

Defining Animal Health and Welfare: Consultation on the Draft Animal Health Bill 2010

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Introduction

The purpose of this paper is to provide commentary and analysis on the Draft Animal Health Bill 2010 as part of the consultation process organised by DEFRA. The Bill has four parts and six schedules and it proposes radical changes in the regulation of animal health, building on the main primary legislation, the Animal Health Act 1981. The major change is in the introduction of a new Animal Health Organisation (AHO) responsible for animal health policy and related functions.

The focus of this paper is to address the main objectives of the Bill in setting up the AHO and to provide a preliminary assessment of how effective the Bill is likely to be in achieving its aims and objectives. Contained in our observations is a strong recommendation that if the Bill is enacted it should be subject to post-legislative scrutiny. This means that after a suitable period of time there will be an opportunity to make an assessment of the new legislation in terms of whether or not the legislation has achieved its main aims and objectives. This is an important means for ensuring that there is an assessment of the co-operation between regulatory bodies and also ensuring the necessary linkage between devolved administrations particularly in relation to future EU strategy and policy. Engaging with the major stakeholders relevant to animal health is a major concern but also an opportunity. Post-legislative scrutiny will help secure confidence, build on existing expertise and develop a shared responsibility for animal health.

One of the key issues raised in our commentary and analysis is whether retaining responsibility for animal welfare with DEFRA is a good proposal. Our preference would be to see animal health and welfare combined in the AHO.

The Bill's Aims and Objectives

The Animal Health Bill contains many of the proposals discussed by DEFRA over the past three years. This includes an expectation that any new regulatory structure will have the following benefits²

- ensure more independent and better informed decision making;

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² DEFRA, *Consultation on a new independent body for animal health* (DEFRA, 2009)

- increase livestock disease awareness amongst farmers and other key stakeholders;
- provide incentives to reduce the cost of disease including the management of disease;
- provide incentives for better risk management and;
- ensure greater financial transparency and accountability in the livestock industry.

The Bill contains a number of key proposals.

- Part 1 of the Bill provides for an independent Animal Health Organisation (England only) – animal health is a devolved policy area. Many of the functions currently exercised by the Secretary of State are devolved to the new Animal Health Organisation (AHO) and involve amending the Animal Health Act 1981;
- Part 2 of the Bill sets out how the main role of the Chief Veterinary Officer (CVO) for the United Kingdom is brought under the AHO. The CVO (England) will be appointed by the AHO. Legislative functions of the CVO are set out in the Bill including duties and consultation with the AHO and the devolved administrations;
- Part 3 of the Bill covers ancillary powers for the AHO in terms of order making powers and the use of vaccines, testing of animals, collecting samples and slaughter making powers including compensation. There are human rights implications for the Bill (Clauses 27, 43-44, 46-48) and these are addressed in the commentary.
- Part 4 of the Bill contains technical law making powers related to orders and other law making powers.

What the Bill does not cover

The Bill does not include the arrangements for cost-sharing which are intended to form a separate Treasury Bill. The link between cost-sharing and the AHO are not set out in the current Bill. This leaves open to question the future of compulsory insurance and the operation of a levy to cover exotic diseases and their surveillance. This is seen as a disappointment by many. The EU's Community Animal Health Policy 2007-13 is expected to provide a cost sharing responsibility for epidemic diseases in 2010. It is important that the cost-sharing requirements are fully addressed.

The link between cost-sharing and the AHO is critical for success of the AHO, particularly in relation to its acceptance by stakeholders, and consequently any new Bill on cost sharing must be appropriately connected to the proposals for the AHO. Ideally, a new Bill on cost sharing should be subject to equal consultation with stakeholders and drafted with full co-operation with AHO and DEFRA.

It is also essential that animal health and welfare are interconnected. The draft Bill provides a separation between animal health and animal welfare. The primary responsibility for welfare is a responsibility which remains with the Secretary of State in DEFRA, discussed more fully below.

General Commentary

Our comments fall mainly on Parts 1 and 2 of the Bill. The comments relate to the following headings:

The AHO - role, function and accountability

The role and functions of the AHO are set out in Clauses 1 and 2 of the Bill. In terms of its core functions and general purposes, the AHO has a major responsibility to protect animal health through disease prevention. This also includes preventing the spread of disease in animals as well as preventing the transmission of disease-causing substances from animals to humans. There is also a general role in protecting the public and also the economy and the environment from harm arising from animal diseases. How are such general purposes to be reconciled? How are priorities delegated to the AHO to be set and what are the key drivers in setting out policy agendas? Such questions need to be addressed in terms of:

- the role of stakeholders;
- the role of advisers and advice;
- the role of the relevant Secretary of State.

In terms of the AHO's core functions, clause 2 provides for review assessments and these must be published. The question is how will such review assessment be debated and what role will stakeholders have in making any objections or criticisms? The status of the AHO is to be a Non-Departmental Public Body. It will be subject to the National Audit Office and there is scope for the NAO to tackle issues of effectiveness and costs especially when discussed in terms of the economy and the environment.

The "arms length" relationship with DEFRA is to be welcomed but the structure of engagement and consultation with stakeholders must be transparent and open. The AHO is likely to be London based rather than based in a region and this may also serve to emphasise the need for full co-ordination with various groups and organisations based outside the capital. It is important that consideration should be given to the regional location of the AHO to ensure that there is adequate connection with farming communities and stakeholders.

AHO Powers and Duties

General

It is important to note that responsibility for animal welfare will remain with DEFRA. The reasons advanced for splitting animal health from animal welfare responsibilities are that DEFRA alone exercises direct ministerial

accountability to Parliament and that this is in the public interest as there is a general public interest in animal welfare for wild and farmed animals. Animal health appears not to have the same public interest, although health and welfare are inextricably linked. Clearly it is envisaged that DEFRA will work closely with the AHO. This is important as Clause 6 of the Bill maintains a policy role for DEFRA including all of the functions of the AHO. The remit of the AHO falls short of any subordinate law making powers which under Clause 7 are retained by DEFRA. Proposals for legislation have to be undertaken in consultation with the AHO and its views are taken into account when any subordinate legislation or proposals are being considered. There are substantial arguments in favour of animal health and welfare being integrated, however and these are as follows:

- Animal health and welfare work best when integrated into policy making that takes account of the both animal health policy and welfare;
- There is nothing in the proposed Bill to prevent DEFRA exercising ministerial responsibility for both animal health and welfare. DEFRA has to be answerable for the AHO to Parliament and the separation of animal health and welfare will not change this position. Clause 24 allows DEFRA to give directions to the AHO and the use of this power is indicative of the need for DEFRA to be answerable to Parliament for the AHO;
- The AHO should be able to develop its own expertise on both animal health and welfare. The close co-operation between DEFRA and the AHO envisaged in the Bill will only be enhanced by the AHO undertaking animal health and welfare functions;
- Setting up the AHO should engage with reducing not increasing complexity. A single responsibility with the AHO for animal health and welfare will encourage that simplification.

Specific Clauses

Many of the functions given to the AHO are contained in Clauses 9-13. They cover advice and training, and a range of public information functions. Clause 12 provides that Financial and other assistance may be given by the AHO. The AHO budget for financial assistance has to be made transparent and accountable in order to provide public confidence and stake holder interest in the role of the AHO.

Clauses 14 - 18 provide important powers to engage with advisory committees and make use of civil servants. Clause 19 is to be welcomed because it provides the AHO with powers to institute criminal proceedings. The use of these powers requires accountability and oversight including the publication of a Code for Criminal Prosecutions, setting out when and how the powers might be used.

AHO and Advisory Committees

One of the most important aspects is the use of advisory committees and their role in providing specialist information and analysis (see: Clauses 14, 15 and 16 relating to advisory committees and co-operation). How independent are the advisory committees going to be and how is transparency provided overall? There are a number of distinctive features related to animal health that require transparency of specialist advisory committees. These are:

- the litigation tendencies of various stakeholders within the animal health community;
- the need for public interest to be addressed with transparency supporting the public confidence in the regulatory system;
- the controversial nature of animal health policy. The general remit of the AHO will not cover wild animals which will be kept within DEFRA which retains responsibility for some of the most controversial policy areas such as the policy relating to badgers;
- the relationship between advice provided to DEFRA and AHO;
- differences between devolved administrations;
- the role of specialist advisors.

Devolved Administrations and AHO

The devolution of animal health and welfare in Wales, Scotland and Northern Ireland provides for the regional devolved administrations to learn from each other and follow distinct policy decisions that are best suited to the needs of their locality. As most of the AHO powers relate to England there is a need for the following:

- transparency in decision-making between the devolved administrations;
- consideration of whether the AHO model should be applied in each of the devolved regions;
- Clauses 37-42 envisage that there are various duties for co-operation (clause 37) and consultation (clauses 38 and 39) and providing information (clause 40). How are such duties and consultations to be made transparent?

The potential for co-operation institutionally is provided under clause 14. It is important that there is adequate monitoring of the effectiveness of any co-ordinated action in a clear and transparent manner.

The form of regulation offered by AHO

From a regulatory viewpoint, the question arises as to the form of regulation envisaged to be adopted by the AHO. It is important that this is addressed in the Bill. In the past, the adoption of a principles based “light touch” regulatory

system was also consistent with a general approach to regulation that found support amongst the main political parties. The “better regulation agenda” as it was optimistically called had begun under the Conservative government in 1985 based on the idea of reducing administrative burdens and decreasing the cost of regulation³. Deregulation policy was shaped by a series of White Papers in 1985, 1986 and 1988⁴. A Cabinet Committee on regulation was established and this led to an anti-red tape impetus that spread across Whitehall culminating in the Deregulation and Contracting Out Act 1994 after another series of White Papers⁵. The 1994 Act has been further extended in 2001 by the Regulatory Reform Act 2001 and then again by the Legislative and Regulatory Reform Act 2006. The movement in favour of deregulation was not confined to the UK as a similar approach is evident in the European Community, now European Union⁶. The invigoration of the light touch agenda was reinforced by the Hampton Report⁷ and the setting up of a Better Regulation Programme under the Better Regulation Executive, separated from the Cabinet Office since 2007. Hampton recommended the streamlining of many regulatory bodies and at the same time the co-ordination of regulatory policy with a regulatory impact assessment as part of each policy initiative. Adopting single strategies, reducing administrative burdens and driving regulation from the centre appears to offer an attractive style of regulation. Central government using traditional command and control techniques seeks to master the role of regulators while regulators look to decreasing controls and increasing autonomy among those regulated. The tensions are well explained by Black:

Indeed, rather than negating the decentred analysis, the observation that the state is seeking to increase its centralised control is its natural corollary. Either through the establishment of “meta-regulators” to regulate non-state regulators as in the case of the accounting, medical and legal professions, or through the internal regulation of other governmental regulators, central government is seeking to enhance its steering capacity⁸.

The Macrory Review⁹ that followed the Hampton Report, was asked to look at the role of sanctions and the functioning of criminal sanctions. This is a critical part of the regulatory system. Regulators require a range of incentives and sanctions in order to be effective. Macrory’s recommendations were largely accepted by the government. New compliance codes and greater managerial controls are also favoured, in his review, as a way of making the compliance

³ See: the DTI White Paper, *Lifting the Burden* Cmnd 9571 (1985).

⁴ DTI White Paper, *Building Businesses Not Barriers* Cmnd 9794 (1986) and *Releasing Enterprise* CM 512 (1988)

⁵ DTI, *Deregulation: Cutting Red Tape*, (1994), *Thinking About Regulation: A Guide to Good Regulation* (1994); *Getting a Good Deal in Europe* (1994).

⁶ R. Baldwin, *Is better regulation smarter regulation?* (2005) Public Law 485

⁷ Hampton, P, *Reducing Administrative Burdens: Effective Inspection and Enforcement Final Report* London: HM Treasury, 2005.

⁸ Black, J, *Tensions in the regulatory state* (2007) *Public Law* 58 at p. 66.

⁹ R. Macrory, *Regulatory Justice: Sanctioning in a post-Hampton World: A Consultation Document* London: Cabinet Office, May, 2006 and *Regulatory Justice: Making Sanctions Effective* London: Cabinet Office, November, 2006.

arrangements more effective. The implementation of many of the Macrory Review's recommendations may be found in the Regulatory Enforcement and Sanctions Act 2008. This underlines the shift beyond the criminal courts for the application of sanctions to regulator based systems of sanctions and enforcement. The Act underlines the five principles of regulation set out in Hampton namely enforcement action should be transparent, accountable, proportionate, consistent and targeted.

The impact of the Hampton and Macrory Reports is important in setting the future direction for regulation in the United Kingdom. The Hampton Report reinforces and encourages a targeted approach to regulation that requires all regulators to perform risk assessments and to adopt an effective, efficient and proportionate response and not placing unnecessary burdens on business. The underlying philosophy is that financial information should only be sought when required. Intervention should be targeted and not invasive to the detriment of market conditions.

While Hampton and Macrory favour a continuation in the deregulation strategy, their analysis emphasises the need for risk assessment and strategic use of tougher penalties. High profile fines and convictions were used as a means of enhancing the profile of the regulator rather than delving into the overall picture of financial control and stability. Both reports raise issues about how in general regulators are to be held to account. The reliance on legal forms of accountability through penalties and sanctions makes the assessment of regulatory decisions to be primarily based on compliance with codes and legal rules. Risk based accountability often enhances managerial accountability within the regulatory body. This is a form of self regulation of the regulators themselves whose test of failure is seen as the assessment of the risk that has itself been defined by the regulators based on the self-assessment.

The value of public law¹⁰ regulation is to create an interface between public and private sectors and through various economic instruments reflects policy choices that may have long term effects. Economic downturns are also an opportunity to reconsider the existing order. Some commentators may see this as an apt moment to address existing economic inequality and build on the democratic principles of more inclusive government, including a re-invigorated social contract. Others may see the opportunity of defining the public interest more widely in addressing the need for sustainable development within the European Union.

The AHO and the Chief Veterinary Officers: CVO (England) and CVO (UK)

Clause 35 of the Bill requires that the Secretary of State should appoint a CVO (UK), employed by DEFRA as a civil servant. The main work of the CVO(UK) will be to give advice on both animal health **and** welfare on

¹⁰ Page, A C, "Public law and economic policy; the United Kingdom experience" (1982) 9 *Journal of Law and Society* 225

international relations including the EU which remains within the UK competence of DEFRA (other related functions are devolved). It would be worthwhile to consider whether the status of the CVO(UK) will be enhanced or diminished by the new Bill. By analogy is the CVO(UK) perceived as having the same status as the Chief Medical Officer?

Schedule 1 of the Bill proposes that the AHO should appoint its own CVO for England. Each of the devolved administrations will have to make their own arrangements. The question arises as to how the CVO (England) covering only animal health under the AHO and the CVO(UK) under DEFRA covering animal health **and** welfare are able to work together? If there is disagreement or a diversity of opinion how best is the advice to be agreed? One solution would be a Concordat setting out the respective relationship. There is a need for appropriate co-ordination and sharing of expertise.

The Animal Health Bill and the European Convention on Human Rights

It is clear that a range of pre-existing legal powers under the Animal Health Act 1981 and the Animal Health and Welfare Act 1984 are now codified and also clarified under the Bill. There are human rights issues associated with the powers to enter land, premises and vehicles. Similarly, seizing animals for slaughter and destroying various items of property raise issues of human rights. The draft Bill provides a sharing of power between the Secretary of State and the AHO with such powers. Clause 27, for example makes it clear that the Secretary of State may make schemes for the transfer to the AHO of property rights or liabilities. Clause 43 provides for the slaughter of animals and seizure of items to be exercised by the AHO. There are also powers for the AHO to introduce a broad range of schemes providing payments by the AHO including orders to prescribe the level of payment.

Under Clause 44 the AHO is also given a mechanism to exclude or reduce payments relating to the behaviour of the owner and the responsibility of compliance under the law. In all the above examples there are issues relating to human rights involving the fairness of the adjudicatory procedures; the public interest that justifies intervention and the legal requirements of fairness.

Clause 46 is also significant. It amends section 16 of the Animal Health Act 1981 that had provided the Secretary of State with powers to prevent the spread of disease by treating any animal or bird with serum or vaccine or both. The existing powers are amended to include a more comprehensive power to treat animals that are in an infected area including the use of "buffer zones". Significantly, these existing powers and the comprehensive amendment have been transferred to the AHO. Such powers fall within the human rights protection of the convention and require procedural and substantive justification. It is also important that the AHO should operate under transparency and engage with stakeholders.

Clause 47 is also relevant in broadening existing powers under sections 62D-F to enter premises and take samples for disease purposes. This is a

controversial extension of power in terms of the rights to private life under Article 8. In addition clause 48 gives a general power to the AHO, or those authorised under its authority to give the details of the sample to the AHO. This is broadly enough worded to be interpreted to include private contractors or vets and the requirement to give details of any tests to the AHO is likely to become very controversial. This includes the nature of private information and access to information about the owner and the nature of any diseases detected.

Hence there are a number of concerns in this area:

- In carrying out its responsibilities under the various Clauses (27, 43-44, 4-48) there are likely to be many issues with a human rights focus;
- How is the new AHO able to adjudicate and make consistent decisions in line with public expectation and public confidence?
- How is the AHO able to combine the use of its statutory powers in this area with its other regulatory functions?
- To what extent will the system of accountability and oversight cope with major controversies involving the use of such powers?

Post-Legislative Scrutiny

The Animal Health Bill, if and when it is enacted, addresses major policy, social and economic issues in an area of public interest and, amongst stakeholders, of great economic and political sensitivity. Given the nature of the legislation and the Government's general commitment to post-legislative scrutiny¹¹ this would require the following:

- a time-table setting out the operation of post-legislative scrutiny review;
- that post-legislative scrutiny should be agreed within three years of the main parts of the bill coming into force;
- that regular reviews be undertaken to ensure that the main regulatory parts of the legislation are working satisfactorily.

In respect of post-legislative scrutiny the Final Report of the Law Commission, *Post Legislative Scrutiny* (2006) noted (3.70) how post legislative scrutiny might operate as an effective way of ensuring the setting of standards in legislation. It might also help move banking regulation to a new dimension –

¹¹ Office of the Leader of the House of Commons, *Post-legislative Scrutiny- The Government's Approach* Cm 7320, March, 2008. For general details of post-legislative scrutiny see: Law Commission (Law Com No 302) *Post Legislative Scrutiny* Cm 6945 (October, 2006).

regular pro-active as well as reactive review of the adequacy of regulation. The arrangements for post-legislative scrutiny are that:

- Any Act is liable to some form of post-legislative review prompted by a Parliamentary Committee or internally within Government;
- After 3-5 years the responsible Department must submit a Memorandum to the relevant Commons Departmental Select Committee;
- The Memorandum will include a preliminary assessment of how the Act meets various benchmarks;
- In the preparation of new legislation, account is taken by the sponsoring department of the various explanatory notes and relevant statements in the preparation of the Bill as the basis for considering the objectives of the Bill. This is relevant to the process of post-legislative scrutiny;
- The relevant Select Committee will determine whether a full post-legislative scrutiny should be undertaken.

The above arrangements apply to Acts passed since 2005 and the expectation is that there should be a routine consideration of every Act within a cycle of 3-5 years. From March 2008 it has been agreed that the promotion of post-legislative scrutiny might take place:

- At the instigation of the department and as part of the Impact Assessment process;
- Through an examination by a Parliamentary Committee based on the decision to conduct an inquiry into the operation of an Act as part of an investigation conducted by a Parliamentary Committee into a related matter where the Act is integral to that matter.

Conclusions

The Animal Health Bill is a welcome development in terms of setting up a much needed regulatory body to develop a more coherent animal health regulatory system in which stakeholders are more involved in development of policy and management of disease.

However, the Bill as proposed raises a concern in terms of how it divides animal health from animal welfare. There are also concerns in terms of how it divides responsibilities and duties between CVO (UK) and CVO (England) . For the Bill to reduce complexity and achieve better regulation, there is a need for co-ordination between devolved organisations, between the proposed CVO (England) and the CVO (UK), and between advisory committees.

In order for Animal Health Bill to be successful in developing a coherent animal health management environment, the proposed legislation for cost-sharing is critical.

After enactment, the arrangements for post-legislative scrutiny (of both bills) will have to be consistent with best practice.