

FortyTwo Talks: Animal Sentience – Part 2

Marcia Hyde: Hello and welcome to *FortyTwo Talks*, the podcast which takes a deep dive into the legal world led by experienced members of 42BR Barristers.

I'm Marcia Hyde and I'm a member of the Family Team at 42 Bedford Row, and I'm delighted to be joined by Ed Walters, who is a regulatory and civil barrister, but he also prosecutes animal welfare matters for the RSPCA.

And I'm also joined by Paul Fuller, who is a business and property barrister, and we're all members of the 42BR Animal Welfare Group.

This is the second podcast, part two, of our podcasts on sentience, and we're going to start now dealing with the actual law and how the law has developed over time in Europe and then we are going to look at the Animal Sentience Act 2022.

Now, Paul, I know you've looked at the five freedoms, the beginning, really, of European Law on animal sentience. Can you just tell us a little bit about that please?

Paul Fuller: Thank you, Marcia. Of course, as you say, really the embryo, I suppose, of animal welfare law within the EU and the recognition indeed of animal sentience within EU law was arguably started with the framework set out initially in a 1965 report of The UK Technical Committee of Inquiry. Now, that report was chaired by a medical scientist, Francis Bramwell, and known colloquially as the Bramwell Report focused on farm animals, and in particular the need for farmed animals to be able to stand up, to lie down, to turn around, to stretch out their limbs, and to groom all parts of their body.

So, the Bramwell Report was focused in the first instance, very much on the physical needs of the animal. But then in 1979, what would go on to become the Farm Animal Welfare Council extended Bramwell's recommendations to encompass also the mental needs of the animal, and this gave spawn to what has, as I say, become known as the five freedoms, and they are today in short form: the freedom from hunger and thirst, the freedom from discomfort, freedom from pain, injury, or disease, freedom to express normal behaviour for the animal, and importantly, fifth, freedom from fear and distress by ensuring conditions and treatment which will avoid mental suffering.

So, we see in particular in the fifth freedom here, the embryo of the recognition of animals or farmed animals, at least, as sentient beings.

Animal sentience, I suppose, was first recognised in EU Law as early as 1997 where the *Treaty of Amsterdam* expressly set out the member states' 'desire to ensure the improved protection and respect for the welfare of animals as sentient beings'. And that was expanded upon in 2007, where in the *Treaty of Lisbon* member states agreed that the member states shall, since animals are sentient beings, pay full regard to the welfare requirement of animals.

So, all well and good, but current EU legislation largely protects only certain classes of animals and excludes others. And this is something that we touched upon in the first instalment of this podcast series. So, for example, decapod crustaceans, that's creatures such as lobsters, crabs, and crayfish are excluded on the grounds that they're not sentient and therefore incapable of suffering. And we can see this reflected in UK law. So, for example, the Animals (Scientific Procedures) Act 1986 regulates the use of any procedure applied to a 'protected animal', which may have the effect of causing the animal a level of pain, suffering, distress, or lasting harm, but crucially protected animals are defined in the act as any living vertebrate and any living cephalopod, so think in that case, octopuses, squid and

cuttlefish. Decapods, however, are not currently protected animals under the act.

Marcia, has this emission been addressed, and if so, how?

Marcia Hyde: That brings us to the Animal Welfare Sentience Act 2022. Originally seen and hailed as a landmark for animals because it recognised in English Law, sentience of animals, and the concern had been, that having left Europe through Brexit, there were a lot of animal welfare regulations, which were feared would not be taken up and enshrined in English law.

So, when the Animal Welfare Sentience Act was enacted, there was a real relief because it was seen as a symbolic landmark in a way. What does it actually do? And we're going to come on, the three of us, to talk about how effective that piece of legislation is or isn't.

But it enshrines the idea of animals as sentient creatures in English law and animals, going back to Paul's question, they are defined as, within the Act, as any vertebrae other than homo sapiens, any cephalopod mollusc, and any decapod crustacean.

So, in answer to your question, Paul, in respect of the limitations of the 1986 Act and generally yes the Animal Welfare Sentience Act, as we can see included cephalopod molluscs and decapod crustaceans.

This was primarily because of the work of Professor Birch and we discussed his work in our first podcast on this topic. The Bill was amended to specifically include these species within the categories of animals that were to be considered as sentient. And this was another reason why the Act was hailed as a landmark piece of legislation because it moved away from the idea of vertebrates only as being sentient and note that fish are included. Often people think they're not. Because fish have backbones and a jaw and that brings them

within vertebrates. What the Act actually does, however, is in effect set up an Animal Sentience Committee, and the purpose of that committee is to review all proposed government policy.

What's important to note is the members of that committee are not politicians, and they're not civil servants. They are all either academics or people working in animal welfare.

Members of the committee are Michael Seals, who's the former chair of Animal Health and Welfare Board for England. And he's the current chairman of Animal Medicine's Train and Regulation Authority.

Professor Richard Bennett, who is a professor of agricultural economics at the University of Reading. He's also a council member of the Humane Slaughter Association and the University's Federation for Animal Welfare, and he's undertaken research on the economics of animal health and welfare for over 35 years.

Richard Cooper is a practicing vet. And he served on many of Defra's Animal Welfare Committee for eight years before joining the Animal Sentience Committee.

Dr. Penny Hawkins has 30 years' experience of life science research, practical bioethics, and animal welfare.

Professor Ann Meredith is the Executive Dean of the Faculty of Natural Sciences at Keele University and has significant experience providing advice to government, including her role as Chair of the Zoo Experts Committee for 10 years.

And lastly, Professor Christine Nichol, who is experiencing veterinary research environments and has published over 200 scientific publications. And her work addresses the conceptual issues around measuring welfare and the evaluation of practical solutions.

So, these are not politicians. They're people who are very embedded and knowledgeable in animal welfare, the practicalities of it and the science of it, and the costs of it, which we will come to when we look at the effectiveness or otherwise of the Animal Welfare Committee.

So that Committee, as I've indicated, is set up to review all proposed government policy to consider whether or not that policy may have an adverse effect on the welfare of animals as sentient beings and the Act allows the committee to make recommendations back to the government about that policy in terms of any adverse effects on the welfare of animals.

Now it's important to note that the Act refers to the sentience committee may make recommendations and it may produce reports, it doesn't have to, and in effect, it chooses what to make a report on, but as I say, it may produce a report, make recommendations. Once it has made a report and made recommendations, the government must lay before Parliament a response to that report within three months. One of the limitations of the recommendations is that the Committee in making those recommendations **must** pay respect, and this is the first 'must', as opposed to 'may', pay respect to current legislative provisions, which respect religious customs, cultural traditions, and regional heritage.

So, your question to me, Paul, was how far has it been remedied that certain animals were not seen as sentient. Whilst all of the animals we've talked about and are within the definition of the Act, there's not much solid protection there for them, is there?

Paul Fuller: No, I suppose really there's two broad points just from my perspective to come out of all of this. Firstly, it's not to be overlooked and it's not to be undervalued, and it should be recognised that for the first time, UK statutory law recognises animals as sentient beings. And that's a big moment...

Marcia Hyde: ...which is why it was hailed as a great Act.

Paul Fuller: Absolutely. And for anyone who hasn't read the Act, it's a very short piece of legislation. It's well worth the read but for me, the key provision here is as section two, subsection two, this is the question that the Animal Sentience Committee has to consider or may consider, whether, or the extent to which the government is having, or has had, all due regard to the ways in which the policy might have an adverse effect on the welfare of animals as sentient beings.

So that's significant. But arguably the shortcomings here are, well, what teeth, what powers really does the Animal Sentience Committee have, other than to make recommendations, which, but for the requirement that the government has to issue a response to those recommendations within three months, the government can essentially just pay lip service to?

Marcia Hyde: Well, we see that, don't we, sadly?

So far the Committee have produced seven reports, on a number of topics, and one of the reports I've looked at was on surveillance and enforcement. And so the report from the Sentience Committee made a number of findings about enforcement generally, in respect of animal welfare, and it was very much reflecting some of the reports that the Animal Welfare Foundation had produced earlier about the lack of enforcement, and the Committee found that there was lacking in an effective, structured, fair and integrated system of animal welfare, surveillance and enforcement. They found substantial enforcement gaps across all species and in particular farm animals. They found a lack of funding, a lack of centralised training, and a lack of consistency in teeth in the codes of practice across all species and what it recommended to the government was a wholesale review of the enforcement of animal welfare, and the government came back in its response, and these are all published online, the surveillance and

enforcement report is published online, and the government response is published online, and the government response is due 2025 and effectively, the government says, well, we've got a lot of aims politically. We are committed to do a lot of things, but effectively the response to the recommendations was, well, no, because the government say Defra is currently developing an animal welfare strategy to set out an overarching approach, which of course is what the Sentience Committee had said, but they haven't done it yet.

So in effect, it appears that Defra were in the process of duplicating what the Sentience Committee had done. To date I don't think I know, Ed or Paul you correct me if I'm wrong, I haven't seen that Defra report. The government was setting out in its response what it is going to ban, but still hasn't, and it didn't agree, the government rejected the central recommendation and thrust of the report and it said, *'we do not agree with the recommendation that a central body responsible for directing and coordinating animal welfare, law, surveillance, and implementation alongside a specified minimum resource allocation is required'*.

It then went on to say, *'limited resources are better focused on improving compliance and enforcement outcomes than on changing governance'*. I, Paul and Ed, find that very difficult because all of the research, and the report was saying, what we have is not working. You can't refine it, and you need to put more money in it, and it needs to be consistent and you need a new framework.

What the government seem to come back to say is, well, we're going to tamper with the old one.

Paul Fuller: Quite and the report rather than the response, another of the criticisms, which ties in with the recommendation for a centralised body, is that there's an over alliance, correct me if I'm wrong, Marcia, on third party agencies...?

Marcia Hyde: absolutely.

Paul Fuller: ...Such as the RSPCA and local authority. And as someone who is a trustee of my local RSPCA and Ed, I'm sure as somebody who often acts for the RSPCA in prosecution cases, I'm sure the RSPCA would take a different view as to whether they're suitably resourced to address the kinds of issues effectively that a centralised body might be much better placed.

Marcia Hyde: And in fact, the RSPCA in terms of prosecutions are also suggesting that they can't do it anymore, that it has to be the Crown Prosecution Service. And of course, the Crown Prosecution Service is saying, oh, we can't afford to do that. But Ed, when you looked at the online Bill, that was a little bit more optimistic, was it, do you think?

Edmund Walters: Well in some ways, but in others not, because the report from the Committee was published on the 23 October 2024, so about a year ago, by the time they published that report, the Online Safety Act developed by the then government at time had received Royal Assent on October 23. And it specifies effectively this Act, and it is complicated, but, it essentially, it specifies that search services and peer-to-peer user platforms must implement systems and processes to prevent and remove illegal content appearing via search results or on the services, so, it's an important Act and obviously this main focus was to prevent tip to children from accessing content that's harmful to children. Harmful content encompasses under the Act, a very broad range of material, a broader range than just illegal content, but the focus of the Animal Sentience Committee in their report in this regard is that harmful content is described in there, but there's a concept called 'priority offenses' under the OSA - Online Safety Act, and one of those priority offenses, that's a category of illegal material effectively, where there's an offense under Section 4.1 of the Animal Welfare Act 2006, of course, that's the section which is very much a focus of my practice when I'm prosecuting, which is the causing unnecessary

suffering to animals, and of course that's the definition within that Act is more limited of course and I'll go to that in a moment, more limited than under the Animal Welfare Sentience Act 2022.

But anyway, the primary intension then of the OSA as this report says, is to protect both adults and children, particularly children I suppose, works from illegal content, and to protect children from content that may harm them. And the illegal content can include material which is effectively an offense under the Section 4, and that obviously was optimistic, this report in the sense that it said the OSA would reduce, or probably will reduce, the risk to users encountering live streaming of unnecessary suffering to animals and content that might encourage others to cause or assist in causing such unnecessary suffering.

And as you may know, there's an awful online element of people live streaming the torture of animals, which is obviously something that neither adults nor children should really be accessing online and for obvious reasons. So, the report is optimistic. It says that this Act should have very positive benefits for animal welfare, directly reducing the risk that sentient animals, covered by the Animal Welfare Act, in the creation of online content and promotion of impulsive subtle attitudes to that regarding the accepted treatment of animals. But there's a potential shortfall in the Act because it's not an offense under the Animal Welfare Act 2006 to record or publish unnecessary suffering of animals, and the OSA doesn't make any new offense to do that, and this was identified by the Committee as being of the funeral, if you like, this prerecorded concept depicting animal suffering on torture is not de-facto illegal content under that Act, and it should be. The committee is saying, and in my submission, well, my opinion quite rightly, the original bill was concerned with illegal content that affected humans only really. But in response to questions, there was a change. So this is the optimistic side of it. There was a change in that there was the inclusion of the unnecessary suffering on the section four, but it

wasn't added to the schedule of offenses in September 2023 at the amendment stage.

But the recommendation, if the court, the Committee's view, was that the additional consultation could have taken place, considered whether the sole reference to offenses on the Animal Welfare Act was the best mechanism to achieve this. And also, it's important to note that the Animal Welfare Act 2006, does not apply to sentient invertebrates or free-living wild animals. Free living, wild animals - another important category of animals. And for animal welfare purposes, the Act doesn't protect those.

So that potentially harmful content relating to violence, injury to unnecessary suffering of those animals is not included. And for example, the awful dismemberment of a live octopus or injury to wild animals using a catapult, for example, is cited in this report as being not covered by this Online Safety Act.

And as I've already said, it's not an offense to record or publish content showing any unnecessary suffering to any animals. So, the Animal Welfare Act does not encompass as many animal species as the Animal Welfare Sentience Act anyway, per se.

So, the recommendations are very much in that report, which is a short report. These reports are short, as you've said, Marcia, there are only to date seven reports. Of course, there have been in limited amount of time, but there's seven very short reports really about this. And of course, it's up to the Committee how long their reports and indeed the form they take. And the response to that was equally short, perhaps shorter from the government.

The government's response, which was on the 12 of February of this year.

The government response to the Animal Sentence Committee Online Safety Act report, and it mentions that the Act received the Royal Assent, the Act provides for new regulatory framework, which has the general purpose of making use of internet services regulated by this Act safer for children and adults in the United Kingdom.

What it said about the illegal content was that it was a new legal concept created for the purpose of the OSA regulatory regime. It means contents that amounts to a relevant offense. Relevant offense includes offenses listed as a priority offense in schedules five to seven of that Act. And the access that service provides are required to treat content as illegal content when they have reasonable grounds to believe it amounts to an offense, but it doesn't create prohibitions on individual users publishing or recording certain kinds of content. And regarding the updates on the Animal Welfare Act specifically, they really handed it over to the Department of Environment, Food and World Affairs - DEFRA has been responsible for Animal Welfare Act, and they said that DEFRA has already initiated a series of meetings with key animal welfare stakeholders as far of the development of an overarching approach to animal welfare.

Marcia Hyde: So it goes back, so to the response to the report on enforcement?

Edmund Walters: Yes. And, and there's another criticism of the Committee was that there's a reference to referring matters to the Communications Act, or that it could be covered, those type of offense could be covered by an interpretation of the Communications Act, and the Animal Sentence Committee considers that referencing the obscenity provision in the Communications Act will only partially address this.

So, in this guidance, really there certainly hasn't been an amendment of the Animal Welfare Act to cover that to date, and I'm afraid the

position remains as per the South and the recommendation is unnecessary suffering should be a particular offense. Again, they've essentially said that that's not really how this Act works.

So, in relation to the recommendation of the Animal Sentience Committee, it recommends that officials and ministers consider whether an amendment to the Animal Welfare Act or to the OSA should be made to prohibit the recording and publishing of material which depicts the unnecessary suffering of animals. They say in relation to that – yes, that Ofcom is consulting on whether the gap can be addressed by the Communications Act and Defra is, which is responsible for the Animal Welfare Act 2006 as initiating this series of meetings. So, that's that.

So obviously we can't go into all these reports and responses to all the seven of them and the responses to date, but just to round us off with what the Animal Sentience Committee has said about their vision in a document, which again is online. It says, *our vision is that all central government policy decisions will pay due regard to the ways in which they may affect the welfare of sentient animals*, which is very brief of course.

And then brief mission statement two, which simply says '*the Committee considers whether in our view, central government has paid all due regard to how policies may affect animal welfare. We independently select which policies to look at. This includes every stage on the very beginning to when policy is finally put in practice. We work across all central government departments to help ensure animal welfare is considered alongside everything else is important to the public*'.

Now, well, I'm cautiously optimistic, personally, that as this committee gains experience and more and more reports that in fact it will have overall a very good effect, I hope, on animal welfare law in this country.

Marcia Hyde: Well, I think I'm probably less optimistic. I think it's great that we have a Committee who is looking at and as it were, checking government policy for animal sentience, but, and I know it's early days, we only have seven reports. But most of them.? Again, it's about teeth.

And Paul, I know we talked previously about how can we use what are very good reports, making good recommendations for animal welfare in our day-to-day practices?

Because there's no case law as Ed says under the Animal Welfare Sentience Act.

Can we use reports within a JR, for example? Is that something lawyers we could be looking at? I mean, so difficult question because it's not statutory, it's advice. It's not something that the government must take account of.

Marcia Hyde: So how do we as lawyers, day to day, and how does Ed, when he's prosecuting, refer to the reports that the Sentience Committee produce?

Paul Fuller: You're right. It is a difficult question. It's one that, as you say, you and I have discussed briefly, Marcia, and it's not my area of expertise, I have to say judicial review, but it seems to me that it would be very difficult to prosecute by way of judicial review or otherwise, some failure to heed the recommendations of the reports, which are purely advisory where the only requirement as far as the legislation is concerned is that the Secretary of State puts in a response to the reports, and unless any particular part of legislation could be seen to be some way unlawful, then, as I say, without having any particular expertise in, judicial review, it appears to me that there seems to be that, that would be difficult at best.

I suppose I sit somewhere between yourself in it, in terms of optimism though, because of course, as you've touched upon it is early days, the Animal Sentience Committee was established, I believe in 2023. We only have seven reports so far. But in so far as the responses are indicative of a trend towards, to coin a phrase I used earlier, simply paying lip service to the recommendations of the report, then yes, it's true that the Committee has little in the way of teeth, but this is nonetheless a body of scrutiny that we didn't have before.

Marcia Hyde: Yes.

Paul Fuller: This is a process which shines a spotlight on government policy and decision making with a focus on animal welfare and animal sentience that we didn't have before.

And that has to be a good thing.

And what I think is important is that those of us who are interested and care about animal welfare, do what we can to highlight the recommendations of the reports and the various government responses to those reports. And of course, podcasts like this and our listeners are very much an instrumental part in that process because the more that we as lawyers and as the electorate bring this evidence into public scrutiny, the more likelihood that that will bring pressure to bear on this government and future governments to perhaps give greater heed to these reports.

Marcia Hyde: So that's a really positive note to finish on. Thank you.

So thank you for tuning into *FortyTwo Talks*. We hope you enjoyed this podcast, the second instalment on Animal Sentience.

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Edmund Walters: Thank you.