

Analysis

The power to panic: the Animal Health Act 2002

Executive contempt for Parliament is such common contemporary currency that one would hardly dare trouble the readers of this journal by seeking to bring another example of it to their attention. However, the Animal Health Act 2002 (“2002 Act”)¹ displays “an aura of arrogance”² in the way it persists with a discredited policy that will be found striking even by this case-hardened readership. During the foot and mouth disease (FMD) epidemic of 2001, the government engaged in *ultra vires* action on a huge scale, for it had no power to slaughter perhaps the majority of the 7 million³ animals it nevertheless did slaughter in the course of the “contiguous cull”⁴ which became the core of its disease control policy.⁵ By passing the 2002 Act, the government has effectively acknowledged that this was so, for that Act seeks to make precisely that which was *ultra vires* in the past legal in the future, in complete disregard of the compelling reasons for the previous withholding of such powers.

What is remarkable is that this contempt for legislative control of executive action is being shown for *no* good reason; the government has no better an idea of what it will do with its extended powers than it had when it first exercised them *ultra vires*. The government did not initially plan to carry out the contiguous cull in 2001. It did so because its original policy for control of FMD, based on authorised culling, completely collapsed. The contiguous cull was the government’s panic response to that collapse. Only in the event of another such collapse would the extended slaughter powers of the 2002 Act be needed, for all the powers necessary for the rational and humane killing of

¹ Royal Assent given on November 7, 2002. The sections discussed in this paper were brought into force on January 14, 2003: SI 2002/3044 (C.101).

² Lord Peel, HL Deb., Vol.630, col.895, January 14, 2002: “The [Animal Health] Bill has what I describe as an aura of arrogance about it which has dumbfounded the agricultural world”.

³ I. Anderson (Chair), *Foot and Mouth Disease 2001: Lessons to be Learned Inquiry Report* (The Stationery Office, 2002), p.171. The total number of animals slaughtered has been estimated at 10,849,000: C. Robertson, *Sunday Post*, January 20, 2002 and R. Uhlig, *Daily Telegraph*, February 19, 2002. This is higher than the figure of 7 million given in the text as it includes 2 million young animals killed with their mothers and 2 million animals killed under the Livestock Welfare [*sic*] (Disposal) Scheme, not because they were claimed to be infected or at risk but because animal movement restrictions imposed growing husbandry costs on their maintenance.

⁴ See n.13 and associated text below.

⁵ We have described this in “‘Carnage by Computer’: The Blackboard Economics of the 2001 Foot and Mouth Epidemic” (2003) 12 *Social and Legal Studies* (forthcoming), to which the reader is referred for more extensive argument and referencing in support of the criticism of FMD policy given in this paper.

animals were available, and had been exercised, under previous legislation.⁶ By passing the 2002 Act, the government, rather than review the flaws in its policy that led to *ultra vires* action on this huge scale, is avoiding any lessons to be learned⁷ by purporting to give itself the legal power to repeat its mistakes. The assumption that legislation at least aspires to implement sensible policy does not apply to the 2002 Act. It is legislation which intentionally gives a power to panic.

Slaughter during the 2001 FMD epidemic

The principal⁸ domestic⁹ legislation establishing the regime for control of livestock diseases, including FMD, in force during the 2001 epidemic was the Animal Health Act 1981 (“1981 Act”). Section 31 introduces Sch.3 dealing with slaughter for disease control purposes. Paragraph 3(1) of Sch.3 provides that:

- The Minister may, if he thinks fit, in any case cause to be slaughtered
- (a) any animals affected with foot and mouth disease, or suspected of being so affected; and
 - (b) any animals which are or have been in the same field, shed, or other place, or in the same herd or flock, or otherwise in contact with animals affected with foot and mouth disease, or which appear to

⁶ By acknowledging that there is a rational case for humane slaughter, we do not say this case is compelling or, indeed, persuasive.

⁷ This is an implicit reference to Anderson, n.3 above, the most important of the three inquiries the government commissioned into the epidemic.

⁸ Secondary legislation is consolidated under the Foot and Mouth Disease Order 1983 (SI 1983/1950). This is being extensively amended in the light of the epidemic: see the following note.

⁹ Agriculture is, of course, a European Community competence, and the general framework for measures to be taken in respect of FMD is laid down in Dir.85/511 as amended by Dir.90/423. The EU, which gained FMD free status for the first time in 1990, abandoned prophylactic vaccination under this latter Directive, thereby placing exclusive reliance on stamping out. MAFF’s national contingency plan was formulated pursuant to Art.5(2) of Dir.90/423 in accordance with general criteria laid down in Decision 91/42/EEC and approved by Decision 93/455/EEC. The Commission’s Food and Veterinary Organisation (FVO) inspected the situation in the UK during the epidemic and found that not all EU measures had been fully transposed into national law (European Commission, *Final Report of a Mission Carried Out in the UK from 12–16 March 2001 in Order to Evaluate the Situation with Regard to Outbreaks of FMD* (DG(SANCO) 3318/2001, para.5.2), but these were predominantly “technical” issues (some of which are being addressed in the amendments to the FMD Order 1983, n.8 above) which need not be discussed here. Much more important is the fact that the FVO had failed to review the UK contingency plan or the readiness to implement it between its approval in 1993 and the time of the epidemic: European Parliament Temporary Committee on Foot and Mouth Disease (EPTCFMD), *Report* (2002/2153 INI) pp.41–42. The epidemic therefore obviously poses major questions at the EU as well as the national level, especially as there were related outbreaks in France, Ireland and the Netherlands, and the EU is in the process of an extensive review of Dir.85/511, etc. (European Commission, *Proposal for a Council Directive on Community Measures for the Control of FMD etc.* (2002/0299 CNS)) and of the operation of its relevant practices and institutions, particularly the inspection of contingency plans and, relatedly, the operation of the FVO: EPTCFMD, *Report*, above, pp.74–79. However, except in respect of vaccination, discussed in n.77 below, our discussion of the specifics of the 2002 Act does not require consideration of Community level measures. For though the EU is guilty of serious sins of omission, on present knowledge it would appear that its role in actually devising the contiguous cull was minor and reactive.

the Minister to have been in any way exposed to the infection of foot and mouth disease.

As was argued during the epidemic, nowhere more clearly than in a widely circulated opinion given by Stephen Tromans (on which we have drawn heavily),¹⁰ this provision did not authorise the contiguous cull carried out in 2001. Paragraph 3(1)(a) requires infection or suspicion of infection as grounds of slaughter and para.3(1)(b) requires exposure to the disease, particularly but not exclusively by contact with infected animals¹¹ or, through the concluding sweeping up clause, suspicion of exposure.¹² The contiguous cull went far beyond this. In its typical form, it involved the slaughter of all animals on premises which shared a boundary with a premises where livestock were suspected of being infected. The word “contiguous” may be a misleading description of this procedure. In this context, contiguity might be expected to imply (suspicion of) a chain of infection, but the cull proceeded in the absence of any such chain; contiguity meant simply sharing a boundary. In Cumbria and Dumfries and Galloway, animals were culled even on premises which did not share a boundary but were contiguous in an even more stretched sense in that they were within a three kilometre radius of a premises declared infected.¹³ That is to say, a circle with a radius of three kilometres having those premises at its centre was drawn on a map, and all premises within that mapped circle had their animals culled regardless of infection or suspicion of infection.

These formal procedures, devised by a new, hastily convened scientific group with little or no relevant epidemiological, agricultural, or, indeed, regulatory experience,¹⁴ the FMD Science Group,¹⁵ were the product of abstract mathematical modelling which took no heed of concrete information about the likelihood of transmission of the disease beyond the original suspicion of infection.¹⁶ The instances of suspicion were themselves generated by a process for identifying infection which was thought highly questionable at the time, partially because of the immense pressures on the State Veterinary Service,¹⁷

¹⁰ This was written in his capacity as a barrister but has now been presented in the form of a published article: S. Tromans, “The Silence of the Lambs: The Foot and Mouth Crisis, Its Litigation and Its Environmental Implications” (2002) 14 *Environmental Law and Management* 197.

¹¹ The occupation of land where infected animals had been should not normally raise a serious issue because, as FMD is able to survive, e.g. in animal slurry for months, such occupation usually is a ground for suspicion of infection.

¹² During the epidemic, MAFF used a terminology not sanctioned by the 1981 Act in which cases of suspicion of infection were called “dangerous contacts”: DEFRA, *Summary of Current Policy on Foot and Mouth Disease* (DEFRA, March 30, 2001, revised June 15, 2001) (www.defra.gov.uk/footandmouth/cases/disease/strategy/current.asp).

¹³ For this reason, the “contiguous” and the “three kilometre” culls are strongly distinguished in some discussions of the epidemic. We follow the predominant usage by normally referring to both as the contiguous cull.

¹⁴ D. Shannon, “Not Like This” (February 2002) *Science and Public Affairs* 6. Dr Shannon was DEFRA’s Chief Scientist during the epidemic.

¹⁵ Anderson, n.3 above, para.10.2.

¹⁶ EPTCFMD, *Submission of R.P. Kitching*, July 16, 2002 (www.europarl.eu.int/comparl/tempcom/fiap/meetings/20020716/kitching.background.en.pdf). Dr Kitching was a senior foot and mouth researcher at the Institute of Animal Health (see the text associated with n.45 below) during the epidemic.

¹⁷ Anderson, n.3 above, para.9.2.

which has turned out to be wrong in 30 per cent of cases.¹⁸ And, we repeat, around each case of suspicion (justified or not), much wider culling on the basis of mere contiguity took place. In the end, though the epidemiological data collected in the course of the culling is so questionable that it is impossible to be precise, it seems certain that considerably more than half of the 7 million animals culled were uninfected,¹⁹ the result of what has been called “postcode slaughter”²⁰ or “carnage by computer”.²¹ The contiguous cull “did not depend on . . . epidemiological groundwork to identify dangerous contacts”²² but was a policy which abandoned slaughter on (suspicion of) infection for slaughter to create an enormous “firewall” around any premises alleged to be infected.

In his capacity as Under-Secretary of State for Environment, Food and Rural Affairs, Lord Whitty had responsibility for securing the passage of the 2002 Act, and in the course of debate he²³ did tell Parliament that “the legality of the [contiguous cull] was never in question”.²⁴ However, the legality of the cull was not merely always questionable but, as a matter of fact, was always questioned. Lord Whitty himself admitted this in evidence he gave to the *Lessons to be Learned* Inquiry on the very same day he maintained the opposite in Parliament,²⁵ and in his evidence to that inquiry, the Chief Veterinary Officer stated that from the outset the three kilometre cull was feared not “likely to be legal”.²⁶

Lord Whitty also maintained in Parliament that “the operation of the cull was tested and upheld in the English and Scottish courts”.²⁷ He based this opinion on the outcome of two emergency applications, one Scots: *Westerhall Farms v Scottish Ministers*²⁸; and one English: *MAFF v Winslade*.²⁹ To evaluate

¹⁸ Anon., “Outcry Over Unnecessary Livestock Slaughter”, *The Guardian*, May 11, 2001.

¹⁹ Report by the Comptroller and Auditor General, *The 2001 Outbreak of Foot and Mouth Disease*, (2001–02 HC 939), fig.38.

²⁰ R. Windsor, “Address to the Royal College of Veterinary Surgeons”, June 6, 2001 (www.warmwell.com).

²¹ I. Mercer (Chair), *Crisis and Opportunity: Final Report of the Devon Foot and Mouth Inquiry* (Devon Books, Exeter, 2002) para.1.25 (evidence of Ms Wendy Vere, a West Country veterinary surgeon).

²² Anderson, n.3 above, para.10.5. The FMD Science Group “advised that it was too risky to wait for infection to be identified . . . cases would inevitably be missed . . . They recommended prompt contiguous culling”: Report by the Comptroller and Auditor General, n.19 above, para.3.72.

²³ Lord Whitty was by no means the only member of the Parliamentary Labour Party who maintained this position, and in particular Mr Elliot Morley, his fellow Under-Secretary, played a similar part: see, e.g. n.50 below.

²⁴ HL Deb., Vol.634, col.1145, May 8, 2002. The best statements of this official position of which we are aware are EPTCFMD, *Questions to Representatives and Former Representatives of the UK Government, etc.*, March 26 and April 8, 2002 (www.defra.gov.uk/corporate/inquiries/eptc.pdf), q.13 and Supplementary Memorandum Submitted by DEFRA, appended to Committee of Public Accounts, *The 2001 Outbreak of Foot and Mouth Disease* (2002–03 HC 487) paras 54–100.

²⁵ The minute of Lord Whitty’s evidence reads: “[t]he legality of the contiguous cull had been an issue”: Anderson, n.3 above, annex B, minute dated May 8, 2002, para.40. It was in the course of commenting on this evidence that the *Lessons to Be Learned* Inquiry recommended “that the powers available [under the 1981 Act] be re-examined . . . to remove any ambiguity over the legal basis for future disease control strategies”: *ibid.* main report, p.163.

²⁶ *ibid.* p.93.

²⁷ HL Deb., Vol.634, col.1143, May 8, 2002.

²⁸ [2001] Scot. C.S. 98 (April 25, 2001).

²⁹ Mitting J., May 22, 2001.

Lord Whitty's opinion, one must put it in context. DEFRA has said that there were 584 "appeals" against slaughter, usually decided by the local MAFF Divisional Veterinary Manager. Of these, 534 were contiguous cull cases, and 336 (69 per cent) were successful. MAFF considered legal proceedings to overcome continuing resistance to the cull in "over 50" of the remaining 198 cases.³⁰ It would appear that MAFF brought legal proceedings in 16³¹ of these cases in England and Wales, but withdrew from 11, having won three³² and lost two³³ of the five³⁴ in which judgment was given; *Upton* in particular being a serious reverse. Despite Lord Whitty's assurance that "all precedent [*i.e.* *Westerhall Farms* and *Winslade*] indicates that the cull was legal",³⁵ discussion even of the cases in which judgment was given is of very limited value for the purposes of legal argument³⁶ because, as emergency applications, they are unreported, and, with the exception of *Westerhall Farms*, their transcripts are not available through a search of the legal databases.³⁷ Having entered this caveat, we are, however, able to describe the general character of these cases on the basis of the materials available to us.

Although it met with success in *Westerhall Farms*, that case clearly illustrates the difficulties in which MAFF found itself. After sheep on a neighbouring premises were found to be infected, the petitioners, owners of *Westerhall Farm*, were informed that their sheep were to be slaughtered because their land was within a three kilometre radius of the steading (the main farm buildings)

³⁰ Supplementary Memorandum Submitted by DEFRA, n.24 above, para.77.

³¹ A. Addy, "Notes for Presentation to the EUTCMD", March 26, 2002, para.17 (www.warmwell.com). Ms Addy's figure is 15, but see n.34 below. Ms Addy, at that time a West Country solicitor who acted for many livestock owners mounting legal resistance to the cull, may well be the person with the largest experience of that resistance (see n.50 below). Her opinion (*ibid.* para.7) is that the contiguous cull "was mostly implemented at a local level by a mixture of intimidation and coercion with an element of blackmail". The extremely generous level of compensation was also intended to nullify resistance to the cull, which was sometimes defended as "voluntary": *e.g.* Mr Nick Brown, Minister of Agriculture, Fisheries and Food, HC Deb., Vol.336, col.713, April 9, 2001 and Mr Elliot Morley, Minutes of Evidence to the Environment, Food and Rural Affairs Committee, November 6, 2001, (2001-02 HC 339-I), q.8: "[a]t the present time, we do not have powers for a firewall cull. There was the three kilometre cull in Cumbria but that was a voluntary cull".

³² In addition to *Winslade*, there was *MAFF v Jordan*, Mitting J., May 25, 2001 and *Hodgson*, n.34 below.

³³ *MAFF v Willmets and Warne*, Mitting J., May 25, 2001 and *MAFF v Upton*, Harrison J., June 21, 2001.

³⁴ Addy, n.31 above, says there were four cases in which judgment was given, that MAFF won two and that proceedings were brought in 15 cases in all, but she almost certainly does not include the somewhat later case of *MAFF v Hodgson*, Stanley Burton J., July 19, 2001 and order for costs before Harrison J. [2001] EWHC Admin 689 (July 27, 2001). *Hodgson* was a mixture of injunction to compel slaughter, partial suspension of the injunction, and abortive application for judicial review used, as it were, defensively. It rather straddles the boundary between MAFF seeking an injunction and being obliged to defend a judicial review in a way which cannot be discussed productively in the absence of a publicly available transcript of the hearing before Stanley Burton J. MAFF both obtained its injunction and successfully defended the judicial review. The Supplementary Memorandum Submitted by DEFRA, n.24 above, para.77 also claims that only four cases "formally came before the courts", but, perhaps understandably, omits *Upton* from this list.

³⁵ See n.27 above.

³⁶ S. Smith: "Letter to Ms Mary Critchley, May 20, 2002", paras 4-6 (www.warmwell.com). We have drawn heavily on these and other (nn. 48, 63) comments of Mr Smith.

³⁷ We have searched BAILII, Casetrack, Lawtel, Lexis and Westlaw. We have obtained the available transcripts through private channels.

of the infected premises. There was no argument that Westerhall Farm sheep had been in contact with livestock from the infected farm; any infection had to be windborne. The likelihood of windborne infection is proportional *inter alia* to the number of livestock giving off the infection (depending on the kind of animal: sheep are least likely to give off windborne infection), inversely proportional to the distance between infected and other livestock, and proportional to the strength of the wind (depending on topography and wind speed and direction). No evidence of the number of infected sheep was given. Only tangential evidence about the distance between the premises was given, but one can infer that the premises were at the extreme edge of the three kilometre circle, with only a part of Westerhall Farm, into which sheep would not have gone,³⁸ being within that circle. No evidence as to wind speed was given but evidence was given that the prevailing wind was *from* Westerhall Farm *to* the infected premises³⁹ and that the land joining the farms was a high ridge which would have been a considerable obstacle to that wind.⁴⁰ In these circumstances, by finding that, “although the risk of a spread of the disease . . . onto the petitioners’ farm is perhaps not of the highest [but] does exist”,⁴¹ “the Court appears to have sanctioned as reasonable a belief that an unspecified number of sheep could transmit FMD . . . possibly thousands of metres *upwind*”.⁴²

Such a finding on such facts, whilst encouraging MAFF to believe that its arguments would be met with considerable sympathy, could not completely discourage further challenges to the contiguous cull if, because of the wording of the 1981 Act, MAFF was obliged to defend that cull on the grounds of suspicion of infection when it was proceeding on an entirely different basis. It seems very significant that *Westerhall Farms* (April 25, 2001) was the earliest of these cases, and authoritative work produced by members of the Pirbright Laboratory of the Institute of Animal Health which, in essence, argues that infection is most unlikely to have been transmitted in circumstances like those of that case,⁴³ was not cited to the court.⁴⁴ Pirbright is not merely the UK’s principal facility for research into FMD but is designated the World Reference Laboratory for the disease by the principal international disease control agencies, the Food and Agriculture Organisation of the United Nations and the Office International des Epizooties (OIE); its views were bound to be given great weight in legal proceedings.⁴⁵ It is likely, but not entirely certain,

³⁸ *Westerhall Farms*, n.28 above, at [10].

³⁹ *ibid.*

⁴⁰ *ibid.* at [10], [16].

⁴¹ *ibid.* at [31].

⁴² Smith, n.36 above, para.33.

⁴³ The most pertinent publication is A.I. Donaldson *et al.*, “Relative Risks of Uncontrollable (Airborne) Spread of FMD by Different Species” (2001) 148 *Veterinary Record* 602.

⁴⁴ But see Supplementary Memorandum Submitted by DEFRA, n.24 above, paras 87–92.

⁴⁵ In subsequent parliamentary debate about the cases MAFF brought to enforce the cull, it was not challenged that the Pirbright “research shows that . . . airborne spread was unlikely to play much part in the lateral spread of the disease”: Lord Whitty, HL Deb., Vol.637, col.WA72, July 8, 2002. The shortcoming of the research was alleged to be that it “downplays . . . other routes” (*ibid.* and Supplementary Memorandum Submitted by DEFRA, n.24 above, para.87). This is an arguable (if

that this work was available to MAFF at the time of *Westerhall Farms*, but it had been published (May 12, 2001) before the next case, *Winslade* (May 22, 2001), and it is most regrettable⁴⁶ that it was not brought to the court's attention in that case or in the two cases heard shortly afterwards, *Willmets and Warne* and *Jordan* (both May 25, 2001).

This work was brought to the court's attention in the penultimate⁴⁷ case MAFF brought, *Upton* (June 21, 2001), and it is possible to speculate why *Upton* was such a serious reverse for MAFF⁴⁸. On facts certainly no less conducive to its case than *Westerhall Farms*, involving alleged physical contact as well as the possibility of windborne transmission, MAFF claimed that there were reasonable grounds to suspect that Mrs Upton's animals were infected. The refusal of an injunction in this case amounted to an (arguably justified: the animals were not infected)⁴⁹ declaration of a lack of confidence in these arguments. In our opinion, in order to press further injunctions MAFF should have appealed *Upton*, but had the decision been upheld (and the Court of Appeal would have been able to be told the animals were uninfected), this would have amounted to the complete wrecking of MAFF's strategy. It was in any case particularly poor tactics from MAFF's perspective to bring this action, which had serious adverse public relations consequences for it. One of the animals MAFF sought compulsorily to slaughter was a pet pig which had taken the starring role in the successful film *Pig at the Ritz*, and this case of "Gruntly" the pig became a major rallying point for opposition to MAFF.

In sum, it has been claimed, that there were at least 200 occasions on which MAFF failed to proceed or withdrew from proceedings in connection with occasions of resistance to the cull.⁵⁰ From all this, it is reasonable to conclude that MAFF had so little confidence in its position under the 1981 Act that, after a number of reverses, it was no longer prepared to test that position in the courts if it could avoid doing so.⁵¹ The picture is of a number of cases, each best

weak) point (*cf.* Donaldson, n.43 above, p.602), but it *was* windborne transmission that was at the heart of MAFF's argument in *Westerhall Farms* and *Winslade*.

⁴⁶ Smith, n.36 above, paras 22–28.

⁴⁷ The Supplementary Memorandum Submitted by DEFRA, n.24 above, para.86 claims that after *Upton* injunctions were threatened in two cases which "concerned contiguous premises". They are not named. From the stated facts, *Hodgson* (n.34 above) is one of these. We have been unable to identify the other. From the brief and bewildering description given of it, it would appear not actually to have been a "contiguous cull" case though it may have "concerned contiguous premises".

⁴⁸ Smith, n.36 above, paras 37–41 and Stephen Smith QC, "Letter to Ms Mary Marshall, July 4, 2001" (www.warmwell.com). But see Supplementary Memorandum Submitted by DEFRA, n.24 above, paras 85–86.

⁴⁹ But see *ibid.* paras 61, 63, 67.

⁵⁰ These were 200 persons advised by Ms Addy: A. Addy, "Letter to Mr Nick Green, n.d.", in N. Green, *Submission to the Cumbria FMD Inquiry* (May 2002) pt.2, para.16 (www.warmwell.com). This letter disputes Mr Morley's comments during debate of the Animal Health Bill about the number of occasions of successful resistance, in which he distinguishes between "appeals" to the relevant authorities and "legal cases" without explaining why MAFF did not turn all the former into the latter: HC Deb., Standing Committee E, November 29, 2001. Especially as there certainly were occasions of resistance in which Ms Addy was not involved, we are unable to reconcile her 200 figure with the figures given by DEFRA at n.30 above.

⁵¹ MAFF successfully defended the three applications made in England and Wales to have the contiguous cull judicially reviewed of which we are aware, most importantly *R. v Secretary of State for the Environment, Food and Rural Affairs Ex p. Hughes* [2001] EWHC Admin 738, which was affirmed by

confined to its facts, in which MAFF defended on grounds of suspicion of infection a slaughter policy which had ceased to be based on such suspicion, and, having met with uneven success in doing so, even though it was highly selective in deciding which cases to fight, it eventually abandoned the attempt. This surely calls into question the ministerial claim that this represents a policy's being "tested and upheld in the English and Scottish courts"?⁵²

However this may be, the government, rather than rely on the hazards of litigation, has turned to Parliament to resolve the issue to its satisfaction. The government had to take very considerable pains to secure the passage of the 2002 Act. Though unsurprisingly encountering no difficulty whatsoever in the Commons, the original Animal Health Bill⁵³ was roundly denounced in the Lords and the government suffered a number of defeats there. The eventual passage of the legislation was the product of the government's strenuous use of its Commons majority. Enduring those pains was pointless if the contiguous cull had been legal under the previous legislation, as was repeatedly pointed out in the Lords' debate.⁵⁴ In spite of maintaining the legality of what had been done, Lord Whitty introduced the 2002 Act as an attempt "to clarify—and extend—the powers relating to slaughter"⁵⁵ given by the 1981 Act, and so "correct" "a major defect in the powers . . . available"⁵⁶ by preventing "the spread of a disease, as distinct from dangerous contacts or exposure in the strict sense".⁵⁷ The issue was made clearer in the consultation document on the Bill issued by DEFRA:

Part 1 of the Animal Health Bill provides new powers to slaughter wherever the Government considers this to be necessary to prevent the spread of FMD. This differs from existing measures in that it provides for the possibility of culling animals in a wider range of circumstances than is at present possible . . . providing for slaughter on preventive grounds, rather than on the existing grounds of being affected with disease,

the Court of Appeal: [2002] EWCA Civ 103. We are unable to explain why Lord Whitty did not refer to these cases when arguing that the contiguous cull was legal. However, to the extent that the available records allow one to say, like *Winslade* (n.29 above) and *Westerhall Farms* (n.28 above), these cases say that, in effect, their facts gave rise to a reasonable suspicion of infection, *i.e.* they are not defences of the firewall as such. It is certainly at least arguable that suspicion of infection was justified in *Hodgson* (n.34 above) and *Ex p. Hughes*, the two English judicial review cases of which we have some idea of the facts, but it is our opinion nevertheless that these cases display a willingness to so extend the grounds of suspicion that an application to review the contiguous cull would be almost bound to fail. See also n.69 below.

⁵² Smith, n.36 above, para.3: "Lord Whitty's apparent belief that the contiguous cull should be taken to have been lawfully carried out wherever it was carried out because of the two decisions to which he refers is seriously misconceived".

⁵³ HC Bill (2001–02) 39, October 30, 2001.

⁵⁴ *e.g.* Baroness Mallalieu, HL Deb., Vol.630, col.892, January 14, 2002.

⁵⁵ See n.27 above.

⁵⁶ HL Deb., Vol.630, col.837, January 14, 2002.

⁵⁷ See n.27 above. The *Lessons to Be Learned* Inquiry regarded the contiguous cull as a process of "pre-emptive slaughter" (n.3 above, Ch.10), and its consequent views on the changes that should be made to the legislation are cited in n.25 above. HM Government and Welsh Assembly Government, *Response to the Reports of the Foot and Mouth Disease Inquiries*, Cm.5637 (2002), para.4.3.25 states that: "powers for pre-emptive (or preventive) culling of animals not exposed to FMD infection in order to get ahead of the disease and stop it spreading are proposed in the Government's Animal Health Bill".

suspicion of being so affected or in any way being exposed to the disease.⁵⁸

Having discussed the position under the 1981 Act sufficiently to allow us to see at least initially what the 2002 Act is about, let us now turn to the relevant provisions.

Slaughter under the 2002 Act

The relevant parts of the 2002 Act insert amending clauses into the 1981 Act in a slovenly way which handicaps the comprehension of both Acts and no doubt will itself cause problems of interpretation. Section 1 of the 2002 Act amends Sch.3, para.3(1) of the 1981 Act by adding: “(c) any animals the Secretary of State thinks should be slaughtered with a view to preventing the spread of foot and mouth disease”. It is impossible to interpret this as anything other than a complete discretion to kill any animal the Secretary of State believes it necessary to kill in order to eradicate an outbreak of FMD.⁵⁹ To the concrete categories of animals set out in 1981 Act, Sch.3, para.3(1)(a) and (b) is added a general category of any animals. It is surely the case that the new (c) renders (a) and (b) superfluous; their retention merely giving an illusory air of concreteness to the new, extremely sweeping power.

The specific reason why the government has taken this power to itself is, of course, to allow it to cull more swiftly by removing the restrictions which formed the basis of opposition to the slaughter in 2001, and therefore, to “minimise” the overall slaughter by speeding it up.⁶⁰ Livestock owners who mounted opposition to the 2001 cull, and their legal representatives, were, in Lord Whitty’s view, behaving “very irresponsibly”.⁶¹ It does not apparently matter that the real reason that MAFF was unable to meet its slaughter targets is that these were (and will remain) impossibly impractical when slaughter is attempted on this scale⁶²; or that, on the best information available, either none or only a very small fraction of those who resisted the cull harboured infected animals.⁶³ The real novelty in the 2002 Act comes in Part 3, which gives extensive powers to enforce compliance with the now legal slaughter power through procedures which give the opportunity for livestock owners to present their case a much lower priority than the perceived need for haste in slaughter.⁶⁴ This has provoked very considerable criticism,⁶⁵ and when in a

⁵⁸ DEFRA, *Consultation on Implementation of Powers in the Animal Health Bill* (www.defra.gov.uk/corporate/consult/ahbill), para.12.

⁵⁹ 2002 Act, s.2 “enables the Secretary of State to extend [the s.1 slaughter power] to diseases other than FMD”.

⁶⁰ HL Deb., Vol.630, col.837, January 14, 2002 and Supplementary Memorandum Submitted by DEFRA, n.24 above, para.100.

⁶¹ HL Deb., Vol.630, col. 837, January 14, 2002.

⁶² Anderson, n.3 above, para.10.4: “[i]n practice, the 48 hour contiguous cull was probably never more than 50 per cent implemented”.

⁶³ S. Smith, “Letter to Ms Mary Critchley, November 5, 2001”, para.5 (www.warmwell.com).

⁶⁴ It goes without saying this is in contradiction of the anxious concern with certain “guiding principles” of transparency and accountability which were said to be “Key Criteria” in the consultation document (DEFRA, n.58 above, paras 6–9).

⁶⁵ Baroness Mollathau, HL Deb., Vol.630, col.891, January 14, 2002.

future outbreak Part 3 powers come to be exercised, they will be open to challenge under Art.6⁶⁶; but at least there is a clear fit between the effective absence of a hearing and the fact that, if the new slaughter power is good law, then there is nothing much to have a hearing about.

The 2002 Act is not, to be sure, the best law. Despite the stated concern with proportionality in the consultation document⁶⁷ and, of course, the statement of compatibility accompanying the Act, the new slaughter power will also be open to challenge under Art.8 and Art.1 of the First Protocol of the European Convention on Human Rights.⁶⁸ We do not want to add to the discussion of these possibilities (about which we are pessimistic),⁶⁹ but we do want to try to explain why the government has taken such pains to get itself into such a difficult position.

Panic and policy formulation

To understand the concrete use to which this now legal slaughter power might ever be put, one must understand why the contiguous cull took place. Prior to the discovery that there had been an outbreak of FMD in 2001 and for some time thereafter, nothing was further from MAFF's mind than such a cull. MAFF's FMD policy had two main parts,⁷⁰ one of which was indeed to "stamp out" an outbreak by slaughter and disposal of infected or at-risk animals; but these animals were to have been quickly identified and isolated, and so their numbers kept low and under control. The 1981 Act gives the powers to implement this policy, which is based on tracing the disease.⁷¹ MAFF's

⁶⁶ Smith, n.63 above, paras 13–20.

⁶⁷ DEFRA, n.58 above, paras 6–10.

⁶⁸ Smith, n.63 above, paras 11–31.

⁶⁹ The new power is no more incompatible with the Convention than the purported exercise of the powers under the 1981 Act was *ultra vires* and, indeed, in our opinion, which we will not defend here, *Wednesbury* unreasonable (notwithstanding *Hodgson*, n.34 above, and *Ex p. Hughes*, n.51 above). The fundamental reasons the law did not and will not prevent the executive defying the rule of law are not, as it were, jurisprudential, and in the panic conditions in which the new power will ever be exercised, when it again will be argued that FMD is out of control, we do not expect human rights considerations to trump the executive's cry of emergency. Rosalind English of One Crown Office Row writes of courts "bending over backwards to align themselves with the Government" and concludes that "the central legal arguments in domestic human rights and EC law will always be doomed to failure": *Persey v Secretary of State for Environment, Food and Rural Affairs* [2002] EWHC Admin 371; [2002] 3 W.L.R. 704, Lawtel Case Comment, March 21, 2002 (www.lawtel2002.com).

⁷⁰ The other part is prevention by biosecurity, especially in regard of the importation of infected animals and animal products, but even more than is always the case with the management of a risk, complete prevention is impossible in the case of FMD, for no completely effective prophylactic vaccination is available at the moment and, in its absence, the disease is so contagious that outbreaks are inevitable.

⁷¹ The stamp out policy laid down at national and Community levels is framed with regard to animal health trade policies laid down by the World Trade Organisation (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures (1994), which itself is based on animal health standards established by the OIE. The only point about these standards it is necessary to note here is that the very definition they give of "stamping out" is in terms of tracing infection or reasonable suspicion of infection: "[stamping out is] carrying out under the authority of the Veterinary Administration, on confirmation of a disease, the killing of the animals which are affected and those suspected of being affected in the herd and, where appropriate, those in other herds which have been exposed to infection by direct animal to animal contact, or by indirect contact of a kind likely to cause the transmission of

contingency plan envisaged up to 10 outbreaks; but so complete a failure was the attempt to identify and isolate the disease that there were five or 10 times as many sites of infection as this before MAFF was even aware of what is now officially regarded as the first outbreak.⁷² In the time it took MAFF to realise what had happened and whilst it was wrongly insisting that the disease, the extent of which it did not appreciate, was under control,⁷³ that disease had been spread so widely by the movement of livestock that in the end almost the entire country was infected or at-risk.

The contiguous cull was a panic response when MAFF, having lost control of the situation, found itself in uncharted territory. As its contingency plan did not envisage the failure of localised stamping out, MAFF had made no provision whatsoever for “a serious and extensive outbreak, including a worst-case scenario”,⁷⁴ and the government undertook huge scale firewall culling when it came to believe that the contingency plan had completely failed. The extent to which the firewall was what might properly be called a deliberate decision remains a matter of extreme contention which the official inquiries have done little to quiet. All its key components—the three kilometre circle,⁷⁵ the 24/48 hour disposal scheme,⁷⁶ the refusal to vaccinate,⁷⁷ etc.—were improvisations produced by panicked decision-making which will never be fully understood.⁷⁸ To the extent that the contiguous cull was a deliberate decision, it was used because it was believed that actual tracing of the disease had become impossible and therefore it was necessary to “get ahead of the

the causal pathogen”: OIE, *International Animal Health Code*, (10th ed., OIE, Paris, 2002), Art.1.1.1.1. (emphases omitted).

⁷² A synopsis of the account of the seeding of the disease given in Anderson, n.3 above, Chs 7–8 and in DEFRA, *Origin of the UK Foot and Mouth Epidemic* (DEFRA, June 2002) illustrates the position.

⁷³ e.g. Anderson, above n.3, para.9.7.

⁷⁴ EPTCFMD, *Report*, n.9 above, p.9.

⁷⁵ The use of a three-kilometre radius was not entirely accidental but corresponds to the “protection zone” demanded by Dir.85/511, Art.9 and implemented by the FMD Order 1983, above n.8, pts 3–4.

⁷⁶ Under this policy animals on premises infected or suspected of being infected were to be disposed of within 24 hours and those in the remainder of the cull zone disposed of within 48 hours. This was logistically impossible given the number of animals involved and the targets were not remotely met (n.62 above), but the extreme haste imposed by the attempt to meet them undoubtedly was the main reason the cull was so despicably cruel. This “policy” emanated from a 10 Downing Street lobby briefing. No justification was then given or has since emerged for this central plank of what passed for disease control policy: Anderson, n.3 above, para.10.3.

⁷⁷ The decision not to vaccinate animals even merely prior to slaughter in an attempt to gain more time to carry out the cull humanely was the product of an extremely heated “debate” during the epidemic. It is not merely that this debate was very largely based on misunderstandings of EU and WTO biosecurity and trade policies maintained by certain special interest groups, notably the national leadership of the National Farmers’ Union, which dominated policy-making (EPTCFMD, *Report*, n.9 above, pp.54–55); it is that it should not have taken place at all. The issue should have been settled earlier in any at all competent contingency planning. But no thought at a basic level had been given to this problem by MAFF since an influential 1973 study, based on the 1967 outbreak, had argued for stamping out without vaccination on welfare economics grounds.

⁷⁸ Anderson, n.3 above, para.10.3: “while some policy decisions were recorded with commendable clarity, some of the most important ones taken during the outbreak were recorded in the most perfunctory way, and sometimes not at all . . . this has made the task of constructing an audit trail extremely difficult in some vital areas, including the contiguous and 3 km. culls”.

disease”.⁷⁹ In the words of Professor Anderson, leader of the FMD Science Group, the contiguous cull was a “draconian”,⁸⁰ “blunt tool”,⁸¹ used because, as “the epidemic [was] not under control”,⁸² there was “a crisis in which it was unfortunately the only tool available”.⁸³ In the restrained description of the DEFRA Select Committee: “[t]he contiguous cull was a response to a desperate situation, not a pre-mediated response to a known, assessed risk”.⁸⁴ Evidence justifying this opinion is provided by every official and unofficial comment on the epidemic of which we are aware.

MAFF lost even bureaucratic control of the epidemic, which was transferred to the Cabinet Office Briefing Room (COBR)⁸⁵—the ad hoc committee which is convened to deal with national emergencies such as the possible terrorist threat immediately after September 11, 2001, in the deliberations of which the Prime Minister took a leading role. Slaughter on (suspicion of) infection required locally sensitive implementation. The contiguous cull, in which up to 100,000 animals were being slaughtered per day, posed logistical problems which could only be met by centralised command.

It did indeed prove to be the case that the combined apparatuses of the UK state, including its army, wielded by COBR had a greater capacity to kill domesticated animals than FMD to spread, at least once animal movement restrictions were in place, and DEFRA has claimed this as a success.⁸⁶ But, to state the obvious, if this was a success, one would not like to see a failure. As we have written elsewhere,⁸⁷ the epidemic:

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

It is vital to recognise that it was a set of circumstances which MAFF did not understand then and DEFRA does understand now that caused the epidemic

⁷⁹ EPTCFMD, *Questions*, n.9 above, q.11. See further n.77 above.

⁸⁰ *Minutes of Evidence Given to DEFRA Select Committee*, November 7, 2001, (2001–02 HC 323–ii), q.240.

⁸¹ R. Uhlig, *Daily Telegraph*, July 17, 2002.

⁸² Anderson, n.3 above, para.10.3.

⁸³ Uhlig, n.81 above.

⁸⁴ Select Committee on Environment, Food and Rural Affairs, *The Impact of Foot and Mouth Disease, First Report*, (2002 HC 323), para.27.

⁸⁵ COBR is also known by the acronym COBRA, as the room in question is Briefing Room A.

⁸⁶ DEFRA, *Autumn Performance Report 2002*, Cm.5698 (2002), p.2.

⁸⁷ See n.5 above.

and therefore the cull to stop when it did. The animal record and epidemiological information available to MAFF was so poor that the course of the epidemic⁸⁸ or even the numbers of infected animals⁸⁹ will never be known with reasonable accuracy. As we therefore do not even know the real nature and extent of the epidemic,⁹⁰ the role the cull played, even if it is properly assessed as a firewall, is extremely unclear; it is not even agreed that that it played *any* positive role.⁹¹ Of course, if one kills all the animals, one stops the epidemic. Reasonable policy, however, must work out where the cost-effective point comes before this, but the 2002 Act represents the abandonment of the effort to do this. It purports to legitimate a power to cull which, as it has no formal limits, need not stop at 10 million animals. Indeed, it is difficult to see why in a future epidemic which does not stop as soon as the 2001 epidemic and in which stamping out without vaccination is used again, DEFRA will be able to avoid exceeding the 10 million figure, incurring and imposing even greater costs and, in particular, repeating the horrible cruelty.

All sorts of revised contingency plans are being devised to make, *inter alia*, the stamping out of identified outbreaks of infection more effective. The government clearly sees the general slaughter power it now enjoys as an important part of the range of options it may wish to employ under those plans.⁹² But this was a power exercised *ultra vires* as a response to the drastic failure of contingency planning to identify infection, and whilst it may in the future be *infra vires*, it will only ever be used when this has happened again, and that use will again involve vast cost and horror. Slaughter on grounds of (suspicion of) infection was possible under the 1981 Act; the 2002 Act makes legal what a panic-stricken government did in excess of this. Unsurprisingly, how or when the government will use the new general slaughter power was not disclosed in the debate on the Bill.⁹³ Openness and honesty here would require DEFRA to admit that its contingency plans for specific slaughter based on identification of the disease may not work, that in the context of current livestock rearing practices this may lead to an epidemic,⁹⁴ and that this is why it is taking a power to slaughter for reasons no more precise than “to prevent

⁸⁸ P. Kitching, interview by Channel 4 News, April 21, 2001.

⁸⁹ Recent litigation has shown that even the number, age and source of the animals burnt in pyres is shrouded in mystery: *Feakins v Secretary of State for Environment, Food and Rural Affairs* [2002] EWHC 2574; [2003] E.H.L.R. 7.

⁹⁰ It is for this reason that the Countess of Mar was right to doubt whether the 2001 epidemic was, as was widely claimed (*e.g.* E. Morley, *Three More Counties Are Foot and Mouth Free* (DEFRA, 2001)), the largest outbreak the world has ever seen, yet equally right to insist that it certainly “was the one in which most animals were killed” (HL Deb., Vol.630, col. 911, January 14, 2002).

⁹¹ EPTCFMD, *Report*, above n.9, p.53.

⁹² Mr Morley, n.31 above, q.1.

⁹³ The consultation paper (n.58 above, paras 11–16) did list four “situations when culls may be required to prevent the spread of the disease”: airborne spread, waterborne spread, spread by wild animals, and the creation of a firewall. The first three would come under the 1981 Act’s powers if they could be shown to ground a reasonable suspicion of infection (discussion of this in relationship to airborne spread was at the heart of the *Westerhall Farms* and *Winslade* cases, above nn.28 and 29), and so they do not relate to what is novel in the 2002 Act. Only the firewall relates to this, and nothing is said about when and how it will be used.

⁹⁴ See n.5 above.

the spread of a disease".⁹⁵ But, in the face of the Lords' opposition, such openness surely would have meant that this Act would never have been passed.

Conclusion

And it would have been better had it not been passed. Had the Lords been able ultimately to defeat the Animal Health Bill, the government would have been obliged to acknowledge the need for a complete re-examination of livestock rearing practices in order to bring the risk of FMD that those practices create within the parameters of realistic, humane and fair disease control policy. The excuse DEFRA now gives for MAFF's abysmal performance during the epidemic is that that epidemic was unforeseeable, being due to "a rare set of circumstances".⁹⁶ This is a most misleading way of describing the breakdown of the contingency plan. The plan would work if FMD could be speedily identified and localised; but it is beyond dispute that the biosecurity practices prevalent in the livestock industry and particularly the routine mass movement of animals made it quite wrong to assume that either of these conditions would obtain. The failure to keep track of the risk of FMD allowed the adoption of livestock rearing practices that turned an inevitable outbreak of the disease into the epidemic occasioning the largest animal slaughter ever recorded in world history. Certainly, MAFF did not foresee this epidemic. But this is hardly an excuse as it had complete oversight of and responsibility for the animal health implications of the livestock rearing practices which caused that epidemic, and, through subsidy under the Common Agricultural Policy, very substantial financial control over those practices.

In the light of what happened in 2001, one might have hoped that the newly constituted DEFRA would now take some account of the inevitable limits to its regulatory capacity and of the cost/benefit calculation that must underpin any rational (public) investment in disease control, and would ensure that livestock rearing practices be framed within those limits. Most unfortunately, the review of farming commissioned after the epidemic⁹⁷ and the large number of other current inquiries into the future of agriculture are having no real impact. The most pernicious consequence of the 2002 Act is that it gives the illusion of being able to control FMD in the absence of any serious attempt to confront the risk attaching to current livestock rearing practices.

By taking to itself the vast slaughter power under the 2002 Act, the government has effectively said it is prepared to bear (and cause others to bear) the costs of dealing with a risk of FMD which it is making no serious attempt to limit. But the notion of bearing an unlimited risk is nonsense. When another epidemic occurs, DEFRA will find that there are limits to what it can do. The 2002 Act is an arrogant refusal to discuss those limits, which will

⁹⁵ See n.27 above.

⁹⁶ M. Beckett, Secretary of State for Environment, Food and Rural Affairs, "Statement on Foot and Mouth Inquiries" (DEFRA, July 22, 2002).

⁹⁷ D. Curry (Chair), *Policy Commission on the Future of Farming and Food Farming and Food* (Cabinet Office, 2002).

become evident only when another serious outbreak again produces panic. Comforted by the illusion of infinite regulatory capacity fostered by its ability to pass legislation like the 2002 Act, the government is paying little or no attention to the restructuring of the livestock industry that would make it unnecessary to panic. This is no merely formal mistake but, bearing in mind the horror of what happened in 2001, a most regrettable failure. Hayek saw executive contempt for the rule of law not only as deplorable in itself but as a bar to rational policy formulation. The passage of the 2002 Act is very strong evidence indeed for his views

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