - a sanction which falls outside of the remit of the regulations and renders them *ultra vires* – or necessitating a 'pragmatic' approach which forces a narrow reading of the definition of "travelling circus". This issue can be resolved very easily by simply removing the "any place where a wild animal associated with a circus is kept" from the definition of the activity and defining it as a separate term. For example, the term "Associated Site" could be added into the regulations and defined as "any place where a wild animal associated with a travelling circus is kept". Following on from this, a simple amendment of S. 4 (1)(b) of the regulations would solve the issue at hand.

S. 4 (1) (b) of the Regulations to be amended from:

The Secretary of State (b) may not grant or renew a licence unless the travelling circus has been inspected by an inspector.

To read:

*The Secretary of State (b) may not grant or renew a licence unless the travelling circus **and any associated site** has been inspected by an inspector.*

This would ensure that winter quarters (and any other place wild animals associated with a circus are kept) are inspected as a part of the business but that the activity of “operating a travelling circus” is limited to the travelling and showing of animals for the purposes of the regulations. This means that, in the event of a licence suspension, there is a clear way in which the suspension can be implemented: by ensuring that the circus neither travels with nor shows animals during the licence suspension.

It is argued that, if these amendments were made, the issues identified in the structure of the regulations would be resolved.

10.2.6 Conclusion

In conclusion to this section, it is argued that if the model outlined in fig. 16 is followed with regard to the implementation of licensing regimes as secondary legislation under the AWA 2006, future regulations have potential to be more effective than those introduced in respect of circuses in 2013. Making the amendments suggested and using this approach in future will ensure that animal welfare concerns identified during inspection can be dealt with swiftly and easily and breaches which impact animal welfare directly are given priority and harsher sanctions than those breaches which relate to procedure. The approach suggested combines a ‘responsive regulation’ approach for issues which can be allowed more time to be resolved whereby inspectors can support businesses in improving standards across the board and a ‘control and command’ approach which allows inspectors to act decisively to protect animals if needed. The incorporation of the improvement orders in the two proposed examples when breaches are considered offences under the regulations also allows inspector discretion to use a more benign approach but also to choose harsher sanctions when it is in the best interests of the animals. The clear definition of the activity ensures that, in the case of suspension, this can be effectively enforced.

If this model were followed in future it is argued that the regimes will have the best chance of supporting the delivery of animal welfare objectives.

10.3 Effective Licensing of Zoos

With regard to the piece of primary legislation under consideration, it has already been concluded that the ZLA 1981 is structured in such a way as could be considered to follow the 'responsive regulation' model. There are a series of escalating sanctions available in the event of non-compliance as well as the potential for prosecution for breaches of condition. In terms of structure, then, it appears that there is a range of sanctions available. This research has found that those sanctions are not being used and thus its failure its perhaps founded in lack of enforcement rather than any fundamental flaw within the legislation itself.

Notwithstanding the Act's strong structure, there are a number of ways in which it is argued that the Act can be strengthened with regard to its ability to further animal welfare objectives. At present, any conviction can lead to a maximum fine of £2,500 (the current level 4 on the standard scale). A fine of this size would certainly have an impact, and thus potentially act as a deterrent, to a small business but many zoos are large, often multi-million pound, businesses and so a fine of this size is unlikely to present a significant deterrent in this case. In addition, there is no differentiation between offences for breach of condition which impact upon animal welfare and those which are procedural. Following the arguments laid about above, it is maintained that it is important to provide swift and easy options to protect animal welfare in the short-term and it is suggested that breaches which

have a direct impact on animal welfare should be treated more harshly than those that do not.

It is therefore recommended that the following steps be taken to amend the ZLA 1981:

- 1) That an additional level of sanctions is added to the Offences and Penalties section to ensure that breaches impacting upon animal welfare are dealt with with the same severity as failing to meet animal welfare needs in any other circumstances. That is, to add fine-based sanctions which mirror those which stem from an offence under S. 9 of the Act. This would allow for sanctions of a fine of no more than level five on the standard scale (which, as of March 2015, can be unlimited³⁹²) to be used against operators who fail to meet animal welfare needs. This clearly gives breaches of animal welfare conditions more weight than breaches of procedural conditions and can be amended to suit the size of the business being sanctioned so that it can be sure to have the desired impact.

It is suggested that any conditions relating to s. 1A(c) “providing each animal with an environment well adapted to meet the physical, psychological and social needs of the species to which it belongs” are those which, if breached, will impact upon animal welfare and thus should be linked to the harsher sanctions.

³⁹² Goucher, L. (2015). Unlimited fines in magistrates' courts | Insight | Nabarro. [online] Nabarro.com. Available at: <http://www.nabarro.com/insight/briefings/2015/may/unlimited-fines-in-magistrates-courts/> [Accessed 4 Sep. 2016].

- 2) Rather than include a section relating to improvement orders, as has been suggested by local authorities and members of the inspectorate³⁹³, it is suggested that the existing tools available under s.16 already provide in practice the same mechanism as improvement orders and so should be employed in conjunction with any action taken to tackle offences under the Act.
- 3) Inspectors should be explicitly encouraged to have in mind that, for any concerns noted during inspection, they can and should consider available enforcement actions under the AWA 2006, as well as those under the ZLA 1981, and explore these options with the local authority, where appropriate.

As already highlighted, the issues found with regard to regulatory failures in relation to zoos were less to do with the structure of the Act itself, than with its enforcement and the sheer size of the industry (and individual businesses) that the Act is required to govern. With the minor changes above, coupled with effective, consistent enforcement, while the regime could never on its own ensure maintain high standards of welfare, it may allow for improved delivery within the limitations of the industry.

10.3.1 Closing Loopholes

Chapter 5 considered the various loopholes and conflicts in relation to zoos, mobile zoos, static circuses and pet shops. The arguments and conclusions relating to these issues were outlined in detail as part of that chapter but are revisited briefly here for completeness. The following recommendations are made in this regard:

³⁹³ DEFRA/ADAS (2010). Review of local authorities' implementation of the Zoo Licensing Act 1981 in England and Wales. London: DEFRA, p.27.

1. Mobile Zoo businesses are brought under the mantle of the ZLA 1981. This would not require any amendment to the legislation, simply interpreting the operation of mobile zoos as falling within the remit of the Act which, it is argued, is unproblematic.
2. It is suggested that the solution to the apparent conflict between the Pet Animals Act 1951 and the ZLA 1981 (outlined in detail in Chapter 5.2 could be resolved by a simple amendment of S. 1(2) of the ZLA 1981, as follows:

*“In this Act “zoo” means an establishment where wild animals (as defined by section 21) are kept for exhibition to the public otherwise than for purposes of a circus (as so defined) and otherwise than, **or in addition to, the purposes of a pet shop** (as so defined); and this Act applies to any zoo to which members of the public have access, with or without charge for admission, on more than seven days in any period of 12 consecutive months”.*

It would also be necessary to update relevant guidance – in particular the “FAQ” section of the Guidance to the Act’s Provisions which erroneously states that local authorities can use discretion to decide which licence is applicable.

3. It is recommended that “static” circuses be either regulated under existing circus regulations or captured by zoo legislation. That these (albeit very few) establishments escape scrutiny altogether is unacceptable.

10.3.2 Training

Considering the feedback from local authorities as part of the 2010 ADAS report, where it was suggested that improvement order style sanctions should be made available, when such

sanctions were already available in s.16, it would appear that there were gaps in understanding of the legislation and its application at that stage. The way in which s. 16 of the ZLA 1981 functions is almost identical in its application to improvement orders under the AWA 2006 but this is clearly not understood at local authority level. The study by Casamitjana in 2012 and the present research suggest that understanding of enforcement obligations, at least, is still a problem. The fact that the explicit instruction from DEFRA to local authorities to use s.16 sanctions issued in 2012 resulted in no improvement in correct enforcement suggests that specific training of local authorities would be advisable in order to improve delivery. If local authorities were to be properly trained on the way in which they can use s. 16 to both help zoos to improve standards and to deliver sanctions where necessary, the way in which the ZLA 1981 is currently implemented could be radically improved.

Chapter Eleven: Conclusion

This thesis has sought to consider how licensing regimes might be used to govern the use of animals, and particularly, in order to protect their welfare. A detailed, original analysis of the regulations of zoos in England, detailed in Chapters Four to Six showed that, while the regulation of zoos was originally envisaged with a view to protect animal welfare, and despite the availability of a great deal of supplementary guidance provided to enforcement authorities to support their delivery of the Act, there is an almost complete absence of enforcement action taken against failing zoos. Arguably, despite the relative strength of the legislation itself on paper, its delivery in practice is significantly lacking.

Circuses have been considered, in Chapters Seven and Eight, as an example of how an industry might be regulated via licensing using relatively new powers granted to the Secretary of State under s.13 of the AWA 2006. While this particular licensing regime is deemed temporary, reflections on its efficacy are valuable in order to inform future planned regulation for other animal establishments (boarding kennels, performing animals and pet shops, among others). Ensuring that any future regulations introduced under this mechanism are clearly drafted to ensure that their scope governs an 'activity' involving animals, rather than the keeping or ownership of animals *per se* appears to be of fundamental importance. With this in mind, the fact that any regime implemented via s. 13 of the AWA 2006 will always be subject to the 'good practice' caveat found in s. 9 (1) of the same will always potentially limit the scope and impact of the regime.

With the foregoing in mind, this research has concluded that licensing, in and of itself, will never provide the 'silver bullet' required to protect animal welfare and members of the

public should be wary of any claims that it is. Officials should be avoid making claims, such as those made by government department DEFRA, that that animal welfare needs are “ensured” simply by virtue of the fact that the business in question is in possession of a valid licence³⁹⁴. In addition, statements made by representatives of the regulated industry which use the possession of a licence to rebut welfare concerns should also be subject to further scrutiny³⁹⁵.

It is a reality that animal welfare, rightly or wrongly, will not be given priority as overworked and under-resourced authorities face cut after cut. Regimes which monitor animal protection, for the foreseeable future, cannot be expected to provide a thorough assessment, nor comprehensive oversight of the industries which they inspect – particularly when those industries may house hundreds of thousands of animals collectively. An inspection once every three years (for zoos, for example) allows the most cursory inspection of processes, practices and perhaps some animals but, even when properly executed and enforced, the small team of inspectors visiting an establishment once every three years cannot be expected to categorically guarantee that standards are met all the time for all the animals. Even in the case of travelling circuses, which are inspected at least three times a year and have very few animals, it has been shown that important factors impacting on animal welfare (e.g. pregnancy) were missed during inspection. As explored previously, the legislation itself does not demand that businesses meet all animal welfare needs all of the

³⁹⁴Gov.uk. (2011). Tough new licensing regime for wild animals in circuses - GOV.UK. [online] Available at: <https://www.gov.uk/government/news/tough-new-licensing-regime-for-wild-animals-in-circuses> [Accessed 20 Nov. 2017].

³⁹⁵Derbyshiretimes.co.uk. (2017). Campaigners urge Derbyshire residents to shun wild animal circus. [online] Available at: <https://www.derbyshiretimes.co.uk/news/campaigners-urge-derbyshire-residents-to-shun-wild-animal-circus-1-8751144> [Accessed 20 Nov. 2017].

time in order to possess a licence. This raises the question: what can we reasonably expect, given the limitations, from licensing regimes which regulate animal use?

It has been argued that licensing on its own is not sufficient to ensure high welfare standards for animals, however it certainly can be used to *support* the delivery of animal welfare objectives. To conclude this thesis, it is suggested that licensing regimes can be applied in the following ways for best effect:

1. As a monitoring tool which can facilitate the periodic assessment of animal welfare standards in its broadest sense; and
2. As a means to enforce best practice within industries with regard to processes which, if properly maintained, can *support* the delivery of high welfare standards, such as ensuring veterinary care programmes are in place and maintained or ensuring that post mortems are carried out in the event of an animal's death.

It is firmly believed by the author that correctly applied and enforced licensing regimes to regulate animal use can be used as fundamental tools to support the delivery of high animal welfare standards. However, to be truly effective in protecting animal welfare, these regimes must be implemented in conjunction with effective, responsive and widely and properly enforced animal welfare legislation which implements minimum welfare standards based on the needs of the species to which the individual animal belongs, and regardless of where or how the individual animal is used. At present, the "Good Practice Caveat", which has been explored in some detail in this thesis, would require a complete reinvention if minimum species-based standards were to be introduced and, in reality, this is highly unlikely to happen. If true welfare standards, based on the true needs of the animals in

question, were introduced, it is likely that a (potentially large) number of practices which are currently legal would become prohibited. If it could be agreed that elephants, for example, need vast amounts of space and complex social groups to live in to have their welfare needs met, it would effectively prevent elephants from being kept in captivity because few, if any, zoos could provide these standards. If it can be agreed that, as a minimum standard, primates should live in natural social troops and only in climates sufficiently similar to their home range, then the keeping of nonhuman primates in zoos in Europe may also be prohibited. If true welfare standards based on the needs of animals were mandated, it becomes difficult to see how many wild species of animal might be held captive at all and, in effect, the introduction of minimum standards would result in the banning of some, if not the majority of, practices involving keeping wild animals in captivity. While the author of this thesis may, from a personal perspective, believe that this would be the best outcome for the animals in question, it would be naïve to believe that this approach is realistic from either a political or legal perspective. Our current legal system, and our legal relationship with animals would have to be completely overhauled for the above to be a possibility and, while smaller industries such as wild animal circuses, may be legitimate targets for outright ban or prohibition, there is currently no appetite – either in government or for a large part of the general public – to begin a discussion about the outright banning of zoos.

As such, and regardless of the personal view of the author, no argument is being made in this thesis that zoos should be, at this point in time, banned outright as this would be unattainable under the existing legal framework. Instead, it is argued that the licensing regimes under examination, properly implemented and enforced – while continuing to be subject to, and limited by, the existing “Good Practice Caveat”, can mitigate some welfare concerns for wild animals in circuses and zoos, but cannot completely eradicate them.

Appendix One: Emails sent to Freedom of Information Departments

Email One: Freedom of Information Request to Councils with Zoos Listed

Please treat this email as a Freedom of Information Act 2000 request.

I am conducting my PhD research into the efficacy of zoo licensing procedures, as part of a doctorate in Law at the University of Essex. I would be grateful if you could provide me with the information below in order to assist me in my work.

I would be grateful if the information could be provided in electronic format if possible. If only hard copy format is possible, please could they be sent to:

[Author's contact details]

Council name: [Name inserted here]

1. Please could you confirm whether or not the following zoos are still operational in your area and, if so, if the listed dispensation granted under s.14 of the Zoo Licensing 1981 is still correct:

Name of zoo	Dispensation
Example 1	Example 1
Example 2	Example 2

2. If there are any new zoos operating in your area, please could you let me know the name of the business and, for each zoo, if any dispensation has been granted under s.14 of the ZLA 1981.
3. For any zoos which have been granted a dispensation under s.14 of the Zoo Licensing Act, please could you let me know the date when the zoo's dispensation status was assessed to ensure that it is still relevant.

4. For every zoo for which such information is held, please could you provide me with the following for a period beginning the 1st January 2008 and ending 1st July 2014
 - a. Current and historic zoo licences (including any conditions attached to the licences)
 - b. All zoo inspection reports (formal, informal and special)
 - c. Any available pre-inspection audits
 - d. All animal stocklists held by the council
 - e. Any correspondence between the zoo and the local authority with regard to licensing
 - f. Copies of any "Directions" issued to the zoo under s.16 of the Zoo Licensing Act 1981 for failure to comply with licence conditions

5. In addition, if any of the zoos also hold licences under the Pet Animals Act 1951, please could you provide me with (for the same period as above):
 - a. Current and historic pet shop licences (including any conditions attached to the licence)
 - b. All inspection reports

Email two: Freedom of Information Request to Councils without Zoos Listed

Please treat this email as a Freedom of Information Act 2000 request.

I am conducting my PhD research into the efficacy of zoo licensing procedures, as part of a doctorate in Law at the University of Essex. I would be grateful if you could provide me with the information below in order to assist me in my work.

I would be grateful if the information could be provided in electronic format if possible. If only hard copy format is possible, please could they be sent to:

[Author's contact details]

1. Please could you confirm whether or not you have any zoos operating in your area and, if so, please could you provide me with the name and (if applicable) any dispensation that has been granted to the zoo (for example, under s.14 of the Zoo Licensing Act 1981 or s. 4 of the Zoo Licensing Regulations for Northern Ireland).
2. For any zoos which have been granted a dispensation under zoo licensing regulations, please could you let me know the date when the zoo's dispensation status was assessed to ensure that it is still relevant.
3. For every zoo for which such information is held, please could you provide me with the following for a period beginning the 1st January 2008 and ending 1st July 2014
 - a. Current and historic zoo licences (including any conditions attached to the licences)
 - b. All zoo inspection reports (formal, informal and special)
 - c. Any available pre-inspection audits
 - d. All animal stocklists held by the council
 - e. Any correspondence between the zoo and the local authority with regard to licensing
 - f. Copies of any "Directions" issued to the zoo under ss. 16 – 16C of the Zoo Licensing Act 1981 or ss. 17 – 19 of the Zoo Licensing Regulations for Northern Ireland for failure to comply with licence conditions

4. In addition, if any of the zoos also hold licences under the Pet Animals Act 1951 (England, Wales, Scotland only), please could you provide me with (for the same period as above):
- a. Current and historic pet shop licences (including any conditions attached to the licence)
 - b. All inspection reports

Email Three: Freedom of Information Request to All Councils

I would like to make the following request under the Freedom of Information Act 2000.

- Please could you confirm whether or not the council has initiated (or been involved with) any prosecutions for offences committed under the Zoo Licensing Act 1981 by zoos operating (either currently or historically) within your council's jurisdiction between the 1st January 2008 to the present day.
- If the answer to the above question is "Yes", please could you provide me with the following details in relation to the prosecution(s):
 - Name of the zoo
 - Date of the hearing(s)
 - Details of charges brought against the zoo
 - The section of the Zoo Licensing Act under which charges were brought against the zoo
 - The outcome of the prosecution (did it result in a conviction, how many of the charges were dismissed and how many were upheld, etc.?)

Appendix Two: How changes in the DEFRA ZOO2 form have been dealt with

Given the changes made to the ZOO2 form made in 2012, some of the questions differ slightly in the new form, meaning that a direct comparison between forms is not possible. However, as the form has changed in very minor ways, the following assumptions have been made and data input carried out on the following basis:

Question in pre-2012 ZOO2 form (Old Form)	Question in post-2012 ZOO2 form (New Form)	Notes
2.1. Is each animal provided with an environment well adapted to meet the physical, psychological and social needs of the species to which it belongs?	2.1. Are the animals provided with an environment well adapted to meet the physical, psychological and social needs of the species to which they belong?	There is no substantive difference to the question so a "Yes" answer on the old form is considered to be a "Yes" on the new form.
	NEW QUESTION: Q. 2.3. Are there satisfactory measures in place to safely confine the animals?	This question was absent in old form. This is left blank when the old form has been used. Questions are renumbered accordingly.

2.4. Do animal enclosures provide sufficient space?	2.4. Do animal enclosures have sufficient shelter and refuge areas?	As there is no means of knowing from the old form whether sufficient refuge was provided, a “Yes” answer on the old form is considered to be a “Yes” on the new form.
3.1. Is each animal provided with a high standard of animal husbandry?	3.1. Are the animals provided with a high standard of animal husbandry?	There is no substantive difference to the question so a “Yes” answer on the old form is considered to be a “Yes” on the new form.
3.2. Do all animals on display to the public appear to be in good health?	3. 2. Do animals on display to the public appear in good health?	There is no substantive difference to the question so a “Yes” answer on the old form is considered to be a “Yes” on the new form.
3.4 Do all animals receive prompt and appropriate attention when problems are noted?	3.4. Do animals receive prompt and appropriate attention when problems are noted?	There is no substantive difference to the question so a “Yes” answer on the old form is considered to be a “Yes” on the new form.
3. 9. Is each animal provided with a developed programme of preventative	3.9. Are the animals provided with a documented and	3.9 and 3.10 from the old form are combined in the new form. As such “Yes”

<p>and curative veterinary care and nutrition?</p> <p>3.10. Is a satisfactory programme of preventative and curative veterinary care established and maintained?</p>	<p>maintained programme of preventative and curative veterinary care and nutrition?</p>	<p>answer to both old form's 3.9 and 3.10 is deemed a "Yes" for new form. A "No" answer for either 3.9 or 3.10 on old form is deemed a "No" for new form.</p> <p>Questions are renumbered accordingly.</p>
<p>3.13. Are medicines correctly kept?</p>	<p>3.12. Are medicines kept and disposed of correctly?</p>	<p>This question added the need to "dispose" of medicines correctly, in addition to keeping. As the "dispose" element was absent in the previous form, no judgement can be made on whether or not this was met previously. As such, a "Yes" in the old form is considered a "Yes" in the new form. A "No" in the old form is considered a "No" in the new form.</p>
<p>4.1. Does accommodation appear adequately to meet</p>	<p>4.1 Do the accommodation and management regimes</p>	<p>The new question simply requires that regimes</p>

<p>the biological and behavioural needs of the animals?</p>	<p>encourage normal behaviour patterns and minimise any abnormal behaviour, taking into account current enrichment and husbandry guidelines?</p>	<p>“encourage” normal behaviour patterns and minimise abnormal behaviour. In this is the implicit acceptance that there is no need to <i>meet</i> “biological and behavioural needs of the animals” (which is, in fact, what the legislation demands). It appears that this has reduced the demands on the zoo to suggest that as long as normal behaviour is “encouraged” then there is no need to meet biological and behavioural needs. As a result of the apparently reduced responsibility imposed on the zoo by this rewording, a “Yes” answer on the old form is deemed to be a “Yes” in the new form.</p>
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	NEW QUESTION: 4.2 Are animals of social species normally maintained in compatible social groups?	This was absent in previous form. This is left blank when the old form has been used.
7.4. Are on-site education facilities commensurate with the collection? 7.4 (a) are they adequate for the purposes?	7.4. Are on-site education facilities adequate for the purposes?	7.4 (a) in the old form is absorbed into 7.4 in the new form. No substantive change to the meaning occurs. As such, a “Yes” answer to 7.4 and 7.4 (a) are deemed to be a “Yes” for the new 7.4. A “No” answer for either 7.4 or 7.4(a) old form is deemed to constitute a “No” answer in the new 7.4.
	NEW QUESTION: 8.3. Are escape drills carried out four times a year, recorded and regularly reviewed (at least two drills should include the escape of a Category 1 animal where present)?	This was absent in previous form. This is left blank when the old form has been used. Questions are renumbered accordingly.

<p>8.8. Does maintenance of buildings appear adequate?</p>	<p>QUESTION REMOVED FROM NEW FORM.</p>	<p>Building safety is now included in 8.9. As such a “Yes” answer to 8.8 and 8.9 in old form is deemed to be a “Yes” answer on the new form. A “No” answer to either 8.8 or 8.9 is deemed to be a “No” answer on the new form.</p>
	<p>NEW QUESTION: 8.12. Are the special safety requirements for walk-through or drive-through exhibits adequately met?</p>	<p>This was absent in previous form. This is left blank when the old form has been used. Questions are renumbered accordingly.</p>
<p>9.2. Are daily diaries maintained? 9.2 (a) do they contain appropriate information?</p>	<p>9.2. Are daily diaries maintained, and do they contain appropriate information?</p>	<p>9.2. and 9.2 (a) from the old form are combined in the new form. As such “Yes” answer to both 9.2. and 9.2 (a) on the old form is deemed a “Yes” for new form. A “No” answer for either 9.2. and 9.2 (a) on old</p>

		form is deemed a “No” for new form.
9.4. Are annual inventories maintained and submitted to the Local Authority?	9.4. Are annual stock records completed in the correct format and submitted to the local authority?	This question added the need to ensure records were submitted in the correct format. As the “format” element was absent in the previous form, no judgement can be made on whether or not this was met previously. As such, a “Yes” in the old form is considered a “Yes” in the new form. A “No” in the old form is considered a “No” in the new form.
10.4. 4. Has an ethical review process been established?	10.4. Has an ethical review process been established and implemented?	This question added the need to ensure the ethical review was implemented as well as established. As the “implementation” element was absent in the previous form, no judgment can be made on whether or not

		<p>this was met previously. As such, a “Yes” in the old form is considered a “Yes” in the new form. A “No” in the old form is considered a “No” in the new form.</p>
<p>12.4 On summary inspection, does the zoo appear to be in compliance with CITES legislation?</p>	<p>QUESTION REMOVED FROM NEW FORM.</p>	<p>12.4 omitted from new form as CITES compliance is no longer part of inspection process. This has been removed from data gathering and so any answer in old form is discarded.</p>

Appendix Three: All instance of non-compliance with the Zoo

Licensing Act 1981

Section	Criteria	2008	2009	2010	2011	2012	2013	2014	Total
1A(c)(ii)	3.10 Is there a system for the regular review of clinical and pathological records?	8	10	2	5	7	10	5	47
16(1)	12.3. Have any Additional licence conditions been met?	3	9	8	10	7	5	3	45
1A(c)(ii)	3.9 Are the animals provided with a documented and maintained programme of preventative and curative veterinary care and nutrition?	5	9	2	6	5	10	7	44
1A(c)(ii)	3.15 Are post mortem examination	4	9	2	4	4	10	2	35

	arrangements satisfactory?								
1A(c)(ii)	3.11 Are appropriate veterinary records kept?	2	8	4	4	5	5	5	33
1A(f)	Are records kept of the causes of any deaths?	2	8	3	3	2	7	2	27
1A(c)(ii)	3.12 Are medicines kept and disposed of correctly?	2	2	3	7	4	7	1	26
1A(b)	7.5. Are the conservation efforts adequate for the resources of the collection?	2	4	4	2	2	3	3	20
1A(f)	9.2. Are daily diaries maintained, and do they contain appropriate information?	2	3	2	3	4	1	3	18
1A(f)	9.6. Are archived records secure?	2	6	0	3	1	5	1	18

1A(d)	8.3. Are escape drills carried out four times a year, recorded and regularly reviewed (at least two drills should include the escape of a Category 1 animal where present)?	0	0	0	0	0	8	9	17
1A(d)	8.5. Do stand-off barriers appear adequate?	2	4	2	4	1	1	3	17
1A(d)	8.9. Do public areas, walkways and buildings appear safe?	3	6	2	2	1	3	0	17
1A(f)	9.4. Are annual stock records completed in the correct format and submitted to the local authority?	4	3	1	1	1	2	4	16
1A(b)	7.6. Are the research efforts	1	6	2	1	3	1	1	15

	adequate for the resources of the collection?								
1A(c)(i)	2.8(a) Is the standard of maintenance adequate for the buildings?	3	3	2	3	1	2	1	15
1A(d)	8.4. Will the perimeter deter unauthorised entry and aid the confinement of zoo stock?	5	2	2	3	1	2	0	15
1A(d)	8.6. Are adequate warning signs provided?	1	2	2	3	1	3	3	15
1A(f)	Are records kept of the health of the animals?	1	4	2	2	1	2	3	15
4(8)	12.1. Is the current licence or a copy on public display at each public entrance?	1	3	3	2	1	2	3	15

1A(c)(ii)	3.13 Are controlled drugs used and recorded satisfactorily?	2	0	1	6	3	2	0	14
1A(d)	8.7. Are prohibited areas appropriately signed?	3	4	2	3	1	0	1	14
1A(d)	8.8. Are exits clearly marked and accessible?	1	3	1	3	0	3	2	13
1A(f)	9.3. Are animal stock records clear and up-to-date?	2	1	1	2	1	3	3	13
1A(c)(i)	2.1 Are the animals provided with an environment well adapted to meet the physical, psychological and social needs of the species to which they belong?	3	1	1	1	2	3	1	12
1A(c)(i)	2.5 Do enclosures provide sufficient space?	1	4	1	0	2	2	2	12

1A(c)(ii)	1.3(b) Are supplies of food and water prepared hygienically?	2	2	2	2	0	4	0	12
1A(c)(i)	2.6 Are backup facilities for life support systems adequate?	0	0	2	1	3	4	1	11
1A(c)(i)	2.7 Is the cleaning of the accommodation satisfactory?	2	3	1	1	1	2	1	11
1A(c)(i)	2.8(b) Is the standard of maintenance adequate for the fences	2	4	0	3	0	2	0	11
1A(c)(ii)	1.3(a) Are supplies of food and water kept hygienically?	2	2	2	2	0	3	0	11
1A(d)	8.2. Are there satisfactory measures in place to be taken in the event of any escape	3	0	2	3	1	1	1	11

	or unauthorised release of animals?								
1A(a)	Conservation provision	0	2	1	1	2	3	1	10
1A(c)(i)	2.4 Do animal enclosures have sufficient shelter and refuge areas?	1	3	2	0	0	4	0	10
1A(c)(ii)	3.3 Are observations of condition and health made and recorded?	3	1	2	2	0	0	2	10
1A(d)	8.10. Are trees regularly inspected and appropriate remedial action taken?	3	0	0	1	4	2	0	10
1A(f)	9.5. Are animal source and destination records kept?	0	2	2	2	0	4	0	10
1A(b)	7.4. Are on-site education facilities adequate for the	2	2	0	1	0	2	2	9

	resources of the collection?								
1A(c)(i)	2.2(a) Are the following environmental parameters met: Temperature	2	1	0	1	3	1	1	9
1A(c)(i)	2.2(e) Are the following environmental parameters met: any other environmental parameters	1	3	0	2	1	1	1	9
1A(c)(i)	2.9 Is all drainage effective and safe?	2	1	1	0	1	3	1	9
1A(f)	Are records kept of acquisitions, births, deaths, disposals and escapes of animals?	0	1	3	2	0	1	2	9
1A(c)(ii)	1.6(a) If feeding is permitted by visitors, is it properly controlled	3	1	1	2	0	1	0	8

1A(d)	8.12. Are the special safety requirements for walk-through or drive-through exhibits adequately met?	0	2	0	1	3	2	0	8
1A(e)	3.17 Are satisfactory measures in place to prevent the intrusion of pests and vermin into the zoo premises?	0	2	0	1	1	2	1	7
1A(e)	3.18 Does it appear that general sanitation and pest control are effective?	0	1	0	1	1	4	0	7
1A(b)	7.7. Is captive breeding properly managed?	3	0	0	1	0	2	0	6
1A(c)(i)	2.2(c) Are the following environmental	1	1	1	0	2	1	0	6

	parameters met: Lighting								
1A(d)	8.11. Have appropriate risk assessments for direct contact by the public with animals been carried out? (SEE 10.3)	0	0	0	0	0	3	3	6
1A(b)	7.3. Where appropriate are animals managed in a way consistent with the conservation needs of the species, (such as exchange between zoos, accommodation to encourage natural behaviour and breeding etc)?	0	1	0	0	1	2	1	5
1A(c)(ii)	3.2 Do animals on display to the public	2	1	0	0	1	1	0	5

	appear in good health?								
1A(f)	9.1. Are there up-to-date records of the zoo's collection, including records of: (i) the numbers of different animals?	0	2	0	0	0	0	3	5
1A(b)	7.2. Is the zoo promoting public education and awareness in relation to the conservation of biodiversity, in particular by providing information about the species of wild animals kept in the zoo and their natural habitats?	0	0	2	1	0	0	1	4
1A(c)(ii)	3.1 Are the animals provided with a	1	0	1	1	0	1	0	4

	high standard of husbandry?								
1A(c)(ii)	3.14 Are appropriate antidotes available?	1	0	0	1	1	1	0	4
1A(c)(i)	2.2(b) Are the following environmental parameters met: Ventilation	0	0	0	0	2	0	0	2
1A(c)(ii)	1.1 Are animals provided with a high standard of nutrition?	1	0	0	1	0	0	0	2
1A(c)(ii)	1.3(c) Are supplies of food and water supplied to the animal hygienically?	0	0	0	1	0	1	0	2
1A(c)(ii)	3.5 Are enclosures designed and operated in such a way that social interaction problems are avoided?	2	0	0	0	0	0	0	2

1A(c)(i)	2.2(d) Are the following environmental parameters met: Noise levels	0	0	0	0	0	0	1	1
1A(c)(ii)	1.4 Has natural feeding behaviour been considered adequately to ensure that all animals have access to food and drink?	0	0	0	0	1	0	0	1
1A(c)(ii)	1.5 Are feeding methods safe for staff and animals?	0	1	0	0	0	0	0	1
1A(c)(ii)	3.4 Do the animals receive prompt and appropriate attention when problems are noted?	1	0	0	0	0	0	0	1
1A(d)	8.1. Are there satisfactory measures in place	0	1	0	0	0	0	0	1

	to prevent the escape of animals?								
1A(c)(i)	2.3 Are satisfactory measures in place to safely confine the animals?	0	0	0	0	0	0	0	0
1A(c)(ii)	1.2 Is food and drink that is supplied appropriate for the species/individual?	0	0	0	0	0	0	0	0
	Totals	105	154	80	118	90	160	91	798

Appendix Four: Email sent to DEFRA Freedom of Information

Department regarding circus licensing

Dear All,

I would like to make the following request under the Freedom of Information Act 2000.

- Copies of any licences (current or historic) issued under the Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012 by your department to travelling circuses.
- Copies of any additional conditions attached to the relevant licences (including any amended conditions following inspection).
- Any correspondence relating to non-compliance with licence conditions between your department and a licensed travelling circus.

This information will be used as part of my PhD research, which considered regulatory licensing regimes in the context of animal welfare.

Best wishes,

Elizabeth Tyson
PhD Candidate
University of Essex - School of Law