Neutral Citation Number: [2019] EWHC 2813 (Admin)

Case No: CO/4770/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 October 2019

Before:

MR JUSTICE MORRIS

- -

Between:

(1) THE ELECTRONIC COLLAR MANUFACTURERS ASSOCIATION (AN UNINCORPORATED ASSOCIATION)	
(2) PETSAFE LIMITED	**Claimants**
- and -	
THE SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS	**Defendant**

- -
- -

Stephen Broach and **Imogen Proud** (instructed by **DLA Piper UK LLP**) for the **Claimants**
Richard Turney (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 22, 23, 24 May and 10, 11 June 2019

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Approved Judgment

Mr Justice Morris:

Introduction

1. By this action, the Electronic Collar Manufacturers Association ("ECMA") and Petsafe Limited ("Petsafe") (together "the Claimants") seek judicial review of the decision of the Secretary of State for Environment, Food and Rural Affairs ("the Secretary of State") dated 27 August 2018 ("the Decision") to ban the use of hand-held remote-controlled e-collar devices for cats and dogs ("e-collars").

2. The Secretary of State announced the Decision following a consultation process which opened on 12 March 2018 and closed on 27 April 2018. On 27 August 2018, the Secretary of State published the Decision in the document entitled "Electronic training collars for cats and dogs in England: Summary of Responses and Government Response – August 2018" ("the Government Response"). The position taken was a "policy decision", being a final decision to introduce regulations under the provisions of section 12 of the Animal Welfare Act 2006 ("the 2006 Act") to ban e-collars.

3. The Claimants contend that the consultation and process by which the Decision was reached were materially flawed and unlawful and that the Decision in substance is irrational, disproportionate and thus unlawful. The Claimants' fundamental contention is that there is an alternative, less restrictive, means of promoting animal welfare by the regulation (rather than outright prohibition) of the use of e-collars. My conclusion is stated at paragraphs 220 and 221 below.

4. The Secretary of State's case, in summary, is that the Claimants' challenge is to the merits of a high level policy decision which followed a consultation exercise in which over 7000 responses were made, including detailed representations from ECMA. The consultation responses were carefully considered by officials, summarised and reported to Ministers. The Decision was ultimately made by the Secretary of State. The fundamental rationale of the proposed ban is the promotion of animal welfare. Welfare is a broad concept and judgments about what measures are appropriate to promote animal welfare are not solely scientific, but involve elements of moral and ethical judgment. Those judgments may vary from time to time (and across different jurisdictions). Through section 12 of the 2006 Act, Parliament has entrusted the decision as to what measures serve the purpose of promoting animal welfare to the Secretary of State.

The Parties

5. ECMA is an unincorporated trade association representing manufacturers and suppliers of electronic dog collars and other electronic training aids for dogs in the UK. Petsafe is a manufacturer and supplier of e-collars, based in Chorley, Lancashire. Ms Angela Critchley is Global Marketing Director of the Petsafe brand of Petsafe's US parent company and that company's representative for the ECMA. She has given evidence in two witness statements. The Claimants have also provided witness statements from Mr Paul Stone, their solicitor in the proceedings, and from Mr James Penrith, a user of e-collars.

6. The Defendant is the Secretary of State (also referred to as "Defra") and is, in England, the "appropriate national authority" under the 2006 Act. Mr Marc Casale,

Head of Defra's Animal Welfare & Disease Control Team, has provided evidence in three witness statements.

The Facts in brief

The nature of e-collars and other devices

7. For present purposes, there are three relevant types of device: e-collars, containment systems and bark control collars. The first two types of devices are described in the consultation document published by Defra at the commencement of the consultation process, entitled "*A ban on electronic training collars for cats and dogs in England: March 2018"* ("the Consultation Document"). E-collars are described as follows:

> *"Remote-controlled devices are operated by the owner/handler and are used to stop unwanted behaviour such as chasing livestock. The owner or handler has a remote device which can trigger an electronic pulse (similar to a static pulse which can be varied in strength) or which can emit a noxious spray…"*

Containment systems are described as follows:

> *"Containment systems can be used to keep a dog or cat within the owner's garden reducing the chances of the animal straying into a busy road or defecating on someone else's property. In such situations the e-collar sends out an electronic pulse or a noxious spray when the animal approaches the boundary …"*

(Whilst this description refers to the term "e-collar", for the purposes of this judgment, I use that term to refer only to the former remote-controlled device operated by the owner).

8. The third type of device, a bark control collar, is a device which is activated by the animal's behaviour and not by the owner. When the dog barks, the collar detects vibration from the voice box, activating delivery of an electrical pulse or other types of stimulant.

The chronology in outline

9. The effects of these devices had been contentious over a number of years and the subject of research reports, and in particular Defra-funded research completed in 2011 (see paragraph 30 below). They had been also made the subject of advice under the statutory code. In 2010 the Welsh Government had imposed a ban on e-collars. In Scotland, there had been an extensive and detailed statutory consultation in 2015-2016. At first the Scottish Government decided not to impose a ban, but rather to deal with the issue by way of licensing/regulation. In 2018, the Scottish Government changed its approach by introducing guidance which suggested that use of e-collars, in certain circumstances, might be an offence.

10. In England, from 2013 until early February 2018, Defra's position was that the evidence provided by the Defra-funded research was not sufficient to justify a ban of

e-collars or containment systems, but rather that the matter was addressed by advice in the statutory code.

11. Later that month, February 2018, the Secretary of State changed his position and brought forward a proposal to ban e-collars and containment systems. This proposal was put out to consultation, as required by the 2006 Act. On 11 March 2018, Defra published the Consultation Document, and on the next day, the consultation response window of 6 weeks opened. In the Consultation Document, the Secretary of State sought views on a proposed ban of e-collars (including at that stage a proposed ban on containment systems). A large number of responses, from welfare organisations and from individuals, were received. ECMA submitted its response to the consultation on 26 April 2018, setting out its position as to why there is a need for electronic training systems and why they should not be banned.

12. On 26 April 2018 the Secretary of State made a statement in Parliament ("the Parliamentary Statement") in which, it is contended by the Claimants, he indicated a decision to ban e-collars. On 27 April 2018 the consultation response window closed. On the same day, The Times reported, and commented upon, the Parliamentary Statement.

13. In June and July 2018, Defra held further meetings with particular interested parties. On 18 July 2018, there was a meeting between Mr Philip Alder of Defra and ECMA representatives.

14. In this period, Defra officials collated and analysed the over 7000 responses to the consultation and produced a draft of the Government Response. On 3 August 2018, Defra officials made a "Submission to Ministers" ("the Ministerial Submission") outlining the consultation responses, the options open to the Secretary of State and recommending a ban on e-collars, but not on containment systems.

15. On 27 August 2018 the Decision was announced by press release and contained in the published version of the Government Response. The Government would ban e-collars, but not containment systems. The terms of the Decision are set out in paragraph 87 below.

Proceedings

16. On 12 November 2018, ECMA sent a pre-action protocol letter. Following a holding response from the Secretary of State on 16 November 2018, on 26 November 2018 ECMA issued proceedings seeking permission to apply for judicial review. On 20 December 2018 Petsafe was joined as a second claimant. On 24 January 2019, permission to apply for judicial review was granted by Lang J. On 21 March 2019, the Office of the Speaker's Counsel wrote to the Government Legal Department setting out its position on the admissibility of the Parliamentary Statement (see paragraph 130 below).

Evidence (witness statements/disclosure)

17. At the outset of the hearing there were a number of applications before me concerning evidence and disclosure. I allowed the admission of further evidence (some of which I refer to below). I decided to leave the issue of admissibility of the Parliamentary

Statement until this substantive judgement (see paragraphs 129 to 138 below). The disclosure application is addressed at paragraph 39 below. The Secretary of State initially relied upon the first statement of Mr Casale dated 22 March 2019. Mr Casale has direct experience of the evolution of Government policy relating to the welfare of captive animals, including the formulation of, and consultation on, the changes to the use of electronic training collars for dogs in England.

The Claimants' claim in outline

18. In summary, the grounds of claim are as follows:

Ground 1: The consultation process was flawed and unlawful (see paragraphs 109 to 180 below);

Ground 2: The Decision is vitiated by the appearance of pre-determination (see paragraphs 113, 121(8), 140, 163 and 180 below);

Ground 3: The Decision was taken in breach of the duty of inquiry established in *Secretary of State for Education and Science v Tameside Metropolitan Council* [1977] AC 1014 ("*Tameside*") (see paragraphs 181 to 184 below);

Ground 4: The Decision was irrational in that it was *Wednesbury* unreasonable (see paragraphs 185 to 203 below);

Ground 5: The Decision was disproportionate and breached the rights of the Claimants under Article 1 Protocol 1 of the European Convention on Human Rights ("A1P1") and Article 34 of the Treaty of the Functioning of the European Union ("TFEU") (see paragraphs 204 to 219 below).

19. In response the Secretary of State contends that the Claimants' case is unfounded.

(1) As to Ground 1, the consultation was lawful. It was entirely appropriate to consult on the basis of a preferred policy. The consultation was carried out fairly, and the product of the consultation was carefully considered and the policy materially changed as a consequence.

(2) As to Ground 2, there was no appearance of pre-determination. This ground is based on an inappropriate use of Parliamentary material, which should be excluded by the Court, but in any event is misconceived as a matter of fact.

(3) As to Ground 3, the Secretary of State did not act in breach of any duty of inquiry.

(4) As to Ground 4, the Decision is not irrational and the claim comes nowhere near meeting the high threshold for judicial review on that ground.

(5) As to Ground 5, the Decision does not in itself amount to an interference with any Convention or Treaty rights, since any such interference could only arise to the imposition of a ban (rather than an intention to ban in the future). Even if there was such an interference, it is a proportionate interference for a legitimate aim and the Claimants' case is hopeless in the light of the judgment

in *R (Petsafe Limited) v The Welsh Ministers* [2010] EWHC 2908 (Admin) ("*Petsafe*").

Legal background

The Legislation: the 2006 Act

20. The 2006 Act is the relevant governing primary legislation. It is an Act "to make provision about animal welfare; and for connected purposes."

21. Section 4, entitled "Unnecessary suffering", provides that it is an offence to cause a protected animal, or allow a protected animal to be caused, unnecessary suffering. Section 4(3) and (4) sets out the considerations relevant to determining whether suffering is unnecessary, in the following terms:

> *"(3) The considerations to which it is relevant to have regard when determining for the purposes of this section whether suffering is unnecessary include–*
>
> *(a) whether the suffering could reasonably have been avoided or reduced;*
>
> *(b) whether the conduct which caused the suffering was in compliance with any relevant enactment or any relevant provisions of a licence or code of practice issued under an enactment;*
>
> *(c) whether the conduct which caused the suffering was for a legitimate purpose, such as–*
>
> *(i) the purpose of benefiting the animal, or*
>
> *(ii) the purpose of protecting a person, property or another animal;*
>
> *(d) whether the suffering was proportionate to the purpose of the conduct concerned;*
>
> *(e) whether the conduct concerned was in all the circumstances that of a reasonably competent and humane person.*
>
> *(4) Nothing in this section applies to the destruction of an animal in an appropriate and humane manner."* (emphasis added)

22. In a separate part of the 2006 Act, entitled "Promotion of welfare", section 9 imposes a distinct duty upon a person responsible for an animal to ensure welfare, creating a separate offence. It provides, inter alia, as follows:

> *"(1) A person commits an offence if he does not take such steps as are reasonable in all the circumstances to ensure that*

> *the needs of an animal for which he is responsible are met to the extent required by good practice.*
>
> *(2) For the purposes of this Act, an animal's needs shall be taken to include–*
>
> *(a) its need for a suitable environment,*
>
> *(b) its need for a suitable diet,*
>
> *(c) its need to be able to exhibit normal behaviour patterns,*
>
> *(d) any need it has to be housed with, or apart from, other animals, and*
>
> *(e) its need to be protected from pain, suffering, injury and disease.*
>
> *…*
>
> *(4) Nothing in this section applies to the destruction of an animal in an appropriate and humane manner."* (emphasis added)

23. Under the same part of the 2006 Act, section 12 then provides the enabling power to make regulations. This is the power under which the Secretary of State proposes to ban the use of e-collars. In particular, section 12(6) sets out the statutory duty of consultation relevant to the proceedings. Section 12 provides, inter alia, as follows:

> ***"Regulations to promote welfare***
>
> *(1) The appropriate national authority may by regulations make such provision as the authority thinks fit for the purpose of promoting the welfare of animals for which a person is responsible, or the progeny of such animals.*
>
> *(2) Without prejudice to the generality of the power under sub-section (1), regulation under that subsection may, in particular-*
>
> *(a) make provision imposing specific requirements for the purpose of securing that the needs of animals are met;*
>
> *(b) …*
>
> *(3) Power to make regulations under subsection (1) includes power-*
>
> *(a) To provide that breach of a provision of the regulations is an offence;*

> …
>
> *(4) Power to make regulations under subsection (1) does not include power to create an offence triable on indictment or punishable with-*
>
> *(a) Imprisonment for a term exceeding 51 weeks, or*
>
> *(b) A fine exceeding level 5 on the standard scale*
>
> …
>
> ***(6) Before making regulations under subsection (1), the appropriate national authority shall consult such persons appearing to the authority to represent any interests concerned as the authority considers appropriate.***
>
> …" (**emphasis** added)

24. Section 14 provides that the appropriate national authority may issue codes of practice for the purpose of providing practical guidance in respect of any provision made by or under the 2006 Act. Section 15 sets out the procedure for the making and approval of a code of practice, including a consultation procedure. A code provides owners with information on how to provide for the welfare needs of their dogs. Whilst it is not an offence to breach the code, if proceedings are brought against someone for an offence under the 2006 Act (including sections 4 and 9), the Court will look at whether that person complied or otherwise with the code in deciding whether they committed an offence. The Code of Practice for the Welfare of Dogs ("the Code") made under ss14 and 15 of the 2006 Act came into force in 2010. Relevant parts of the most recent version (amended after consultation with ECMA) are set out in paragraph 35 below.

The Scotland 2006 Act

25. There is similar statutory provision in Scotland, namely the Animal Health and Welfare (Scotland) Act 2006 ("the Scotland 2006 Act"). Section 26 is in terms similar to section 12 of the 2006 Act. Section 26(5) imposes a duty to consult in similar, but not precisely the same, terms. Section 37 makes provision for Scottish Ministers to make *codes of practices*, in terms similar to s.14 of the 2006 Act. Section 38 provides that the Scottish Ministers may, with a view to securing the welfare of protected animals, issue *guidance* on such matters as they consider appropriate. There is no requirement for consultation before the issuing of guidance.

The law on consultation: generally

26. At this point I set out some general principles relating to the duty of consultation in public law, relevant to Ground 1. These are not substantially in dispute. I have been referred to a considerable number of authorities. The most pertinent are *R v Brent London Borough, ex parte Gunning* (1985) 84 LGR 168; *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 2131 (CA); *R (Montpeliers and Trevors Association) v City of Westminster* [2005] EWHC 16 (Admin); *R (Royal*

Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts [2012] EWCA Civ 472 126 BMLR 134 (CA); *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56 [2014] 1 WLR 3947 (also known as "*Stirling"*); *R (Robson) v Salford City Council* [2015] EWCA Civ 6 [2015] PTSR 1349; *R (West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441 [2016] 1 WLR 3923; *R (Langton) v Secretary of State for Environment, Food and Rural Affairs* [2018] EWHC 2190 (Admin) [2019] Env L R 9; *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin) [2019] 1 WLR 1649; *R (Spurrier) v Secretary of State for Transport* [2019] EWHC 1070 (Admin). The two leading authorities are *Coughlan* and *Moseley.*

27. From these authorities, the following general propositions can be stated.

(1) A duty of consultation may arise under express statutory provision or, in certain circumstances, as part of the common law duty of procedural fairness.

(2) In either event, the content of the duty comprises four elements (as explained in *Coughlan* §108, citing *Gunning* and as now approved in *Moseley* per Lord Wilson at §24).

1) Consultation must be undertaken at a time when proposals are still at a formative stage. *("Coughlan (1)")*

2) It must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response. (*"Coughlan (2)")*

3) Adequate time must be given for this purpose. *("Coughlan (3)")*

4) The product of consultation must be conscientiously taken into account when the ultimate decision is taken. *("Coughlan (4)")*

The legal principles relating specifically to each of these four requirements are addressed in paragraphs 139 to 153 below.

(3) The duty of consultation is protean and highly fact sensitive: *Moseley* per Lord Wilson §24 and *Law Society* §68.

(4) The "Coughlan" requirements are said to be a "prescription for fairness": *Royal Brompton* §9 and *Law Society* §67. Whilst at common law, and absent a statutory duty, there is no general overriding duty to consult, a duty to consult may arise as part of the common law duty of procedural fairness: *Moseley* per Lord Reed §35. Where the duty does arise from a particular statute, it is important to concentrate upon the particular statutory context and particular statutory purpose for which the consultation in question is carried out. There is a difference in emphasis in the authorities. Some suggest that even where the source of the duty is statutory, the duty forms part (or is informed by) of the common law principle of procedural fairness: see *Montpelier* §26, *Royal Brompton* §9, *Moseley* per Lord Wilson §23. Other authorities suggest that, where the source of duty is statutory, it is important to concentrate on the particular statutory context; the statutory duty is distinct, depends on the facts

and does not directly involve the common law duty of procedural fairness: *Moseley* per Lord Reed §§34 to 37 and subsequently *Langton* §105 and *Spurrier* §126. As discussed further below, there are differences in the judgments of Lord Wilson and Lord Reed in *Moseley.* Baroness Hale and Lord Clarke (at §44) whilst agreeing with both judgments, went out of their way expressly to support Lord Reed's approach. To the extent that such differences are material, I consider that, in the light of the observations of Baroness Hale and Lord Clarke, it is the judgment of Lord Reed which more closely represents the view of the majority of Supreme Court and I follow that approach.

(5) The purpose of the particular consultation is important in considering the content of the duty to consult and in turn that purpose is to be derived from the statutory context. In *Moseley* Lord Wilson at §24 identified three possible purposes which may arise in particular cases: first, in order to lead to better decision-making, by ensuring that the decision-maker receives all relevant information; secondly, to avoid a sense of injustice on the part of the person who is the subject of the decision (described by Lord Reed at §38 as procedural fairness in the treatment of persons whose legally protected interests may be adversely affected); and thirdly, where the consultation needs to be wide-ranging and is not directed at protecting interests of particular individuals, to reflect the democratic principle of public participation in the decision-making process (see Lord Reed at §38). See also *Spurrier* §127.

(6) The ultimate test is one of "clear unfairness" i.e. whether the consultation process as a whole was so unfair as to be unlawful, i.e. where something has gone clearly and radically wrong: *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin) §§62, 63, *Royal Brompton* §13, *Robson* §§25, 35, *West Berkshire* §60, *Langton* §104 and *Law Society* §68. (I do not accept the Claimants' submission that the Supreme Court in *Moseley* did not endorse such a requirement). Aspects of unfairness should be reviewed both individually and in aggregate. An individual aspect may seem trivial on its own, but may acquire greater significance when seen with other aspects of unfairness: *Royal Brompton* §12.

(7) In *Moseley*, Lord Wilson referred to three other matters relevant to the content of the duty to consult: first the identity of the particular consultees may influence the degree of specificity in the consultation; secondly, the demands of fairness are likely to be higher when an authority contemplates depriving someone of an existing benefit or advantage (§26); and thirdly, it may be permissible to test the fairness of the consultation in question by comparing it with a consultation carried out by another body in respect of the same or a similar issue (§30).

The Facts in detail

Background

28. Prior to the 2006 Act and the 2010 Code there had been no specific controls on the use of e-collars. From 2010 the use of e-collars had been controlled through the Code.

29. There has been a long-running campaign by animal welfare organisations and dog interest groups to ban the use of e-collars because they were considered cruel and unnecessary. Mr Casale pointed out that, in terms of any evidence of cruelty, whilst there had been a number of research studies carried out, none of them had been funded by government. The then existing evidence did not lead the Westminster government of the time to ban e-collars. However in 2010 the Welsh Government decided to ban the use of all e-collars on the basis that they were cruel.

The Defra-funded research

30. Due to the conflict between animal welfare organisations and the e-collar industry, the Government decided in 2007 to fund research into whether e-collars were cruel to dogs. That research was conducted by the University of Lincoln. There were two projects. First, project AW1402 ran from September 2007 to November 2010 and the final report was published on 10 June 2013. The second project, AW1402a was a further study of dogs in training which ran from October 2010 to June 2011 with a final report being published also on 10 June 2013. I refer to AW1402 and AW1402a, respectively, as "Lincoln 1" and "Lincoln 2", and to the two projects compendiously as "the Lincoln research". The background to, and content of, these reports is set out in more detail in paragraphs 88 to 90 below. They are key background to the events leading up to the consultation, to the consultation itself and the Decision. A further relevant report was provided by the Companion Animal Welfare Council published in 2012 ("CAWC Report"): see paragraph 92 below.

ECMA's position

31. In her evidence, Ms Critchley stated that it is estimated that over 500,000 people in the UK own and use or have used either an electronic containment system or an e-collar, as a training device or bark control device. A ban on use has been implemented in Germany, Wales, Denmark and other countries. In other countries there has been regulation. There is no consensus amongst developed Western nations with equivalent standards of animal welfare that these products should be banned or that a ban is in fact an effective or sensible means of regulating the use of electronic collars. She also pointed out that ECMA and its members are strongly in favour of regulation for e-collars designed for use in training dogs. ECMA has worked closely with authorities in the Netherlands and in the State of Victoria to develop effective systems of regulation and also with the Chief Veterinary Officer in Scotland on options for regulation.

32. Ms Critchley stated that, in the majority of cases with most well-behaved dogs reward-based training will suffice and there is no need to consider other methods. There is however a significant minority of dogs where reward-based training will not work to correct an underlying behavioural problem; that is not seriously open to dispute. She suggested that if reward-based training does not work then, if there is a ban, the only alternative is that the pet in question should either be euthanised or constrained in such a way that it leads a very constricted life, which may adversely affect its welfare. She pointed out that no consideration has been given to the fact that if electronic collars are banned, other owners may resort to the use of other products, such as physical choke collars or prong collars, with potentially far worse welfare consequences.

33. In his statement dated 27 April 2019 Mr Penrith gave evidence "to assist the court in further understanding e-collars including how they are used to address behavioural problems in certain dogs". He explained that he is an experienced and well regarded dog training professional and founder of Take the Lead Dog Training, his business providing training for behaviourally challenged dogs throughout the UK. He worked as a professional dog trainer for several years – at first employed by Devon and Cornwall Police Force from 2003 to 2013. The force, in common with many other police forces, used a number of highly aversive training devices and techniques, including choke collars. His view is that choke collars can be far more damaging to a dog than an e-collar. He then gave evidence of his experience of using e-collars during the course of 2011 with his own dog. The collar had proved to be remarkably effective at correcting his dog's innate predatory behaviour. In his experience, for some dogs, e-collars are an appropriate way to resolve otherwise intractable behavioural problems. In his practice, he treats at least 100 to 150 dogs a year using e-collars. He supports targeted regulation by government both in relation to e-collar manufacturing standards and professional status, a government backed "kitemark" scheme for e-collar devices and mandating that only government-registered dog trainers could use e-collars. He states that the RSPCA had seen his work and on more than one occasion had informed him that they have no problem with his use of e-collars for training purposes.

Chronology

10 June 2013

34. By email dated 10 June 2013 Mr Alder of Defra's Animal Welfare & Dangerous Dogs Team responded to a request from Ms Critchley for a copy of Lincoln 2, and set out Defra's then current "lines" on that research in the following terms:

> *"• While research showed no evidence that e-collars cause long-term harm to dog welfare when used appropriately, Defra wants to ensure electric dog collars are used properly and manufactured to a high standard.*
>
> *• We will work with the Electronic Collar Manufacturers Association to draw up guidance for dog owners and trainers advising how to use e-collars properly and to develop a manufacturers' charter to make sure any e-collars on sale are made to high standards.*
>
> *• A ban on e-collars could not be justified because the research provided no evidence that e-collars pose a significant risk to dog welfare. For a ban to be introduced there would have to be evidence showing they were harmful to the long-term welfare of dogs."* (emphasis added)

Thus, at this point in time Defra's position was that evidence of harm to animal welfare is required to justify a ban on e-collars, but that Lincoln 2 did not provide such evidence.

August to December 2017: Amendment of the Code, with consultation with ECMA

35. In his first witness statement, Mr Casale explained that the then Government decided that the conclusions in the Lincoln reports were not enough to warrant a ban on the use of the collars. Instead in December 2017 the Government amended the Code; e-collars are addressed as follows:

> *"Training dogs is important to help them learn to behave appropriately and to make it easier to keep them under control. … An incorrect training regime can have negative impacts on your dog's welfare. Reward-based training which includes the use of things that dogs like or want (e.g. toys, food and praise) is enjoyable for your dog and is widely regarded as the preferred form of training dogs.*
>
> *Training which includes physical punishment may cause pain, suffering and distress. These techniques can compromise dog welfare, lead to aggressive responses and worsen the problems they aim to address."* (emphasis added)

This wording had been agreed with animal welfare organisations and ECMA. In particular between June and August 2017 there had been correspondence between Mr Alder and Ms Critchley. Defra took on board drafting amendments suggested by ECMA, leading to the highlighted words above.

5 February 2018

36. In early February 2018, Defra wrote to a number of interested parties setting out its position on e-collars. By letter dated 5 February 2018 to a Mr Thomas Slater, Mr Mark Oroma of Defra's Ministerial Contact Unit, wrote in the following terms:

> *"…*
>
> *I understand the strong feelings that some people have about the use of these training devices and we are aware of the Scottish Government's recent announcement, intending to ban their use. Before introducing a blanket ban on their use however, the Government would need to be satisfied that such a ban was in the public interest and could be supported from an animal welfare point of view.*
>
> *In 2013, Defra published research it had commissioned on the use of electronic training aids for dogs. The findings provide evidence that electronic aids can have a negative impact on the welfare of some dogs, but not all. The evidence from the studies was not strong enough to support a ban on the devices under the Animal Welfare Act 2006. The claim that electronic training aids may be no more effective than other training methods is not in itself a reason to introduce a ban or to impose restrictions on their use. Having said that, our advice is that electronic training aids should only be used as a last resort and*

> *on the recommendation of a professional such as a vet, a suitably qualified dog behaviourist, or a dog trainer, and should only be used by competent operators.*
>
> *We have updated the statutory Code of Practice for the Welfare of Dogs (made under the Animal Welfare Act 2006), and strengthened the form of wording on the use of negative training methods. The draft code, which is currently before Parliament, makes it clear that any training method which includes physical punishment may cause pain, suffering and distress and could lead to aggressive responses and worsen the problems they aim to address."* (emphasis added)

"The published research" and "the evidence" referred to in the letter is Lincoln 2. Thus, the Secretary of State's position in early February 2018 was that evidence did not support a ban on e-collars. Secondly, the letter accepts that there has to be "evidence" relating to animal welfare in order to support a outright ban. Thirdly the letter accepts that the appropriate course is control of use of e-collars by other means.

37. This was a "standard lines" letter which would have been sent to others who had inquired. However there is no evidence that this position was publicly announced or otherwise published to the world at large. In his first witness statement, Mr Casale summarised Defra's position at this stage as follows:

> *"Between 2011 and the beginning of 2018 there was continuing interest from animal welfare organisations and ECMA in the state of Government policy on e-collars. Officials and Ministers responded to correspondence to the effect that there were no proposals to ban the use of e-collars but that the Code had been updated and referred to training which causes pain and distress."*

A change of position

38. It is not now disputed that shortly after the letter(s) at the beginning of February 2018, the Secretary of State's position in relation to a ban on e-collars changed. Mr Casale's first witness statement continued as follows:

> *"16. In February 2018 Ministers indicated that they wished to consider a ban on e-collars and sought the advice of officials. On 21 February 2018, officials provided advice setting out four options: (i) amend the statutory dog welfare code to ban e-collar use; (ii) introduce a Statutory Instrument (SI) to ban e-collar use; (iii) consider a hybrid approach (i.e. introduce an SI but via the lighter process applying to updating a welfare code); and (iv) introduce an SI to ban e-collars sales and imports.*
>
> *17. The four options reflect various combinations of changes to the statutory welfare code and to legislation itself.*

> *Having read the paper and considered the options, Ministers decided to choose option (ii).*
>
> *18. Before a public consultation on a proposal to ban e-collars could begin, Defra first needed to gain approval from the Social Reform (Home Affairs) sub-Committee (a Cabinet Committee). This "write-round" took place between 22 and 27 February 2018. On 1 March 2018 the Chair of the Social Reform (Home Affairs) sub-Committee approved Defra to consult widely (for a period of 6½ weeks) on a proposal to ban the use of all e-collars."*

The disclosure application and Mr Casale's second and third statements

39. The indication given by Ministers referred to in the first sentence of paragraph 16 of Mr Casale's witness statement had been contained in an exchange of emails between officials. The Claimants sought disclosure of those emails. I heard detailed submissions including reference to relevant case authority, and in particular *Tweed v Parades Commission* [2007] 1 AC 650. It seemed to me that the relevant issue to which the documents related, if any, was the underlying rationale for the apparent change of position, namely the wish to consider introducing a ban on e-collars. In argument, Mr Turney on instructions confirmed that the emails contained no additional reasoning or rationale. On that basis, I declined to order such disclosure on the grounds that it was not necessary to dispose fairly of that, or any other, issue. I directed that the Secretary of State should serve a witness statement confirming what had been stated in oral argument. Thus, in his second statement dated 23 May 2019, Mr Casale confirmed that the email sent by Ministers in February "did not contain any rationale or reasons for the Ministers' indication of the wish to consider a ban on e-collars and request for advice". At the same time I was informed that the Secretary of State did not wish to put in any further evidence as to the underlying reason for the change of position.

40. However, subsequently upon the resumption of the oral hearing on 10 June, Mr Casale provided a third witness statement, in which he addressed the question of the rationale for considering a ban on e-collars in February 2018 and whether this represented a change of position. He explained:

> *"Defra considers that in general whilst research evidence in a particular area may not have changed since the last time a policy position was presented, the views and attitudes of society towards that area to which the research pertains may change. For example, the research may indicate that a risk of harm exists in a particular situation. Whilst that risk itself might not change over time, society's attitude towards and acceptance of that risk might evolve and become less accepting. It is legitimate for views on the desirable policy which relates to that research to evolve over time in line with the changing views and attitudes of society, and for a consultation to inform what, if any, changes to the policy should be.*

> *In this instance, the research referred to as AW1402 and AW1402A identified some adverse effects on the welfare of dogs from the use of electronic collars in some circumstances. The position of Ministers was initially that this evidence did not support a ban on the use of these devices. However, having taken into account the current views of society towards animal welfare in relation to this particular area, Ministers considered that there was a case for a change in policy subject to the outcome of the public consultation."* (emphasis added)

Mr Casale went on to confirm that the letter of 5 February 2018 "reflected Defra's policy on electronic collars at that time", although the decision to consider a change in approach "followed shortly afterwards".

41. Essentially, Mr Casale accepted that that the Secretary of State had changed his position on whether e-collars should be banned, and recognised that the evidential basis relevant to the issue of a ban on e-collars has not changed. The rationale for the change of position was an evolution in desirable policy relating to that evidence, in line with "the current views of society towards animal welfare" which he suggested had been or might be evolving. The change of position appears to have occurred some time between 5 and 21 February.

The Consultation Document 11 March 2018

42. On 11 March 2018 Defra published the Consultation Document. It runs to 5 pages in total, the substance of the material presented being comprised in 3 pages. In the first section headed "Overview", the Consultation Document describes "types and uses of e-collars" referring only to two types of device: hand-held remote-controlled devices and containment systems. There is no reference to bark collars. In the next section headed "Other parts of the UK", the Consultation Document states:

> *"Scotland has recently announced plans to issue Scottish government guidance which highlights the welfare effects of e-collars and clarifies what offences may apply in relation to their use."*

In a footnote to that sentence, the Consultation Document set out an extract from a draft of the Scottish guidance, in substantially similar terms to the guidance eventually issued: see paragraph 105 below. This section of the Consultation Document then referred to the ban on use of e-collars in Wales and continued:

> *"In light of growing concerns regarding the use and potential misuse of e-collars in England, and in order to protect the welfare of cats and dogs, we wish to ban their use here by introducing regulations under the Animal Welfare Act 2006. ..."* (emphasis added)

43. In the next section, headed "Electronic collars for cats and dogs - a ban on their use in England", the Consultation Document states:

> *"We are proposing right now to make it an offence to use an e-collar or even to put one on a cat or dog, or be in charge of a cat or dog that is wearing one. This will dry up sales of these punitive devices.*
>
> *We will consider all consultation responses carefully and want to hear views about what these proposals will mean for the sale and retailers of e-collars and whether any further restrictions will be required beyond what the government is proposing in order to deliver our objective to end their use."*

44. The next section, headed "Welfare effect of e-collars", states:

> *"Defra-funded research published in 2014* [i.e. Lincoln 2 report] *showed that e-collars can have a detrimental welfare effect on dogs and can cause harm and suffering. The research also showed that many owners did not read the manufacturers' instructions prior to use. Many animal welfare organisations, veterinary representative groups, the Kennel Club and many dog trainers and behaviourists are opposed to the use of e-collars, not just on account of the harm they can cause, but also because they are a negative form of training. Many consider that dog should only be trained with positive reward methods (e.g. offering morsels of food to encourage correct behaviour). Many consider that negative forms of training which inflicts some form of punishment do not necessarily work, can be counter-productive and can cause the dog to exhibit other problems or dangerous behaviour.*
>
> *It has also been suggested that e-collars might have a beneficial impact for example in preventing dangerous and harmful behaviour by dogs which are out of control, and that e-collars might be a last resort measure for poorly behaved dogs which would otherwise be put down. Relatively little evidence has been provided to support the suggestions, although evidence about the harm e-collars inflict on pets has been growing.*
>
> *Weighing up the evidence which has been emerging about the impact of e-collars, and taking account of public concerns that we should treat all our pet animals with appropriate reward and respect, Defra has concluded that the time is now right to adopt a legal ban on the use of e-collars in England. This would bring the law in England into line with the law in Wales where they are already banned.*
>
> *Users and manufacturers of e-collars argue that when used correctly they might enable difficult dogs that do not respond to more traditional positive reward training to be trained and controlled. They also argue that containment systems can keep cats and dogs within a defined area where alternative methods*

> *are not realistically possible, for the benefit of their safety and also to prevent unwanted behaviours occurring in other places."* (emphasis added)

45. In the next section "Scope of a ban", the Consultation Document sets out that the ban could apply to the use of e-collars on cats and dogs and could be introduced by regulations providing for an offence and an appropriate level of penalty. It continues:

> *"If Defra proceed with such a legal ban, the statutory dog and cat codes in England would be amended to align them with the regulations banning the use of e-collars after the adoption. In addition the statutory dog and cat codes could be amended to align them with the language on e-collars proposed by Scotland in their government guidance."* (emphasis added)

46. The final substantive section of the Consultation Document, headed "Impact on e-collar suppliers and manufacturers" states as follows:

> *"As a consequence of the proposed ban on the use of e-collars we expect that pet owners and handlers will instead use other means of managing their pet's behaviours. Businesses which supply and manufacture e-collars may experience a reduction in profits. However we would expect a rise in demand from the suppliers and manufacturers of other pet training aids and implements. The suppliers and manufacturers of e-collars themselves may consider whether to focus on other markets where these devices can still be used."* (emphasis added)

47. The Consultation Document concludes by setting out an invitation for consultation responses. Under the heading "Next steps" it states:

> *"We would welcome comments on **the proposal** to introduce an offence to attach an e-collar to a cat or dog, to cause an e-collar to be attached to a cat or dog, or to be responsible for a cat or dog which has an e-collar attached. Please feel free to comment on all aspects of the proposals including the expected impacts."* (**emphasis** added)

The Consultation Document invited responses by 27 April 2018. In his first witness statement, Mr Casale stated that whilst consultation periods vary, the 6½ week period was considered by officials and Ministers long enough for people and organisations to submit their views and, in accordance with the Cabinet Office Consultation Principles, proportionate in the circumstances. Apart from the Claimants' concerns, Defra did not receive any complaints about the period being too short.

48. Consultees were provided with an opportunity to respond in a number of ways, including an online facility, allowing responses to be made using a tick box system with additional space for free text. That facility posed nine questions. Question 6 and 7 asked the consultees, effectively, whether there should be a ban on e-collars.

49. In her second statement dated 5 June 2019, Ms Critchley explained that, prior to publication of Consultation Document, there had been no attempt by Defra to take soundings from ECMA and this was in contrast with the previous pattern of engagement with ECMA. It was also in contrast with the approach of the Scottish Government. There had been a long history of detailed engagement by Defra with ECMA, particularly between 2006 and 2015 and again later in 2017. Up to that time, ECMA had been proceeding on the basis that Defra would let it know about any material change in its approach to controls on use of e-collars.

March 2018 Tweets

50. On 11 March 2018, Defra's official Twitter feed posted quotes from the RSPCA and the Dogs Trust supporting the ban, as follows. First, Defra tweeted:

> *"@RSPCA_official dog welfare expert Samantha Gaines gives her views on the purposed [sic] ban on [hashtag] ElectronicTrainingCollars.*
>
> > *"These cruel devices are used to train and control cats and dogs using pain and fear. Not only is this unacceptable but they are also unnecessary to achieve long-term behavioural change.""*

In the second Defra tweet:

> *"We are delighted that the Government has announced a consultation on banning the use of electronic shock collars" @ DogsTrust Dr Rachel Casey shares her views.*
>
> > *"We are delighted that the Government has announced a consultation on banning the use of electronic shock collars. This decision is a major step towards improving dog welfare."*
> >
> > *Dr Rachel Casey Director of Canine Behaviour and Research at Dogs Trust."*

The Consultation Responses: 12 March 2018 to 27 April 2018

51. There were 7,334 responses to the Consultation Document, from organisations (including the RSPCA and the Kennel Club), or individuals, associated with a relevant sector and from members of the public.

Countryside Alliance

52. In its consultation response dated 5 April 2018, the Countryside Alliance expressed its disappointment that the Government was intending to introduce an outright ban without proper consideration of other options; including regulation, a licensing system or statutory controls on the quality and specification of devices. Such options were not included in the Consultation Document, but the Countryside Alliance expressed the hope that Defra would consider them. They also expressed disappointment that the Consultation Document dismissed the argument that electric collars can be a useful

device in cases of last resort. They pointed out that the use of e-collars can bring benefits to animals that might otherwise have led very restricted lives. The Government seemed to have misunderstood the concept of cruelty and the distinction between unnecessary and necessary suffering. They further pointed out that the Consultation Document ignored the findings of the Scottish consultation which had found that respondents were evenly divided.

53. In a statement dated 20 April 2018, Mr Tim Bonner, the Chief Executive of Countryside Alliance, stated:

> *"It is illustrative of the Government's confusion over animal welfare issues at the moment that it is reluctant to act on a real and evidenced animal welfare issue like sheep worrying, but ready to legislate on electric collars where evidence suggests at most a marginal welfare problem. Worse than that a ban on electric collars and boundary fences could see more sheep attacked and more dogs shot or euthanised."*

Consultation response of Caroline Furze 25 April 2018

54. An individual consultation response was submitted by Ms Caroline Furze on 25 April 2018. She is a woman in her late 40s, wheelchair dependent due to multiple sclerosis. She set out the benefits of the use of an e-collar on her beloved dog, particularly so as to prevent it chasing livestock, which is essential in the area in which she lives. It is better than other methods of aversive training. Positive enforcement is not sufficient alone. Use of e-collars is safe, effective and minimally distressing. The research cited is weak to non-existent and does not address the effectiveness of the different training methods. It is wrong to penalise those who use e-collars responsibly, just because some people might misuse them. The farmer is entitled to shoot the dog chasing livestock, but the dog owner is not entitled to stop it chasing by use of a mild electric shock.

ECMA submissions on consultation 26 April 2018

55. On 26 April 2018, one day before the close of the consultation period, ECMA submitted its consultation response ("the ECMA Consultation Submission"). This was a substantial document comprising 36 pages of argument and a further 23 pages of annexed material.

56. In the opening "summary", the ECMA set out its grounds for opposing the proposed ban on e-collars: the consultation process was not lawful; there were substantive and significant errors of fact and law within the proposal; there was no evidence or analysis to support a blanket ban; with proper regulation, e-collars will contribute to an overall improvement in animal welfare; and Defra should follow the good regulatory model proposed in Scotland.

57. ECMA submitted that:

    (1) Existing animal welfare law is capable and competent to deal with any misuse of training methodologies or equipment. Use of a quality product under qualified supervision addresses all concerns of animal interest groups.

(2) There is an existing regulatory model that enables Defra to lawfully meet its objectives and to ensure that dogs are safely trained under professional supervision in instances where the use of electronic training systems is considered to be the best training tool.

(3) Evidence research and common sense demonstrate that positive reward systems are not 100% effective in 100% of dogs and 100% of dog/owner/community circumstances.

(4) There are times where the use of reliable, controlled and supervised electronic training systems is not only reasonable but necessary to ensure that the dog is properly trained to behave safely and socially in all situations.

Part 1 of the ECMA Consultation Submission concluded by making recommendations, including to obtain and publish a comprehensive expert analysis of the potential impact of alternative proposals for reform/regulation.

58. In Part 2, the ECMA identified examples of issues which required further analysis and research by Defra. These included considering the full range of products now available for the control of dogs and cats; what alternative products/methods will be used in the place of e-collars when banned; anecdotal evidence showed a troubling increase in sheep worrying by dogs that have escaped and bite victims and further detrimental consequences associated with poorly trained dogs. ECMA submitted that an outright ban does not work in practice and pointed to the strong evidence from Victoria in Australia that regulation can work and deliver positive benefits. ECMA went on to point out a number of mistakes said to have been made by Defra. Defra had misrepresented the position of the Scottish Government; the Scottish Government had not supported implementation of a ban but rather had decided to implement a regulatory program that retained the option of using electronic training systems.

59. In its summary of Part 2, ECMA submitted that it supported the introduction of sensible regulation but was concerned that Defra's current approach has been seriously distorted by a lack of analysis and by seemingly structuring its approach, based solely on submissions received from a small number of animal interest groups with a pre-determined agenda to secure a blanket ban of electronic dog collars in all circumstances.

60. In Part 3, ECMA referred to lessons from other jurisdictions showing that a regulated industry can achieve its statutory purpose and objectives. Models which applied a blanket ban create problems. It referred in particular to Holland as an integrated model of regulation. It prayed in aid the position in Scotland, as the ECMA understood it to be at the time, being a regulatory model.

61. In its "conclusion" section, the ECMA objected to the unnecessarily short time allowed for response. ECMA had been deprived of a fair opportunity to provide a more detailed evidence based submission. A consultation based on a more balanced approach that focuses equally on all the options for regulation was the correct approach. The consultation paper revealed a lack of any proper consideration or prior analysis and, as a result, a litany of mistakes, incomplete information, misunderstandings and misrepresentations.

26 April 2018: The Parliamentary Statement

62. On 26 April 2018, the day before the close of the consultation period, in the course of Parliamentary questions, Mr John Hayes MP asked the following question:

> *"T.S. Eliot said "When a cat adopts you "you just have" to put up with it and wait until the wind changes". A cruel wind may be blowing for the thousands of cat owners who put protective fencing in place to stop their much-loved pets joining the hundreds of thousands that are killed by cars on our roads each year. Will the Secretary of State, a noted cat owner, stand alongside those friends of felines, or will he send TS Eliot spinning in his grave and many cats to theirs, too?"*

63. The Secretary of State replied as follows:

> *"I am grateful to my right hon. Friend for raising both cat welfare and invoking the spirit of T.S. Eliot. At the beginning of "The Waste Land", T. S. Eliot wrote:*
>
> > *"April is the cruellest month"*
>
> *But this April will not be a month in which cruelty towards any living thing will be tolerated. We want to introduce legislation to ensure that the use of shock collars as a means of restraining animals in a way that causes them pain is adequately dealt with.*
>
> *My right hon. Friend raises another important point in that containment fences can play a valuable role in ensuring that individual animals, dogs and cats, can roam free in the domestic environment in which they are loved and cared for. Several submissions have been made to our consultation on the matter. I know that my right hon. Friend cares deeply about the welfare of domestic pets and other animals, and he and others have made representations that we are reflecting on carefully."*

The Secretary of State objects to reliance being placed on this statement, as being the subject of Parliamentary privilege under Article 9 of the Bill of Rights 1689.

27 April 2018: close of consultation period and The Times

64. The consultation period closed on 27 April 2018. On the same day, The Times reported the Parliamentary Statement in terms, including the following:

> *"Michael Gove is preparing to drop plans for a total ban on electric shock collars for cats and dogs, allowing them to be used to prevent pets from straying on to roads.*
>
> *In a carefully scripted exchange with John Hayes, a former transport minister who uses collars on his cats, Mr Gove*

indicated that he would limit the ban to collars used as training devices and exempt those used to contain animals."

Between the close of the consultation period and the Decision

May to July 2018: Further meetings with interested parties

65. Following the close of the consultation period, but prior to the completion of the analysis of consultation responses, Defra held meetings with other interested parties, including RSPCA, the Kennel Club, a manufacturer of invisible fences, Countryside Alliance, Feline Friends, and Mr Penrith and ECMA. Mr Casale explained that the purpose of the meetings was to give further opportunity for key interested parties to add any comments to their consultation responses. The meetings contributed positively to the consultation process and allowed Defra to gather more information from consultees. The meetings informed the Ministerial Submission in due course.

17 May 2018 Letter from The Association of Responsible Dog Owners

66. On 17 May 2018 Mr Penrith wrote to Defra as a member of the Association of Responsible Dog Owners (ARDO), seeking to encourage an alternative to an outright ban of e-collars. (He had previously submitted an online response within the consultation window.) He advocated establishing restrictions regarding unregulated purchase of substandard aids; working to develop a quality assurance kite-mark for highest-standard training aids; limiting availability through registered expert trainers; establishing a recognised trainer education programme; and establishing a registered-user database to facilitate further analysis of the impact on animal welfare of e-collars. In conclusion, he said that there remains inconsistent and insufficient evidence to support an outright ban. There had been no prosecutions under existing legislation for animal cruelty or suffering arising from use of electronic training aids. On 26 June 2018 Mr Penrith had a meeting with Mr Alder at Defra. Mr Penrith states in his evidence that *"[Mr Alder] and his colleagues seemed uninterested with having a discussion about any other proposal. He instead simply restated the Secretary of State's position - I believe the words he used were to the effect of "ministers want a ban*" - *and that in essence was it".*

18 July 2018: meeting between Defra and ECMA

67. In the meantime, on 7 June 2018 ECMA wrote to Defra, making further representations in the light of the Parliamentary Statement in which the Secretary of State had indicated that, whilst containment systems would not be banned, he "was apparently still minded to pursue a ban …". ECMA advocated regulation and went on to highlight features of the Dutch and State of Victoria's approach, where regulation rather than a ban was the approach adopted.

68. On 18 July 2018 there was a meeting between Defra and ECMA. The meeting was also attended via conference call by Dr Andrew Voas, a senior veterinary officer in the Scottish Government. According to Mr Stone, in that meeting, Dr Voas confirmed his view that he had not recommended an outright ban and had been more in favour of regulation because advocates of a ban had not been able to provide him with any adequate explanation of what should happen in welfare terms to those dogs whose behavioural problems could not be resolved by more conventional means. Mr Stone

went on to say that, since ECMA had no knowledge of the substance of other evidence received by Defra, it was not in a position to make any genuinely new or expanded submissions.

Analysis of consultation responses

69. In his first statement, Mr Casale explained the process of considering the responses to the consultation. The analysis was undertaken by three officials. The tick box answers to the online survey were automatically collated by the software. Free text comments received were considered and categorised and recorded on an Excel spreadsheet. All responses were read by the officials and all key comments captured on those spreadsheets. Once that statistical analysis had been completed, they moved to the drafting of the Government Response document. Most of that document was a breakdown of responses to each of the main questions. The information was displayed in a series of pie charts, graphs and tables. A series of quotes from organisations and individuals was also included. The decision to ban e-collars was also based on the findings from the Lincoln research which found that remote-controlled e-collars do compromise the welfare of some dogs. The exemption for containment systems was considered appropriate in the light of the compelling argument put forward that, for many owners, alternative methods like physical fencing were not available or extremely difficult. There was also Lincoln research from 2016 which showed that there was no evidence of long-term welfare problems with electronic containment of cats. Mr Casale stated that the analysis took four months to complete and provided ample time for the responses to be considered appropriately.

3 August 2018 The Ministerial Submission

70. On 3 August 2018, officials put forward the Ministerial Submission, enclosing a draft of the Government Response. The Submission recorded that animal welfare groups were strongly in favour of a ban, whilst the majority of respondents (individuals) were not. They recommended a more proportionate approach, banning hand-held devices and, in respect of containment systems, to update statutory welfare codes to say that they should be installed and set up by professionals and suitable training should be provided. The Submission summarised the main findings of the consultation in the following terms:

> *"• There were 7,334 responses to the consultation. Overall, 64% were opposed to a ban on e-collars and 36% were in favour of a ban.*
>
> *• Many of the respondents who did not want to see e-collars banned considered it important that the collars are used properly in line with the manufacturers' instructions; many such respondents felt it is important that all users receive professional training prior to using e-collars.*
>
> *• A small percentage of respondents wanted to see a regulatory scheme for using e-collars. Some wanted to see the hand-held remote devices banned but the containment systems permitted and regulated.*

> - *Most of those against a ban questioned why the Government's stance had changed given that no new major evidence to support a ban has emerged recently.*
>
> - *Most of those who support a ban considered that the devices are by necessity cruel (a negative form of reinforcement), and that there are long-term negative effects from e-collars. There were objections in principle to using pain or the threat of pain in modern society to steer behaviours when more positive techniques are available and work well.*
>
> - *Supporters of containment systems argue that the only alternative is to erect physical fencing which in many cases is not practical or not as effective cats are particularly difficult to contain, and also difficult to train. A ban on containment systems would therefore generate other new risks of harm to pets from them straying especially onto public roads."*

71. In Annex A, officials identified four different policy options, setting out the pros and cons of each. The four options were:

    (1) Ban on use of all e-collars (as proposed in consultation);

    (2) Ban the use of hand-held remote controlled e-collars only;

    (3) Do not ban the use of e-collars and just tighten the current wording in the statutory welfare codes for dogs and for cats, adopting the same approach as Scotland.

    (4) Introduce a regulatory system for using e-collars.

72. As regards option 1, the "pros" included that the legality of this option had already been tested in the *Petsafe* case and that it was supported by a number of animal welfare organisations, including the RSPCA, the Dogs Trust and the Kennel Club. The cons included reference to the 2016 Lincoln research on cats (paragraph 69 above).

73. As regards option 2, the only "pro" for the ban on e-collars itself was the statement "supported by findings of research by Defra funded research Lincoln University which showed that such devices compromise the welfare of *some* dogs" (*emphasis* added). This option was said to be supported by a number of organisations, including the Countryside Alliance (although in so far as this option provided for a ban on e-collars that is not correct). The "cons" included: "It removes a way of controlling dogs, including potentially being less able to prevent livestock attacks in motion"; "there is a risk of legal challenge from ECMA" and; it "requires careful handling to ensure that the arguments we deploy to distinguish containment systems do not undermine the welfare arguments needed to justify the ban on hand-held devices".

74. As regards option 3, the "pros" included that it provided for continued use of e-collars to tackle wayward dogs and that it would have support from some stakeholders including Countryside Alliance and ECMA. Amongst the "cons" it was stated that

this option did not properly address problems associated with incorrect use of remote hand-held devices.

75. Finally, as regards option 4 (introduction of a regulatory system), the Submission stated that "This would require further development and could include licensing of e-collar providers and possibly requiring e-collar users to hold a licence. This option reflects the concern that many people are not using e-collars, (particularly remote hand-held devices) in compliance with manufacturers' instructions." The "pros" stated that this option aimed to tackle the identified problem that some owners do not use e-collars correctly whilst providing for the continued use of e-collars to tackle wayward dogs (e.g. around livestock). It was said to have support from ECMA and Countryside Alliance. The "cons" included the consideration that a new regulatory system might be burdensome and hard to apply; that it might be unpopular if owners and keepers needed to apply for licences and it would be unclear how a licensing regime would be enforced and operate in practice. As far as containment systems were concerned, it was said that a new regulatory system would add little to a robust self-regulatory approach.

76. The Submission stated, in its conclusions, inter alia, that:

> *"We consider that there is an animal welfare justification for banning hand-held remote controlled e-collar training devices. There is sufficient evidence that these devices can generate avoidable pain and suffering especially when not used properly. There are also other, more positive, means of training pets which may achieve the same or better behavioural outcomes.*
>
> *There are also ethical reasons to ban e-collars, in the sense that it is wrong in principle to use pain or the threat of pain better to steer behaviours. However a legislative ban under the Animal Welfare Act 2006 would need to be based solely on animal welfare grounds.*
>
> *We consider that the animal welfare justification for banning invisible fencing containment systems is less clear.*
>
> *..."* (emphasis added)

77. The Ministerial Submission then set out views of stakeholders, referring to meetings with key stakeholders including ECMA. It recorded that animal welfare groups were strongly in favour of banning all e-collars including containment systems, "partly for ethical reasons as well as for animal welfare reasons".

78. The Submission went on to set out the position in the devolved administrations, recording the 2010 ban in Wales. It recorded that Scotland had announced that they would publish guidance and that that guidance would not introduce a new offence; rather it was similar to "our statutory welfare codes."

79. It suggested that if the Secretary of State decided to proceed with option 2 "*we will frame this decision as the Secretary of State did when he was questioned in the House*

on this topic. This would demonstrate that the government has listened carefully to stakeholders concerns on invisible fences but remains committed to banning the remote control devices which can be abused." (emphasis added)

80. In an attached Regulatory Triage Assessment, focusing on the impact of the ban on business, the rationale for intervention and intended effects was stated as follows:

> "*Hand-electronic training (the e-collars) are punitive devices which enable electronic static pulses to be applied to pets by their owners. In light of growing concerns regarding the use and potential misuse of hand-held e-collars in England, and in order to protect the welfare of cats and dogs, we wish to ban the use by introducing regulations under the Animal Welfare 2006. …"*

Defra's estimate of the business impact is set out in paragraph 93 below. Other impacts included the following: expected protection and improvement of animal welfare; an impact upon those who use hand-held e-collars; there had been mixed claims about the impact the measure will have on dog behaviour, and stating that little evidence has emerged to support the suggestion that e-collars have positive impacts.

27 August 2018: the Decision

81. In a press release dated 27 August 2018, Defra and the Secretary of State announced his decision that e-collars were to be banned:

> *"Cruel electric shock collars for pets to be banned*
>
> *Cruel electronic training, which are used for dogs and cats are to be banned under new legislation, the Government has announced today.*
>
> *Remote controlled electronic training (e-collars) have a remote device that triggers an electronic pulse, which can be varied in strength, whilst others may spray a noxious chemical. As well as being misused to inflict unnecessary harm and suffering, there is also evidence e-collars can re-direct aggression or generate anxiety - based behaviour in pets-making underlying behavioural and health problems worse.*
>
> *The action follows a public consultation on a proposed ban for all e-collars.*
>
> *However, after listening closely to the views of pet owners and respondents, the Government will not extend the ban to invisible fencing systems which can keep pets away from roads and potential traffic accidents.*
>
> *…*
>
> *Secretary of State Michael Gove said:*

> *We are a nation of animal lovers and the use of punitive shock collars cause harm and suffering to our pets.*
>
> *This ban will improve the welfare of animals and I urge pet owners to instead use positive rewards.*
>
> ...
>
> *A considerable number of responses, whether supportive of a total ban or supportive of invisible fencing, also expressed concern at the number of people who use the hand-held devices incorrectly and without proper training."*

The Government Response

82. At the same time as announcing the Decision, Defra published the Government Response which comprised an analysis of consultees' responses, followed by a statement of the Government's response and position.

83. The document states that it is a summary of responses to the consultation exercise and points out that, given the number of responses received, it does not offer a detailed opinion on all the comments received. In the first two pages, the document repeats the contents of the Consultation Document. 7,334 direct responses had been received of which over 6000 were from members of the public and the remaining were from organisations or individuals associated with a sector of relevance. The document then went through and set out a statistical summary of the responses to the particular questions as posed in the online survey/questionnaire. As regards questions 6 and 7 around 65% answered that there should not be a ban and around 35% answered that there should be ban.

84. As regards question 8, asking for "any other views on these proposals or relating to them" the document identified that 6% of respondees mentioned some level of regulation for devices, 20% said that devices were fine as long as they were used correctly, 11% mentioned that devices were effective tools, 10.5% mentioned justifications or unintended consequences if devices were banned, including more dogs being put down and an increase in dog attacks, 15% mentioned the importance of remote collars for safety and control. The summary went on to identify that a total of over 4000 responses added further comments on question 8 and then set out the percentage of the free text responses referring to a number of identified issues, such as e-collars providing a safety feature for the animal, being important for uncontrollable animals, allowing an animal more freedom, being the best training option and others. The document did not seek to analyse or assess these responses. Rather it provided a statistical summary of the content of various types of response.

85. Later in the summary of responses, the comments of various stakeholders were recorded including comments of the Kennel Club, the RSPCA, and the Universities Federation for Animal Welfare. It then recorded various quoted general comments, under a number of different themes as follows: anti-ban; pro-ban; on sensible use; on technical issues relating to banning; on regulation; and other topics. In the section on regulation, the document recorded points made by consultees favouring regulation, as opposed to a ban.

86. Overall the full range of evidence received is summarised. In particular the views of those who favoured use of e-collars were recorded in some detail, as further explained in paragraph 176 below.

87. The Decision itself is then recorded in the final section, under the heading "Government response":

> *"The government has decided that it will proceed towards a ban on the use of remote controlled hand-held e-collar devices for dogs and cats in England. The government accepts that, where this is necessary as a last resort to prevent other serious risk of harm, there is an argument for retaining the ability to use invisible fencing containment systems for cats and dogs subject to them being set up and used properly, and these will not be subject to the prohibition at this stage.*
>
> *The government's decision is based on the concern that hand-held remote controlled devices can be all too easily open to abuse and can be harmful for animal welfare. In addition to information received as part of the consultation exercise, Defra's funded research in 2014 [the Lincoln research] showed that many users of the hand-held devices were not using them properly in compliance with the manufacturers' instructions leading to welfare problems for the dogs. In many cases alternative positive reward training can be used to encourage and to correct a dog's behaviour. The government will therefore bring forward secondary legislation, to be made under the Animal Welfare Act 2006, to ban the use of hand-held remote controlled e-collars devices.*
>
> *The government considers that, when installed and set up properly for the cat or dog and for the premises in question, and when proper training is provided, the adverse animal welfare impact of invisible fencing containment fences can be minimised and at the same time these systems can avert other risks to animal welfare. For example these systems can play a role in preventing a cat or dog from wandering into a potentially dangerous environment. When appropriate training is provided, cats and dogs should quickly learn to understand the boundaries without being regularly subject to electronic pulses."* (emphasis added)

The background research evidence

University of Lincoln Research

Lincoln 1

88. The first study (Lincoln 1) assessed the welfare of dogs trained with pet training aids, specifically e-collars. The project aimed to assess the physical characteristics of the e-collars and the physiological, behavioural and psychological consequences of their

use in dog training under four objectives, the fourth of which was to investigate the long-term behavioural, physiological and psychological effects of using training devices in the domestic dog. The conclusions were set out both in an Executive Summary and in the final section headed "Overall project conclusions", where it stated:

> *"Overall this project has highlighted very variable outcomes between individual dogs when trained using e-collars. The combination of differences in individual dog's perception of stimuli, different stimulus strength and characteristics from collars of different brands [*and other differences*] are likely to lead to a wide range of training experiences for pet dogs. Owners reported a number of differences in immediate response to application of training device between e-collars and other devices, including the cessation of on-going activity, but also a relatively high frequency of vocalisations on first and subsequent applications of the e-collar stimuli. Owners of dogs in the e-collar group were more likely to have used the device for recall or chasing problems, and more likely to rate their dog's behaviour as severe than those in the control population. This may suggest that the e-collar dogs may constitute a harder to train sub-population of dogs, though there was no evidence of differences in ease of training or other population differences found in these dogs, from questionnaire or baseline behavioural data…*
>
> …
>
> *Significant differences were, however, found in data collected from e-collar and control dogs undergoing standard training tests with and without dummy e-collars. These included a difference in the change in salivary cortisol between tests. E-collar dogs showed an increase in this measure in comparison to control dogs trained using largely positive reinforcement approaches. There were also behavioural changes between these two tests that were consistent with changes in emotional state. E-collar dogs showed an increase in a composite behavioural score which incorporated duration of time tense, inverse of duration of time relaxed, and duration of time attentive to owner, whoever was conducting the training, when compared with all controls (and also when just compared with the positive reinforcement sub-population). These training tasks were designed to replicate the context where e-collar training had occurred in the past, and indicate a shift towards higher levels of physiological and behavioural arousal in the e-collar dogs. These findings suggest that the experience of a stimulus is sufficiently aversive in at least a proportion of dogs for them to experience negative emotions when trained in the situation which may predict collar use."*

These conclusions were repeated in the Executive Summary, which added in conclusion:

> *"Thus it seems reasonable to conclude that the previous use of e-collars in training is associated with behavioural and physiological responses that are consistent with negative emotional states. It is therefore suggested that the use of e-collars in training pet dogs leads to a negative impact on welfare, at least in a proportion of animals trained using this technique."* (emphasis added)

Lincoln 2

89. In the Executive Summary, it was stated that Lincoln 2 was a follow-up field study and referred to the Lincoln 1 in the following terms:

> *"In previous defra funded work (AW1402) there was evidence that experience of e-collars had long-term negative welfare consequences in some dogs from the pet community. However, the retrospective nature of this previous work meant it was not possible to establish a causal relationship. In this study we sought to overcome this limitation and also examine industry recommended practice concerning the use of e-collars in the field…. this study focused on the welfare consequences of use of the collars within industry recommended training protocols compared with reward based training."*

Lincoln 2 (at p.14) referred to the fact that owners recruited to Lincoln 1 reported considerable variation in their use of e-collars and that best practice, as recommended by ECMA, was not consistently used by owners. Most had used devices without formal training and instruction manuals varied considerably.

90. Lincoln 2 found:

> *"The results of this study show that both the trainers' general approach and the tools they use in training affect the dog's emotional responses to training. It would therefore be of value to further investigate the welfare consequences of the skill levels of e-collar operator as well as the tools they use. Nevertheless the study did find behavioural evidence that use of e-collars negatively impacted on the welfare of some dogs during training even when training was conducted by professional trainers using relatively benign training programmes advised by e-collar advocates."*

In its final conclusion, Lincoln 2 stated:

> *"… this study shows that even with best practice as advocated by collar manufacturers and trainers, there were differences in the behaviour of dogs that are consistent with more negative emotional states (including anxiety and aversion) in some dogs*

> *trained with e-collars, that these differences persist for the duration of the initial training period, and that there is some evidence of elevated arousal upon the later return to the training situations by these dogs. Further, the results indicate that there is no statistical significant not clinically relevant differences in the efficacy of an e-collar training protocol combined with rewards and a reward-based program that does not use an e-collar for the management of dogs presented with comparable levels of livestock chasing, which is one of the most commonly advocated justifications for the necessity of e-collar training. The findings of this study are however confined to the specific application of the training protocols investigated, namely the use of positive reward-based training of a recall task, compared with additional use of e-collar training, as advocated by industry representative bodies."* (emphasis added)

The PLOS One Article

91. Subsequently, on 3 September 2014, the authors of Lincoln 1 and Lincoln 2 published independently the results of their research in the academic journal, PLOS One, in an article entitled "The Welfare Consequences and Efficacy of Training Pet Dogs with Remote Electronic Training Collars in Comparison to Reward-based Training". The authors stated their conclusion in the following terms:

> *"Our results indicate that the immediate effects of training with an e-collar give rise to behavioural signs of distress in pet dogs, particularly when used at high settings. Furthermore, whilst best practice as advocated by collar manufacturers mediates the behavioural and physiological indicators of poor welfare detected in the preliminary study, there are still behavioural differences that are consistent with a more negative experience for dogs trained with e-collars, although there was no evidence of physiological disturbance. E-collar training did not result in a substantially superior response to training in comparison to similarly experienced trainers who do not use e-collars to improve recall and control chasing behaviour. Accordingly, it seems that the routine use of e-collars even in accordance with best practice (as suggested by collar manufacturers) presents a risk to the well-being of pet dogs. The scale of this risk would be expected to be increased when practice falls outside of this ideal."*

The CAWC Report

92. The Companion Animal Welfare Council (CAWC) is a body which includes amongst its principal objectives the provision of advice on the welfare of companion animals in the furtherance of the full understanding of companion animal welfare. It undertakes independent and objective studies of companion animal welfare issues and prepares and publishes reports. In June 2012, and after the outcome of the Lincoln research was known, CAWC published a report entitled "The Use of Electric Pulse

Training Aids (EPTAs) in Companion Animals". The Report undertook a comprehensive survey of the relevant research and writings on the subject. In summary, CAWC concluded:

(1) There are sound animal welfare-based arguments both for and against the use of e-collars but there is a substantial lack of relevant research.

(2) Published studies do *not* allow general conclusions to be drawn on the impact of e-collars on long-term welfare, when used in an appropriate manner.

(3) The lack of conclusive scientific research concerning welfare implications mean that decisions on whether to legally permit use of e-collars need to be informed by broader ethical analyses than those based exclusively on animal welfare.

(4) It is not possible to formulate an evidence-based argument for or against the use of e-collars.

(5) E-collars can be used in a way which causes harm, critically where devices lack specific safety features or are in the hands of less competent trainers. There is therefore an unnecessary risk to animal welfare in unregulated availability.

(6) If government supports the continued legality of e-collars, then suggestions for regulation of manufacture and use of e-collars are made.

Evidence of financial impact of ban upon manufacturers/suppliers

93. In the Regulatory Triage Assessment, Defra estimated, in summary, the business impact of a ban on e-collars upon manufacturers or sellers of e-collars to be around £800,000 loss of profits per annum. However that was thought to be an overestimate: suppliers and manufacturers might be able to focus their efforts on other markets and there might be increased demand for alternative, less punitive, pet behavioural devices.

94. As regards the impact on the businesses of ECMA members, in her first statement Ms Critchley estimated that the loss of the English market would have an immediate adverse impact on sales of £1 to £2 million per year, albeit that figure included sales of containment systems. She added:

> *"Further I am clear that if a ban is introduced (even if it is subsequently set aside) the long-term adverse economic effects of such a ban on our products' reputation in the market and sales both in the UK and elsewhere could last for many years. ..."*

95. In his second witness statement, Mr Stone provided an update on potential adverse financial impact. Since announcements of the proposed ban, Petsafe had already seen a downturn in sales of £51,000 from their financial year end 2018 compared with the same period for 2017. A French company member of ECMA had reported a downturn in sales in the region of £10,000 since the publication of Defra's consultation

response. A third member had reported that their downturn in sales was in the region of £500,000 since that date.

The Position in Wales and the "Petsafe" case

96. In 2010 Welsh Ministers made regulations under s.12(1) of the 2006 Act ("the 2010 Regulations"), prohibiting the use on cats and dogs of any electronic collar designed to administer an electric shock. The ban covers e-collars, containment systems and bark collars. This followed three distinct periods of consultation between November 2007 and February 2010, of 3 months, 2 ½ months and 7 weeks duration respectively. The Claimants in the present action challenged the 2010 Regulations by way of judicial review. On 16 November 2010 Beatson J dismissed that challenge in his judgment in *Petsafe*. The Claimants raised five grounds of challenge, three of which are relevant for present purposes: breach of A1P1, breach of Article 34 TFEU and *Wednesbury* unreasonableness. There was no challenge to the consultation process.

97. By way of background, the first consultation paper sought views as to whether any controls should be placed on e-collars, whether they should be banned, restricted or continue to be freely available (§29). Over the three consultations, there were just under 250 responses. The majority of respondents to the three consultations were in favour of a ban. The proposed ban was supported by the Chief Veterinary Officer for Wales ("CVO"), whose detailed witness evidence was relied upon by the Ministers. The ban included a ban on containment systems, on the basis that their use was not consistent with animal welfare. At the time, the Lincoln research was underway, but the Welsh Ministers decided to proceed with a ban, before the outcome of that research and of the CAWC report were known. The CVO said that the matter would be kept under review as evidence became available. At the time of publication of the draft regulations, there was a Regulatory Impact Assessment. The Claimants put forward evidence of two alternatives to a ban: a training system for pet owners, and a licensing system to permit those licensed to use e-collars. The CVO accepted that licensing would reduce potential for incorrect use.

98. As to the EU and ECHR grounds, Beatson J addressed Article 34 first. The ban engaged Article 34, so he turned to justification under the proportionality test. As regards the first limb, suitability to achieve a legitimate aim, the Ministers had identified three areas of concern: (1) the shock causes discomfort; (2) e-collars can cause pain and distress in untrained hands; and (3) e-collars conflict with positive reward-based training. Beatson J held (§65) that the fact that a more wide-reaching measure (banning other aversive techniques) would have been justified, did not mean that the narrow ban was not justified.

99. Turning to the second limb (§§66-75), Beatson J held that the prohibition satisfied the requirement of proportionality under Community law (§75). Although there had been no express proportionality analysis, it was clear that those considering the policy had balanced the advantages of collars with the disadvantages from impact on animal welfare. The option of training and/or licensing did not address the first and third areas of concern identified by Ministers (§69). It was open to legislators to form their own judgment as to whether the activities in question caused a sufficient degree of suffering for legislative action to be taken (§70). It was a matter for the Ministers to set the level at which they wish to ensure animal protection. He accepted that the extent of the restriction on trade had a part to play in the assessment of

proportionality. Further in assessing justification, Beatson J considered that it was relevant that there had been three rounds of consultation (§74). The impediment on trade was a minor and unintended consequence which bore more hardly on those within Wales than in other Member States (§75).

100. As regards A1P1 (at §77) Beatson J assumed, without deciding, that the ability to sell e-collars was an economic interest in the nature of goodwill, but decided that the ban was a justifiable interference with those possessions, on the basis of the Claimants' concession that if the ban was proportionate under EU law, it was also proportionate under the A1P1 test.

101. As regards *Wednesbury* unreasonableness, the Claimants made six points. These included that procedural powers under the 2006 Act and to make provision in codes of practice show that a ban is not necessary; failure to await the outcome of Lincoln research; and the evidence in support of harm being unproven.

102. Beatson J held that the 2010 Regulations were not irrational, relying on the following factors: the Ministers' first and third concerns; the divided opinions of scientists; the decision was supported by the majority of consultees; the decision was made only after receipt of the advice of the CVO and was approved by the democratically accountable and elected National Assembly. S.4 offences address the position after the event; there is a distinction between fences for livestock and fences for dogs and cats; and the fact that the Regulations could have banned other devices did not demonstrate that the ban as made was irrational. In conclusion (§81), Beatson J recognised that other governmental authorities within UK had taken a different decision, but nevertheless it was not irrational to decide not to await the outcome of the steps taken by the Scottish or English authorities.

The position in Scotland

103. Between November 2015 and January 2016, the Scottish Government carried out a consultation exercise on control of electronic training aids. It was an extensive and detailed process. The consultation document ran to 22 pages – listing over 200 named interested parties and set out expressly four options, including a ban, code guidance and regulation. It referred to the Lincoln research and the CAWC Report and in detail to the position in other countries – both those where there is a ban, and those with regulation. The Scottish Government considered that the Lincoln research did <u>not</u> provide clear evidence that e-collars are inherently harmful in general nor convincing evidence of long-term effects on welfare, if used properly. Nevertheless there was a potential risk to welfare of some dogs when equally effective results can be achieved by other forms of training.

104. There was a detailed analysis of the consultation responses in June 2016, running to some 81 pages, comprising 50 pages of main report and over 30 pages of annexes. In September 2017 the Scottish Government announced that it intended to proceed by way of regulation of use of e-collars, rather than an outright ban. However, in January 2018 the Government announced that following further concerns raised by stakeholders and the public, it would take steps "to effectively and promptly ban use of e-collars". Such a "ban" however was to be effected by the issue of guidance under s.38 Scotland 2006 Act, suggesting that use of e-collars may be an offence of

causing unnecessary suffering, rather than by way of a direct ban by secondary legislation.

105. The guidance was eventually published on 15 October 2018 (after the Decision). After referring to reward-based positive training and training that includes unpleasant aversive stimuli, the Guidance continues:

> *"Particular training devices that the Scottish Government does not condone are: electronic shock (static pulse) collars, electronic anti-bark collars, electronic containment systems or any other method to inflict physical punishment or negative reinforcement. This includes the use of any device that squirts oils such as citronella or other noxious chemicals that interfere with a dog's acute sense of smell, or emits any other aversive stimulus. These techniques compromise dog welfare, as they may lead to aggressive responses and worsen the problems that they aim to address to address by masking or aggravating underlying behavioural issues.*
>
> *This guidance is advisory and may provide an aid to both dog owners and those involved in the enforcement of the Animal Health and Welfare (Scotland) Act 2006. Those responsible for enforcement of the 2006 Act may refer to the guidance when issuing advice, warning letters or care notices under the 2006 Act. A Court may, at its discretion, consider the guidance in a prosecution under Section 19 or Section 24 of the Animal Health and Welfare (Scotland) Act 2006."* (emphasis added)

106. Somewhat inconsistently with earlier announcements, on 29 November 2018, the Scottish Government stated, in response to a parliamentary question, that the guidance was not a legislative ban and was never intended to be. Rather the guidance is intended to avoid the misuse of e-collars. It may be that this stance is best described as a "soft ban". It is not clear what circumstances will amount to "misuse" and give rise to a risk of prosecution for an offence.

The Grounds

107. I turn to address the Grounds, setting out, in respect of each, the parties' submissions, followed by the relevant legal principles and my analysis and discussion. Ground 2 is considered in the context of "Ground 1, Coughlan (1)" and the issue of Parliamentary privilege is considered as a preliminary issue to Grounds 1 and 2.

108. The Claimants' essential case in opposition to an outright ban on e-collars can be summarised as follows: first, dogs which do not respond to positive training might have to be destroyed or might attack other animals; secondly a ban will drive owners to use other negative training mechanisms, harmful to animal welfare; and thirdly, concerns about possible misuse by owners can be adequately addressed by regulation.

Ground 1 and Ground 2: consultation and appearance of pre-determination

The Claimants' submissions

109. The Claimants contend that the consultation in the present case failed to meet the standard set by each of the four *Coughlan* requirements (paragraph 27(2) above). Overall the defects in the procedure were not minor. The Consultation was fundamentally flawed. The Court should declare it so and quash the resulting Decision.

110. It does not matter how the duty is generated. The same common law duty of procedural fairness informs the manner in which the consultation should be conducted: *Moseley* per Lord Wilson §23. The Claimants further rely on the two points made by Lord Wilson in *Moseley* at §26: see paragraph 27(7) above.

The Claimants' case on Coughlan (1) and on Ground 2

111. The Secretary of State had pre-determined the merits of the decision prior to consideration of, or even receipt of, consultation responses. This renders the Decision unlawful because the consultation did not take place at a "formative stage". Whilst accepting that the Secretary of State was entitled to consult on a preferred option, what he could not do was to have a closed mind to other options and to consult solely on questions of implementation, or on whether to implement any further restrictions. However that is what he did.

112. First, the Consultation Document itself indicated that the Secretary of State's mind was closed to alternative options. It stated that "Defra has concluded" that it would adopt a legal ban. The Secretary of State clearly indicated that his mind was already made up on the question of principle, namely <u>whether</u> e-collars should be banned. Consultees were asked for views as to what the proposals would mean for sale and retailers and whether any further restrictions will be required. Secondly, the Claimants rely upon Defra's official Twitter feed, on the day before the consultation window opened, posting quotes supporting the ban, and the absence of quotes from organisations opposing the ban. Thirdly, the Claimants rely upon the Parliamentary Statement, read in the context of the Consultation Document, as meaning that the Secretary of State was going to ban e-collars, but not containment systems. That was exactly how the words were understood by The Times on the following day. The passage referring to "careful reflection" was a reference to the submissions on containment systems only. The reference to legislating because he would not tolerate cruelty meant, and could only mean, a reference to the imposition of a ban. Fourthly, the absence of consultation on alternative options adds to the evidence that the Secretary of State's mind was closed to the alternative to an outright ban. Fifthly, the brevity of the consultation window also strongly indicated that the Secretary of State had a closed mind.

113. As to Ground 2, the Claimants submit that, even if the evidence does not establish actual pre-determination under *Coughlan (1)* a fair-minded and informed observer would think that the evidence gives rise to a real possibility that the Secretary of State had pre-determined the matter, in the sense of closing his mind to the merits of the contrary options prior to the Decision having been taken. The relevant evidence is the

express terms of the Consultation Document itself, the Parliamentary Statement and the other matters relied upon on in relation to *Coughlan (1)*.

The Claimants' case on Coughlan (2)

114. The Consultation Document did not include sufficient reasons for the particular proposal to allow consultees to give intelligent consideration and make a considered response. The Claimants make the following points:

(1) The Consultation Document was very brief: just four pages long.

(2) There was no analysis as to how devices operate in relation to cats. No information was given on the circumstances in which the collars might work when non-aversive techniques fail. No information was given of any comparison of the impact of e-collars with alternatives, such as choke chains or prong collars, nor as to the welfare implications of their increased use.

(3) The information was presented unfairly. E-collars were described as "punitive devices" and "a last resort measure". There was no acknowledgement that a number of animal welfare organisations and experts support the use of e-collars. The reference to "relatively little evidence" was premature since that evidence should come from the consultation itself. The statement about "growing" evidence was not the evidence base and did not support the conclusion as to harm.

(4) The information was not adequately clear. It did not distinguish between e-collars and containment systems. There was no differentiation between use for everyday training of dogs without behavioural problems and use for specialist training for dogs who do not respond to alternative methods of training.

(5) The Consultation Document made no reference to alternative options of increased regulation, licensing or statutory controls on quality. The 2006 Act did not limit the Secretary of State to consulting only on a preferred option. Fairness required the Consultation Document to highlight that there were other available options for achieving the Secretary of State's aim of promoting animal welfare. The case is on all fours with the facts of *Moseley*. This was a consultation open to the public and there is no reason to think that such the alternatives would have been reasonably obvious to the public being consulted and it was not obvious why the Secretary of State was minded to reject them. Consultees could not give an informed response to a proposal to ban when they were unaware of the range of options. The Consultation Document may have caused supporters of alternatives to think that it was not their time to voice their views or that there was no point in expressing their views: see *Montpeliers* at §29. Even if the case fell within the second category of case identified by Lord Wilson in *Moseley* (§28), there was not even a passing reference to the option of using increased regulation to reduce abuse and promote animal welfare.

(6) The Consultation Document was misleading, in failing to refer to the rationale for the proposal, as subsequently explained in Mr Casale's third witness statement.

(7) A comparison with the Scottish Government consultation exercise clearly demonstrates the inadequacies of the Secretary of State's approach.

The Claimants' case on Coughlan (3)

115. The Claimants submit that 6½ weeks was inadequate for a consultation of this type, given the complexity of the issue, the information that needed to be considered and the likely unfamiliarity of the general public with the issues and gave insufficient time for ECMA to provide a more detailed, evidence based, submission.

116. Previous government guidance had laid down as good practice a consultation period of 12 weeks, to be extended for technical consultations with potentially serious impacts. A ban on e-collars will seriously impact manufacturers' businesses. In any event the current Cabinet Office Guidance warns that consulting too quickly will not give enough time for consideration and will reduce the quality of responses.

117. Both members of the public who may use the e-collars and the Claimants and other manufacturers were prejudiced by the short length of the consultation. Some potential consultees (for example ordinary pet owners who use e-collars) who may have responded within a longer window would not have been able to respond; and, secondly, those consultees who did respond were limited by the time available to prepare their submissions. Six weeks was insufficient for ECMA to procure a separate independent expert report. By comparison, the Scottish consultation ran for double the time, 12 weeks.

The Claimants' case on Coughlan (4)

118. The Secretary of State failed to give conscientious consideration to the product of the consultation. The requirement of conscientious consideration is of particular importance where, as here, a significant majority of consultees are opposed to the proposals being consulted upon. Whilst there is no obligation for the Secretary of State to accept the majority view, what is required is careful consideration of the reasons why the policy is opposed and an explanation as to why it is nonetheless being adopted. There needs to be some evidence of consideration of important points made by consultees.

119. First, the Parliamentary Statement, making clear the Secretary of State's concluded view, was given at a time when it is impossible for the Secretary of State to have taken into account, either properly or at all, the 7,334 responses to the consultation. Secondly, there is nothing to suggest that any consideration had been given to a number of important concerns raised by ECMA by the time of the Decision. Thirdly, the manner in which responses were analysed by officials amounted to no more than a tick box exercise. There is no evidence that the substance of the consultation responses was taken into account and analysed. The absence of substantive analysis in the Ministerial Submission indicates that Ministers were not put in a position where they could sensibly consider the product of the consultation. Fourthly, the Government Response shows no analysis of the reasons why a clear majority of consultations were opposed to the ban and whether and how that was taken into account. The recording of "stakeholder comments" in the Government Response was not fairly balanced as between those in favour, and those against, a ban.

The Secretary of State's submissions

120. The Secretary of State submits that each of the four bases of complaint on Ground 1 are without merit. This ground can only succeed if the Claimants can demonstrate "clear unfairness" i.e. that the consultation was so unfair as to be unlawful.

The Secretary of State's case on Coughlan (1) and Ground 2

121. The Secretary of State submits as follows:

(1) The duty to consult under s.12(6) was to consult on a "proposed regulation" and not a general duty to consult on wider issues of policy. The Secretary of State was consulting on a proposal. It was entirely proper for the Secretary of State to consult on the basis of a preferred option and to set out his view.

(2) The purpose of this consultation was to ensure procedural fairness for those who might be affected by the decision and not to engage in a broad exercise of public participation which might be required under other statutory duties.

(3) The Consultation Document was framed sufficiently broadly to allow those who opposed the principle of the ban to make representations to that effect. The responses clearly demonstrate this. Four policy options emerged from the consultation in the Ministerial Submission.

(4) In any event the Consultation Document invited comments generally; the online survey asked whether it should be an offence to use e-collars and also asked for "any other views on these proposals".

(5) There cannot have been any failure to consult on the principle of a ban when the outcome of the consultation was a material change to the proposed policy.

(6) As regards the tweets, their purpose was to draw attention to the proposals and to the launch of the consultation process. The tweets were reporting the view of other persons and they reflect the early stage in the process. They do not express the Secretary of State's view.

(7) Reliance on the Parliamentary Statement is impermissible. In any event, the Secretary of State does not say in the Statement that there will be a ban. The passage read as a whole makes clear that there is no actual pre-determination (nor the appearance of such). The Secretary of State is expressing a legitimate predisposition – rather than a predetermination. In any event the desire to introduce legislation to ensure that use of e-collars is "adequately dealt with" does not suggest that the Secretary of State has closed his mind except to one pre-determined option – namely a ban. It leaves open other options being introduced by legislation. He refers to representations which were being reflected on carefully. The Times Report is to be treated with circumspection. In any event at the time ECMA interpreted the Statement to mean only that the Secretary of State was "minded" to pursue a ban (see letter of 7 June).

(8) The Secretary of State relies upon the same points in relation to Ground 2.

The Secretary of State's case on Coughlan (2)

122. First, the Consultation Document contained sufficient reasons for the proposal to allow an intelligent response. It summarised the case for the proposed ban as well as the contrary arguments, including the potential welfare benefits for cats. Fairness did not require the consultation to summarise the full range of views nor that a consultation on a proposed regulation to ban e-collars should consult on the full range of alternative devices and their potential uses. The Consultation Document did not need to contain a detailed scientific analysis.

123. Secondly, the presentation in the Consultation Document was not unfair. It was framed sufficiently broadly to elicit a range of views. The Secretary of State was entitled to express his views. The suggestion that supporters of e-collars may have felt that there was no point expressing their views is not supported by what in fact happened; it is clear that consultees understood it was open to them to make representations to that effect (see *Langton* §108).

124. Thirdly, there was no obligation here to make reference to alternative options. *Moseley* was a case of special circumstances and is to be distinguished from the present limited consultation duty. Consultees could be expected to identify alternatives in this case, and in fact they did.

125. Fourthly, as regards the length of the Consultation Document, it is possible for too much information to be given. Bark collars were not within the scope of what was proposed to be banned. The Consultation Document did accurately summarise the position in Scotland, which by that time had moved on.

126. Finally, as to the contention that consultees were not told that previously Defra's view was that the evidence was not sufficient to support a ban, this was not misleading, because self evidently there had been a change in policy.

The Secretary of State's case on Coughlan (3)

127. The consultation period was adequate. The relevant Cabinet principles in place at the time provide that consultation should last for a proportionate amount of time. Here 6½ weeks was proportionate. Secondly, the key concept here is fairness of process. Thirdly, there is no evidence to support the proposition that the period caused prejudice or unfairness either to ordinary pet owners or to ECMA or other manufacturers.

The Secretary of State's case on Coughlan (4)

128. The Secretary of State submits as follows:

(1) The Secretary of State is not required to consider every response to a public consultation. It is sufficient for officials to have considered the responses and identified relevant points for the ultimate decision-maker.

(2) Mr Casale's evidence shows that all responses were analysed before being reported. Both the Government Response and the Ministerial Submission explicitly acknowledged that the majority of respondees were not in favour of

the ban. The Government Response provides a further breakdown of free-text responses by themes.

(3) As a result of considerations that emerged during the process, there was a material change to the proposal, namely to exclude containment systems.

(4) The Parliamentary Statement (if admissible) does not show that the Secretary of State had taken a view before the consultation had ended.

(5) The Government Response was a thorough 26 page analysis of the overall spread of views, but also pulling out key points made on the proposal. Material from relevant organisations concerned with welfare are particularly important when looking at *Wednesbury*/proportionality. There is nothing of substance from the ECMA Consultation Submission which was left out of account. Points made by Ms Furze are points of detail and cannot alter the overall judgment. As to Mr Penrith, his argument is effectively that e-collars "work for some dogs in some circumstances"; an argument made by ECMA and considered in the summary of responses. In any event Mr Penrith met with officials after the close of the consultation period.

Analysis on grounds 1 and 2

(1) Preliminary issue on Parliamentary Privilege

129. Before turning to the analysis of Grounds 1 and 2, I address the issue of the admissibility of the Parliamentary Statement.

The Office of the Speaker

130. In a letter dated 21 March 2019 to the Government Legal Department, the Office of the Speaker's Counsel expressed the view that even merely relying upon what the Secretary of State said in Parliament as evidence that he gave the appearance of pre-determination appeared to exceed the permissible bounds for the use of Parliamentary material "*since it relies on a statement made in Parliamentary proceedings as evidence of what position the Secretary of State had taken. In order to take a view on that evidence, it is necessary to draw inferences as to the substance and meaning of the words spoken and the intention of the Secretary of State, contrary to Article 9 as interpreted in Prebble and elsewhere*". The letter did not address the contention that the statement related to the Secretary of State's position taken *outside* Parliament.

The Parties' submissions

131. The Claimants submit that they permissibly seek to rely on the Parliamentary Statement to show that the consultation was not at a formative stage and that there was an appearance of pre-determination: *Coughlan (1)* and Ground 2. They also rely upon it, to a lesser extent, in relation to *Coughlan (4)*. It did not go to the core or essential business of Parliament; rather it was an update on a consultation, which happened to be given by way of a Parliamentary answer. They are not challenging or questioning what was said in Parliament; they are challenging action of the executive taken *outside* Parliament. Relying on *Toussaint v Attorney General of Saint Vincent and the Grenadines* [2007] UKPC 48 [2007] 1 WLR 2825 §17, it is not objectionable

to rely on a statement in Parliament to establish lack of consultation outside Parliament. This case falls squarely within the legitimate use indicated in *Prebble v Television New Zealand* [1995] 1 AC 321. If not permissible, then it would allow the Secretary of State to adopt the "cloak of invisibility".

132. The Secretary of State submits that the Parliamentary Statement cannot be relied upon for these purposes because to do so infringes the principle of Parliamentary privilege. The Claimants are seeking to rely on the Parliamentary Statement as evidence of what position the Secretary of State had taken; the view of the Speaker should be given considerable weight. Since they contend that the Parliamentary Statement is evidence of a closed mind, the Claimants do directly impugn the Secretary of State's conduct. The Claimants' contention is that the Secretary of State said something on the floor of the House which is *itself* unlawful and the Secretary of State has to respond by contesting what was meant by what he said. The Claimants' argument requires the Court to rule on the meaning and effect of what was said. Alternatively, if the words are clear, the Claimants are seeking to draw an inference from what was said in the House by the Secretary of State. This is distinguishable from cases where what was said in Parliament is relied upon to show the *reasons* for an external decision. Significantly, however, Mr Turney accepted in oral argument that, whilst what was said in Parliament could not be relied upon, other admissible evidence which demonstrated the Secretary of State's state of mind at the time, could be relied upon and that included what was said later in the Ministerial Submission, by reference to the Parliamentary Statement (see paragraph 79 above). He accepted that the August statement could be relied upon, even to the extent that the word "remains committed" indicate that not only was Secretary of State committed to a ban in August, but was so committed throughout the process. He submitted however that that commitment amounted to no more than "predisposition" and not "predetermination".

The Law on Parliamentary Privilege

133. Article 9 of the Bill of Rights 1689 states:

> *"the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament"*

134. I have considered the following cases on the nature and scope of this Parliamentary privilege: *Prebble*, supra; *Toussaint*, supra; *Office of Government Commerce v Information Commissioner* [2008] EWHC 774 (Admin) [2010] QB 98; *R (Justice for Health Limited) v The Secretary of State for Health* [2016] EWHC 2338 (Admin); *R (Heathrow Hub Limited and others) v The Secretary of State for Transport* [2019] EWHC 1069 (Admin). The relevant principles are as follows:

(1) It is an infringement of the privilege to question in proceedings words spoken in Parliament by suggesting, by direct evidence, cross-examination, inference or submission, that they were untrue or misleading or instigated for improper motives: *Prebble* at 332F, 337A-B. The court cannot consider allegations of impropriety, inadequacy or lack of accuracy in the proceedings of Parliament: *Office of Government Commerce* §47.

(2) But the "obscure" wording of Article 9 cannot be read absolutely literally: *Toussaint* §10. The principle does not exclude all references in court proceedings to what has taken place in Parliament. It is not an infringement to allege the saying of certain words, without any accompanying allegation of impropriety or any other questioning: *Prebble* at 337G.

(3) Moreover, evidence of what was said in Parliament *is* admissible to explain executive action taken *outside* Parliament and the policy and motivation leading to it. This is permissible even where the aim is to show conduct involving the improper exercise of power: *Toussaint* §17; *Office of Government Commerce* §45, and *Justice for Health* §161. The rationale for this principle is that if such reference were not permitted it would hamper challenges to the legality of executive decisions; this would enable Ministers to avoid challenge by announcing a decision and its reasons in Parliament: *Justice for Health* §§162, 164.

(4) *Toussaint* §23 suggests that the meaning of statements made in Parliament is an objective matter, to be determined by the Court. However there are issues as to the extent to which a court may determine the meaning and effect of a ministerial statement in Parliament: *Heathrow Hub* §§151-152, although there the Divisional Court expressed reservations on the view of the Office of the Speaker's Counsel that the court is prohibited from determining meaning.

(5) Therefore a key issue for the Court is to identify the purpose for which a statement in Parliament is being relied upon.

(6) Where the line dividing what amounts to "questioning" of a statement in Parliament should be drawn or whether the interpretation by the Court of such a statement is impermissible raises difficult questions of law and the answers are far from clear: *Heathrow Hub* §152.

(7) Where the statement is to the same effect as statement made outside Parliament, there will be no need to make a ruling: *Heathrow Hub* §145.

Analysis on Parliamentary Privilege

135. As was the case in *Heathrow Hub*, this is not an easy issue in the present case. This case falls close to the dividing line.

136. In my judgment, if the meaning of, or inferences to be drawn from, the Parliamentary Statement are clear (i.e. a ban will be introduced), reliance upon it for the purposes sought by the Claimants would not fall within the scope of Parliamentary privilege. The Statement is relied upon as evidence of the Secretary of State's state of mind and conduct *outside* Parliament; and it is the latter which the Claimants seek to challenge. I do not accept that the Claimants are alleging that what was said on floor was *itself* unlawful. On the other hand, if the meaning, or inferences to be drawn, are not clear, then, as suggested in *Heathrow Hub*, the position is less straightforward and reliance may fall within the privilege.

137. Considering, at least provisionally, the meaning of what was said, the Parliamentary Statement has two distinct paragraphs: the third paragraph concerns e-collars and the

fourth paragraph appears to be directed towards containment systems (dealing with the specific issue raised by the question), see paragraph 63 above. First, the reference, in the fourth paragraph, to "submissions made in the consultation" relates specifically to containment systems; although the words "reflecting carefully on representations" are not as clearly confined to those systems. Secondly, the third paragraph is open to more than one interpretation; it does not clearly state in terms that a ban on e-collars will be introduced; rather it refers to "legislation" to "deal adequately" with e-collars. Such legislation might, at least potentially, be regulation. On the other hand, the words "want to introduce legislation" are not, as accepted by Mr Turney, ambiguous. Whilst I note the interpretation placed on the words by The Times, this is not determinative. ECMA itself did not interpret them as a definitive decision: see letter of 7 June 2018 (paragraph 67 above). In these circumstances, I am not satisfied that the meaning of the Parliamentary Statement is clear nor that the determination of that meaning would not involve "questioning" what was said in Parliament.

138. However, as in *Heathrow Hub* at §152, I conclude that it is not necessary for the Court to determine these difficult issues, and in particular, the issue of how far the Court should be involved in resolving a dispute as to what was meant by a minister in a Parliamentary statement. In any event the passage in the August Ministerial Submission referring back to the position stated in the Parliamentary Statement and suggesting that government "remains committed" to banning e-collars *is* admissible evidence. It is evidence not only that the Secretary of State was committed in August 2018, but also that he was committed in April 2018 at the time that the Parliamentary Statement was made. Mr Turney accepted that that statement is admissible evidence of the Secretary of State's position in April, albeit contending that it evidenced no more than a permissible pre-disposition towards a ban, and not evidence of unlawful pre-determination. That is a distinct matter which falls to be addressed substantively in Grounds 1 and 2 below.

(2) Grounds 1 and 2 Analysis

(1) The law

Coughlan (1): Formative stage – Actual pre-determination

139. The requirement that the consultation takes place at a "formative stage" means that at the relevant time the decision-maker must have an "open mind on the issue of principle involved": *Montpelier* §21 (ii). The question is whether the decision-maker had already made up its mind to adopt the proposal or whether it was willing to reconsider its proposal in the light of the consultation process if a case to do so was made out. There must be no *actual* pre-determination on the part of the decision-maker. Where the decision-maker is consulting on a particular proposal, the consultation must include consultation on *whether* the proposal should be adopted, and not just on *how*. However I accept the Secretary of State's submission that there is a legitimate distinction to be drawn between actual pre-determination on the part of the decision-maker and the decision-maker having a "pre-disposition" towards the proposal. The latter is permissible, and necessarily so in circumstances where the decision-maker is, as entitled to do, to determine the particular proposal upon which he wishes to consult, see *Lewis v Redcar* §§63, 95, 99, 106-107; *Langton* §§106, 107; *Spurrier* §§503-535, especially at §§ 509-511, 524, 531.

Appearance of pre-determination (Ground 2)

140. Whilst actual pre-determination (under *Coughlan (1)*) involves a finding on the subjective attitude or state of mind of the decision-maker, a decision may be impugned on the grounds of an appearance of pre-determination. The question here is for the Court to consider whether a fair-minded and informed observer would think that the evidence gives rise to real possibility or risk that the decision-maker had pre-determined the matter, in the sense of closing his mind to the merits of the issue to be decided: *R (British Homeopathic Association) v NHS Commissioning Board* [2018] EWHC 1359 (Admin) at §73. That risk falls to be assessed by the Court: *Lewis v Redcar* §§96-97. However this is not easy to prove, where the role of the decision-maker in the statutory context is to put forward a proposal and/or his role is political: *Spurrier §*511 and *Franklin v Minister of Town and Country Planning* [1947] AC 87 at 104-105.

Coughlan (2): sufficient reason for proposal

141. There are a number of aspects to the *Coughlan (2)* requirement. First, the general obligation is to let those with a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this: *Coughlan* §112.

142. Secondly, the presentation of the information must be fair. Thus it must be complete, not misleading and must not involve failure to disclose relevant information: *Royal Brompton* §§10, 12; *Robson* §§32, 33 35, *Langton* §§101-102. Whether non-disclosure made the consultation process so unfair as to be unlawful will depend upon the nature and potential impact of the proposal, the importance of the information to the justification for the proposal and for the decision ultimately taken, whether there was a good reason for not disclosing the information and whether the consultees were prejudiced by the non-disclosure, by depriving them of the opportunity of making representations which it would have been material for the decision-maker to take into account: *Law Society* §§71 to 74. Thirdly, the decision-maker may present for consultation his or her preferred option: *Royal Brompton* §10.

143. Fourthly, the question then arises as to whether the consultation document should refer to other options, alternative to the proposal being put forward. This was addressed in *Moseley.* There, the Supreme Court unanimously held that, on the particular facts, there had been an obligation to refer to possible alternatives to the scheme for council tax reduction proposed by the local authority. Lord Wilson distinguished two situations: first, at §27:

> *"Sometimes, particularly when statute does <u>not</u> limit the subject of the requisite consultation to the preferred option, fairness <u>will require</u> that interested persons be consulted not only upon the preferred option but also upon arguable yet discarded alternative options."*

Secondly, at §28,

> *"But, even when the subject of the requisite consultation is limited to the preferred option, fairness may nevertheless require passing reference to be made to arguable yet discarded alternative options. …"* (emphasis added)

144. In his application of those principles to the facts, Lord Wilson appears to have regarded the case as falling within §28, and that "brief reference" should have been made to other alternatives: §29. At §31 he referred to the need to consider whether other options would have been reasonably obvious to consultees. Even where they were obvious, it was also necessary to consider, first, whether it would have been reasonably obvious to consultees why the decision-maker was minded to reject those options and secondly, whether the consultation document in any event led the consultees to believe that the other options were irrelevant.

145. Lord Reed took a somewhat different approach. Having pointed out that he placed more emphasis on the statutory context and the particular duty of consultation, he took the view that in that case the statutory purpose was public participation in a wide-ranging consultation relating to a local authority power in relation to finance. He continued at §39 to 41:

> *"39. In order for the consultation to achieve that objective, it must fulfil certain minimum requirements. Meaningful public participation in this particular decision-making process, in a context with which the general public cannot be expected to be familiar, requires that the consultees should be provided not only with information about the draft scheme, but also with an outline of the realistic alternatives, and an indication of the main reasons for the authority's adoption of the draft scheme. …*
>
> *40. That is not to say that a duty to consult invariably requires the provision of information about options which have been rejected. The matter may be made clear, one way or the other, by the terms of the relevant statutory provisions, as it was in R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts (2012) 126 BMLR 134 . To the extent that the issue is left open by the relevant statutory provisions, the question will generally be whether, in the particular context, the provision of such information is necessary in order for the consultees to express meaningful views on the proposal. … In the present case … it is difficult to see how ordinary members of the public could express an intelligent view on the proposed scheme, so as to participate in a meaningful way in the decision-making process, unless they had an idea of how the loss of income by the local authority might otherwise be replaced or absorbed.*
>
> *41. Nor does a requirement to provide information about other options mean that there must be a detailed discussion of*

> *the alternatives or of the reasons for their rejection. The consultation required in the present context is in respect of the draft scheme, not the rejected alternatives; and it is important, not least in the context of a public consultation exercise, that the consultation documents should be clear and understandable, and therefore should not be unduly complex or lengthy. Nevertheless, enough must be said about realistic alternatives, and the reasons for the local authority's preferred choice, to enable the consultees to make an intelligent response in respect of the scheme on which their views are sought."* (emphasis added)

146. As regards the other Justices, Lord Kerr agreed with Lord Wilson. Baroness Hale and Lord Clarke considered that there was "very little between Lord Wilson and Lord Reed as to the correct approach". However they went on expressly to endorse Lord Reed's approach based on the statutory context and purposes and, on the facts, the specific steps set out by Lord Reed in §39.

147. In the present case, the Claimants place emphasis upon Lord Wilson's approach. The Secretary of State relies on that of Lord Reed.

148. In *Langton* Mr Justice Cranston at §109 described *Moseley* as an exceptional case, accepting the submission that the duty to make reference to discarded alternatives had only arisen there because of special circumstances, including the nature of the consultees (i.e. the general public) and the likely impact of the preferred proposal on their vital financial interests, the fact that consultees could not be expected to identify those alternatives themselves and the particularly wide terms of the statutory duty of consultation. In *Spurrier* the Divisional Court cited with approval §§38 and 39 of Lord Reed's judgment.

149. In my judgment, the position in summary is as follows:

(1) There is no hard and fast rule that a consultation document must refer to discarded alternative options.

(2) In considering whether it should so refer, it is necessary to identify the purpose of the particular consultation, which in turn is to be identified from the statutory context of the particular duty.

(3) If the purpose of the particular consultation is general public participation in a wide-ranging consultation, then there might be a duty to make some reference to discarded alternatives. This will particularly be the case where general public cannot be expected to be familiar with the issues.

(4) If the purpose of the consultation is narrower, and to protect particular persons likely to be affected by the proposal, then there may not be a duty even to refer to discarded alternatives. This is more likely to be the case where the consultees can be expected to be aware of the alternatives.

(5) It is relevant to consider whether the failure to refer to discarded alternatives has caused prejudice to consultees, whether those alternatives would have been

obvious to consultees and whether it was obvious why the decision-maker had not referred to the alternatives. (However the observations in *Montpeliers* at §29 turn on the particular facts there of a two-stage process.)

Coughlan (3): Adequate time

150. What will constitute adequate time will depend on the particular facts of each case. For this reason there is little case authority expanding upon the content of this requirement. In the early case of *R v Social Services Association ex parte Association of Metropolitan Authorities* [1986] 1 WLR 1 at 4G-H, Webster J indicated sufficient time "does not mean ample, but at least enough for the relevant purpose to be fulfilled". It appears that cases where a breach of this requirement has been found have involved a very short period of consultation (e.g. in *Gunning* a period of 10 days was held to be insufficient). The Cabinet Consultation Principles in place at the relevant time state that "Consultations should last for a proportionate amount of time". The length of the consultation should "take into account the nature and impact of the proposal".

Coughlan (4): Conscientious consideration

151. This requirement does not amount to an obligation to adopt the submission by any particular respondent, nor to adopt the majority view. The decision-maker is entitled to consider the whole range of responses and then to form his own view, independently of the views of any particular consultees. Further there is no obligation to consider each and every specific item of detail: *West Berkshire CC* §§62-63. There is an obligation to take account of the majority view, but no obligation to adopt that view: *R (Assisted Reproduction and Gynaecology Centre) v The Human Fertilisation and Embryology Authority* [2017] EWHC 659 (Admin) §117.

152. As to the information placed before the decision-maker, the decision-maker must know enough to ensure that nothing that is necessary, because legally relevant, for him to know is left out of account. But there is no requirement that he must know everything that is relevant. The claimant must establish that a matter was such that no reasonable decision-maker would have failed in the circumstances to take it into account as a relevant consideration: *Langton* §115 citing *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at §§60-63. To this extent, the *Coughlan (4)* requirement is based on a *Wednesbury* approach.

153. The scope of any obligation to give reasons, as part of the duty to give conscientious consideration, was addressed in *Spurrier* at §§131 to 137. After citing *West Berkshire* above, the Court went on to approve the approach of Ouseley J in *R (Buckinghamshire CC) v Secretary of State for Transport* [2013] EWHC 481 (Admin) at §549 and 624. Where there is a large number of consultation responses, conscientious consideration does not require a fully reasoned decision letter as following a public inquiry. The real question is whether the response to the problems is rational. Nevertheless there should be evidence of consideration of important points made by consultees: *R (Morris) v Newport City Council* [2009] EWHC 3051 (Admin) §38.

(2) Discussion

Pre-determination: Coughlan (1), and Ground 2

154. The starting point is to consider the particular duty of consultation in s.12(6) of the 2006 Act, both its wording and its statutory context. In my judgment, as a matter of construction, the subject matter of the consultation required by s.12(6) is "regulations" which the appropriate authority is considering making i.e. the proposed regulations. Thus, in the present case, where the Secretary of State was proposing to make regulations banning the use of e-collars, it was that proposed ban upon which he was required to consult.

155. Secondly, the purpose of this consultation was to ensure procedural fairness for those who might be affected by the introduction of the regulations. Under s.12(6) itself, the class of persons to be consulted are "persons representing any interest concerned" and, moreover, it is for the Secretary of State to determine who those persons are. Given this statutory context, I do not accept that the purpose was public participation in a wide-ranging consultation, such as might be required under other statutory duties (cf. the wider class of persons in s.26(2) of the Scotland 2006 Act).

156. Thirdly, in order to ensure consultation at the "formative stage", the Secretary of State was required to consult on *whether* such a ban should be introduced, and not just on the implementation of that ban.

157. Fourthly, the Secretary of State's role in this statutory context was to put forward a proposal and he was entitled to have a pre-disposition in favour of his proposal i.e. introducing a ban on e-collars, and to advance that preference in the consultation exercise; see in particular *Langton* at §§106-107.

158. Whilst it may be that, at places, the Secretary of State could have expressed himself more carefully, I am not satisfied that either at the time he went to consult or at any stage during that process, there was either any actual pre-determination, or the appearance of pre-determination, of the issue of whether to introduce a ban.

159. As regards the Consultation Document itself, it has to be considered as a whole. Whilst the statement that the Secretary of State "has concluded" might suggest pre-determination, other statements indicate that he was doing no more than putting forward his preferred choice ("we wish to ban"; "we are proposing … to make it an offence"; "If Defra proceed"; "proposed ban" "comments on the proposal".)

160. Nor are Defra's "tweets" on 11 March evidence of a closed mind. Rather Defra was praying in aid the views of those who support the Secretary of State's preferred choice. There was no obligation the Secretary of State to remain neutral or to refrain from expressing his preference.

161. Assuming, as I do, that the words "remains committed" in the Ministerial Submission in August indicate that as at 26 April and earlier, the Secretary of State was also "committed" to introduce a ban, I am not satisfied that this is sufficient to indicate a closed mind, rather than a pre-disposition towards his preferred scheme at that earlier stage. I address this statement further under *Coughlan (4)* below.

162. The Secretary of State did consult on "whether" and not just on "how". The Consultation Document allowed opponents of a ban to make representations: see questions 6, 7 and 8 of the online survey. What is more, the content of responses received (with large numbers opposing the ban) indicates that consultees understood that they could make representations on that question. The fact that the consultation *also* sought views on implementation (i.e. effect on retailers and further restrictions) does not detract from this conclusion.

163. Finally, that the Secretary of State did not have a closed mind is demonstrated by his subsequent change of position in relation to containment systems. Nor do I consider that, taking account of all of these circumstances, the fair-minded and informed observer would consider that there is a real possibility that the Secretary of State had closed his mind to the merits of whether there should be a ban on e-collars.

164. For these reasons I conclude that the *Coughlan (1)* requirement was satisfied and Ground 2 is not established.

Contents of the consultation: Coughlan (2)

165. As regards fairness and balance, the mere brevity of the Consultation Document is not, of itself, unfair. Nor do I consider that the Secretary of State was required to go into great detail about alternative devices, nor about the circumstances where reward-based training might fail, nor to refer to bark collars. Moreover, the Consultation Document did not misrepresent the then current position in Scotland. Whilst the position in Scotland appears to have changed over time (and whilst Defra's understanding of that position was at times confused (see paragraph 71(3) above)), the Consultation Document accurately quoted the draft Scottish guidance as it then was, and reflected it as eventually substantially enacted: see paragraphs 42 and 105 above.

166. However, there are weaknesses in the Consultation Document. It could have been expressed more clearly and in more detail. It was written in terms which favoured the introduction of a ban. The description of e-collars as "punitive devices" whilst strictly accurate in so far as it refers to them as being an "aversive" training method, nevertheless carried a perjorative connotation. The statement that the Lincoln research showed that e-collars "can have a detrimental effect on dogs and can cause harm and suffering" was, again, strictly accurate. However it did not point out that those conclusions related to *some* dogs and that the Lincoln research was more finely balanced. As to the references to the evidence "growing" and "emerging", that is a reference to the Lincoln research and it is correct that the Lincoln research did represent new and additional scientific evidence of harm to animal welfare. However that evidence had been known by Defra since 2011.

167. Furthermore, the Consultation Document did not refer to Defra's change of position. Consultees were not informed that, a matter of a few weeks earlier in its 5 February letters (paragraph 36 above) Defra's opinion was that the Lincoln research - now positively relied upon to support a ban - was not sufficient evidence to support a ban. It would have been better had the Consultation Document explained this and the rationale for the change of position, in the detail that it has now been explained by Mr Casale in his third statement (paragraph 40 above). However, first, the Consultation Document did expressly rely upon, in addition to the Lincoln research evidence, the "public concerns" regarding treatment of pet animals. Secondly a main finding of the

Ministerial Submission was that "most of those against a ban" were aware that the Government's stance had changed (see paragraph 70 above). For example, Mr Penrith in his online response complained about the change of position. Consultees had sufficient information to make an informed and intelligent response.

168. As regards the absence of reference to alternative options, and in particular regulation, licensing or quality controls, the present case, at its highest, falls within Lord Wilson's second category (§28), where brief reference to discarded alternatives *may* be required. Applying Lord Reed's approach in §40, that depends on "the particular context". That includes the fact that, unlike *Moseley,* the purpose here was procedural fairness for those affected. Subject to one point, none of the exceptional features of *Moseley* identified by Cranston J in *Langton* §109 apply to the present case. That point is the question whether consultees could be expected to identify the alternatives themselves. ECMA, Countryside Alliance and other interest group organisations were aware of the alternatives, as was Mr Penrith on behalf of ARDO. Moreover they expressly referred to them in their consultation responses. The ECMA Consultation Submission plainly put forward in some detail the alternative options for regulation. Whether others were aware is not known. It appears that in fact many consultees positively advocated measures to ensure proper use of e-collars including professional training. However only a small percentage of consultees (about 6%) wanted to see a regulatory scheme and/or a licensing scheme and/or mandatory training. Whilst it cannot be ruled out that some consultees were deprived of the opportunity to comment on these alternative options, the case for regulation was put forward in some detail in the course of the consultation exercise (and subsequently considered in the Government Response and the Ministerial Submission). In these circumstances, I conclude any deficiency in this regard is not sufficient to infringe the *Coughlan (2)* requirement.

169. Finally, as regards the Scottish consultation (paragraphs 103 to 106 above), whilst in appropriate circumstances, comparison with other consultation exercises may cast light on the sufficiency of the consultation in question (see *Moseley* per Lord Wilson §30), such comparison should be undertaken cautiously, particularly where there has not been any judicial assessment of the comparator. In the present case, the Scottish Consultation Document was substantially longer and more detailed that the Consultation Document. Comparison with the Scottish consultation does highlight weaknesses in the Consultation Document. However, taking account of Lord Reed's observations in *Moseley* at§41 about undue complexity or length, I am not satisfied that *only* a document of such detail could satisfy the *Coughlan (2)* requirement.

170. For these reasons, I conclude on balance that, whilst not free from deficiency, the Consultation Document included sufficient reasons to allow consultees to give intelligent consideration and an intelligent response and the *Coughlan (2)* requirement was satisfied.

Adequate time: Coughlan (3)

171. Whilst the consultation period was short in comparison with the time allowed in Scotland, I consider that the time allowed was "adequate" for the purpose of enabling those consulted to provide an intelligent response. First, there was no fixed time limit. The period had to be proportionate. Secondly, there were a large number of responses, substantially greater than in the Welsh and Scottish consultations, which

were longer. Thirdly, no-one asked for more time. ECMA suggested that they had not been able in the limited time to provide more evidence, but did not, at the time, ask for more time. Fourthly, there is no actual prejudice to either the Claimants or to anyone else. As regards the public at large, there is no evidence that ordinary pet owners required a longer period to formulate a response. Over 6000 of the 7,334 replies were from members of the public.

172. As regards ECMA in particular, it submitted a detailed and lengthy response within the period and, moreover (along with other key interested parties) was afforded a further opportunity to discuss matters after the end of the consultation period at the July meeting and before the analysis of proceedings was completed. I am satisfied that it was able to put across its views fully and fairly. At the time no complaint of unfairness or prejudice was made. No complaint was made at the July meeting, nor in the pre-action letter, about inadequate time.

173. As regards the suggestion of an expert report, that was not raised at the time. No such report was provided at the meeting in July 2018, some four months after the consultation period. The Claimants had nothing to add at that meeting. There was no explanation even before the Court of what the content of that report might be. The points made in Mr Stone's second statement were all made in the consultation responses of the parties concerned. Whilst the lack of a warning in advance of the consultation was not consistent with previous practice, it does not mean that the time allowed thereafter was inadequate.

174. For these reasons, I conclude that the *Coughlan (3)* requirement was satisfied.

Conscientious consideration: Coughlan (4)

175. The principal points made in the ECMA Consultation Submission were failure to consider (1) the full range of products available, (2) what alternative products will be used if there is a ban, and their detrimental effect, (3) experience of other countries, (4) existence of bark collars and (5) regulation. Other points were made by others opposed to a ban, including the Countryside Alliance, Ms Furze and Mr Penrith. These were also the matters into which, under Ground 3, the Claimants contend there was no adequate inquiry.

176. The Government Response and the Ministerial Submission set out in some detail an analysis of the consultation responses. The process of collating, recording and analysing those responses is explained by Mr Casale in his first witness statement. The summary of response section of the Government Response runs to some 20 pages, and was included, in draft, with the Ministerial Submission. It is a very detailed document. It extracts the key points made both for and against a ban. It expressly identifies specific reasons given by those opposing a ban, including: advocating regulation and/or a licensing system; proper and/or mandatory training; the unintended consequences of more dogs being put down and increase in dog attacks; e-collars causing reduced behavioural problems; safety and control; importance for uncontrollable animals; and giving the animal more freedom. It then sets out in detail a series of observations from those opposed to a ban and specific points made in favour of a regulation, rather than a ban. All this material was placed before the Secretary of State in the Ministerial Submission.

177. Moreover the Ministerial Submission itself, particularly in its consideration of the four options, addressed in substance many of the points made opposing a ban and in support of regulation. It recognised that a majority of respondents were not in favour of a ban and took account of the fact that, of those, many thought it important that e-collars should be used properly and that a smaller number wanted a regulatory scheme. Then, importantly, the Submission set out four options, which it proceeded to analyse in some detail. As regards Option 2, that was adopted, the Submission took account of the fact that it would remove a way of controlling dogs, and thus less ability to prevent livestock attacks. Most significantly, regulation was expressly addressed as Option 4. Substantive consideration was given to introducing a regulatory system (see paragraph 75 above); the pros and cons of regulation were fairly addressed. The ECMA point that regulation would enable e-collars to be used to tackle wayward dogs was considered and it was expressly recognised that this approach had support both from ECMA and from the Countryside Alliance. The Submission went on to consider what were the perceived disadvantages of a regulatory system. In this way, I am satisfied that the alternative of regulation was conscientiously considered by the Secretary of State.

178. The Secretary of State was not obliged to accept the majority view opposed to a ban. There was no need for a detailed reasoned analysis in respect of every point made by consultees. In this regard, I note that the Scottish response document did not go into underlying reasons for accepting/rejecting responses. The fact that the original proposal was modified so as to exclude containment systems demonstrates conscientious consideration having been given.

179. As to the "remains committed" statement in the Ministerial Submission, whilst it might suggest that even prior to consideration of the consultation responses the Secretary of State had effectively *decided* to introduce a ban, it is clear that there was conscientious consideration of the responses, at least to the extent of a change of position on containment systems. The fact that the Secretary of State may have wished to introduce a ban on e-collars, both before and after receipt of the consultation responses, does not mean that he did not give conscientious consideration to those responses. It is equally consistent with him not being persuaded to change that initial view. In view of the detail of the analysis of responses, the Government Response and the Ministerial Submission described above, I am satisfied that that was the position. I conclude therefore that the requirement of *Coughlan (4)* was met.

Conclusion on Ground 1 and Ground 2

180. The consultation process here was far from perfect – it could have been better. The Secretary of State could have expressed himself in some less trenchant terms; the Consultation Document was brief; it could have referred to alternative options; in places it used unfortunate language. However ultimately there was a large response to the consultation, representing a full range of views on e-collars; the case for alternative options was made and was considered by the Secretary of State. I ask myself the question whether overall, and taking account of such deficiencies as there were, the consultation process as a whole was so unfair as to be unlawful i.e. whether something had gone clearly and radically wrong. My answer to that question is No. The consultation as a whole was not clearly unfair. Accordingly, and in the light of my conclusions at paragraphs 164, 170, 174 and 179, Grounds 1 and 2 are not established.

Ground (3): Tameside

The Claimants' submissions

181. The Claimants submit the Secretary of State was properly required to understand a number of considerations raised in the ECMA Consultation Submission as follows:

(1) The full range of products now available for the control of cats and dogs;

(2) Evidence or lack of evidence on the impact of bans in other jurisdictions;

(3) Approaches other than a ban taken in other jurisdictions;

(4) The need to distinguish between e-collars and bark control collars;

(5) The welfare implications for those animals which do not respond to positive training and of other alternative devices being used; and the potential for regulation.

The Secretary of State failed to make any inquiry into these matters before making the Decision, and in this way was in breach of the duty of inquiry, established in *Tameside*.

The Secretary of State's submissions

182. The Secretary of State submits on the facts the Claimants do not get close to the high threshold for a breach of the *Tameside* duty, as explained in *R (Khatun) v Newham LBC* [2004] EWCA Civ 55 [2005] QB 37. This complaint is, in substance, a further assertion that Part 2 of the ECMA Consultation Submission was not properly considered, under *Coughlan (4)*. However, officials considered all consultation responses and fairly and properly reported them to the Secretary of State. The Claimants have not explained why their views were a mandatory relevant consideration – i.e. why a lawful decision could not be made in the absence of that information. The Claimants' case amounts to a contention that the Secretary of State should have generated new scientific evidence.

Analysis

(1) <u>The Law</u>

183. A decision-maker is under a duty of inquiry: a duty to ask himself the right question and to take reasonable steps to acquaint him or herself with the relevant information to enable him to answer it correctly: *Tameside*, supra, at 1065. Subject to *Wednesbury* challenge, it is for the decision-maker and not the court to conclude what is relevant and to decide upon the manner and intensity of inquiry to be undertaken into any relevant factor accepted or demonstrated as such. The court should only strike down a decision not to make further inquiries if no reasonable decision-maker, possessed of material before the decision-maker, could suppose that the inquiries made were sufficient: *Khatun*, supra, at §35.

(2) Discussion

184. I accept the Secretary of State's submissions here. First, in substance, this raised no different point from the issue of conscientious consideration in *Coughlan (4)*. Secondly the issue is whether the alleged failure to investigate these matters was *Wednesbury* unreasonable. Thirdly, on the facts, in the summary of responses section of the Government Response, the full range of evidence received was summarised. In particular the views of those who favour use of e-collars were recorded in some considerable detail as set out in paragraph 176 above. The Government Response and the Ministerial Submission covers all the main points made by the ECMA Consultation Submission. Finally, in so far as the Claimants' contentions here amounted to a submission that the Secretary of State should generate new scientific evidence, this goes beyond the *Tameside* duty. It cannot be said to be *Wednesbury* unreasonable for a decision-maker not to be required to defer making a decision based on existing material, by having to commission further evidence.

Ground (4): Wednesbury unreasonableness

The Claimants' submissions

185. The Claimants submit that the Decision was irrational because it was not a reasonable response to any welfare concerns regarding the use of e-collars. The Decision involved "serious logical or methodological error", particularly in the treatment of the research base. The Decision was devoid of valid reasoning. Neither of the two reasons there given stand up to scrutiny.

186. First, as to e-collars being potentially open to abuse, a wide range of products can be open to abuse; the risk of abuse can be addressed through regulation and when used appropriately e-collars can be beneficial. There is no evidence that e-collars are more easily open to abuse than other products, such as a choke chain or prong collar. There is no evidence of any comparative assessment having been carried out by the Secretary of State. The assertion that owners did not read instructions prior to use is not evidence, but in any event can be addressed by better regulation.

187. Secondly, as to potential harm to animal welfare, this has to be considered in the round. The Secretary of State has failed to consider what would happen in the absence of e-collars, namely animals, which could otherwise be controlled, being put down; other animals being attacked by dogs whose behavioural problems cannot otherwise be managed or such dogs suffering to an even greater extent through the misuse of prong or choke collars. There is no rational basis for distinguishing the approach as between e-collars and containment systems. Having recognised that containment systems can produce a net benefit in animal welfare, the conclusion that the e-collars can be harmful to animal welfare is unreasonable in its over-simplicity and fails to balance benefit and disbenefits (in the way considered in the case of containment systems).

188. Thirdly, as to the Lincoln research, in the Ministerial Submission, it was the only "pro" reason given for the ban of e-collars. Yet, the reliance on the Lincoln research is unbalanced. It fails to take account of the conclusion there that e-collars cause no long-term detrimental effects on animal welfare. Furthermore, having taken the position, as late as 5 February 2018 that that evidence was not strong enough to

support a ban, the Secretary of State now seeks to rely on that same evidence for the opposite conclusion. No rational explanation has been given for this "volte face". Fourthly the Secretary of State has failed to engage with the fact that the 2006 Act aims to prevent "unnecessary suffering", rather than outlawing any act which causes any animal pain. Fifthly, the case of *Petsafe* is distinguishable on the facts and provides no basis for the conclusion that the Decision was not *Wednesbury* unreasonable. Sixthly, there is no evidence that the Secretary of State had regard to the counter-argument that it may be necessary to destroy dogs which cannot be controlled.

The Secretary of State's submissions

189. The Secretary of State contends that the Claimants' argument here is no more than a lengthy disagreement with the merits of his policy. The question is not the merits of the claimants' hypothetical alternative regulatory system, but whether the proposal in question was in the range of reasonable responses open to the Secretary of State. The rationale for the proposed ban (to be found in the Consultation Document and in the Government Response) included the following:

(a) The Lincoln research showed that e-collars can have a detrimental welfare effect on dogs and can cause harm and suffering.

(b) Many owners do not read instructions prior to use and e-collars can be open to abuse.

(c) Many welfare organisations are opposed to the use of e-collars, because negative forms of training do not necessarily work, can be counter-productive and can cause dogs to exhibit other dangerous behaviour.

(d) By contrast the welfare impact of containment systems can be minimised and such systems may avert other risks to animal welfare.

These reasons are rational and supported by evidence. The Secretary of State was entitled to conclude that, whilst a ban had not been implemented in the past, it now should be.

190. Further the fact that other devices may also cause welfare concerns, but have not been banned does not demonstrate that it was irrational to ban the collars. The potential benefits of e-collars (including the avoidance of destroying dogs which cannot be controlled without e-collars) were fully understood. However this is covered by s.9(4) of the 2006 Act in any event.

191. In oral argument, Mr Turney submitted that the key point in this case is that the Decision was a policy-laden decision, involving a moral/political judgment. The Decision is a discretionary decision, as made plain by the terms of section 12. There is a mischief to be addressed in relation to the use of e-collars and the ban on their use is one rational solution to that mischief and is directly connected to, and addresses, that mischief. It cannot be said that no decision-maker could reach that conclusion.

Analysis

(1) The Law

192. Applying the recent exposition in the *Law Society* case at §98, *Wednesbury* unreasonableness has two distinct aspects:

(1) Whether the decision was outside the range of reasonable responses open to the decision-maker.

(2) As regards the process by which it was reached, a decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it – for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning or that the reasoning involved a serious logical or methodological error. Factual error can also be regarded as an example of flawed reasoning – the test being whether a mistake as to a fact which was uncontentious and objectively verifiable played a material part in the decision-maker's reasoning.

193. The intensity of the scrutiny of review depends on the circumstances of the case. There is a spectrum of decisions, from, at one end, decisions involving political judgment or policy where there is low intensity of review to, at the other end, decisions involving fundamental rights where review is stricter and sets a lower threshold of unreasonableness. The greater the policy content of a decision and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational: *Spurrier* §§147-150 citing *IBA Healthcare v OFT* [2004] EWCA Civ 142 and *R v Ministry of Defence ex parte Smith* [1996] QB 517. A decision *supported* by expert evidence is difficult to challenge (albeit that is not the same as a decision with no evidence).

(2) Discussion

194. I have not found this issue straightforward, most particularly in the light of the Secretary of State's change of position. Nevertheless, it is necessary to concentrate, in the first place, on the underlying rationality of the Decision, rather than on the change of position.

195. First, the decision in issue is the Decision in August 2018 and not the decision to consult made at the end of February 2018. By August 2018, the Secretary of State had received and considered a substantial number of consultation responses. Secondly, the Decision was a matter for the Secretary of State's discretion and to the extent that it was a policy decision, the Court exercises its review function with caution. Thirdly, however, (as recognised in the Ministerial Submission) the Decision could only be made "for the purpose of promoting animal welfare" and therefore there had to be some evidence that use of e-collars is detrimental to animal welfare. A ban could not properly be imposed *solely* because, as a matter of morality or ethics, it is wrong in principle to inflict an electric shock upon an animal. This was accepted in the Ministerial Submission (paragraph 76 above).

196. Here there is positive evidence that use of e-collars can be detrimental to animal welfare. The Lincoln research itself provides evidence, in a number of places, that their use leads to a negative impact on welfare, at least in a proportion of dogs: see paragraphs 88 to 90 above. This is confirmed by the PLOS One report. To this extent, the Ministerial Submission on Option 2 is correct: see paragraph 73 above. The suggestion that e-collars do *not* cause long-term detrimental effects on animal welfare is not to be found in the Lincoln research itself (In fact, the summary of Lincoln 1 at the outset of Lincoln 2 suggests the opposite). Rather, that suggestion is to be found in Defra's 2013 letter, the CAWC Report and in the Scottish government's interpretation of the Lincoln research: see paragraphs 34, 92(2) and 103 respectively above. Moreover, the Claimants themselves recognise that use of e-collars does raise animal welfare issues which need to be addressed.

197. The Decision puts forward two reasons for the ban. First, as regards "harm to animal welfare" arising from the electric shock itself, this is supported by the Lincoln research. But containment systems, not to be banned, also involve the administering of an electric shock. The Ministerial Submission recognised the potential for inconsistency in this regard. However in my judgment, there is a rational basis for distinguishing between the two devices, as set out in the Decision. Containment systems prevent other risks to animal welfare (e.g. straying on to public roads), physical fencing is not a real practical and/or affordable alternative and the pet learns not to approach the fence after having received only one or two shocks. Moreover, there was also the 2016 Lincoln research relating to cats: see paragraph 69 above.

198. Secondly, as to e-collars being "open to abuse", it is inherent in the difference between a manually operated device and one operated automatically without human intervention, that the former, and not the latter, is open to misuse or certainly use other than in accordance with manufacturer's instructions; and in this way the scope of harm to animal welfare is greater. The consultation responses provided evidence of concerns relating to such misuse, arising from failure to use in line with manufacturers' instructions. Moreover, as stated in the Decision, the Lincoln research did show that many users did not use e-collars in compliance with manufacturer's instructions: see paragraph 89 above. The Claimants did not dispute that there is such potential for abuse; indeed that is one of their principal reasons for advocating stringent regulation of e-collars and their use. Moreover, as Beatson J pointed out in *Petsafe*, the fact that other devices could have been banned does not mean it was irrational to ban e-collars.

199. Regulations under section 12 of the 2006 Act may go beyond the matters addressed in section 4 and section 9. It is a broad discretionary judgement. The full breadth of material was considered including the risks of dogs being destroyed.

200. Thus, on the basis of this evidence and reasoning, in my judgment it cannot be said that the Decision was outside the range of reasonable responses open to the Secretary of State, nor that there is a demonstrable flaw in the reasoning which led to it.

201. The question then arises as to whether the Secretary of State's change of position in February 2018 leads to a different conclusion. The change of position was stark and sudden: from a position in the 5 February 2018 letter that the Lincoln research did not support a ban to a position, within a few weeks, that it did support a ban. Moreover, the underlying rationale for the change was not disclosed until very late in the

proceedings – Mr Casale's third witness statement provided on the morning of the fourth day of the hearing, see paragraphs 36 to 38, 40 and 41 above. The Claimants' sense of grievance by this turn of events is understandable.

202. Nevertheless, I ask myself how this change of position renders irrational an otherwise rational decision. Ultimately, I conclude that the change of position, and the reasons for it, do not render the Decision *Wednesbury* unreasonable. There is evidence of detriment to animal welfare. Whether that evidence is *sufficient* to justify a ban is a matter of assessment and judgment on the part of the decision-maker (see paragraph 99 above, *Petsafe* at §70). Different assessments may be made of one and the same evidence by different decision-makers. That is particularly the case here, where there are strongly held divergent opinions on the evidence. Whilst the evidence has not been entirely the same, Welsh and Scottish Ministers have reached varying assessments of e-collars and whether there should be a ban – as indeed have the authorities in other jurisdictions. As recognised by Beatson J, to do so is not irrational. Similarly, it seems to me that the same decision-maker may reach a different conclusion at different points in time. The assessment of Scottish Ministers has changed over time: see paragraphs 104 to 106 above. Here, the Secretary of State undertook a fresh evaluation of the Lincoln research evidence and reached a different conclusion, to the extent that he decided to put forward, for consultation, a ban on e-collars. That was a matter of policy judgment. As made clear in Mr Casale's third statement, in making that fresh evaluation, leading to the decision to consult towards the end of February 2018, the Secretary of State took account of the changing views and attitudes of society towards animal welfare. But those "changing" or "current" views" did not amount to new or different "evidence". The decision to consult on a ban was founded upon the Lincoln research evidence of an effect on animal welfare, albeit viewed afresh through the lens of the Secretary of State's perception of public views on animal welfare, namely that the public are less willing to countenance harm to animals. The "change" in views relied upon cannot sensibly be read as a change that had taken place in the two to three weeks since the 5 February letter; it must be a reference to a shift in attitudes which had been ongoing for some time. Moreover, some 6 months later, after the consultation process had been completed, the Decision itself was founded upon the Secretary of State's assessment of the Lincoln research evidence, taking account of the consultation responses (which included reference to the views of society) and wider public concerns.

203. For these reasons, I conclude that the Decision was not *Wednesbury* unreasonable and Ground 4 is not established.

Ground 5: A1P1 and Article 34

The Claimants' submissions

204. The Claimants submit that the decision was disproportionate and thereby breach their rights under the ECHR A1P1 and Article 34 TFEU.

205. First, A1P1 and Article 34 can be engaged by a ban that is not yet in force. The Decision was a final policy decision to introduce a ban. The Decision does in a real and practical sense interfere with the Claimants' businesses. Secondly, there is substantial evidence of impact upon the Claimants' property rights. A complete ban on sale would undermine most of ECMA's members' businesses in the UK as a whole.

206. As regards A1P1, first, the relevant possession or property is the Claimants' ability to sell e-collars in England. This has the nature of presently marketable goodwill. A loss of current sales has happened and that is a possession. Affecting the value of goodwill is enough. It is a necessary inference that the Decision has a current effect on sales. Nor is the claim premature: the Court can and should make a decision on an issue of principle. Secondly, the decision to ban use of e-collars amounts to a deprivation (i.e. an expropriation) of those property rights. There is a greater burden of justification in a case of deprivation. Thirdly, there is no evidence that any proportionality assessment was conducted by the Secretary of State. This reduces the weight that the court should give to the Secretary of State's own views. Fourthly, applying the relevant four-limb proportionality test, the interference is not proportionate:

    (1) A proposed ban which increases the number of otherwise avoidable animal deaths and/or the use of other aversive products cannot be objectively shown to be rationally connected to the legitimate aim of animal welfare.

    (2) The aim could have been achieved by less intrusive measures, namely effective regulation. This has been shown to work in other jurisdictions. Further the Secretary of State initially accepted that the evidence base was not strong enough to support a ban. Without the ban, abuse concerns can be addressed through proper regulation.

    (3) The Secretary of State cannot show that on a fair balance, the benefits of achieving the aim by this measure outweigh the disbenefits resulting from the restriction of the Claimants' rights.

207. Further this case is distinguishable from *Petsafe*. Here the Secretary of State cannot benefit from an extensive consultation. The decision and the evidence base is different. The Secretary of State has a detailed and cogent submission from ECMA. A ban in England is clearly a greater interference with the Claimants' property rights than a ban in Wales.

208. As regards article 34 the same result ensues. First as in *Petsafe*, Article 34 is engaged by the Decision. As to justification, first, the aim of animal welfare is legitimate; second, the measure of a blanket ban is not suitable to achieve that aim (for the same reasons as under A1P1); thirdly the decision is disproportionate (for the same reasons as under A1P1). Finally the impediment on trade here is not minor and unintended, given the express aim of the ban to dry up sales.

The Secretary of State's submissions

209. The Secretary of State submits that the Claimants' argument is premature. First, there has been no actual interference; secondly, the scope of the impact has not yet crystallised; thirdly there is no evidence of loss of present marketable goodwill; the impact of the announcement now is an impact on future sales; there is no claim for actual lost contracts. There is no evidence that the Decision has had a decisive effect on the Claimants' members' business. Moreover, there, is no deprivation for A1P1 purposes.

210. As regards justification, there is no relevant distinction on the facts from *Petsafe*. The case of justification is stronger in the present case, and there are no new factors militating against a ban. The broad rationale for the Decision remains the same as that accepted by Beatson J; namely, the three concerns he identified (paragraph 98 above). There is a wide margin of appreciation. The Secretary of State was plainly pursuing a legitimate objective and the nature of the objective goes to the extent to which the court should be willing to interfere. Whilst there is as yet no Regulatory Impact Assessment as there was in *Petsafe*, the advantages and disadvantages of both the proposed scheme and the regulatory framework were considered in the Ministerial Submission. The Regulatory Triage Assessment contained a proportionality assessment. Business costs are shown to be low. The Secretary of State considered that the proposed limited ban was proportionate to the animal welfare aims. The Claimants are unable to demonstrate any disproportionate effect arising from the proposed regulations. There was a clear factual basis for the proposals. The proposals distinguish between different devices i.e. it is a nuanced proposal. The alternative of a regulatory scheme would not necessarily be less intrusive.

Analysis

(1) The Law

ECHR Article 1 Protocol 1

211. A1P1 provides that:

> *"(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *(2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*

212. The following principles are relevant to the application of A1P1:

(1) The concept of possessions under A1P1 is freestanding. Loss of future income per se is not a possession protected by A1P1. However the goodwill of a business with a present marketable value may constitute a possession. That present day value may reflect a capacity to earn profits in the future, which in turn is derived from the reputation that the business enjoys as a result of its past efforts: *Breyer Group plc v Department of Energy and Climate Change* [2014] EWHC 2257 (QB) [2015] 2 All E R 44 (Coulson J) at §75; and [2015] EWCA Civ 408 [2015] 1 WLR 4559 (CA)) §§23, 43-45. If the interference causes a loss of marketable goodwill at the time of the interference and it can be capitalised, it is protected by A1P1.

(2) Both deprivation (expropriation) and control of possessions amount to interference within A1P1. But the distinction between the two is not crucial: *R (Mott) v Environment Agency* [2018] UKSC 10 [2018] 1 WLR 1022 at §32.

(3) A1P1 can be engaged by measures which are not yet effective. A proposal for consultation which, as a matter of fact and in practice, has an immediate and serious adverse impact on business will amount to an interference: *Breyer (CA)* §§71-73.

(4) Justification of an interference with property rights protected by A1P1 involves four stages: (i) whether there is a legitimate aim which could justify the restriction of the protected right (ii) whether the measure adopted is rationally connected to that aim (iii) whether the aim could have been achieved by a less intrusive measure and (iv) whether, on a fair balance, the benefits of achieving the aim by the measure outweigh the disbenefits resulting from the restriction of the protected right: *In re Medical Costs for Absestos Diseases (Wales) Bill* [2015] AC at §§45 -46, 53, 54, 56 applying *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39 at §20. A fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The Court must consider whether the person concerned has to bear a disproportionate and excessive burden: *Hutten-Czapska v Poland* (2006) 45 EHRR 4 at §167.

(5) At the fourth, fair balance, stage, the Court must decide for itself the question. However where the authorities have given proper consideration to the issues of fair balance, the court should give appropriate weight to their assessment: *Welsh Asbestos*, supra §§46, 54.

Article 34 TFEU

213. Article 34 TFEU provides that:

> *"Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."*

Article 36 TFEU provides that:

> *"The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants;… Such prohibitions or restrictions shall not however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."*

214. The protection of animal welfare is a legitimate objective and capable of justifying a measure pursuant to Article 36. As regards EU principle of proportionality, this is not expressed or applied in the same way as the principle under the ECHR (set out above). Under EU law, it is for the national court to reach its own conclusion on proportionality (and not merely to review the proportionality assessment of the

national authority responsible for the measure). Proportionality involves consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method. However, this does not require the selection of the least onerous method; rather the question is whether a less onerous method could have been used without unacceptably compromising the objective pursued. Further there is some debate as to whether there is a third question, sometimes referred to as proportionality stricto sensu: namely, whether the burden imposed by the measure is disproportionate to the benefits secured: see *R (Lumsdon) v Legal Services Board* [2016] AC 697 §§26, 29, 33, 101, 105 108(1) and *R (Mas Group) v Secretary of State for Environment, Food and Rural Affairs* [2019] EWHC 158 (Admin) at §53.

(2) Discussion

215. As regards A1P1, I proceed, as did Beatson J, on the basis that a ban on e-collars will involve an interference with the possessions of the Claimants' members and that the Decision to introduce such a ban is equally an interference. Whilst I accept that a loss of future sales contracts is not sufficient, first, there is evidence of an actual downturn in sales since the announcement of the proposed ban and secondly, in the light of Ms Critchley's evidence at paragraph 94 above, I consider it likely that the present day capital value of the goodwill of a member's business (based on past sales of e-collars) is adversely affected by the knowledge that, in the future, e-collars sales will be prohibited. To that extent, the Decision itself has already had an impact and amounts to a relevant interference. Moreover, to the extent that the Claimants' case is based on the effect of a ban, once it is introduced, I do not consider that this ground of challenge is premature. The Court can make a decision in principle that a measure when introduced will be unlawful or incompatible with the ECHR: see *Lewis: Judicial Remedies in Public Law* (5th edn) §7-049.

216. As regards justification, the promotion of animal welfare is a legitimate aim which is capable of justifying the restriction of the right to peaceful enjoyment of possessions, and, in my judgment, the proposed ban is rationally connected to that aim. As I have concluded under Ground 4, in the current circumstances the proposed ban is a rational response to concerns about harm to animal welfare. The three concerns identified by Beatson J apply here too. Just because the ban could have been wider so as to include other aversive techniques (e.g. choke collars), does not mean that the narrower ban is not justified: *Petsafe* §65.

217. As to the third stage, I am not satisfied that the aim could have been achieved by a less intrusive measure, namely effective regulation. Various alternative measures of regulation (licensing of users, or of trainers, or regulation of training) have been put forward at different times. It is far from clear what measures are proposed and how and whether they would work in practice. Moreover, as Beatson J observed (albeit in the context of proportionality under Article 34), regulation would address only the concern about potential misuse, and not, in particular, the harm arising from the electric shock itself. On any view, regulatory measures are likely to be complex and, what is more, to impose a cost and time burden on business and/or a regulator and the consumer. In my judgment, as suggested in the Ministerial Submission under Option 4, the alternative of "regulation" has not been shown to be less intrusive or less costly. As to the fourth stage, fair balance, I give some weight to the proportionality

assessment within the Ministerial Submission and the RTA. In any event, in my judgment the burden of a ban (but excluding containment systems) upon the Claimants' members is not so substantial nor so excessive as to be disproportionate when set against the benefits of promoting animal welfare.

218. As regards Article 34, the proposed ban does engage Article 34. Nevertheless it pursues the legitimate objective of protection of animal welfare under Article 36. Applying the proportionality test under EU law, for the reasons given above, first I am satisfied that the proposed ban is suitable or appropriate for achieving that objective. Secondly, even if the alternative of regulation could be shown to be "less onerous", nevertheless it would not meet the concern arising from the administering of the electric shock itself. Thirdly, as to the balance between burden and benefit, the relevant burden for Article 34 purposes is the impact upon imports rather than upon the entire trade in e-collars. Having found the latter burden not to be disproportionate, it follows that the lesser burden upon imports is not disproportionate.

219. For these reasons, the Decision does not infringe either A1P1 or Article 34 TFEU and Ground 5 is not established.

Conclusions

220. These proceedings have raised a number of matters about which the Claimants have, understandably, had concerns. There are aspects of the Secretary of State's approach to the introduction of a proposed ban on e-collars which are justifiably open to criticism. Ultimately however I conclude that the Secretary of State has not acted unlawfully.

221. In the light of my conclusions at paragraphs 180, 184, 203 and 219 above, the Claimants have not established any of their grounds of challenge. Accordingly this claim for judicial review is dismissed.

222. In due course I will hear submissions as to the appropriate orders to be made consequential upon these conclusions. Finally I am grateful to all counsel for the assistance they have provided to the Court in the presentation of oral and written arguments in this matter.