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Consultation on changes to the Animals Act 1971 to clarify the application of strict liability to the keepers of animals

March 2009

defra

Department for Environment Food and Rural Affairs

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Contents

Summary of Proposals

1. Introduction 4
2. Legislative Reform Orders 9
3. Background to the Policy and Legislation at Issue 13
4. The Proposed Amendment 19
5. Proposed Parliamentary Procedure 21
6. Legal Analysis Against the Requirements of the Legislative and Regulatory Reform Act 2006 23

Annex A Response Form 31

Annex B Legislative Reform Orders – Parliamentary Consideration 37

Annex C Impact Assessment 42

Annex D Draft Legislative Reform Order 48

Annex E Consolidated Version of Revised Text 50

Summary of Proposals

Animals Act 1971

What is being consulted on?	The proposal is to amend section 2 of the Animals Act 1971 to clarify the application of strict liability to the keepers of animals that cause harm or damage, by replacing the existing wording of section 2(2)(b) with a new formulation referring to the damage being caused by “unusual or conditional” characteristics of the animal. Unusual characteristics are defined as those that are not shared by the species generally, while conditional characteristics are defined as those that are shared generally by the species but only in particular circumstances. The new wording would require that for strict liability to apply in cases where an unusual characteristic was the cause of the damage, the keeper of the animal at the time the damage was caused must have known of that characteristic in the animal. Where the damage is due to a conditional characteristic of the animal, it limits the application of strict liability by providing a defence if the keeper of the animal when the incident took place can show that there was no particular reason to expect that the particular circumstances that provoked the conditional characteristic would arise at that time.
How will these proposals be taken forward, and when will they be implemented?	We intend that the proposed changes to legislation are made through a Legislative Reform Order under the Legislative and Regulatory Reform Act 2006. Subject to the outcome of consultation, we propose that the changes are implemented from **1 October 2009.**
Consultation	This consultation is being made in accordance with the requirements of the Legislative and Regulatory Reform Act 2006 and the terms of the Government’s Code of Practice on Consultations at: **http://www.berr.gov.uk/bre/consultation%20guidance/page44459.html** **All responses should be received by 19 June 2009.**

1. Introduction

1. This section provides an Executive Summary of the proposed Legislative Reform Order (LRO) and outlines the consultation process.

What is being consulted on?

2. This consultation paper sets out in detail the Government's proposals for amending the legislation governing the application of strict liability to the keepers of non-dangerous species of animals[1], such as dogs, horses, sheep, cows etc, when their animals cause harm or damage to people or property.

3. The proposal is to:

> **Amend section 2 of the Animals Act 1971 to clarify the application of strict liability to the keepers of animals that cause harm or damage, by replacing the existing wording of section 2(2)(b) with a new formulation referring to the damage being caused by "unusual or conditional" characteristics of the animal. Unusual characteristics are defined as those that are not shared by the species generally, while conditional characteristics are defined as those that are shared generally by the species but only in particular circumstances. The new wording would require that for strict liability to apply in cases where an unusual characteristic was the cause of the damage, the keeper of the animal at the time the damage was caused must have known of that characteristic in the animal. Where the damage is due to a conditional characteristic of the animal, it limits the application of strict liability by providing a defence if the keeper of the animal when the incident took place can show that there was no particular reason to expect that the particular circumstances that provoked the conditional characteristic would arise at that time.**

Why are the changes needed?

4. Since the Animals Act was passed, there has been disagreement and conflicting case law concerning the interpretation of section 2(2)(b) of the Animals Act. There has also been repeated judicial criticism that section 2(2)(b) lacked clarity. This issue culminated in the House of Lords' judgment

[1] "Dangerous species" is defined by section 6(2) of the Animals Act 1971 as one that is not commonly domesticated in the British Islands and whose fully grown members normally have such characteristics that they are likely, unless restrained, to cause severe damage or that any damage they may cause is likely to be severe. A non-dangerous species for the purpose of this consultation is, therefore, one that does not fall within this definition.

in the Mirvahedy v Henley [2] case, which confirmed a broad interpretation of the wording, potentially bringing within the scope of strict liability under the Act the keepers of animals that were not known to possess a dangerous characteristic.

5. The Government does not believe that strict liability should apply in cases where damage is caused by animals of a non-dangerous species which are not known to possess dangerous characteristics in those circumstances. It also concurs with the judicial criticism of the clarity of the wording of the Act. The Government, therefore, believes that section 2(2) of the Act should be amended to clarify the wording and restrict the application of strict liability to a more narrowly defined range of circumstances.

Who will the proposals affect?

6. The proposed amendment will be of general benefit because it will clarify a piece of legislation that has long been considered confusing and subject to judicial criticism. In particular, it will benefit the keepers of all non-dangerous species of animal (e.g. horses, dogs, cows, sheep) as it will clarify their legal position in the event of accidents occurring involving their animals. This includes both individual animal owners and businesses who keep and utilise such animals, such as farms, riding schools, livery yards, petting zoos and pony trekking establishments. People injured in such accidents will also be affected because the law will be clearer about when compensation claims can be made against non-negligent animal keepers and when they cannot. In some cases, however, people who might currently be able to pursue a claim for compensation from such keepers under strict liability in the light of existing case law will no longer be able to pursue one.

Devolution

7. The Act applies in England and Wales. Accordingly, this consultation exercise, and any changes that might ensue, will apply only in England and Wales. Northern Ireland and Scotland have their own legislation dealing with

[2] WLR 882. In *Mirvahedy v Henley*, Mr Mirvahedy was seriously injured when his car collided with a horse owned by Mr and Mrs Henley which had been spooked by something unknown and bolted onto a dual carriageway. The horse had been in a secure field and a claim against the Henleys under liability in negligence failed. However, in a majority judgment in the House of Lords, the Henleys were held strictly liable for the horse's actions, and thus for Mr Mirvahedy's injuries, under section 2(2)(b) of the Animals Act 1971. This decision, which confirmed that the keepers of animals could be held responsible for any damage caused by their animals regardless of any actions they had taken to prevent such damage, is a matter of considerable concern to individual animal owners and their representative organisations. Many also believe that the decision led to a significant increase in insurance premiums for equine and other businesses, which has impacted adversely on the rural economy.

the liability of animal owners. In Scotland this is the Animals (Scotland) Act 1987 and in Northern Ireland this is the Animals (Northern Ireland) Order 1976.

Consultation

8. The Legislative and Regulatory Reform Act 2006 (LRRA) requires Departments to consult widely on all LRO proposals. The list of consultees, including the devolved administrations, to which this document has been sent is appended to this document and available on the Internet at: http://www.defra.gov.uk/corporate/consult/animals-act/index.htm

9. Comments are invited from all interested parties, and not just from those to whom the document has been sent. A response form is at Annex A.

10. A note explaining the Parliamentary process for LROs to be made under the LRRA can be found at Annex B. This will help consultees understand when and to whom they are able to put their views should they wish to do so.

11. This consultation document follows the format recommended by the BRE for such proposals. The criteria applicable to all UK public consultations under the BRE can be found at Annex C, with further details via the following link. **http://bre.berr.gov.uk/regulation/documents/consultation/pdf/code.pdf**

Disclosure

12. Normal practice will be for details of representations received in response to this consultation document to be disclosed, and for respondents to be identified. While the LRRA provides for non-disclosure of representations, the Minister will include the names of all respondents in the list submitted to Parliament alongside the draft LRO. The Minister is also obliged to disclose any representations that are requested by, or made to, the relevant Parliamentary Scrutiny Committees. This is a safeguard against attempts to bring improper influence to bear on the Minister. We envisage that, in the normal course of events, this provision will be used rarely and only in exceptional circumstances.

13. You should note that:

    - If you request that your representation is not disclosed, the Minister will not be able to disclose the contents of your representation without your express consent and, if the representation concerns a third party, their

consent too. Alternatively, the Minister may disclose the content of your representation but only in such a way as to anonymise it.

• In all cases where your representation concerns information on a third party, the Minister is not obliged to pass it on to Parliament if he considers that disclosure could adversely affect the interests of that third party and he is unable to obtain the consent of the third party.

14. Please identify any information which you or any other person involved do not wish to be disclosed. You should note that many facsimile and e-mail messages carry, as a matter of course, a statement that the contents are for the eyes only of the intended recipient. In the context of this consultation such appended statements will not be construed as being requests for non-inclusion in the post-consultation review unless accompanied by an additional specific request for confidentiality.

Confidentiality and Freedom of Information

15. It is possible that requests for information contained in consultation responses may be made in accordance with access to information regimes (these are primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004). If you do not want your response to be disclosed in response to such requests for information, you should identify the information you wish to be withheld and explain why confidentiality is necessary. Your request will only be acceded to if it is appropriate in all the circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

Responding to the consultation document

16. Any comments on the proposals in this consultation document should be sent by **19 June 2009** at the latest to:

Amy Barry,
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17 Smith Square,
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from whom further copies of this document may also be obtained. Or e-mail: animalsact.consultation@defra.gsi.gov.uk

2. Legislative Reform Orders

17. This section outlines what can be delivered by an LRO, and sets out the preconditions and restrictions governing them.

Legislative Reform Order-making Powers

18. Under section 1 of the LRRA, a Minister can make an LRO for the purpose of "removing or reducing any burden, or the overall burdens, resulting directly or indirectly for any person from any legislation".

19. Section 1(3) of the LRRA defines a 'burden' as:
    - a financial cost;
    - an administrative inconvenience;
    - an obstacle to efficiency, productivity or profitability; or
    - a sanction, criminal or otherwise, which affects the carrying on of any lawful activity.

20. Section 1(5) states that a "financial cost or administrative inconvenience may result from the form of the legislation (for example, where it is hard to understand)."

21. Under section 2 of the LRRA, a Minister can make an LRO for the purpose of securing that regulatory activities are exercised in a way that is transparent, accountable, proportionate, consistent, and targeted only at cases in which action is needed.

22. 'Regulatory functions' is defined in section 32 as:

    - a function under any enactment of imposing requirements, restrictions or conditions, or setting standards or giving guidance, in relation to any activity; or

    - a function which relates to the securing of compliance with, or the enforcement of, requirements, restrictions, conditions, standards or guidance which under or by virtue of any enactment relate to any activity.

23. Section 20 of the LRRA enables a Minister to exercise the order-making powers under sections 1 and 2 together with the power to make an order under section 2(2) of the European Communities Act 1972 in a single instrument. This enables a single order to implement Community law under section 2(2) of the 1972 Act and, for example, to remove or reduce burdens resulting from pre-existing statutory provisions.

Process

24. We propose to introduce the reform by means of an LRO under section 1 of the LRRA, in line with section 1(5) which allows for one to be made where the form of the existing legislation is "hard to understand". This consultation is being conducted in accordance with the provisions of section 13(1) of the Act. Views are invited on all aspects of the consultation paper, and a number of specific questions are set out in Annex A.

Preconditions

25. Each proposal for an LRO must satisfy the preconditions set out in section 3 of the LRRA. The rest of this document is designed to elicit the information that the Minister will need in order to satisfy the Parliamentary Scrutiny Committees that, among other things, the proposal satisfies these preconditions.

26. For this reason, we would particularly welcome your views on whether and how each aspect of the proposed changes in this consultation document meets the following preconditions:

    • **Non-Legislative Solutions** – An LRO may not be made if there are non-legislative solutions which will satisfactorily remedy the difficulty which the LRO is intended to address. An example of a non-legislative solution might be issuing guidance about a particular legislative regime.

    • **Proportionality** – The effect of a provision made by an LRO must be proportionate to its policy objective. A policy objective might be achieved in a number of different ways, one of which may be more onerous than others and may be considered to be a disproportionate means of securing the desired outcome. Before making an LRO, the Minister must consider that this is not the case and that there is an appropriate relationship between the policy aim and the means chosen to achieve it.

    • **Fair Balance** – Before making an LRO, the Minister must be of the opinion that a fair balance is being struck between the public interest and the interests of any person adversely affected by the LRO. It is possible to make an LRO which will have an adverse effect on the interests of one or more persons only if the Minister is satisfied that there will be beneficial effects which are in the public interest.

    • **Necessary protection** – A Minister may not make an LRO if he considers that the proposals would remove any necessary protection. The notion of necessary protection can extend to economic protection, health and safety protection, and the protection of civil liberties, the environment and national heritage.

• **Rights and freedoms** – An LRO cannot be made unless the Minister is satisfied that it will not prevent any person from continuing to exercise any right or freedom which they might reasonably expect to continue to exercise. This condition recognises that there are certain rights that it would not be fair to take away from people using an LRO.

• **Constitutional Significance** – A Minister may not make an LRO if he considers that the provision made by the LRO is of constitutional significance.

An explanation as to how the Government considers the proposed LRO to amend the Animals Act measures up against these preconditions can be found in the Legal Analysis section in Chapter 6.

27. It should be noted that even where the preconditions of section 3 of the LRRA are met, an LRO cannot:

• Deliver 'highly controversial' proposals;

• Remove burdens which fall solely on Ministers or Government departments, except where the burden affects the Minister or Government department in the exercise of regulatory functions;

• Confer or transfer any function of legislating on anyone other than a Minister; persons or bodies that have statutory functions conferred on or transferred to them by an enactment; a body or office which has been created by the LRO itself;

• Impose, abolish or vary taxation;

• Create a new criminal offence or increase the penalty for an existing offence so that it is punishable above certain limits;

• Provide authorisation for forcible entry, search or seizure, or compel the giving of evidence;

• Amend or repeal any provision of Part 1 of the LRRA;

• Amend or repeal any provision of the Human Rights Act 1998;

• Remove burdens arising solely from common law.

These points are also considered in Chapter 6.

Devolved administrations

28. The LRRA imposes certain restrictions regarding LROs and the devolution agreements:

    • Scotland – A Minister cannot make an LRO under Part 1 of the LRRA which would be within the legislative competence of the Scottish Parliament. This does not affect the powers to make consequential, supplementary, incidental or transitional provisions.

    • Wales – The agreement of the Welsh Ministers is required for any provision in an LRO which confers a function upon the Welsh Ministers, modifies or removes a function of the Welsh Ministers, or restates a provision conferring a function upon the Welsh Ministers. The agreement of the National Assembly for Wales is required for any provision in an LRO which is within the legislative competence of the Assembly.

3. Background to the Policy and Legislation at Issue

29. This section sets out the background to the current problem with the Animals Act, outlines the case for reform and summarises some concerns that have arisen on this matter.

The current regime

30. The keeper of a non-dangerous animal[3] may be found liable to pay compensation for damage or injury caused by their animal. Depending on the circumstances of the case, compensation may be sought under liability in negligence or in line with the regime of strict liability imposed by the Animals Act 1971.

31. Liability in negligence is a principle of common law which applies to all cases where damage is caused by animals. It is fault-based liability, i.e. the animal keeper must have been guilty of some wrongful act or omission that contributed towards the damage being caused. By contrast, strict liability is the imposition of liability without fault, i.e. the keeper of the animal is liable for any damage caused regardless of any actions he may have taken to limit the risk of it occurring. The proposals under consultation do not in any way affect the application of liability in negligence under the common law to the keeper of an animal.

32. Prior to the 1971 Act, the law relating to liability in cases where non-dangerous animals caused accidents was felt to be unclear and "in an unsatisfactory state".[4] The Animals Act 1971 was developed following a 1967 Law Commission report which concluded:

> Strict liability should also be imposed in respect of injury or damage done by an animal which does not belong to a dangerous species, if the particular animal had known dangerous characteristics from which the injury or damage in fact resulted. Such characteristics should be capable of giving rise to strict liability even if, though not common to the species as a whole, they are shared by other animals within the species, whether at a particular age, at certain times of the year, or in certain conditions.[5]

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[3] "Dangerous species" is defined by section 6(2) of the Animals Act 1971 as one that is not commonly domesticated in the British Islands and whose fully grown members normally have such characteristics that they are likely, unless restrained, to cause severe damage or that any damage they may cause is likely to be severe. A non-dangerous species for the purpose of this consultation is, therefore, one that does not fall within this definition.

[4] Law Commission on Civil Liability for Animals (1967) Law Com No 15) p 5

[5] Law Commission on Civil Liability for Animals (1967) Law Com No 15) p 15

33. The passage from the 1967 Law Commission report to the 1971 Act was lengthy and affected by a change in Government following a General Election. However, the Government believes that the intention behind section 2(2) of the Act was to ensure that the keeper of a potentially dangerous animal should bear appropriate responsibility for damage caused by that animal, and should take particular precautions when there was a real and identifiable risk of damage occurring. To this end, it imposed strict liability on the keeper when the animal in question was known to present such a risk either permanently because of its temperament, or temporarily because of the particular circumstances applying at the time. In line with the 1967 report, it is not believed that the intention of the Act was to impose strict liability in respect of all damage done by all animals – if that had been the intention, section 2 of the Act would have looked very different, and section 2(2)(b) would have been entirely unnecessary.

34. Section 2(2) of the Animals Act currently states:

> "Where damage is caused by an animal which does not belong to a dangerous species, a keeper of the animal is liable for the damage, except as otherwise provided by this Act, if-
>
> > (a) the damage is of a kind which the animal, unless restrained, was likely to cause or which, if caused by the animal, was likely to be severe; and
> >
> > (b) the likelihood of the damage or of its being severe was due to characteristics of the animal which are not normally found in animals of the same species or are not normally so found except at particular times or in particular circumstances; and
> >
> > (c) those characteristics were known to that keeper or were at any time known to a person who at that time had charge of the animal as that keeper's servant or, where that keeper is the head of a household, were known to another keeper of the animal who is a member of that household and under the age of sixteen.".

The need for reform

35. Since the Act was passed, there has been disagreement and conflicting case law concerning the interpretation of section 2(2), and in particular section 2(2)(b), both as concerns the purpose of the first phrase "the likelihood of the damage or of its being severe" and the meaning of the last phrase "except at particular times or in particular circumstances".

36. This culminated in the House of Lords judgment in Mirvahedy v Henley [2003], which confirmed a broad interpretation of the wording, potentially bringing animal keepers who could not have known that their animal would display a particularly dangerous characteristic at a given time within the scope of strict liability under the Act. There has been repeated judicial criticism that section 2(2)(b) lacked clarity.

37. In addition to the obvious difficulties arising from unclear legislation, in terms of lack of legal certainty and conflicting judicial interpretations, many people believe that the lack of clarity in the law, and particularly the direction taken in the Mirvahedy decision, has had an adverse effect on individuals and businesses through significantly increased insurance premiums for animal owners and rural businesses. Organisations such as the Country Land and Business Association (CLA), the British Horse Society (BHS) and the National Farmers Union (NFU) have accordingly campaigned for an amendment to the Act.

38. The Government accepts that insurance premiums for many land based and equestrian businesses rose in the period following the Mirvahedy judgment – public liability premiums for commercial riding establishments rose by an estimated 79% in 2003, 39% in 2004, and 34% in 2005. However, evidence to support a direct link between insurance premiums and the Mirvahedy judgment is inconclusive. Nevertheless, the Government believes that there could be benefits to businesses and individuals, including potentially reduced insurance premiums, from amending the Act, even though its primary reason for proposing an amendment is that the meaning of section 2(2)(b) is unclear.

39. The Government conducted an informal consultation on the question of whether the Animals Act should be amended in the autumn of 2006. Barry Gardiner, the then Minister for the Horse Industry, wrote to a wide range of stakeholders and interested individuals to gain their views on this issue. Of the 29 responses received, all but three were in favour of amending the Act. One of the three respondents who were then against amending the Act has since indicated that it is content with the proposed approach to amending it.

40. In the light of this broad support for an amendment, the Government supported the Private Member's Bill brought forward by Stephen Crabb, MP for Preseli Pembrokeshire, in March 2008, and was disappointed when this Bill fell due to an insufficient number of MPs being present in the House of Commons for the vote. This LRO is intended to achieve the same effect as that Bill and a draft Order, which is subject to possible drafting amendments post-consultation, can be found at Annex D.

Concerns about the reform

41. While the overwhelming response to an earlier consultation on whether the Act should be amended was positive, correspondence during that consultation and debate during the recent attempt to effect the amendment via a Private Member's Bill in Parliament revealed some areas of concern.

42. Some people with a professional interest in personal injury law have argued that strict liability should apply to all cases where harm or damage is caused by animals. They argued that such a regime already applies in some other countries, such as France, where animal keepers are expected or required to take out insurance to indemnify themselves against any claims that arise out of the actions of their animals. The Government recognises that there is some logic in this argument, in terms of creating legal clarity and a level playing field for all accident victims, but does not accept the principle that all animal keepers should be automatically liable for the actions of their animals regardless of the circumstances. Nor does it believe that the application of strict liability in all cases would necessarily encourage the kind of responsible animal keeping that the Government wishes to foster, as it would take away the incentive for responsible owners to take extra precautions above and beyond the basic level to prevent incidents, while realistically placing no new incentive on those who are already negligent in this regard.

43. Some people have argued that whatever the wording of section 2(2)(b) of the Animals Act was supposed to have meant, the effect of the Mirvahedy judgment has been to resolve the question of its meaning once and for all. They believe that there is, therefore, no reason to amend the wording to clarify it. The Government does not accept this view. Far from clarifying what even the majority of the judges in Mirvahedy agreed was an ambiguous piece of legislation, the effect of the judgment has been uncertain. It has arguably extended the possible application of strict liability to a wider range of situations but, as the Court of Appeal's verdict in a recent case (McKenny v Foster [2008]) has shown, the courts have not felt constrained to apply strict liability in other cases where damage is caused by animals. The Government feels that relying on case law to determine the meaning of the unclear wording in the Act has simply compounded the problem over interpreting and applying the legislation and created greater uncertainty and confusion in the minds of animal owners and a greater risk for insurers.

44. Another issue that arose in the Parliamentary debate was the question of whether or not people who are injured in accidents or who are the victims of attacks by dangerous dogs, such as postmen going about their business, could continue to claim compensation for their injuries if the Act were to be amended.

45. In the case of people who suffer serious injuries when they are involved in accidents involving animals, their ability to claim compensation will depend, as it does now, on whether they can show any fault on the part of the animal's keeper that would support a claim under liability in negligence, or they can show that the circumstances that caused the accident fell within the scope of section 2 of the Animals Act which would allow for a claim under strict liability. The Government recognises that the proposed clarification of section 2(2)(b) will limit the range of situations under which strict liability may currently apply following the Mirvahedy judgment, and that it may, therefore, be possible that some people who might currently be able to pursue successfully a claim for compensation might not be able to do so under the amended Act. However, as noted above, the situations under which strict liability currently applies are not clear cut even following Mirvahedy, so there is no certainty of redress for such people as things currently stand.

46. Moreover, the number of real as opposed to theoretical cases where there is no element of keeper's liability under negligence, no "unusual" or "conditional" characteristics involved that might bring the case within the revised section 2(2)(b), and no alternative means of compensation available, e.g. through insurance, is thought to be relatively small. While the state will not provide financial compensation for anyone affected, their medical care and rehabilitation will, of course, be covered by the National Health Service, like any other accident victim.

47. In the case of people, such as postmen, injured when they are attacked by dangerous dogs, the position is essentially unchanged by the amendment. The animals' owners can be prosecuted under existing dangerous dogs legislation, such as the Dangerous Dogs Act 1991. This latter legislation is fundamentally concerned with the control of certain dogs and criminal liability, whereas the Animals Act 1971 is concerned with civil liability for damage caused by animals. They are, therefore, quite separate. However, both may be engaged in a given case. For example, if a rottweiler attacks a child in a public place, its owner could be prosecuted under the dangerous dogs legislation and a disqualification order and a destruction order could be made. Under section 130 of the Powers of Criminal Courts (Sentencing) Act 2000 compensation could also be awarded to the victim following a successful conviction. However, any outstanding claim for civil liability could be pursued, if applicable, under section 2(2) of the Animals Act or in negligence. This proposal to amend the Animals Act would have no effect on this relationship.

Consultation Question

Q1. Do you agree that there is a case for amending section 2(2)(b) of the Animals Act 1971?

Q2. Do you have views regarding the expected benefits of the proposals as identified in Chapter 3 of this consultation document and addressed in the Impact Assessment at Annex C?

Q3. Do you have any views on the possible adverse impacts of this proposal as identified in Chapter 3 of this consultation document and addressed in the Impact Assessment at Annex C?

4.The Proposed Amendment

48. This section summarises the detail of the proposed amendment.

49. The proposed LRO amends section 2(2) of the Animals Act 1971 by replacing the existing wording of section 2(2)(b) with a new formulation referring to the damage being caused by "unusual or conditional" characteristics of the animal. Unusual characteristics are defined as those that are not shared by the species generally, while conditional characteristics are defined as those that are shared generally by the species, but only in particular circumstances (or one of a range of particular circumstances). The term "particular circumstances" is not defined in the Bill, and it would be for the courts to decide what constitutes them in the light of the details of cases brought before them. A draft LRO is attached at Annex D and a consolidated version of section 2(2) as it would stand if the LRO is passed is attached at Annex E.

50. There are two limbs in the new section 2(2)(b); one concerning "unusual characteristics", the other concerning "conditional characteristics". The new wording requires that for strict liability to apply in cases where an unusual characteristic was the cause of the damage, the keeper of the animal at the time the damage was caused must have known of that characteristic in the animal. Where the damage is due to a conditional characteristic of the animal, it limits the application of strict liability by providing a defence if the keeper of the animal when the incident took place can show that there was no particular reason to expect that the particular circumstances that provoked the conditional characteristic would arise at that time.

51. The intention is to allow the courts to distinguish between a continuing, generalised risk that the keeper knows may occur at some time (e.g. a horse may shy at a plastic bag if one blows in the wind near it) but does not know when it may occur, and a heightened, specific risk over a specific period of time that the keeper knows will increase the possibility of the animal displaying dangerous behaviour during that period (e.g. a cow with calves, or a horse in a field next to a shoot). Although each case must be taken on its merits, and liability in negligence remains unchanged, the Government believes that in the first instance above it would be unreasonable to apply strict liability. However, in the second instance, the Government considers that it would be reasonable for strict liability to apply as the keeper should have been aware of the risk presented by the known circumstances.

52. Finally, the LRO addresses a further long-standing criticism of section 2(2)(b) of the Act, by removing the phrase "the likelihood of the damage or of its being severe" and replacing it with "the damage", as suggested by the Court of Appeal in *Curtis v Betts* [1990]. This is intended to simplify the Act, by removing references to the likelihood and severity of the damage that are

already contained in section 2(2)(a) and, therefore, to remove any confusion that may arise from the repetition of these words.

53. The Act applies in England and Wales. Accordingly, this consultation exercise and any changes that might ensue will apply only in England and Wales. We will liaise closely with the Welsh Assembly Government during the LRO process. Scotland and Northern Ireland have their own legislation dealing with liability in accidents involving animals and we will also keep them informed of progress.

Consultation Question

Q4 Do you agree that the proposed approach will achieve the objective of clarifying the law in order to limit the application of strict liability where harm or damage is caused by animals to cases where the animals involved are known to be dangerous either permanently or in the specific circumstances known to apply at the time the damage was caused?

5. Proposed Parliamentary Procedure

54. This section outlines the proposed Parliamentary procedure to be used to give effect to the LRO.

55. The Minister can recommend one of three alternative procedures for Parliamentary scrutiny depending on the size and importance of the LRO. The negative resolution procedure is the least onerous and, therefore, may be suitable for LROs delivering small regulatory reform. The super-affirmative procedure is the most onerous, involving the most in-depth Parliamentary scrutiny. Although the Minister can make the recommendation as to Parliamentary procedure, Parliamentary Scrutiny Committees have the final say about which procedure will apply.

    Negative Resolution Procedure – This allows Parliament 40 days to scrutinise a draft LRO after which the Minister can make the LRO if neither House of Parliament has resolved during that period that the LRO should not be made.

    Affirmative Resolution Procedure – This allows Parliament 40 days to scrutinise a draft LRO after which the Minister can make the LRO if it is approved by a resolution of each House of Parliament.

    Super-Affirmative Resolution Procedure – This is a two-stage procedure during which there is opportunity for the draft LRO to be revised by the Minister. This allows Parliament 60 days of initial scrutiny, when the Parliamentary Committees may report on the draft LRO, or either House may make a resolution with regard to the draft LRO. If, after the expiry of the 60 day period, the Minister wishes to make the LRO with no changes, he must lay a statement. After 15 days, the Minister may then make an LRO in the terms of the draft, but only if it is approved by a resolution of each House of Parliament. If the Minister wishes to make material changes to the draft LRO he must lay the revised draft LRO and a statement giving details of any representations made during the scrutiny period and of the revised proposal before Parliament. After 25 days, the Minister may only make the LRO if it is approved by a resolution of each House of Parliament.

56. Under each procedure, the Parliamentary Scrutiny Committees have the power to recommend that the Minister not make the LRO. If one of the Parliamentary Committees makes such a recommendation, a Minister may only proceed with it if the recommendation is overturned by a resolution of the relevant House.

57. Defra believes that the **Affirmative Resolution Procedure** is appropriate for this LRO, the revisions are few, fairly minor and relatively non-controversial in nature and 40 days' scrutiny, together with its approval by both Houses of Parliament, is deemed sufficient and proportionate.

Consultation Questions

Q5. Do you agree that the proposed Parliamentary resolution procedure (as outlined in Paragraphs 54-57) should apply to the scrutiny of this proposal?

6. Legal Analysis Against Requirements of the Legislative and Regulatory Reform Act 2006

58. Under section 1 of the LRRA, a Minister can make an LRO for the purpose of "removing or reducing any burden, or the overall burdens, resulting directly or indirectly for any person from any legislation". This section provides further information about the proposed amendments and addresses in detail the preconditions and requirements for making an LRO in this case.

(a) what legislation is at issue?

59. **The Animals Act 1971** deals with the application of civil liability in respect of damage done by animals, including specific provisions in relation to trespassing animals and the protection of livestock from dogs.

(b) what burden is imposed?

60. The Government considers that the lack of clarity in section 2(2)(b) of the Animals Act 1971, highlighted in the House of Lords' judgment in Mirvahedy v. Henley [2003], has imposed a significant burden on the keepers of animals in terms of both financial cost and administrative inconvenience. This burden arises from the form of the legislation, which the courts and others have criticised for lack of clarity and may, therefore, be considered to be "hard to understand" in line with section 1(5) of the LRRA.

(c) who is burdened?

61. The keepers of all non-dangerous species of animal (eg horses, dogs, cows, sheep) are potentially affected by this burden, with the keepers of such animals that cause harm or damage directly affected. All animal keepers who insure their animals, particularly the keepers of horses, are indirectly affected. This includes businesses who keep and utilise such animals, such as farms, riding schools, livery yards, petting zoos and pony trekking establishments.

(d) how does the burden result from legislation?

62. Since the Act was passed, there has been disagreement and conflicting case law concerning the interpretation of section 2(2), and in particular section 2(2)(b), both as concerns the purpose of the first phrase "the likelihood of the

damage or of its being severe" and the meaning of the last phrase "except at particular times or in particular circumstances".

63. The lack of clarity in section 2(2)(b) has resulted in a burden to:

   i. the keepers of non-dangerous species of animal that have caused harm or damage in circumstances that could not have been predicted and where no liability arises in terms of negligence, as these now potentially come within the scope of section 2(2) of the legislation following the House of Lords' judgment in Mirvahedy. These people are thus rendered open to lengthy and expensive court cases (the length and expense being in part attributable to the lack of clarity in the law) and are potentially liable for significant damages; and

   ii. more broadly, the keepers of all non-dangerous species of animal, but particularly horses, who have faced substantial increases in insurance premiums in the period following the Mirvahedy judgment. The precise relationship between the Mirvahedy judgment and increased insurance premiums is difficult to demonstrate, but it has been estimated that insurance premiums for public liability insurance for commercial riding establishments increased by 79% in 2003, 39% in 2004, and 34% in 2005. This sharp rate of increase has levelled off, but premiums are still substantially higher now than they were in the years before the Mirvahedy judgment.

(e) How do you propose to remove the identified burden?

64. The Government proposes to remove the identified burden through a change to section 2(2)(b) of the Act, intended to clarify the law and limit the application of strict liability to a more closely defined range of circumstances. The draft LRO (attached at Annex D) introduces the concepts of "unusual" and "conditional" characteristics in animals and sets out the principles governing the application of strict liability in cases where animals exhibiting such characteristics are the cause of harm or damage. The application of strict liability in these cases does not affect liability in negligence under common law for the keeper of an animal.

65. The proposal requires that for strict liability to apply in cases where harm or damage was caused by an "unusual characteristic" in the animal, (i.e. a characteristic that is not shared by the species generally), the keeper of the animal at the time the damage was caused must have known of that characteristic in the animal. Where the damage is due to a "conditional characteristic" of the animal (i.e. one that is shared generally by the species, but only in particular circumstances) strict liability would not apply where the keeper of the animal when the incident took place can show that there was no

particular reason to expect that the particular circumstances that provoked the conditional characteristic would arise at that time.

66. The Government considers that this change would remove the identified burden in relation to the keepers of animals in paragraph 63i above, i.e. those where the damage caused could not have been predicted and where no liability arises in terms of negligence, as they will no longer be within the scope of section 2(2)(b) of the Act. It may also alleviate the burden in relation to keepers identified in paragraph 63ii above, i.e. all animal keepers who pay insurance premiums, although the size of premiums are, of course, for insurance companies to determine in the light of their professional judgement, perceived risk and the prevailing economic conditions.

(f) Will the LRO impose any new burdens?

67. The Government does not consider that the amendment will impose any new burden. It acknowledges, however, that there may be an impact on some individuals injured in accidents involving animals where no liability in negligence can be proven but strict liability might currently apply to the animal's keeper under current case law interpreting section 2(2) of the Animals Act. The proposed amendment will mean that strict liability will no longer apply to the animal's keeper in some such cases. In some circumstances, strict liability will continue to apply. In others, injured parties will still be able to receive compensation through other means, such as insurance or litigation (for example, by virtue of the Powers of Criminal Courts (Sentencing) Act 2000). However, in some further cases it is possible that no compensation will be payable as no fault or liability will be involved and no alternative means of redress will exist. Such cases are thought to be relatively rare and their outcome is uncertain even under the current legislation, so no new general burden is being imposed. Moreover, the Government considers that more people will benefit from the change in the law and that the overall burden will, therefore, be reduced.

Preconditions and Restrictions

68. As noted in paragraph 25 above, any proposed LRO must satisfy a number of preconditions and fall within certain restrictions. The following paragraphs set out Defra's views on whether the proposed LRO to amend the Animals Act meets these criteria.

Could the policy objective be satisfactorily achieved by non-legislative means (section 3(2)(a))?

69. The lack of clarity within the law is due to the ambiguous nature of the wording of section 2(2)(b) of the Act. The only effective mechanism for rectifying this ambiguity is through a legislative change.

Is the effect of the provisions proportionate to the policy objective (section 3(2)(b))?

70. The Government believes that the proposed relatively minor amendment to the law, clarifying its meaning, is proportionate to the policy objective of clarifying the law.

Will the provisions of the proposed order strike a fair balance between the public interest and the interest of any person adversely affected by them? (section 3(2)(c))?

71. The Government believes that the proposed order strikes a fair balance between the wider public interest and the interest of the small number of people who might be adversely affected by them. The public interest is served by the delivery of benefits to all responsible animal keepers including greater certainty over the law as it affects them and, potentially, reduced insurance premiums. In addition to this broad benefit, the keepers of domesticated non-dangerous species of animal that cause harm or damage in circumstances that could not have been predicted and where no liability arises in terms of negligence would gain even more, as the improved certainty in the law will remove them from the application of strict liability under section 2(2)(b) of the Act and thus from the costs and distress associated with court cases as well as the possibility of having to pay substantial damages in cases where no fault attaches to them.

72. In addition to the practical benefits that a clarification of the law in this area will deliver, the Government believes that an amendment to the law will have important additional benefits in reinforcing the overall public policy message on liability and compensation, i.e. that there should not be an automatic right to compensation in all cases where people are injured regardless of circumstance or liability.

73. Against these benefits accruing to a broad range of people, a relatively small, and unquantifiable, number of people might be adversely affected by the change through being unable to claim compensation for injuries sustained in genuine accidents where no fault or liability is involved and where no alternative route to compensation through insurance or litigation is available. However, their current ability to claim such compensation is by no means certain and depends entirely on the courts' interpretation of the wording of section 2(2)(b) of the Act.

74. For all of these reasons, the Government considers that the proposed amendment strikes a fair balance between the interests of the majority, who will benefit directly and indirectly, and those of a small (and unquantifiable) number who may lose the potential to receive compensation.

Will the provisions of the proposed order remove any necessary protections (section 3(2)(d))?

75. The Government is clear that all keepers of animals should bear responsibility for doing everything in their power to ensure that their animals are kept under control and that they do not cause damage or harm to others. The Government is equally clear that liability in negligence should continue to apply in all cases where reasonable precautions to prevent harm or damage are not taken. It also believes that it is entirely appropriate that strict liability should apply in certain situations, e.g. where particular animals are known to present specific risks. The Animals Act 1971 was drafted in order to enshrine this necessary protection in legislation so that people injured by the actions of animals known to be dangerous could claim redress from keepers who had failed to meet their responsibilities. The proposed amendment would not remove this necessary protection.

76. The question as to whether the Act also imposes strict liability on the keepers of animals of non-dangerous species with no particularly dangerous traits is, however, more controversial, with the courts reaching varying conclusions on this matter prior to the Mirvahedy judgment. The Government does not believe that strict liability is appropriate in such situations and does not consider that the extension of strict liability to such cases, that could be argued to have been achieved under certain readings of the case-law, represents a necessary protection.

Would the provisions of the proposed order prevent a person from exercising any right or freedom which they might reasonably expect to continue to exercise? (section 3(2)(e))?

77. The provisions of the proposed order would prevent a relatively small, and unquantifiable, number of people from being able to pursue compensation from the keepers of domesticated non-dangerous species of animal that cause harm or damage in circumstances that could not have been predicted and where no liability arises in terms of negligence.

78. There is no clear right to pursue compensation in such circumstances on the face of the existing legislation, and the possible freedom to do so was only conferred through case law, culminating in the House of Lords' majority

interpretation of section 2(2)(b) of the Animals Act in Mirvahedy v Henley [2003]. However, case law since Mirvahedy has not demonstrated conclusively that compensation can be attained in all such cases. The Government does not, therefore, believe that the proposal removes either an unequivocally existing right or freedom.

Are the provisions of the proposed order constitutionally significant (section 3(2)(f))?

79. The Government does not believe that that the proposed order is constitutionally significant.

Will the proposal restate an enactment? If so, does the proposal make the law more accessible or more easily understood? (section 3(4))

80. The proposal will restate an enactment in order to make the law more easily understood. However, in order to achieve this legal clarity it is necessary to remove an ambiguity in the existing law. The amendment is, therefore, more than an alteration of form or arrangement within the term of the LRRA 2006, and accordingly the Government does not propose to rely on section 3(4) of that Act.

Is the proposal 'highly controversial'?

81. The Government does not believe that the proposal is highly controversial. However, debate during the second reading of the Animals Act (Amendment) Bill 2008, a Private Member's Bill put forward by Stephen Crabb MP, identified some opposition to the amendment from a small number of MPs with an interest in personal injury law who believe that the keepers of all animals should bear full and strict liability for any harm or damage caused by their animals. The Government does not concur with this view.

Will the proposal confer or transfer any function of legislating on anyone other than a Minister; persons or bodies that have statutory functions conferred on, or transferred to them prior to the proposed order; or a body or the holder of an office which you are proposing to create using the order itself?

82. No.

Will the proposal impose, abolish or vary taxation?

83. No.

Will the proposal create a new criminal offence or increase the penalty for an existing offence so that it is punishable above certain limits?

84. No.

Will the proposal authorise forcible entry, search or seizure, or compel the giving of evidence?

85. No.

Will the proposal amend or repeal any provision of Part 1 of the Act?

86. No.

Will the proposal amend or repeal any provision of the Human Rights Act 1998?

87. No.

Consultation Questions

Q6. Do you think the proposal will remove or reduce burdens as explained in Chapter 6?

Q7. Are there any non-legislative means that would satisfactorily remedy the difficulties which the proposal intends to address?

Q8. Is the proposal put forward in this consultation document proportionate to the policy objective?

Q9. Does the proposal put forward in this consultation document taken as a whole strike a fair balance between the public interest and any person adversely affected by it?

Q10. Does the proposal put forward in this consultation document remove any necessary protection?

Q11. Does the proposal put forward in the consultation document prevent any person from continuing to exercise any right or freedom which he

might reasonably expect to continue to exercise? If so, please provide details.

Q12. Do you consider the provisions of the proposal to be constitutionally significant?

Q13. Does the proposal put forward in the consultation document make the law more accessible and easily understood?

Annex A – Consultation on changes to the Animals Act 1971

Response form

Date: 27 March 2009

Please use this form to address specific questions relating to the proposals contained in this consultation.

The closing date for the submission of responses is **19 June 2009.**

Responses can be returned by email (preferable) or post.
Email address: **animalsact.consultation@defra.gsi.gov.uk**
(clearly mark the subject field **'Animals Act Consultation'**)

or by post to:

Amy Barry,
Rural Policy Division,
Area 3B,
Nobel House,
17 Smith Square,
London,
SW1P 3JR.

In order to help us analyse responses, please provide details of your organisation below. In line with Defra's policy of openness, at the end of the consultation period copies of the responses we receive may be made publicly available through the Defra Information Resource Centre, Lower Ground Floor, Ergon House, 17 Smith Square, London, SW1P 3JR. The information they contain may also be published in a summary of responses. If you do not consent to this, you must clearly request that your response be treated confidentially. Any confidentiality disclaimer generated by your IT system in email responses will not be treated as such a request.

You should also be aware that there may be circumstances in which Defra will be required to communicate information to third parties on request, in order to comply with its obligations under the Freedom of Information Act 2000 and the Environmental Information Regulations.

Further information can be found at:
http://www.defra.gov.uk/corporate/opengov/index.htm

Animals Act Consultation I – Respondent Details

Name	
Organisation / Company	
Organisation Size (no. of employees)	
Job Title	
Department	
Address	
Email	
Telephone	
Fax	

Organisation Type	Please give details as appropriate
NGO	
Public Sector (e.g., local / central government, hospitals, universities) (please give details)	
Retail Sector (e.g., supermarkets) (please give details)	
Service Sector (e.g., cinemas, hotel chains, banks, law) (please give details)	
Industry / Manufacturing	
Land/Property Management	
Trader	
Research Institute	
Other (please give details)	

NB: on the form below, please leave the response box blank for any questions that you do not wish to answer. All boxes may be expanded as required.

Animals Act Consultation II – Specific Questions

1. Do you agree that there is a case for amending section 2(2)(b) of the Animals Act 1971?
Comments:

2. Do you have views regarding the expected benefits of the proposals as identified in Chapter 3 of this consultation document and addressed in the Impact Assessment at Annex C?
Comments:

3. Do you have any views on the possible adverse impacts of this proposal as identified in Chapter 3 of this consultation document and addressed in the Impact Assessment at Annex C?
Comments:

4. Do you agree that the proposed approach will achieve the objective of clarifying the law in order to limit the application of strict liability where harm or damage is caused by animals to cases where the animals involved are known to be dangerous either permanently or in the specific circumstances known to apply at the time the damage was caused?
Comments

5. Do you agree that the proposed Parliamentary resolution procedure (as outlined in Paragraphs 54-57) should apply to the scrutiny of this Proposal?
Comments:

6. Do you think the proposals will remove or reduce burdens as explained in Chapter 6?
Comments:

7. Are there any non-legislative means that would satisfactorily remedy the difficulties which the proposals intend to address?
Comments:

8. Are the proposals put forward in this consultation document proportionate to the policy objective?
Comments:

9. Do the proposals put forward in this consultation document taken as a whole strike a fair balance between the public interest and any person adversely affected by it?
Comments:

10. Do the proposals put forward in this consultation document remove any necessary protection?
Comments:

11. Do the proposals put forward in the consultation document prevent any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise. If so, please provide details.
Comments:

12. Do you consider the provisions of the proposals to be constitutionally significant?
Comments:

13. Do the proposals put forward in the consultation document make the law more accessible and easily understood?
Comments:

Animals Act Consultation III – General Comments

Please provide any other comments on the proposed LRO

Annex B – Legislative Reform Orders – Parliamentary Consideration

Consideration

Introduction

1. These reform proposals in relation to the Animals Act 1971 will require changes to primary legislation in order to give effect to them. The Minister could achieve these changes by making a Legislative Reform Order (LRO) under the Legislative and Regulatory Reform Act 2006 (LRRA). LROs are subject to preliminary consultation and to rigorous Parliamentary scrutiny by Committees in each House of Parliament. On that basis, the Minister invites comments on these reform proposals in relation to the Animals Act as measures that might be carried forward by a LRO.

Legislative Reform Proposals

2. This consultation document on the Animals Act has been produced because the starting point for LRO proposals is thorough and effective consultation with interested parties. In undertaking this consultation, the Minister is expected to seek out actively the views of those concerned, including those who may be adversely affected, and then to demonstrate to the Scrutiny Committees that he or she has addressed those concerns.

3. Following the consultation exercise, when the Minister lays proposals before Parliament under the section 14 Legislative and Regulatory Reform Act 2006, he or she must lay before Parliament an Explanatory Document which must:

> i) Explain under which power or powers in the LRRA the provisions contained in the Order are being made;
>
> ii) Introduce and give reasons for the provisions in the Order;
>
> iii) Explain why the Minister considers that:
>
> - There is no non-legislative solution which will satisfactorily remedy the difficulty which the provisions of the LRO are intended to address;
> - The effect of the provisions are proportionate to the policy objective;
> - The provisions made in the order strike a fair balance between the public interest and the interests of any person adversely affected by them;
> - The provisions do not remove any necessary protection;

• The provisions do not prevent anyone from continuing to exercise any right or freedom which they might reasonably expect to continue to exercise;
• The provisions in the proposal are not constitutionally significant; and
• Where the proposals will restate an enactment, it makes the law more accessible or more easily understood.

iv) Include, so far as appropriate, an assessment of the extent to which the provision made by the order would remove or reduce any burden or burdens;

v) Identify and give reasons for any functions of legislating conferred by the order and the procedural requirements attaching to the exercise of those functions; and

vi) Give details of any consultation undertaken, any representations received as a result of the consultation and the changes (if any) made as a result of those representations.

4. On the day the Minister lays the proposals and explanatory document, the period for Parliamentary consideration begins. This lasts 40 days under negative and affirmative resolution procedure and 60 days under super-affirmative resolution procedure. If you want a copy of the proposals and the Minister's explanatory document laid before Parliament, you will be able to get them either from the Government department concerned or by visiting the BRE's website at: **http://bre.berr.gov.uk/regulation/reform/bill/**

Parliamentary Scrutiny

5. Both Houses of Parliament scrutinise legislative reform proposals and draft LROs. This is done by the Regulatory Reform Committee in the House of Commons and the Delegated Powers and Regulatory Reform Committee in the House of Lords.

6. Standing Orders for the Regulatory Reform Committee in the Commons stipulate that the Committee considers whether proposals:

(a) appear to make an inappropriate use of delegated legislation;

(b) serve the purpose of removing or reducing a burden, or the overall burdens, resulting directly or indirectly for any person from any legislation (in respect of a draft Order under section 1 of the Act);

(c) serve the purpose of securing that regulatory functions are exercised so as to comply with the regulatory principles, as set out in section 2(3) of the Act (in respect of a draft Order under section 2 of the Act);

(d) secure a policy objective which could not be satisfactorily secured by non-legislative means;

(e) have an effect which is proportionate to the policy objective;

(f) strike a fair balance between the public interest and the interests of any person adversely affected by it;

(g) do not remove any necessary protection;

(h) do not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise;

(i) are not of constitutional significance;

(j) make the law more accessible or more easily understood (in the case of provisions restating enactments);

(k) have been the subject of, and takes appropriate account of, adequate consultation;

(l) give rise to an issue under such criteria for consideration of statutory instruments laid down in paragraph (1) of Standing Order No 151 (Statutory Instruments (Joint Committee)) as are relevant, such as defective drafting or failure of the department to provide information where it was required for elucidation;

(m) appear to be incompatible with any obligation resulting from membership of the European Union.

7. The Committee in the House of Lords will consider each proposal in terms of similar criteria, although these are not laid down in Standing Orders.

8. Each Committee might take oral or written evidence to help it decide these matters, and each Committee would then be expected to report.

9. Copies of Committee Reports, as Parliamentary papers, can be obtained through HMSO. They are also made available on the Parliament website at

- **Regulatory Reform Committee** in the Commons; and
- **Delegated Powers and Regulatory Reform Committee** in the Lords.

10. Under negative resolution procedure, each of the Scrutiny Committees is given 40 days to scrutinise an LRO, after which the Minister can make the order if neither House of Parliament has resolved during that period that the order should not be made or to veto the LRO.

11. Under affirmative resolution procedure, each of the Scrutiny Committees is given 40 days to scrutinise an LRO, after which the Minister can make the order if it is not vetoed by either or both of the Committees and it is approved by a resolution of each House of Parliament.

12. Under super-affirmative procedure each of the Scrutiny Committees is given 60 days to scrutinise the LRO. If, after the 60 day period, the Minister wishes to make the order with no changes, he may do so only after he has laid a statement in Parliament giving details of any representations made and the LRO is approved by a resolution of each House of Parliament. If the Minister wishes to make changes to the draft LRO he must lay the revised LRO, as well as a statement giving details of any representations made during the scrutiny period and of the proposed revisions to the order, before Parliament. The Minister may only make the order if it is approved by a resolution of each House of Parliament and has not been vetoed by either or both relevant Committees.

How to Make Your Views Known

13. Responding to this consultation document is your first and main opportunity to make your views known to the relevant department as part of the consultation process. You should send your views to the person named in the consultation document, in this case Amy Barry. When the Minister lays proposals before Parliament you are welcome to put your views before either or both of the Scrutiny Committees.

14. In the first instance, this should be in writing. The Committees will normally decide on the basis of written submissions whether to take oral evidence. Your submission should be as concise as possible, and should focus on one or more of the criteria listed in paragraph 6 above. The Scrutiny Committees appointed to scrutinise Legislative Reform Orders can be contacted at:

Delegated Powers and Regulatory Reform Committee
House of Lords
London
SW1A 0PW

Tel: 0207 219 3103
Fax: 0207 219 2571
mailto: DPDC@parliament.uk

Regulatory Reform Committee
House of Commons
7 Millbank
London
SW1P 3JA

Tel: 020 7219 2830/2833/2837
Fax: 020 7219 2509
mailto: regrefcom@parliament.uk

Non-disclosure of responses

15. Section 14(3) of the LRRA provides what should happen when someone responding to the consultation exercise on a proposed LRO requests that their response should not be disclosed.

16. The name of the person who has made representations will always be disclosed to Parliament. If you ask for your representation not to be disclosed, the Minister should not disclose the content of that representation without your express consent and, if the representation relates to a third party, their consent too. Alternatively, the Minister may disclose the content of the representation in such a way as to preserve your anonymity and that of any third party involved.

Information about Third Parties

17. If you give information about a third party which the Minister believes may be damaging to the interests of that third party, the Minister does not have to pass on such information to Parliament if he does not believe it is true or he is unable to obtain the consent of the third party to disclosure. This applies whether or not you ask for your representation not to be disclosed.

18. The Scrutiny Committees may, however, be given access on request to all representations as originally submitted, as a safeguard against improper influence being brought to bear on Ministers in their formulation of legislative reform orders.

Better Regulation Executive
Department for Business, Enterprise and Regulatory Reform

Annex C – Impact Assessment

Summary: Intervention & Options

Department /Agency: Department for the Environment, Food and Rural Affairs	Title: Impact Assessment of The Legislative Reform (Animals Act 1971) (Amendment) Order 2009	
Stage: Consultation Proposal	**Version:** 1	**Date:** 1 February 2009
Related Publications: Consultation on Changes to the Animals Act 1971 to clarify the application of strict liability to the keepers of animals. Defra. September 2008.		

Available to view or download at:

http://www.defra.gov.uk/corporate/regulat/impact-assessment/

Contact for enquiries: Tony Williamson **Telephone:** 020 7238 5640

What is the problem under consideration? Why is government intervention necessary?

There is disagreement and conflicting case law concerning the interpretation of section 2(2) of the Animals Act 1971, which imposes strict liability on the keepers of animals that cause harm or damage in certain circumstances. This lack of clarity has adversely affected equestrian and other, particularly rural, businesses whose commercial activity involves non-dangerous species of animal, as they have faced uncertainty over their legal position in the event of their animals causing harm or damage. This lack of legal certainty may also have adversely affected these businesses through large increases in insurance premiums. Government intervention to amend the Act would ensure greater certainty in the law.

What are the policy objectives and the intended effects?

The Government is committed to reducing burdens on business generally and to promoting rural enterprise. Amending section 2(2) of the Animals Act to remove the current lack of clarity will enable the courts to decide more easily whether strict liability applies in particular cases, and thus provide a more certain legal environment in which equestrian and land-based businesses, such as farms and commercial estates, can operate and flourish.

What policy options have been considered? Please justify any preferred option.

Amending the Act is the only option if we wish to improve the clarity of the existing legislation. Doing nothing would not achieve any improvement in clarity and, therefore, not resolve the problem. In the absence of suitable primary legislation, the Government has previously supported a Private Member's Bill to achieve this objective. This option failed and the Government now favours a Legislative Reform Order as a means to amend the Act.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? The Government would be prepared to review the impact of the amendment in 2012, which should allow time for the effects of the amendment to be identified and assessed.

Ministerial Sign-off For Consultation Proposal Impact Assessment:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

.... Date:

Summary: Analysis & Evidence

Policy Option:	Description: Legislative Reform Order

COSTS

ANNUAL COSTS		Description and scale of **key monetised costs** by 'main affected groups'
One-off (Transition)	**Yrs**	It is not expected that there will be any significant monetised costs arising to any particular group as a result of this amendment.
£ n/a		
Average Annual Cost (excluding one-off)		
£ n/a		**Total Cost** (PV) **£ n/a**

Other **key non-monetised costs** by 'main affected groups' There may be an impact on individuals injured in accidents involving animals where strict liability does not apply following the Order and yet may have been applied by the courts under current case-law interpreting section 2(2) of the Animals Act. Such cases are thought to be relatively rare and their outcome is relatively uncertain even under the current legislation.The Department of Health has estimated that initial treatment for the most serious injuries, e.g. serious spinal and/or head injuries, could cost the NHS up to £40,000 in each case. However, the suggestion that there will be an additional cost to the NHS presupposes that people who obtain such compensation spend the money on private medical treatment, and do not rely on the NHS in any case.

BENEFITS

ANNUAL BENEFITS		Description and scale of **key monetised benefits** by 'main affected groups'
One-off	**Yrs**	None of the benefits of the amendment can be readily monetised.
£ n/a		
Average Annual Benefit (excluding one-off)		
£ n/a		**Total Benefit** (PV) **£ n/a**

Other **key non-monetised benefits** by 'main affected groups' The amendment will provide greater legal certainty for equestrian and other land-based businesses, which will reduce legal costs and encourage investment and expansion in these sectors. It will also enable the insurance industry to better assess risk and may potentially reduce insurance premiums.

Key Assumptions/Sensitivities/Risks Proposal assumes that the courts will recognise the greater certainty provided by the revised wording and deal with cases accordingly. It also assumes that the insurance industry will, in due course, pass any savings in litigation on to its customers, subject to other prevailing factors affecting the insurance market.

Price Base Year	Time Period Years	**Net Benefit Range** (NPV) **£ n/a**	**NET BENEFIT** (NPV Best estimate) **£ n/a**

What is the geographic coverage of the policy/option?			England and Wales	
On what date will the policy be implemented?			July 2009 (estimate)	
Which organisation(s) will enforce the policy?			n/a	
What is the total annual cost of enforcement for these organisations?			£ n/a	
Does enforcement comply with Hampton principles?			Yes	
Will implementation go beyond minimum EU requirements?			n/a	
What is the value of the proposed offsetting measure per year?			£ n/a	
What is the value of changes in greenhouse gas emissions?			£ n/a	
Will the proposal have a significant impact on competition?			No	
Annual cost (£-£) per organisation (excluding one-off)	Micro **n/a**	Small **n/a**	Medium **n/a**	Large **n/a**
Are any of these organisations exempt?	No	No	No	No

Impact on Admin Burdens Baseline (2005 Prices)					(Increase - Decrease)
Increase of	£ n/a	Decrease of	£ n/a	**Net Impact**	£ n/a

Evidence Base (for summary sheets)

The Problem to be Addressed

The purpose of the Order is to address a long-standing issue relating to the interpretation of the Animals Act 1971. Section 2 of the Animals Act 1971 creates strict liability for the keeper of an animal in certain circumstances. Section 2(1) provides that the keeper of an animal that is of a "dangerous species" is strictly liable for damage caused by it. "Dangerous species" is defined by section 6(2) of that Act as one that is not commonly domesticated in the British Islands and whose fully grown members normally have such characteristics that they are likely, unless restrained, to cause severe damage or that any damage they may cause is likely to be severe. Section 2(2) provides for strict liability in certain circumstances for damage caused by an animal that is not of a dangerous species. [6]

Since the Act was passed, there has been disagreement and conflicting case law concerning the interpretation of section 2(2), and in particular section 2(2)(b), both as concerns the purpose of the first phrase "the likelihood of the damage or of its being severe" and the meaning of the last phrase "except at particular times or in particular circumstances". There has also been repeated judicial criticism that section 2(2)(b) lacked clarity. This issue culminated in the House of Lords' judgment in the *Mirvahedy v Henley* [7] case, which confirmed a broad interpretation of the wording, potentially bringing within the scope of strict liability under the Act the keepers of animals that were not known to possess a dangerous characteristic.

The precise effects of the *Mirvahedy* judgment on businesses are difficult to assess. The courts have not found animal keepers strictly liable in all comparable cases since the judgment was handed down, so the uncertainty that existed before *Mirvahedy* continues, but with the added complication that businesses now believe that they are more likely to be found strictly liable, and insurance companies believe that they are more likely to be required to pay compensation when incidents occur. In addition to this adverse effect on business confidence, it is believed by many that this continuing uncertainty has had a negative impact on insurance premiums. Evidence to support a direct link between *Mirvahedy* and insurance premiums is inconclusive, as insurance premiums are based on a wide range of commercial factors. However, the Government accepts that insurance premiums for many rural and equestrian businesses did indeed increase

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[6] Section 2(2) of the Act currently states:

(2) Where damage is caused by an animal which does not belong to a dangerous species, a keeper of the animal is liable for the damage, except as otherwise provided by this Act, if-

(a) the damage is of a kind which the animal, unless restrained, was likely to cause or which, if caused by the animal, was likely to be severe; and

(b) the likelihood of the damage or of its being severe was due to characteristics of the animal which are not normally found in animals of the same species or are not normally so found except at particular times or in particular circumstances; and

(c) those characteristics were known to that keeper or were at any time known to a person who at that time had charge of the animal as that keeper's servant or, where that keeper is the head of a household, were known to another keeper of the animal who is a member of that household and under the age of sixteen.".

[7] WLR 882. In *Mirvahedy v Henley [2003]*, Mr Mirvahedy was seriously injured when his car collided with a horse owned by Mr and Mrs Henley which had been spooked by something unknown and bolted onto a dual carriageway. The horse had been in a secure field and a claim against the Henleys under liability in negligence failed. However, in a majority judgment in the House of Lords, the Henleys were held strictly liable for the horse's actions, and thus for Mr Mirvahedy's injuries, under section 2(2)(b) of the Animals Act 1971. This decision, which confirmed that the keepers of animals could be held responsible for any damage caused by their animals even where the animal was not particularly dangerous as an individual and where the animal was not known to be likely to display any dangerous characteristic at that particular time, is a matter of considerable concern to individual animal owners and their representative organisations. Many also believe that the decision led to a large increase in insurance premiums for equine and other businesses, which has impacted adversely on the rural economy.

significantly in the period following the judgment, with public liability premiums for commercial riding establishments increasing by an estimated 30% in 2002, 79% in 2003, 39% in 2004 and 34% in 2005.

The Proposed Intervention

The Government's proposal is to replace the existing wording of section 2(2)(b) with a new formulation referring to the damage being caused by "unusual or conditional" characteristics of the animal. Unusual characteristics are defined as those that are not shared by the species generally, while conditional characteristics are defined as those that are shared generally by the species but only in particular circumstances. The new wording would require that for strict liability to apply in cases where an unusual characteristic was the cause of the damage, the keeper of the animal at the time the damage was caused must have known of that characteristic in the animal. Where the damage is due to a conditional characteristic of the animal, it limits the application of strict liability by providing a defence if the keeper of the animal when the incident took place can show that there was no particular reason to expect that the particular circumstances that provoked the conditional characteristic would arise at that time.

Essentially, the Order seeks to reflect the policy that it is desirable that the keepers of animals that do not belong to an inherently dangerous species should be strictly liable for damage or harm caused by that animal when they know that the animal in question may be dangerous at the time the damage is caused, either because of its particular temperament, or because of the particular circumstances applying at the time, such as having young to protect. The Order confirms that strict liability applies to a keeper of an animal that is of a normal temperament for the species but causes damage due to becoming dangerous in particular circumstances only if it can be shown that the damage was caused in such circumstances. It further provides the keeper of the animal with a defence against strict liability if the keeper can show that there was no particular reason to expect that those circumstances would arise at that time.

The Case for Government Support

The Government recognises that there is a lack of clarity over the meaning of Section 2(2) of the Act and that this uncertainty may have adversely affected rural businesses, particularly those in the land-based and equestrian sectors, whose business confidence has been undermined by the ambiguity in the current legislation, and who believe that their insurance premiums have risen significantly as a result of the wider interpretation of the Act favoured in the *Mirvahedy* case. The Government's primary purpose in supporting an amendment to the Act is to ensure greater certainty in the law, and thus restore business confidence, but it would welcome any additional benefits to rural business arising from it.

In the absence of Government time in Parliament to address this issue, Ministers have previously indicated that they would support an acceptable and workable Private Member's Bill to achieve this objective, if a willing MP could be identified. Stephen Crabb MP brought forward a Ten Minute Bill in summer 2007 proposing amendments to the Act, and followed this up a Private Member's Bill in spring 2008. The Government supported this Bill, and was disappointed when it fell due to an insufficient number of MPs being present in the House of Commons for the second reading. [8]

The content of the proposed Legislative Reform (Animals Act 1971) (Amendment) Order is essentially identical to the earlier Private Member's Bill, and is the result of discussions with all interested parties.

[8] The Bill was supported by a majority of 26:1 in its second reading vote, but a minimum of 40 MPs must be present in order for a Bill to proceed.

The Impact of the Amendment

The principal impact of the amendment would be to ensure greater certainty in the law. It is expected that it will enable the courts to decide more easily whether strict liability applies in particular cases, and, in due course, reduce the number of cases brought before them under the Act.

The overall impact on business is difficult to quantify, as the amended law will only take direct effect if and when certain circumstances occur. However, the Government expects that the proposed amendment will be of general benefit because it will clarify a piece of legislation that has long been considered confusing and subject to judicial criticism. In particular, it will benefit the keepers of all non-dangerous species of animal (e.g. horses, dogs, cows, sheep) as it will clarify their legal position in the event of accidents occurring involving their animals. This includes both individual animal owners and businesses who keep and utilise such animals, such as farms, riding schools, livery yards, petting zoos and pony trekking establishments. This greater certainty will remove a disincentive to investment and expansion amongst such businesses and will thus benefit the businesses themselves, their customers, and the wider, particularly rural, economy. The amendment should also benefit the insurance industry by creating greater certainty in instances where strict liability applies and thus better enabling them to assess the risk of having to pay compensation in order to settle cases brought under the Act. Insurance companies may choose to pass on these benefits to their customers in the form of reduced premiums but the size and timing of any reductions would be commercial decisions for the industry to determine over time and in the light of other factors. Assuming some benefits are passed on, land-based and equestrian businesses, the majority of whom are both rural and small- and medium-sized enterprises, would be among the main beneficiaries. The Government would welcome the benefits to rural businesses deriving from reduced insurance premiums.

The amendment may have an impact on individuals injured in accidents involving normally well behaved animals where, under the current case law, a court might impose strict liability provided it could infer that the injury resulted from "particular circumstances", irrespective of whether those circumstances could be identified or whether the person responsible for the animal had any reason to expect that they might arise. Some of these cases may be addressed by negligence and some of them will not. The impact will be felt more acutely in cases where negligence cannot be established, and no alternative route for compensation, eg personal insurance, exists. Such cases are thought to be relatively rare and their outcome is relatively uncertain even under the current legislation.

The amendment will have no particular effect on charities or the voluntary sector. It will not affect competition, nor will it affect the legal aid budget. It will not lead to any changes in the emission of Greenhouse gases, and will have no other impacts on the environment or sustainable development. There will be no impact on public health, well-being or health inequalities, although there may be a cost to the National Health Service in the relatively small number of cases where people injured in incidents involving animals are no longer able to claim compensation from the animal's keeper, and rely on NHS treatment for their injuries rather than private medical care. The Department of Health has estimated that initial treatment for the most serious injuries, e.g. serious spinal and/or head injuries, could cost the NHS up to £40,000 in each case. However, the suggestion that there will be an additional cost to the NHS presupposes that people who obtain such compensation spend the money on private medical treatment, and do not rely on the NHS in any case.

The potential impacts of the Order on gender, race and disability equality have been duly considered, as have the Order's implications for human rights. The Order will not have a differential impact on any particular group of people or region. However, it is expected that the majority of businesses likely to benefit from any reduced insurance premiums passed on to customers as a result of the Order will be small- and medium-sized enterprises in rural areas, although it is not currently possible to assess the scale of this positive impact.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	***Results in Evidence Base?***	***Results annexed?***
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	Yes	No
Carbon Assessment	Yes	No
Other Environment	Yes	No
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	Yes	No

Annex D – Draft Legislative Reform Order

Draft Order laid before Parliament under section 14(1) of the Legislative and Regulatory Reform Act 2006, for approval by resolution of each House of Parliament.

D R A F T   S T A T U T O R Y   I N S T R U M E N T S

2009 No.

REGULATORY REFORM

ANIMALS

The Legislative Reform (Animals Act 1971) (Amendment) Order 2009

Made - - - -	***
Laid before Parliament	***
Coming into force - -	***

The Secretary of State, in exercise of the powers conferred by section 1 of the Legislative and Regulatory Reform Act 2006([1]), makes the following Order.

For the purposes of section 3(1) of the Legislative and Regulatory Reform Act 2006, the Secretary of State considers that the conditions under section 3(2), where relevant, are satisfied.

The Secretary of State has consulted in accordance with section 13(1) of that Act.

The Secretary of State laid a draft Order and an explanatory document before Parliament in accordance with section 14(1) of that Act.

Pursuant to section 15 of that Act, the affirmative resolution procedure (within the meaning of Part 1 of that Act) applies in relation to the making of the Order.

In accordance with section 17(2) of that Act, the draft has been approved by resolution of each House of Parliament after the expiry of the 40-day period referred to in that provision.

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[1]([1]) c.51; see section 32 for the definition of "Minister of the Crown".

Citation, commencement and extent

1. This Order—

(a) may be cited as the Legislative Reform (Animals Act 1971) (Amendment) Order 2009;

(b) extends to England and Wales; and

(c) comes into force on [date] 2009.

Amendment to section 2 of the Animals Act 1971

2.— Section 2 of the Animals Act 1971([2]) is amended as follows.

(1) For subsection (2)(b), substitute—

(b) the damage was due to an unusual or conditional characteristic of the animal".

(2) In subsection (2)(c)—

(a) for "those characteristics" substitute "that characteristic, in the case of an unusual characteristic,"; and

(b) for "were" (in each place) substitute "was".

(3) After subsection (2), insert—

(3) A characteristic of an animal is unusual if it is not shared by animals of that species generally.

(4) A characteristic of an animal is conditional if it is shared by animals of that species generally, but only in particular circumstances.

(5) Subsection (2)—

(a) applies by virtue of a conditional characteristic only if the damage was caused in the particular circumstances (or one of them) by reference to which the characteristic is a conditional characteristic; and

(b) does not apply by virtue of a conditional characteristic if the keeper of the animal at the time when the damage was caused shows that there was no particular reason to expect that those circumstances would arise at that time..

Jonathan Shaw
Parliamentary Under Secretary of State
Date — Department for Environment, Food and Rural Affairs

EXPLANATORY NOTE

(This note is not part of the Order)

This Order is made under section 1 of the Legislative and Regulatory Reform Act 2006 (c.51). It amends section 2 of the Animals Act 1971 (c.22) and concerns the circumstances in which strict liability is applied where damage is caused by an animal that does not belong to a dangerous species, as defined by section 6(2) of that Act.

An impact assessment has been produced for this instrument and placed in the library of each House of Parliament. Copies can be obtained from [ ].

([2]) c.22.

Annex E – Consolidated Version of Revised Text

Proposed revised text of section 2, with amendments underlined

“**2 Liability for damage done by dangerous animals**

(1) Where any damage is caused by an animal which belong to a dangerous species, any person who is a keeper of the animal is liable for the damage, except as otherwise provided by this Act.

(2) Where damage is caused by an animal which does not belong to a dangerous species, a keeper of the animal is liable for the damage, except as otherwise provided by this Act, if-

> (a) the damage is of a kind which the animal, unless restrained, was likely to cause or which, if caused by the animal, was likely to be severe; and
>
> (b) the damage was due to an unusual or conditional characteristic of the animal; and
>
> (c) that characteristic, in the case of an unusual characteristic, was known to that keeper or was at any time known to a person who at that time had charge of the animal as that keeper’s servant or, where that keeper is the head of a household, was known to another keeper of the animal who is a member of that household and under the age of sixteen.

(3) A characteristic of an animal is unusual of it is not shared by animals of that species generally.

(4) A characteristic of an animal is conditional if it is shared by animals of that species generally, but only in particular circumstances.

(5) Subsection (2)-

> (a) applies by virtue of a conditional characteristic only if the damage was caused in the particular circumstances (or one of them) by reference to which the characteristic is a conditional characteristic; and
>
> (b) does not apply by virtue of a conditional characteristic if the keeper of the animal at the time when the damage was caused shows that there was no particular reason to expect that those circumstances would arise at that time.”