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Comments on

Performing Animals Protection Amendment Bill

Submission by:

The South African Institute for Advanced Constitutional, Public, Human Rights and International Law, A Centre of the University of Johannesburg

Supported by:

The South African Veterinary Association

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SAIFAC

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PART ONE - INTRODUCTION

1. Background

1.1. In July 2013, the Constitutional Court struck down two sections of the Performing Animals Protection Act ("**PAPA**" or the "**Act**") and required the legislature to revise the Act within 18 months. The Court granted parliament a six month extension until July 2015. The main question related to the constitutional validity of magistrates being given the task to grant licenses under the PAPA and whether this was consistent with the separation of the powers. The Constitutional Court ruled that the granting of licenses in terms of the PAPA should not be conceived of as a judicial function and there was no good reason why this should not be performed by the Executive.

1.2. In light thereof, the Department of Agriculture recently has issued a PAPA Amendment Bill (the "**Bill**") and opened this up for comment. SAIFAC, a centre of the University of Johannesburg, is an institute that conducts advanced research in its areas of focus which includes fundamental rights, public law and constitutional law. Its director has written several research publications relating to the status and protections for animals in South African law.

1.3. Several institutions support this submission. The South African Veterinary Association is a professional association of veterinarians in South Africa. It promotes the interests and activities of the veterinary profession and assists veterinarians to fulfil their role in the community.

1.4. The Faculty of Veterinary Science at the University of Pretoria is the only veterinary faculty in South Africa and trains veterinarians and nurses.

1.5. The Centre for Applied Legal Studies, University of the Witwatersrand - which supports this submission- also is a well-known centre working in areas that have considerable public importance. Its director also has published research publications in relation to animals and the law.

2. Key Submissions on the 2015 Bill

2.1. The Constitutional Court required a revision of the PAPA to place the licensing function in relation to the protection of animals within the executive. This move is not simply a transfer from one functionary to another: placing a power within the executive requires attention to the manner in which executive power is regulated and the legal frameworks such as the Promotion of Administrative Justice Act 3 of 2000. The original PAPA also dates back to 1935 and is therefore materially

outdated in respect of scientific developments concerning the understanding of the welfare of animals. We accordingly believe this amendment offers the opportunity not only to comply with the Constitutional Court judgment, but also to update the PAPA in such a way that takes account of important developments in scientific knowledge in relation to the welfare of animals. This is of great importance in order to achieve the very purpose of the Act.

2.2. Certain practices can be shown to be cruel today which may not have been considered to be as such at the time the PAPA was originally passed. Furthermore, the increasing use of animals for performance in different industries, such as the film and TV industry were not adequately provided for in 1935. Marine and aquatic parks were also not addressed. The PAPA was designed for the protection of animals and it is necessary that any amendments adequately meet this purpose and ensure that the resulting legislation overall meets the requirements of the Constitution.

2.3. In this submission, we focus first on comments relating to the current draft Bill as proposed by the Department of Agriculture and then on additional provisions we believe should be considered.

PART TWO – SUMMARY OF SUBMISSIONS

Our central submissions are as follows concerning changes to be made to the Bill:

1. **Purpose:** The purpose of the Act and licensing system needs to be made explicit to recognize that it is designed to protect the welfare of performing animals and dogs used for safeguarding.

2. **Decision-Making:** The National Licensing Officer must be required explicitly to take account of several specific factors drawn from the science of animal welfare to determine whether to grant a license or not. These factors should include:

   2.1. where the animal originates from;

   2.2. the conditions in which the animal is kept;

   2.3. the training methods that are utilized;

   2.4. the identity/ies of the owner/s and trainer/s and whether they have any history of failing to protect the welfare of the animals they control;

   2.5. whether the performing activity or safeguarding is conformity with the animal's nature;

   2.6. whether the performance activity or safeguarding harms the welfare of the animal;

   2.7. whether the animal's physical, social and emotional needs are met in the conditions in which the animal resides;

   2.8. whether adequate provision has been made for its housing in conditions that are adequate for the animal's welfare upon ceasing the performing activity; and

   2.9. whether the activity poses any risk to humans and other animals.

3. **Decision-maker:** it is vital to ensure that the decision-maker is a person who is well-schooled to understand the welfare concerns that arise. Unfortunately, the current provisions fall short in that regard. The appeal process also requires more attention in that regard.

4. **Democratic Participation:** our view is that any decision must take account of as much information as possible to ensure that animal welfare is protected. As such, applications for licenses should be public and individuals or organisations with objections should be allowed

to lodge them. There must also be transparency concerning the persons to whom licences are granted.

We elaborate upon these key points below in more detail. In Part 4 below, we also provide comments as to how the original PAPA overall could be strengthened through this amendment process.

PART THREE- DETAIL TO SUBMISSIONS

1. Purpose

1.1. The purpose of the PAPA Bill is stated around a number of technical matters relating to definitions and procedures. Whilst these are no doubt important, they fail to capture what the Bill must be about: that is, the very purpose of this legislation and the renewed procedures - to ensure adequate protection for the welfare of performing animals.

1.2. The original Act of 1935 also lacks clarity in this regard: the purpose is stated as being to '*regulate the exhibition and training of performing animals and the use of dogs for safeguarding*'. It is unclear from this statement why these areas require regulation. We would suggest that the purpose of the Act and the new Bill be made explicit: '***to ensure the welfare of animals is respected and protected in the exhibition and training of performing animals and the use of dogs for safeguarding; to ensure that all cruelty in these areas is prohibited; to introduce a licensing system that offers protection for the welfare of animals and to provide for the sanctions for non-compliance***'. This purpose is suggested by the very the title of the Act itself and in the Memorandum on the Objects of the Amendment Bill where it is stated that "[t]he purpose of this Bill is to ensure that animals used for training, exhibition and performance purposes, as well as dogs used for safeguarding, are *protected*" and should likewise be reflected clearly in the purpose of the Act. The addition of these clauses would help clarify the very purpose of the licensing system which is the mechanism that is set up specifically to ensure that animals are being treated properly where they are used for training and performing purposes.

2. Decision Making

The Factors

2.1. **Section 3F** is a crucial section in that it outlines the basis upon which a National Licensing Officer may grant an application for a license.

2.1.1. In terms of the *Dawood* decision of the Constitutional Court, it is clear that sufficient guidance must be given in law for the exercise of a discretion.[1] The court states the following:

> '*[i]t is an important principle of the rule of law that rules be stated in a clear and accessible manner … if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision*' (para 47).

2.1.2. Our view is that the current section 3F (dealing with the factors involved) does not provide sufficient guidance and is therefore open to constitutional challenge. We elaborate upon these points below and provide proposals as to how it should be amended:

2.1.3. Section 3F(a) is radically unclear: what does it mean to say that the information furnished by the applicants is in accordance with the purpose of the Act? As has been mentioned, the purpose has not been adequately defined. Even if our proposal is adopted and the purpose is defined more closely, it would be better explain more accurately what the National Licensing Officer must take account in making this enquiry. It is also clear that section 3H is connected to section 3F: 3H outlines the information required in an application for a license. Whilst this is no doubt important, a decision can only be made after the criteria for assessing the information are laid out. As mentioned, these are, however, much too vague.

2.1.4. Section 3F (b) focuses on specific factors but once again lacks adequate clarity. It provides the requirement that the National Licensing Officer be satisfied that the '*premises, accommodation, equipment and facilities that are utilized for the training, exhibition or performance of the animal are safe and will not cause harm to the animal*'. Two criteria are included here: first, there is the requirement of safety – but, it is not clear what this means. Whose safety must be considered: is it human safety or animal safety? The second criterion is that it does not 'cause harm to the animal': once again, however, the nature of this harm is left unspecified. The science of animal welfare has developed considerably since the

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[1] *Dawood v Minister of Home Affairs* 2000 (3) SA 938 (CC).

passing of the 1935 Act and today there is a multi-dimensional approach to assessing welfare which includes physical, emotional, psychological and social dimensions of an animal.[2] We believe that the amendment Bill should take account of these scientific advances. We thus believe that the discretion of the Licensing Officer must be guided by relevant factors that take account of the modern understanding of animal welfare. We thus suggest how the provisions should be amended in paragraph 2.1.5 below.

2.1.5. We outline here a draft provision which we submit would ensure the law provides sufficient guidance (required by *Dawood*) to the National Licensing Officer and we provide explanations for the provisions in brackets.

> '*The National Executive Officer may grant an application for any license if he or she is satisfied that –*
>
> a. *the exhibition or training activity to which the animal will be subjected is safe, humane and will not cause harm to the physical, emotional, social and psychological welfare of the animal;* [This places the welfare of the animal as primary in determining whether the activity should be allowed and references the multi-dimensional components of welfare];
>
> b. *the animal was born in captivity and has been treated in a manner that respects its welfare since its birth;* [This limits animals that can be used for performance to those who were born in captivity and requires respect for their welfare; no provision should allow the capture of wild animals for performance purposes];
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> c. *the training methods that are to be employed are consistent with animal welfare (both in terms of the hours and conditions of training as well as the instruments used by the personnel dealing with the animal)*; [This places emphasis on the training methods employed];

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[2] See, for instance, Marian Stamp Dawkins 'The Science of Animal Suffering' (2008) 114 *Ethology* 937-945.

d. *the specific animal's biology, psychology, social and emotional needs are taken account of in the premises, accommodation, equipment and facilities which are clearly adequate to ensure that the animal's welfare is protected;* [This addresses the condition of the animals and the manner in which they are kept];

e. *the lifestyle involved in the activity is consistent with the animal's welfare;* [Continued transportation of a wild animal, for instance, in small cages would not be consistent with the best understanding of its welfare. Provision should be made for the social needs of animals and whether the activity is consistent with this];

f. *provision is made for the animal to live in a manner consistent with a high standard of welfare after it has ceased with the performing/exhibition/safeguarding activity;* [This section makes sure that there is a plan for the animal to live in conditions appropriate for its welfare once the exhibition activity has ceased];

g. *provision is made for the animal to live in a manner consistent with a high standard of welfare should a license not be granted and such provision shall be at the cost of the person applying for the license* [This provision deals with the importance matter of the costs for the up-keep of an animal in the event of a license not being granted which is a concrete problem often faced];

h. *the person in charge of the activity is a fit and proper person and has no record of animal cruelty or abuse;* [This ensures that the person in charge is a reliable person who has not record of animal cruelty]; *and*

i. *appropriate measures have been taken to protect the safety of humans and other animals.'*

2.2. **Section 3H** is crucial as it outlines the information that will be available to the National Licensing Officer when making a decision under 3F. Currently, the information required only relates to the animal, and the performances itself.

2.2.1. However, it is vital that five additional crucial links in the chain of information be included:

2.2.1.1. firstly, there is information concerning where the animal comes from and how it came to be in the possession of the applicant for training/performing/exhibition/safeguarding. Since, in some cases, wild animals are involved, it is necessary to be clear about whether the animals came from the wild or were bred in captivity and how they were acquired;

2.2.1.2. secondly, it is necessary for information to be provided about the plans for the treatment of the animals after it ceases to be engaged in the performance/exhibition/safeguarding activity;

2.2.1.3. thirdly, it is necessary to have information about plans for the animal's welfare should the license not be granted and what will happen to it;

2.2.1.4. fourthly, it is necessary to be provided with information concerning the relationship animals will have with other creatures as many animals are social in nature and provision needs to be made for these needs; and

2.2.1.5. finally, it is necessary to be provided with information regarding whether the animal will be required to travel regularly or continuously, the conditions of such travel and whether this is consistent with its welfare.

2.2.2. In our view, section 3H should also include a provision that any person who applies for such a license should be required to declare in the application that the performances and any training/exhibition of performing animals and dogs for safeguarding will not inflict any cruelty on the animals concerned and will ensure their welfare is protected to the highest level. This will place a clear duty of care upon the individuals who hold the license.

2.2.3. A similar point about the lack of guidance for the body constituted to hear an appeal also applies. The detailed provisions fail to indicate the relevant criteria the appellate body should employ in considering the decision by the National Licensing Officer. Outlining the relevant factors that have to be considered will assist the appellate body. A particular provision could also be inserted which states that the primary factor in

deciding an appeal is to ensure whether or not the National Licensing officer (or delegated officer) exercised their discretion in such a way as to ensure that the welfare of animals was primary and would adequately be protected within the training/exhibition/safeguarding activities.

3. **The Decision-Maker**

3.1. Clearly, the individual(s) empowered to grant the license has a lot of power in this context and will determine whether the protections afforded by the Act in fact eventuate. In our view, the current provisions are defective in that regard for several reasons.

3.1.1. Section 3B provides that the National Licensing Officer must be either an animal scientist or a veterinarian. The latter category is clear and it is evident why a veterinarian might be appropriate to perform this task, given their training. The category of an 'animal scientist' though is much less clear and this term is defined in section 11 as meaning "*a person so registered 'in terms of the South African Natural Scientists Professions Act (no 27 of 2003)*" ("**SANSPA**"). As a technical matter, there is a **mistake** in the designation of this Act in the current Bill as its full name in the Government Gazette is the 'Natural Scientific Professions Act'. Further, once one consults this act from 2003, it is clear that there is no terminology referring specifically to an 'animal scientist' in that act. The PAPA Bill thus makes reference to a category that does not exist. SANSPA makes reference to the possibility of registration by professional, candidate and certificated natural scientists in the field of 'animal science' (included in Schedule 1). Is this what is meant by an animal scientist? If that is the case, it needs to be specified better in the definitions section which at present refers to an empty category.

3.1.2. Moreover, in our view, that would not be an adequate solution as it is quite unclear what qualifications are necessary to become an animal scientist. Such a notion seems to include those who are concerned with animal welfare, persons involved in agriculture concerning animals, persons involved in research into animal diseases, persons involved in the cell biology of animals and persons which work with animals in a laboratory. The PAPA Bill is clearly concerned with the *protection of animal welfare*: thus the only persons with the qualification to make decisions in this regard should be persons with an expertise in dealing with animal welfare. All other categories of animal scientist should not be eligible to become National Licensing officers.

3.1.3. Moreover, veterinarians have specific professional ethical duties to ensure that they are not exploited in a manner that may be detrimental to an animal. This effectively means that they would be required to exercise their discretion in a manner consistent with animal welfare and which does not lead to any unnecessary abuse. No similar ethical duties apply to the broad category of animal scientists and thus providing them with decision-making powers in terms of the PAPA provides very little protection for animals. We align ourselves with the more detailed submission provided by the South African Veterinary Association (SAVA) on this point.

3.1.4. Section 3D allows for the appointment of '*experts or other persons as may be necessary to implement this Act*'. Section 3E then allows for the National Licensing Officer to delegate his/her functions under the Act to an '*expert or other person appointed in terms of 3D*'. In our view, this power of delegation as it is constituted is irrational and thus likely to be unlawful. The first problem is that the draft Bill refers to 'other persons' but fails to provide any specification as to who these people may be. If any person can grant a license, then why does the Bill suggest that some expertise is required in that regard? The reason must be that the purpose of the Act will not be fulfilled unless a person who understands animal welfare is placed in a position to make decisions about licenses. The licensing function is the protection offered by the Act. Yet, it seems that any person, no matter their expertise, may be delegated the power to grant a license. This makes no sense. Moreover, even the expert requirement is unclear: what expertise must the individual in question have? We have already shown that not all expertise in the domain of animal science will be relevant to the application of this Act. Section 3D and 3E widen the matter even further to allow for experts without a specification as to the nature of their expertise. It is crucial that any delegation only be to those with similar qualifications; if this is not possible, the powers and functions should not be capable of delegation.

3.1.5. The problem with doing so is highlighted in the provisions relating to an appeal against a decision by the National Licensing Officer (section 11A). The current provision requires the Minister to appoint a chairperson of the board who has expertise in relevant fields of law, '*including but not limited to, Intellectual Property Law and Administrative Law*'. It is quite unclear why having expertise in intellectual property law provides an individual with any basis to make assessments in relation to

the granting of a license for the protection of performing animals. Expertise in any field cannot be the basis for making decisions in this area which has particular expertise required.

4. **Democratic Participation**

4.1. One of the key benefits to having the licensing application within the executive is the possibility of increasing democratic participation. Doing so can help ensure that all relevant information is placed before the National Licensing Officer. Unfortunately, at present, the process is designed to allow the Officer to make a decision simply based on the documents presented to him/her. Only in the case of where a hearing is held can another interested person apply to make representations concerning the license. In our view, there should be an opportunity for interested persons (many of whom will be organisations involved in animal welfare) to make representations to the National Licensing Officer even prior to a hearing being held. A register of applications and successful grants of licences should be kept and communication should be made on the website of the Department of Agriculture and in the Government Gazette requesting anyone with relevant information to an application to present it by a particular date. This would help advance the protection of performing animals as it would enhance the information available to the Licensing officer in making his/her decision. Section 1(5) of the United Kingdom Performing Animals (Regulation) Act of 1925 expressly includes the requirement that a registry must be kept of any applications in this regard which can be rendered accessible readily to any member of the public.

PART FOUR – ADDITIONAL COMMENTS

1. Improvements on the 1935 Act

As was mentioned earlier, the opportunity to amend the PAPA does not arise often. In our view, the opportunity should be taken to amend other provisions which are either not in line with the new constitution order or public opinion or are out of date. The following are our suggested improvements.

1.1. Express Criminalisation of Cruelty to Performing Animals

In our view, this Act should expressly include a prohibition on any cruel treatment to animals in the course of their training, exhibition or use as guard-dogs. A penalty should be included in this Act relating to such cruel treatment. Although section 10 states that the Act must be read with the Animal Protection Act (Act 71 of 1962), it is important to make explicit the kinds of actions that are prohibited. Such a prohibition should be criminalized and a penalty indicated. Currently, the only criminal offence relates to not having a license rather than focusing on the treatment of performing animals. The United Kingdom Performing Animals (Regulation) Act of 1925 also includes further offences that could be considered such as obstructing any inspection or seeking to conceal an animal from an inspector.

Moreover, should an individual be found guilty of an offence in terms of the Act, it should be possible to declare the person unfit to take charge of an animal for a specified period of time or to take this into account as a determinative factor in whether to grant a license or not. A provision could be added that a licensing officer 'shall not grant a license should an individual have been found guilty of any offence in terms of the Animal Protection Act or the Performing Animals Protection Act'.

1.2. Right of entry: Preventative and Confiscation

The right of entry provisions in section 4 of the original Act should be understood as part of the regulation of an area that uses performing animals. Understanding the vulnerability of animals means that stronger procedures are necessary to ensure their protection. The analogy should be to the protection of children or women in abusive relationships. As such, in our view, there should be an additional right to confiscate any animal from individuals where there is a finding that any information provided by the applicant is false or any of the conditions the applicant attested to are found not to be adequate to protect the welfare of animals. The up-keep of such an animal should be for the cost of the person who abuses the animal: this is important as there is often a major problem as to what to do with an animal when it is found to be in conditions not consistent with its welfare. The right of entry should also be conferred on societies for the prevention of cruelty to animals and national

licensing officers (or those to whom they delegate their functions) in addition to the police given their inability often to respond to animal welfare complaints.

1.3. Penalties

The penalties for obstructing a police officer, for violating a regulation in terms of this Act and for contravening the Act should be increased significantly to indicate the seriousness with which this offence is viewed.

1.4. Exclusions

Many of the exclusions in section 9 of the original Act appear to be arbitrary. If the purpose of the Act is to protect animals used in entertainment, then it makes no sense why animals in public zoological gardens, a horse show, dog show, for sporting purposes or a caged bird show are excluded. The range of the Act should be determined by its subject matter and what it wishes to protect not by arbitrary exclusions.

1.5. Regulations

Section 7 should be amended to allow the Minister to prohibit any performing or exhibition activity or training methods which can be reasonably be shown to be detrimental to the welfare of animals and expressly to exclude classes and types of animals from being used for such activities. The Minister should be entitled to conduct an investigation into any practices and conditions and their effect on the welfare of animals.

1.6. Terms

1.6.1. The original terms are defined in section 11. The word 'animal' is defined in the PAPA as it is in the Animal Protection Act (i.e. "*animal means any equine, bovine, sheep, goat, pig, fowl, ostrich, dog, cat or other domestic animal or bird, or any wild animal, wild bird or reptile which is in captivity or under the control of any person*") but explicitly excludes reptiles. Given advances in scientific knowledge, it is clear that reptiles can also be the subject of cruel treatment. This exclusion is thus arbitrary. Moreover, the definition of animal as it stands does not include aquatic animals. Thus, highly sentient creatures such as dolphins and orcas are excluded from the operation of the PAPA yet are often used in

performances and exhibitions.[3] In our view, this is arbitrary and aquatic animals should be included within the ambit of the Act.

1.6.2. Section 11 should be amended to read that '*exhibit means to expose for show or engage in any activity for entertainment purposes*'. The definition in the Act is currently too restrictive and should cover all performing animals whether or not people pay or not and whether or not this occurs for public or private purposes.

1.6.3. Furthermore, the definition of the words 'use for safeguarding' in the original Act is unclear and should include all dogs that are used in the process of safeguarding (apart from those in a private domestic context). The focus on dogs alone also appears arbitrary: horses, for instance, are also used in the security industry. We are of the view that this definition should extend to include all animals used for safeguarding purposes (apart from those in a private domestic context).

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[3] In 2013, the Indian Ministry of Environment and Forests banned the establishment of dolphinariums as well as any other commercial enterprise that involves the capture or confinement of cetacean species. The Ministry issued a statement recognizing that 'highly sensitive and intelligent' cetaceans, such as orcas and dolphins, should be regarded as '"non-human persons" and as such should have their own specific rights'. The Ministry went on to justify the ban by pointing out that '[c]onfinement in captivity can seriously compromise the welfare and survival of all types of cetaceans by altering their behaviour and causing extreme distress'. See Government of India: Ministry of Environment and Forests *Policy on Establishment of Dolphinarium* F. N0. 20-1/2010-CZA (M) (17-05-2013). In 2014, the San Francisco Board of Supervisors (the legislative branch of the City and County of San Francisco) issued a resolution recognising that 'every whale and dolphin has the right to be free of captivity, and to remain unrestricted in their natural environment'. See Board of Supervisors *Resolution supporting the free and safe passage of whales and dolphins in San Francisco's coastal waters, San Francisco Bay, and its estuaries* (2014). Proposed legislation banning enterprises that confine cetaceans are currently under 'interim study' in California. See Orca Welfare and Safety Act (AB 2140).

PART FIVE – CONCLUDING REMARKS

1. In this submission, we have sought to provide comments to strengthen the constitutionality and legal framework contained in the Performing Animals Protection Amendment Bill. We contend in the main that the following changes need to be made:

   1.1. The Bill needs to be more explicit about its purpose and protection it offers to animals;

   1.2. The Bill must better guide the discretion of officers who are in charge of granting licenses to take account of particular matters affecting animal welfare directly and outline a set of criteria for making the decision to grant a license or not;

   1.3. The Act should ensure that only individuals with an expertise in animal welfare are entitled to grant licenses and that any delegations of authority occur only to those with such expertise;

   1.4. The Act must ensure access to information for concerned member of the public and organizations about the applications for licenses and the decisions and the ability to place relevant information before the National Licensing Officer;

   1.5. The Act should enable the Minister to pass regulations that prohibit and constrain any practices that are shown to be harmful to animals; and

   1.6. The Act should apply to all animals who are required to perform or are trained, exhibited, or used for safeguarding and the definition should therefore be extended.