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**The Power to Panic:
The Animal Health Act 2002**



David Campbell and Bob Lee



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The Power to Panic: The Animal Health Act 2002

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The Power to Panic: The Animal Health Act 2002

Executive contempt for Parliament is such common contemporary currency that one would hardly dare trouble the readers of this journal by seeking to bring another example of it to their attention. We nevertheless believe that the Animal Health Act 2002 (2002 Act) displays an arrogance which will be found striking even by this case-hardened readership.¹ During the foot and mouth disease (F.M.D.) epidemic of 2001, the government engaged in *ultra vires* action on a huge scale, for it had no power to slaughter the majority of the 7 million² animals it nevertheless did slaughter in the course of the “contiguous cull” which became the central plank of its disease control policy.³ By passing the 2002 Act, the government has effectively acknowledged that this was so, for the Act seeks to make precisely that which was *ultra vires* in the past legal in the future, in complete disregard of the compelling reasons for the previous withholding of such powers.

What is remarkable is that this contempt for legislative control of executive action is being shown for *no* good reason; the executive has no better an idea of what it will do with its extended powers than it had when it first exercised them in an *ultra vires* manner. The executive did not initially plan to carry out the contiguous cull in 2001. It did so because its original policy for control of F.M.D. completely collapsed and the *ultra vires* action that constituted the cull was the executive’s panic response to that collapse. Only in the event of another such collapse would the extended slaughter powers of the 2002 Act be needed, for all the powers necessary for the rational and humane killing of animals were available under previous legislation.⁴ By passing the 2002 Act, the executive, rather than review the flaws in its policy that produced *ultra vires* action on this huge scale, is avoiding any lessons to be learned⁵

by giving itself the power to repeat its mistakes. The assumption that legislation at least aspires to implement sensible policy does not apply to the 2002 Act. It is legislation which intentionally gives a power to panic.

Slaughter during the 2001 F.M.D. epidemic

The principal legislation establishing the regime for control of livestock diseases, including F.M.D., in force during the 2001 epidemic was The Animal Health Act 1981 (the 1981 Act). Section 31 introduces Schedule 3 dealing with slaughter for disease control purposes. Paragraph 3(1) of Schedule 3 provides:

The Minister may, if he thinks, fit, in any case cause to be slaughtered

(a) any animals affected with foot and mouth disease, or suspected of being so affected; and

(b) any animals which are or have been in the same field, shed, or other place, or in the same herd or flock, or otherwise in contact with animals affected with foot and mouth disease, or which appears to the Minister to have been in any way exposed to the infection of foot and mouth disease.

This provision did not authorise the contiguous cull carried out in 2001. We can be brief over the legal argument, for two reasons. First: this argument was convincingly made during the epidemic, nowhere more clearly than in a widely circulated opinion given by Stephen Tromans (on which we have drawn very heavily).⁶ Paragraph 3(1)(a) requires infection or reasonable suspicion of infection as grounds of slaughter and paragraph 3(1)(b) requires exposure to the disease, particularly but not exclusively by contact with infected animals⁷ or, through the concluding sweeping up clause, reasonable suspicion of exposure. The contiguous cull went far beyond this. In what became its typical form, it involved the slaughter of all animals within a 3 kilometre radius of a premises where livestock were suspected of being infected. That is to say, a circle with a radius of three kilometres having the

suspected premises at its centre was drawn on a map, and all premises within that mapped circle had their animals culled regardless of infection or suspicion of infection.

This formal procedure, devised by a new, hastily convened scientific group with no relevant epidemiological, agricultural, or, indeed, regulatory experience, was the product of abstract mathematical modelling which took no heed of concrete information about the likelihood of transmission of the disease beyond the original suspicion of infection. The instances of suspicion were themselves generated by a process for identifying infection which was thought highly questionable at the time, due to the immense pressures on the State Veterinary Service; which has turned out to be wrong in between 30-40% of cases. In the end, of the over 7 million animals culled, perhaps 90% were uninfected, the result of what has been called “postcode slaughter”⁸ or “carnage by computer”.⁹ In fact, the word “contiguous” is a misleading description of the 3 kilometre cull that took place. In this context, “contiguity” implies (reasonable suspicion of) a chain of infection, and the cull proceeded in the absence of any such chain. The contiguous cull was a policy which abandoned slaughter on (reasonable suspicion of) infection for slaughter to create an enormous firewall or *cordon sanitaire* around any premises alleged to be infected.

The second reason we can be brief with legal argument about the *ultra vires* nature of the cull is that the executive evidently has accepted it. In his capacity as Under-Secretary of State for Environment, Food and Rural Affairs, Lord Whitty had responsibility for securing the passage of the 2002 Act; and it is true that in the course of debate he¹⁰ was sufficiently unwise to tell Parliament that “the legality of the [contiguous cull] was never in question”.¹¹ But, as a matter of fact, the legality of the cull was not merely always questionable but was always questioned. Lord Whitty

himself admitted this in evidence he gave to the *Lessons to be Learned Inquiry* on the very same day he maintained the opposite in Parliament,¹² and in his evidence to that Inquiry the Chief Veterinary Officer stated that from the outset the cull was feared not “likely to be legal”.¹³ Lord Whitty also maintained in Parliament that “the operation of the cull was tested and upheld in the English and Scottish courts”.¹⁴ We do not want to take up space in this journal by discussing the substance of his argument, which has been exposed as a gross misrepresentation *inter alia* in a widely circulated letter by Stephen Smith Q.C.¹⁵ It is enough here to note that Lord Whitty is referring to merely *two* (questionable) cases at first instance, one English¹⁶ and one Scots.¹⁷ So far as we are aware, M.A.F.F. brought only fourteen further cases to legally overcome occasions of resistance to the cull in England and Wales,¹⁸ withdrawing from eleven and losing two of the three it took into court, the last one being a serious reverse.¹⁹ M.A.F.F. also withdrew from at least 200 other proceedings it had started, and it is manifest that it had so little confidence in its position under the 1981 Act that it was not prepared to test that position in the courts. What can one say of the mendacity that allows a Minister to say that this represents a policy’s being “tested and upheld in the English and Scottish courts”?

The executive had to take very considerable pains to secure the passage of the 2002 Act. Though unsurprisingly encountering no difficulty whatsoever in the Commons, the original Animal Health Bill²⁰ was roundly denounced in the Lords and suffered a number of defeats there. The eventual passage of the legislation was the product of the executive’s strenuous use of its Commons majority. Enduring those pains was pointless if the contiguous cull was legal under the previous legislation, as was repeatedly pointed out in the Lords’ debate.²¹ But to one prepared to make the statements about the legality of the cull we have seen Lord Whitty made,

contradicting those statements must pose no difficulty whatsoever, and he did indeed introduce the 2002 Act as an attempt “to clarify - and extend - the powers relating to slaughter”²² given by the 1981 Act, and so “correct” “a major defect in the powers ... available”²³ by preventing “the spread of a disease, as distinct from dangerous contacts or exposure in the strict sense”.²⁴ The game was completely given away in the consultation document on the Bill issued by the Department of the Environment, Food and Rural Affairs (D.E.F.R.A.):

Part 1 of the Animal Health Bill provides new powers to slaughter wherever the Government considers this to be necessary to prevent the spread of F.M.D.. This differs from existing measure in that it provides for the possibility of culling animals in a wider range of circumstances than is at present possible ... providing for slaughter on preventive grounds, rather than on the existing grounds of being affected with disease, suspicion of being so affected or in any way being exposed to the disease.²⁵

Having put the obscurity of Lord Whitty sufficiently to one side to allow us to at least initially see what the 2002 Act is about, let us now turn to the relevant provisions.

Slaughter under the 2002 Act

The relevant parts of the 2002 Act insert amending clauses into the 1981 Act in a slovenly way which handicaps the comprehension of both Acts and no doubt will itself cause tremendous trouble. Section 1 of the 2002 Act amends Schedule 3 para. 3(1) of the 1981 Act by adding:

(c) any animals the Secretary of State thinks should be slaughtered with a view to preventing the spread of foot and mouth disease.

It is impossible to interpret this as anything other than a complete discretion to kill any animal the Secretary of State believes it necessary to kill in order to eradicate an outbreak of F.M.D.²⁶ To the concrete categories of animals set out in 1981 Act, sched.

3, para. 3(1)(a) and (b) is added a general category of any²⁷ animals. It is surely the case that the new (c) reduces (a) and (b) to surplusage; their retention merely serving to give a quite illusory air of concreteness to the new, amazingly sweeping power.

The specific reason why the executive has taken this power to itself is, of course, to allow it to cull more swiftly by removing the legal grounds on which slaughter was opposed in 2001, and therefore, to “minimise” the overall slaughter by speeding it up.²⁸ Livestock owners who mounted opposition to the 2001 cull, and their legal representatives, were, in Lord Whitty’s view, behaving “very irresponsibly”,²⁹ and to an executive that believes its *ultra vires* exercise of power was wise, one can see why this might well appear to be the case. It does not apparently matter that the real reason that M.A.F.F. was unable to meet its slaughter targets is that these were (and will remain) impossibly impractical for other than a small (quickly contained) outbreak of the disease; or that, on the best information available, none of those who resisted the cull harboured infected animals.³⁰ The real novelty in the 2002 Act comes in Part 3, which gives the executive very extensive powers indeed to enforce compliance with the now legal slaughter power, through procedures under which reasonable opportunities for livestock owners to present their case have been sacrificed to the perceived need for haste in slaughter.³¹ This has provoked very considerable criticism,³² and is obviously open to challenge under Article 6,³³ but at least there is a clear fit between the effective absence of a hearing and the fact that, if the new slaughter power is good law, then there is nothing much to have a hearing about. The 2002 Act is not, to be sure, the best law. Despite the stated concern with proportionality in the consultation document³⁴ and, of course, the certificate of compatibility accompanying the Act itself, the new slaughter power is also open to challenge under Article 8 and Article 1 of the First Protocol.³⁵ We do not want to add

to the discussion of this possibility directly,³⁶ but we do want to try to explain why the executive has taken such pains to get itself into such a dreadful position.

Panic and policy formulation

To understand the concrete use to which this now legal slaughter power might ever be put, one must understand why the contiguous cull took place. It was, in the words of the D.E.F.R.A. Select Committee: “a response to a desperate situation, not a pre-mediated response to a known, assessed risk.”³⁷ Prior to the discovery that there had been an outbreak of F.M.D. in 2001 and for some time thereafter, nothing was further from M.A.F.F.’s mind than such a cull. M.A.F.F.’s F.M.D. policy had two main parts,³⁸ one of which was indeed to “stamp out” an outbreak by culling and disposal of infected or at-risk animals; but these animals were to have been quickly identified and isolated, and so their numbers kept low and under control. The 1981 Act gives the powers to implement this policy, which is based on tracing the disease. M.A.F.F.’s contingency plan envisaged up to ten outbreaks. But so complete a failure was M.A.F.F.’s attempt to identify and isolate an outbreak that there were at least fifty and perhaps up to a hundred sites of infection before M.A.F.F. was even aware of what is now officially regarded as the first outbreak. In the time it took M.A.F.F. to realise what had happened and whilst it was wrongly insisting that the disease was under control, the disease had been spread so widely that in the end almost the entire country was infected or at-risk.

The cull was a panic response to a situation of which M.A.F.F. had completely lost control. The extent to which the firewall cull was the result of what might properly be called a conscious decision remains a matter of extreme contention which the official inquiries have done little to quiet. To the extent that it was a conscious

decision, it was used because it was realised that actual tracing of the disease had become impossible. Four points illustrative of the *ad hoc*, panicked nature of what was done can be given. First: the decision to make the radius of the circle three kilometres was a fluke. Other radii were modelled and 1.5 kilometres in fact appeared to be the optimum (as generated by the highly questionable methodology). What, however, seems to have been decisive in the confused and panicked decision-making process was that the relevant E.U. provisions stipulate a protection zone of three kilometre radius be established round infected premises, within which animal movements be stopped, stock be placed under strict surveillance, vaccination be considered, etc. Such a protection zone is hardly an automatic culling zone, indeed it is the opposite, but in wide areas of the UK that is what it became.

Second: the extreme haste with which killing within this zone was carried out followed from the adoption of a “24/48 hour slaughter” policy, by which animals on premises infected or suspected of being infected were to be killed within 24 hours and those in the remainder of the zone within 48. This was logistically impossible given the number of animals involved and the targets were not remotely met, but the extreme haste imposed by the attempt to meet them undoubtedly was one of the reasons the cull was so despicably cruel. This “policy” emanated from a 10 Downing Street lobby briefing. No justification was then given or has since emerged for this central plank of what passed for disease control policy.

Third: the decision not to vaccinate animals even merely prior to slaughter in an attempt to gain more time to carry out the cull humanely³⁹ was the product of an extremely heated “debate” *during* the epidemic. It is not merely that this debate was very largely based on misunderstandings of E.U. and W.T.O. biosecurity and trade policies maintained by certain special interest groups, notably the national leadership

of the National Farmers' Union, accorded questionable privilege in policy-making; it is that it should not have taken place at all. The issue should have been settled earlier in any at all competent contingency planning; but it still remains completely unsettled.⁴⁰

Fourth, and perhaps the single most significant point, is that the cull was not administered by M.A.F.F. but by the Cabinet Office Briefing Room (C.O.B.R.)⁴¹ - the *ad hoc* committee which is convened to deal with national emergencies such as the possible terrorist threat immediately after 11 September 2001. C.O.B.R. meets in a reinforced subterranean bunker in which televisions monitor "sensitive" areas of London. The incredible state of affairs in which a regulatory problem of livestock rearing and farm economics, dealing with a disease which in almost all adult animals is no more serious than flu in humans, could be dealt with only by a government apparatus designed to deal with problems more akin to general insurrection has passed with nothing other than approving official comment. It did indeed prove to be the case that the combined forces of the apparatuses of the U.K. state, including its army, wielded by C.O.B.R. had a greater capacity to kill domesticated animals than F.M.D. to spread, once animal movement restrictions were in place, and D.E.F.R.A. has claimed this as a success.⁴² But, to state the obvious, if this was a success, one would not like to see a failure. If we may quote ourselves, the epidemic:

caused an economic loss which D.E.F.R.A. estimates to be £9 billion. This figure is but a remote expression of the concrete losses, which include: the premature deaths of over 10 million animals, killed in ways which were almost always unacceptably, indeed criminally, inhumane and very often so horribly cruel as to be an occasion of lasting national shame; the loss of irreplaceable special breeds; the horror experienced by those with a scrap of humanity involved in the cull; the misery of thousands of small farmers and small businesspersons in areas related to farming and tourism whose incomes were drastically reduced, some of whom were driven into bankruptcy; the (continuing) pollution caused by the disposal; the frustration of the enjoyment of the countryside for a year.

It was a set of circumstances which M.A.F.F. did not understand then and D.E.F.R.A. does understand now that caused the epidemic and therefore the cull to stop when it did. The animal record and epidemiological information available to M.A.F.F. was so poor that the course of the epidemic or even the numbers of infected animals will never be known with reasonable accuracy.⁴³ As we therefore do not even know the real nature and extent of the epidemic,⁴⁴ the role the cull played, even if it is properly assessed as a firebreak, is extremely unclear. Of course, if one kills all the animals, one stops the epidemic; but the point is to work out where the cost-effective point comes before this, and D.E.F.R.A. has no idea about this. But the 2002 Act purports to legitimate a power to cull which need not stop at 10 million animals. It is difficult to see how, in a future epidemic which did not stop when (or earlier than) the 2001 epidemic did, D.E.F.R.A. will be able to avoid exceeding the 10 million figure, incurring and imposing even greater costs and, in particular, if stamping out without vaccination is used again,⁴⁵ repeating the horrible cruelty.

All sorts of revised contingency plans are being devised to make, *inter alia*, the stamping out of identified outbreaks of infection more effective. The executive clearly sees the general slaughter power it now enjoys as an important part of these plans. But it was a power exercised *ultra vires* as a response to the complete failure of contingency planning to identify infection, and it will only ever be used when this has happened again. Slaughter on reasonable suspicion was possible under the 1981 Act; the 2002 Act makes legal what a panic-stricken executive did in excess of the reasonable. There is, of course, no epidemiological practice that can guide a power to slaughter on this basis, for it is done, precisely, in the absence of reliable epidemiology; and so the executive will no more be able to exercise it sensibly now than it did when that exercise rightly was *ultra vires*. It did not emerge in the course

of the debate about the Bill how or when the executive will use the general slaughter power, and it simply was not possible that it could do so.⁴⁶ Frank speaking here would require the executive to admit that its contingency plans for specific slaughter based on identification of the disease may not work, and that it is thereby taking a power to slaughter for reasons it cannot give at any level more precise than that they are “to prevent the spread of a disease”.⁴⁷ But, of course, frank speaking surely would mean that, even in this Parliament, this Act would never have been passed.

Conclusion

And, of course, it would have been better were it not passed. Had the Lords been able to defeat the Animal Health Bill, the Government would have been obliged to recognise the need for a complete re-examination of livestock rearing practices in order to bring the risk of F.M.D. within the parameters of realistic disease control policy. The excuse D.E.F.R.A. now gives for M.A.F.F.’s absolutely abysmal performance during the epidemic is that that epidemic was unforeseeable, being due to “a rare set of circumstances”.⁴⁸ There can be no doubt that M.A.F.F. did not foresee the outbreak, and that it was incapable of responding to the situation when it perceived what was happening. But M.A.F.F. had complete oversight of and responsibility for the animal health implications of the livestock rearing practices which caused the epidemic; practices over which, through subsidy under the Common Agricultural Policy, it has substantial financial control. Nevertheless, M.A.F.F. was disgracefully derelict in actually keeping track of the risk of F.M.D.,⁴⁹ with the result that livestock rearing practices were adopted that turned an inevitable outbreak of F.M.D. into the epidemic of the disease in which by far and away the largest number of animals were slaughtered in world history.

In the light of what happened in 2001, one might have hoped that the newly constituted D.E.F.R.A. would now take some account of the inevitable limits to its regulatory capacity and the cost/benefit calculation that must underpin any rational (public) investment in disease control, and ensure that livestock rearing practices be framed within those limits. Most unfortunately, the review of farming the executive commissioned after the epidemic, and the large number of other inquiries into the future of agriculture, are having no real impact. But then, why might this be expected when D.E.F.R.A. signals business as usual? The most pernicious consequence of the 2002 Act is that it gives the illusion of being able to control F.M.D. in the absence of any serious attempt to change livestock practices.

By taking to itself the slaughter power under the 2002 Act, the executive has effectively said it is prepared to bear (and cause others to bear) what might as well be called the unlimited costs of dealing with a risk of F.M.D. which it is making no serious attempt to limit. But when one talks of bearing an unlimited risk, one is talking nonsense, and D.E.F.R.A. will find, when another epidemic occurs, that there are limits to what it can do. The 2002 Act is an astoundingly conceited refusal to discuss those limits, and, very sadly, they will again become evident only when, in another serious outbreak, D.E.F.R.A. again responds to them by (now legal) panic. Comforted by the illusion of infinite regulatory capacity fostered by its ability to pass legislation like the 2002 Act, the executive is paying little or no attention to the restructuring of the livestock industry that would make it unnecessary to panic. This is no merely formal mistake but, bearing in mind the horror of what happened in 2001, a simply shameful failure. Hayek saw executive contempt for the rule of law not only as deplorable in itself but as a bar to rational policy formulation. The passage of the 2002 Act is very strong evidence indeed for his views.

Notes

¹ Earl Peel, H.L. Deb., vol. 630, col. 895, January 14, 2002: “The [Animal Health] Bill has what I describe as an aura of arrogance about it which has dumbfounded the agricultural world”.

² The total number of animals slaughtered has been estimated at 10,791,000. This is higher than the official figure of 7m animals referred to in the text as it includes e.g. 2 million uninfected and not at risk animals killed under the Livestock Welfare (*sic*) (Disposal) Scheme because animal movement restrictions imposed growing husbandry costs on their maintenance.

³ We have described this in “‘Carnage by Computer’: The Blackboard Economics of the 2001 Foot and Mouth Epidemic’ (forthcoming 2003) *Social and Legal Studies*, to which the reader is referred for argument and references in support of the account given in this note of the executive’s conduct during the epidemic.

⁴ By acknowledging that there is a rational case for culling, we do not say this case is compelling or, indeed, persuasive.

⁵ This is an implicit reference to I. Anderson (Chair), *Foot and Mouth Disease 2001: Lessons to be Learned Inquiry Report* (Stationery Office, 2002), the most important of the three inquiries the executive commissioned into the epidemic.

⁶ This was written in his capacity as a barrister but has now been presented in the form of a published article: S. Tromans, ‘The Silence of the Lambs: The Foot and Mouth Crisis, Its Litigation and Its Environmental Implications’ (2002) 14(4) *Environmental Law and Management* 197.

⁷ The occupation of land where infected animals had been typically will not raise a serious issue because, as F.M.D. is able to survive e.g. in animal slurry for months, such occupation often is a ground for reasonable suspicion of infection.

⁸ R. Windsor, ‘Address to the Royal College of Veterinary Surgeons’, June 6, 2001 (available at www.warmwell.com).

⁹ I. Mercer (Chair), *Crisis and Opportunity: Final Report of the Devon Foot and Mouth Inquiry* (Devon Books, 2002) para. 1.25.

¹⁰ Lord Whitty was by no means the only member of the Parliamentary Labour Party who maintained this position, and in particular Mr. Elliot Morley, his fellow Under-Secretary, played a similarly undistinguished part.

¹¹ H.L. Deb., vol. 634, col. 1145, May 8, 2002.

¹² The minute of Lord Whitty’s evidence reads: “The legality of the contiguous cull had been an issue”: Anderson, above n 5, annex B, minute dated May 8, 2002, para. 40.

¹³ *ibid.* p. 93.

¹⁴ H.L. Deb., vol. 640, col. 482, November 4, 2002.

¹⁵ S. Smith, ‘Letter to Ms Mary Critchley, May 20, 2002’ (available at www.warmwell.com).

¹⁶ *M.A.F.F. v. Winslade*, Mitting J., May 22, 2001. Though see also a case not mentioned by Lord Whitty: *R v Secretary of State for the Environment Food and Rural Affairs and the National Assembly for Wales ex p Hughes* [2002] EWCA Civ 103.

¹⁷ *Westerhall Farms v. Scottish Ministers*, Lord Carloway, Outer House, Court of Session, April 25, 2001.

¹⁸ A. Addey, 'Notes for Presentation to the E.U. Temporary Committee on Foot and Mouth Disease', March 26, 2002, para. 17 (available at www.warmwell.com). Ms. Addey, a West Country solicitor who acted for many livestock owners mounting legal resistance to the cull, may be the person with the largest experience of that resistance. Her opinion (*ibid.*, para 7) is that the cull "was mostly implemented at a local level by a mixture of intimidation and coercion with an element of blackmail". The extremely generous level of compensation was also intended to nullify resistance to the cull.

¹⁹ *M.A.F.F. v. Willmets and Warne*, Mitting J., May 25, 2001; *M.A.F.F. v. Jordan*, Mitting J., May 25, 2001 and *M.A.F.F. v. Upton*, Harrison J., June 21, 2001. It is easy to see why *Upton* was the last straw for M.A.F.F., which should have been in a strong position as this was not really a contiguous cull case. M.A.F.F. claimed there had been dangerous contact under 1981 Act, sched. 3, para. 3(1)(b) and that Mrs. Upton's animals *were* infected. The refusal of an injunction in this case amounted to an (entirely justified: the animals were not infected) declaration of lack of confidence in M.A.F.F.'s F.M.D. testing, much less in the cull which did not really turn on testing. To press further injunctions, M.A.F.F. really would have had to appeal *Upton*, but had the decision been upheld (and the Court of Appeal would have been told the animals were uninfected), this would have amounted to the complete wrecking of M.A.F.F.'s strategy by exposure of the fact that its testing procedures were extremely suspect. It was singularly foolish from M.A.F.F.'s point of view to bring this action, which had disastrous public relations consequences. One of the animals M.A.F.F. sought compulsorily to slaughter was a pig which had taken the eponymous starring role in *Babe*, an internationally successful film, and this case of "Grunty" the pig became a major rallying point for opposition to M.A.F.F.

²⁰ H.C. Bill (2001-2) 39, October 30, 2001.

²¹ E.g. Baroness Mallalieu, H.L. Deb., vol. 630, col. 892, January 14, 2002.

²² Above, n. 14.

²³ H.L. Deb., vol. 630, col. 837, January 14, 2002.

²⁴ Above, n. 14.

²⁵ D.E.F.R.A., *Consultation on Implementation of Powers in the Animal Health Bill* (n.d.) para. 12. The Explanatory Notes to the Animal Health Bill, H.C. Bill (2001-2) 39 E.N., para. 10 were similarly explicit: ‘the new power may be exercised whether or not the animals concerned are affected or suspected of being affected with the disease’ (see now Explanatory Notes to the Animal Health Act 2002, para. 9).

²⁶ 2002 Act, s. 2 ‘enables the Secretary of State to extend [the section 1 slaughter power] to diseases other than F.M.D.’.

²⁷ There is an immediate difficulty about the use of “any”. Although probably the most infectious animal disease, F.M.D. is restricted to cloven-footed animals. The 1981 Act, s. 87 defines animals to mean “cattle, sheep and goats and all other ruminating animals and swine”, a definition intended to restrict animals subject to slaughter to “susceptible” animals (the 1981 Act deals with other diseases as well as F.M.D.). The consultation document says that the new slaughter power is restricted to susceptible animals (D.E.F.R.A., above n. 25, para. 15.), but, it is submitted, this is inconsistent with the definition of the new power. Non-susceptible animals (and, indeed, vehicles, clothing, etc.) can physically carry the F.M.D. virus though they cannot contract the disease, and, it is submitted, the amended Act now allows the slaughter of non-susceptible animals, probably within a legal (and practical) limit imposed by the preserved power under 1981 Act, s. 87(2) to extend by order the

definition of “animal” for disease control purposes to include any kind of mammal (except man) or four-footed beast which is not a mammal.

It is farm cats, dogs, horses, etc. that are under particular threat from the vagaries of the definition of this term (D.E.F.R.A., above n. 25, para. 16), but the position of wild animals also is unclear. There are, of course, wild as well as domesticated cloven-footed animals, and the Minister had the power to kill susceptible wild animals under the 1981 Act, s. 21(2)(a). This power was consciously preserved in terms stressing its restriction to susceptible animals: D.E.F.R.A., above n. 25, annex A, para. 15. Nevertheless, it is submitted that the amended Act conveys the power to kill non-susceptible wild animals (subject to 1981 Act, s. 87 (2)).

²⁸ H.L. Deb., vol. 630, col. 837, January 14, 2002.

²⁹ *ibid.*

³⁰ S. Smith, ‘Letter to Ms. Mary Critchley, November 5, 2001’, para. 5 (available at www.warmwell.com).

³¹ It goes without saying this is in contradiction of the anxious concern with certain “guiding principles” which would apply to all use of powers and which were said to be “Key Criteria” in the consultation document (above n. 25, paras. 6-9): “We will act *openly and transparently* making widely available the guiding principles that govern our approach... We will use powers in a way that is *proportionate* ... We have an underlying commitment to minimise the overall number of animals that need to be slaughtered by using the powers in a *timely and targeted* way and by taking appropriate preventative action where this is justified. The Government will be fully *accountable* for its use of the slaughter powers... We will seek to *consult* wherever

time permits, including with the relevant local interests, before taking a decision to exercise the slaughter powers” (emphases in the original).

³² Baroness Mallalieu, H.L. Deb., vol. 630, col. 891, January 14, 2002: “The [Animal Health] Bill ... gives virtually unlimited powers, providing D.E.F.R.A. officials with, in effect, *carte blanche* to order slaughter without any requirement that they publicly justify, explain, give reasons [or] provide a fair hearing”.

³³ Above n. 30, paras. 13-20.

³⁴ Above n. 25, paras. 6-10.

³⁵ Above n. 30, paras. 11-31.

³⁶ We are, in fact, pessimistic. The new power is, in our opinion, not one whit more incompatible with the Convention than the purported exercise of the powers under the 1981 Act was *ultra vires* and, indeed, *Wednesbury* irrational. The fundamental reasons the law did not and will not prevent the executive defying the rule of law are not, as it were, jurisprudential, and in the panic conditions in which the new power will ever be exercised, when it will be the case that F.M.D. will be argued to be out of control again, we do not expect human rights considerations to trump the executive’s cry of emergency. Rosalind English of One Crown Office Row writes of courts “bending over backwards to align themselves with the Government” and concludes that “the central legal arguments in domestic human rights and EC law will always be doomed to failure” (*Persey v. Secretary of State for Environment, Food and Rural Affairs* [2002] 3 W.L.R. 704, Lawtel Case Comment, March 21, 2002 (available at www.lawtel2002.com)).

³⁷ Select Committee on Environment, Food and Rural Affairs, *The Impact of Foot and Mouth Disease, First Report* (H.C. 323, 2002).

³⁸ The other part is prevention by biosecurity, but even more than is always in the case with the management of a risk, complete prevention is impossible in the case of F.M.D., for no completely effective prophylactic vaccination is available at the moment and, in its absence, the disease is so contagious that outbreaks are inevitable.

³⁹ There are other possible uses of vaccination which, seeking to confine ourselves to discussion of the basic rationality rather than desirability of a policy of culling, we will not discuss.

⁴⁰ The 1981 Act, s. 14B (inserted by the 2002 Act, s. 15) places D.E.F.R.A. under a duty to consider whether vaccination “is more appropriate than any other means of treating the disease”. This anodyne duty, which leaves D.E.F.R.A. perfectly free not to vaccinate at all, is a very considerable watering down of a Lords’ attempt to give vaccination much greater priority in the treatment of any future outbreak conceded only to get the legislation through: H.L. Deb., vol. 640, cols. 873-917, November 7, 2002. At a time when the E.U. has concluded that the stamp out policy “cannot continue in its present form” (European Parliament, *Report of the Temporary Committee on Foot and Mouth Disease etc.*, November 28, 2002, para.11) and is in the process of revising disease control policy accordingly (European Commission, *Final Proposal for a Council Directive on Community Measure for the Control of Foot and Mouth Disease etc.* (2002)), and when the Secretary of State is making public statements of her intention to vaccinate (P. Hetherington, ‘Beckett Vows to Vaccinate in any Future Foot and Mouth Outbreak’, *Guardian*, November 7, 2002), this effective defence of the power not to vaccinate leaves the law of disease control in a bewildering state. There is the most pressing need to sort out a policy over this,

and the passage of the 2002 Act before this has been done is a specific example of the deplorable nature of this legislation.

⁴¹ C.O.B.R. is also known by the acronym C.O.B.R.A. as the room in question is Briefing Room A.

⁴² D.E.F.R.A., *Autumn Performance Report 2002* (Cm 5698, 2002) p. 2.

⁴³ Recent litigation has shown that even the number, age and source of the animals burnt in pyres is shrouded in mystery: *Feakins v. Secretary of State for Environment, Food and Rural Affairs* [2002] EWHC 2574.

⁴⁴ For this reason, the Countess of Mar may well have been right to doubt whether the 2001 epidemic was, as is widely claimed, the largest outbreak the world has ever seen. Nevertheless, she was equally right to insist that it certainly “was the one in which most animals were killed” (H.L. Deb., vol. 630, col. 911, January 14, 2002).

⁴⁵ As the 2002 Act allows: see n. 40 above.

⁴⁶ The consultation paper (n. 25 above, paras. 11-16) did list 4 four “situations when culls may be required to prevent the spread of the disease”: airborne spread, waterborne spread, spread by wild animals and the creation of a firebreak. The first three would come under the 1981 Act’s powers if they could be shown to ground a reasonable suspicion of infection (discussion of this in relationship to airborne spread was at the heart of the *Westerhall* case, above n. 17), and so they do not relate to what is novel in the 2002 Act. Only the firebreak relates to this, and nothing is said about when and how it will be used, because nothing could be said.

⁴⁷ Above, n. 14.

⁴⁸ Secretary of State for Environment, Food and Rural Affairs, ‘Statement on Foot and Mouth Inquiries’ (D.E.F.R.A., July 22, 2002).

⁴⁹ As, it must be said, was the livestock industry. Under the 1981 Act, disease control was essentially made the responsibility of M.A.F.F., and it evidently was the case that, by treating disease control as a public good in this way, M.A.F.F. largely made it external to the cost calculations of the livestock industry. That industry consequently adopted extremely hazardous practices, particularly a system of mass live animal movements which really would not be much different if it was intended to spread the disease, and gave a low priority to biosecurity, and these were the conditions that turned an inevitable outbreak of this extremely contagious disease into the most costly epidemic ever known.

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