

Monday 2<sup>nd</sup> November 2009

## **Badger Trust calls for Welsh cull plan to be revoked**

The Badger Trust has formally asked for the decision of 28 September 2009 by the Minister for Rural Affairs in the Welsh Assembly Government to organise a badger cull to be revoked. The Trust has asked Mrs Elin Jones, the Minister, to postpone any cull while she considers the legal position and responds to the Trust's further letter before action under the Judicial Review Pre Action Protocol. (See below).

The Minister's order permitting the cull, at odds with the overwhelming preponderance of scientific evidence before her, came into force on 21 October, but a motion in opposition has been laid down and a debate against the order is due to be held on Wednesday (4 November).

David Williams, Chairman of the Badger Trust, said: "We have embarked on the process of judicial review with great reluctance because of our constructive relationship with the Welsh Assembly Government and the Ministry for Rural Affairs generally, and we hope our scientifically-based concerns about the proposals to kill badgers will be taken seriously and that our claim will not need to be pursued.

"Our letter before action carries full references to scientific sources of information, unlike material we are aware of produced in support of a culling policy".

The Badger Trust [1] emphasises that it would only tolerate the killing of badgers where it was underpinned by robust scientific evidence, which showed that it was necessary and would achieve a legitimate aim such as preventing the spread of bovine tuberculosis. It does not consider that this test has been satisfied in the current instance.

The Minister first mooted a "pilot cull" in April 2008 and in March this year said a cull alongside cattle measures would be necessary, subject to further research and a public consultation. On 13 May the Trust expressed concern because there had been no significant change in the scientific or economic issues since May 2008. But three days before the consultation closed on 30 July 2009 landowners were advised of the imminence of a cull.

The Trust's position is that badgers, a protected species, cannot be killed unless, under the Animal Health Act, it is to eliminate or substantially reduce the spread of disease, that it is both necessary and the most appropriate way but without causing unnecessary suffering. In this case, the Trust says, any benefit would be at best very marginal and the cost in terms of badgers killed and the impact on other species would be substantial. Consequently, a disproportionate cull of badgers would be against the principal purpose of the Act.

The Trust also challenges the contention that the cull would be within geographical boundaries which impede badger movement. The "Intensive Action Plan Area" is in North Pembrokeshire, one of the least isolated parts of Wales according to a Food and Environment Research Agency (FERA) survey commissioned by the Minister.

The UK ratified the "Bern" Convention on the Conservation of European Wildlife and Natural Habitats of 1979. Article 8 prohibits activity causing local disappearance or serious disturbance to badgers. The Trust asked the Minister what percentage of badgers were to be killed over the four-year period, but she replied on 15 September that initial surveys had not been done, exact numbers were unknown and there had been no ecological surveys. Without this information it is impossible for the Welsh Assembly Government to know whether it is risking the local disappearance or serious disturbance to badgers.

There is no adequate evidence on which the Minister could reasonably conclude that her order would achieve the requirements set out in the Animal Health Act 1981: "eliminate or substantially reduce" the incidence of disease; satisfy the test of necessity; and avoid the risk of spreading disease [2]. The order cannot, then, be valid under section 21 of the Act and would be wholly contrary to the policy of the Act itself. Furthermore, no evidence has been provided to say it would not be in breach of the Bern Convention.

It is a matter of public record that the farming community of Wales, on whom the Minister relies for support, has been vociferous in its calls for a badger cull. The Trust is sympathetic to the plight of all farmers suffering from the consequences of bovine tuberculosis, but such distress does not entitle the Minister to disregard the scientific evidence or act in breach of statute.

Note to editors

[1] The Badger Trust's aims are to promote and enhance the welfare, conservation and protection of badgers, their setts and their habitats for the public benefit, and it uses all lawful means to campaign for the improved protection of badgers.

[2] The Independent Scientific Group overseeing the ten-year £50 million Randomised Badger Culling Trial, said: "*After careful consideration of all the RBCT and other data presented in this report, including an economic assessment, we conclude that badger culling cannot meaningfully contribute to the future control of cattle TB in Britain*". (Bourne, J., Donnelly, C. A., Cox, D. R., Gettinby, G., McInerney, J. P.,

*Morrison, W. I. & Woodroffe, R. (2007) Bovine TB: the scientific evidence, Defra*). There is still no substantial or respectable body of science contradicting the conclusions of the ISG.  
Ends

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Dear Sirs

## **Proposed claim for judicial review on behalf of the Badger Trust**

### ***Introduction***

We are instructed by the Badger Trust in relation to the Minister for Rural Affairs' decision of 28 September 2009 to authorise a badger cull through the Tuberculosis Eradication (Wales) Order 2009.

We have advised our clients that the Minister's decision is unlawful and amenable to challenge by way of a judicial review claim in the Administrative Court.

Besides setting out our reasons for reaching that view, the purpose of this letter is to comply with the Judicial Review Pre Action Protocol. We also want to give the Minister an opportunity to reconsider her position and respond in a way that either makes the proposed claim unnecessary, or narrows what is in dispute, or at least makes the Minister's position clearer.

Our clients have asked us to make clear that the Badger Trust has embarked on the process of judicial review with great reluctance, given its constructive relationship with the Welsh Assembly Government and the Ministry for Rural Affairs generally. Its Board hope that its science-based concerns about the culling proposals will be taken seriously and that the proposed claim will not need to be pursued.

### **The details of legal advisers**

Our details are given on the letter head above. This matter is being dealt with by Gwendolen Morgan, a solicitor in the Public Law Department.

### **The details of the matter being challenged**

The Minister for Rural Affairs' decision of 28 September 2009 to implement a cull of badgers.

## **The issues: factual background and legal framework**

### *Factual background*

1. The National Federation of Badger Groups was formed in January 1986 by 19 local badger groups. In 2005 the Federation became the Badger Trust and it has now expanded to around 60 affiliated local groups. The Badger Trust is a company limited by guarantee and a registered charity.
2. The Trust's objectives are to promote and enhance the welfare, conservation and protection of badgers, their setts and their habitats for the public benefit. It is the leading voice for badgers and represents and supports around 60 local voluntary badger groups and around 1,000 individual supporters. The Trust provides expert advice on all badger issues and works closely with Government, the police and other conservation and welfare organisations. The Trust uses all lawful means to campaign for the improved protection of badgers and the Trust is a member of the Partnership for Action Against Wildlife Crime (PAW) and Wildlife and Countryside Link.
3. The Trust would like to emphasise that it would only tolerate the killing of badgers where it is underpinned by robust scientific evidence, which shows that it is necessary and would achieve a legitimate aim such as preventing the spread of bovine Tuberculosis. It does not consider that this test has been satisfied in the current instance.
4. The Minister's decision was made against a background of the evidence set out below.
5. A programme of culling has been firmly rejected in England and Eire. Scotland, which is officially TB-free, has not used culling either. Whilst the decision at the heart of this challenge was made in respect of Wales, the Minister would still have been cognisant of these relevant facts.
6. In 1998, the Independent Scientific Group on Cattle TB (ISG), a group of independent scientists, was commissioned by the Westminster Government to conduct a Randomised Badger Culling Trial (RBCT) in order to establish the effects of badger culling on the incidence of bovine TB in herds.
7. On the 18 June 2007 the ISG final report<sup>1</sup> was presented to the Secretary of State for the Department of Environment Food and Rural Affairs (DEFRA). Based on almost a decade of research costing over £50 million, the report concluded that:

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<sup>1</sup> Bourne, J., Donnelly, C. A., Cox, D. R., Gettinby, G., McInerney, J. P., Morrison, W. I. & Woodroffe, R. (2007) Bovine TB: the scientific evidence, Defra  
[www.defra.gov.uk/animalh/tb/isg/pdf/final\\_report.pdf](http://www.defra.gov.uk/animalh/tb/isg/pdf/final_report.pdf)

*“The ISG’s work – most of which has already been published in peer-reviewed scientific journals - has reached two key conclusions. First, while badgers are clearly a source of cattle TB, **careful evaluation of our own and others’ data indicates that badger culling can make no meaningful contribution to cattle TB control in Britain. Indeed, some policies under consideration are likely to make matters worse rather than better.** Second, weaknesses in cattle testing regimes mean that cattle themselves contribute significantly to the persistence and spread of disease in all areas where TB occurs, and in some parts of Britain are likely to be the main source of infection. Scientific findings indicate that the rising incidence of disease can be reversed, and geographical spread contained, by the rigid application of cattle-based control measures alone.”* [emphasis added]

8. The following important points emerge from the research: cattle-based measures were likely to achieve more than badger culling in terms of TB control; localised “reactive” culling made things significantly worse; and widespread “proactive” culling reduced cattle TB incidence to some extent inside culled areas, but these benefits were largely offset by increased cattle TB incidence on neighbouring un-culled lands. The reason for this was clear. The culling trials showed that badgers disturbed by a cull move more widely, spreading the disease to both cattle and other badgers. To achieve even modest overall benefits would require repeated, co-ordinated and synchronous culls over areas as large as 300km<sup>2</sup> and the financial costs of performing such culls would exceed the financial benefits in terms of breakdowns prevented.
9. The report concludes that, *“After careful consideration of all the RBCT and other data presented in this report, including an economic assessment, we conclude that badger culling cannot meaningfully contribute to the future control of cattle TB in Britain.”* There is still no substantial or respectable body of science contradicting the conclusions of the ISG.
10. Surprisingly, against the background of this evidence, in April 2008 the Minister made an announcement that *“a badger cull would only be pursued if ecological reviews, ethical considerations, epidemiological assessments, practical implementation and the relevant legal requirements could be satisfactorily met.”* On 13 May 2008 we wrote to the Minister expressing our client’s concerns. The Minister advised that she had taken no decision but was merely exploring the evidence for and against.
11. The Minister commissioned technical experts to investigate the potential effects of different badger control strategies. These technical experts were drawn from the Government’s Food and Environment Research Agency (‘FERA’) which is taking the lead in an EU-wide review of TB in wildlife for the European Food Safety Authority.
12. On 24 March 2009 the Minister announced that, in her view, a badger cull alongside additional cattle measures was likely to be necessary. This was subject to further research and a consultation on the secondary legislation necessary to authorise a government-coordinated cull.
13. We wrote to the Minister on 13 May 2009 to express concern at this announcement given that there had been no significant change in the scientific or

economic analysis of the issues since a 'pilot cull' was first mooted by the Minister in April 2008.

14. On 24 April 2009, the Minister launched a public consultation which ran until 30 July 2009. Our clients were amongst the 741 respondents. Prior to the closure date, the chief state vet, Dr Glossop, was reported in the press as stating that plans for the cull were well advanced although the exact cull area was not yet known. (We understand that she considers that she was misquoted, although we are not aware of any press complaint having been made in this regard.) Landowners were also sent official letters on 27 July 2009 advising them of the imminence of the cull. Dr Glossop is quoted in Tivy-Side Advertiser on 28 July as saying: *"If we are ultimately successful we won't be able to say for sure whether it is the cull or our other actions that did it."* (This point that the IAPA is not a scientific trial and cannot distinguish between the badger and cattle-based effects was confirmed to our clients in the Minister's letter dated 15 September.) The consultation closed on 30 July 2009.
15. In the summary of the consultation responses published on 30 September, it is noted that 50% of respondents to the consultation stated that they were against culling with only 49% in favour. 86% agreed that the development of a badger vaccination policy should be pursued. (It is understood that this will be available early next year. DEFRA is planning to avail of this strategy.)
16. Importantly, the only statutory consultee, the Countryside Council for Wales (CCW), was plainly unsatisfied that the requisite legal test was met. It was critical of the proposed cull in its response dated 18 August 2009 although it did not formally oppose it. This response is referred to below in more detail.
17. The Minister's own Head Researcher from FERA, Dr McDonald, was plainly not satisfied that the proposed cull was necessary or that it would substantially reduce the incidence of TB. On 4 September 2009, he reported to the Farmers Guardian that culling badgers in the way proposed would in fact spread bovine TB. He is quoted as saying: *"The reduction of one group will cause badgers from another group to go and 'investigate' the vacated area, taking their diseases with them or picking up new infections in the process."* He added that: *"A huge number of badgers would have to be killed to make a difference and while it is cheap and easy to trap and exterminate animals in the early days it gets harder and more expensive as time goes on"*. He advocated vaccination as an effective alternative.
18. It is necessary to address one final point. In the official summary of responses to the consultation<sup>2</sup> at page 12 a question is posed *"Isn't culling going against the conclusions of the ISG on RBCT?"* The Government's answer is that since the publication of the ISG report further analysis of the data subsequent to the end of the RBCT has shown significant reductions in cattle in the RBCT areas and the perturbation effects seen during the RBCT also appear to have reduced.

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19. The CCW deals with this issue in its statutory response to the consultation. They say that in fact *“the extent of the benefit is limited, with the most recent results from the RBCT indicating that culling resulted in only a 9% reduction in the incidence of cattle herd breakdowns (12 breakdowns out of a potential 130).”* In support of this view they cite Jenkins et al.<sup>3</sup>, who concluded in 2008 that *“the overall reduction in the incidence of confirmed herd breakdowns associated with widespread badger culling remains modest...the economic costs of implementation... would exceed the savings achieved”*. Jenkins et al. further predicted, on the basis of ecological data, that *“the benefits observed in the first years post-culling will dissipate as badger numbers increase”*. (The Secretary of State for DEFRA had access to Jenkins et al.’s findings before they were published, when reaching his decision not to go ahead with a cull.)

20. Against this background and at odds with the overwhelming preponderance of scientific evidence before her, on 28 September the Minister made an Order which would permit a cull. The Order was laid before the Assembly on 30 September. Although the Order came into force on 21 October, a motion in opposition has been laid down. Opposition is growing amongst Assembly Members and a debate against the Order is due to be held on 4 November 2009.

### *Legal framework*

The Protection of Badgers Act 1992 gives special protection to badgers and makes it an offence wilfully to kill or harm a badger.

As the Minister does not propose to issue individual culling licences under section 10 of that Act<sup>4</sup>, we focus on the Animal Health Act 1981 under which the Order was made.

Under section 21(2) of the Animal Health Act *“the Minister, if satisfied in the case of any area—*

*(a) that there exists among the wild members of one or more species in the area a disease [...], and*

*(b) that destruction of wild members of that or those species in that area is necessary in order to eliminate, or substantially reduce the incidence of, that disease in animals of any kind in the area,*

*may, subject to the following provisions of this section, by order provide for the destruction of wild members of that or those species in that area.*

[...]

*(4) The order shall not authorise such use unless the Minister is satisfied that use of the method or methods in question is the most appropriate way of carrying out that destruction, having regard to all relevant considerations and, in particular, the need to avoid causing unnecessary suffering to wild members of the species in question [emphasis added].”*

The UK ratified the Bern Convention (Convention on the Conservation of European Wildlife and Natural Habitats 1979) in 1982. It was implemented into UK law by the

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<sup>3</sup> Jenkins et al. (2008, ‘International Journal of Infectious Diseases’ 12, 457-465)

<sup>4</sup> And we would argue that licences could not be granted under the Protection of Badgers Act in any event for the same reasons which underpin this challenge.

Wildlife and Countryside Act 1981. The Convention prohibits causing local disappearance or serious disturbance to badgers (Article 9). The European badger is listed as a protected species at Appendix 3. Article 8 prohibits *“the use of all indiscriminate means of capture and killing and the use of all means capable of causing local disappearance”* of such a species.

## **The issues: analysis**

*i. Destruction must be “necessary” in order to “eliminate or substantially reduce” the incidence of disease*

As set out above, badgers are a protected species. This means that they may not be killed unless it is for one of the limited purposes for which the Animal Health Act provides. Section 21 requires that the Minister must be satisfied that such killing is necessary for the purpose of eliminating or substantially reducing the incidence of disease before she may authorise the killing of a badger. We take these points in turn.

*a) No evidence that the cull would “substantially reduce” the incidence of disease*

Since the ISG’s robust conclusions in 2007, there is further evidence that culling cannot “eliminate” or “substantially reduce the “incidence” of bovine TB in cattle.<sup>5</sup> Most recently, in 2008 Jenkins et al.<sup>6</sup> concluded that:

*“When considering the available data in their entirety, our analyses suggest that the overall reduction in the incidence of confirmed herd breakdowns associated with widespread badger culling remains modest (e.g., on average only 12 confirmed breakdowns prevented over six years by five annual culls targeting a 125 km<sup>2</sup> area, compared with 130 confirmed breakdowns expected in the absence of culling). As published previously, culling that is small-scale, patchy, or short-term is likely to increase, rather than reduce, TB risks to cattle.”*

In addition to this evidence for adverse effects on cattle, there is also scientific evidence to show that badger culling increases the prevalence of infection in badgers<sup>7</sup>, and prompts spatial spread within badger populations<sup>8</sup>, which is likely to undermine its ability to reduce TB incidence in cattle in the long term, unless badgers themselves can be either eradicated or permanently suppressed.

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<sup>5</sup> Donnelly et al. (2007, ‘International Journal of Infectious Diseases’ 11, 300-308, and 2006, ‘Nature’ 439, 843-846) who showed that culling badgers elevated the incidence of cattle TB on adjoining uncultured lands, and from Jenkins et al. (2007, ‘Journal of Applied Ecology’ 44, 897-908) who stated that: *“Prior to culling, M. bovis infections were clustered within cattle populations. Where badger culling was localised, and in uncultured areas just outside widespread culling areas, cattle infections became less spatially clustered as badger culling was repeated.[..] Our findings confirm that badger culling can prompt spatial spread of M. bovis infection, a phenomenon likely to undermine the utility of this approach as a disease control measure.”*

<sup>6</sup> Jenkins et al. (2008, ‘International Journal of Infectious Diseases’ 12, 457-465)

<sup>7</sup> Woodroffe et al. (2006 ‘Proceedings of the National Academy of Sciences of the USA’ 103: 14713-14717, and 2008 ‘Journal of Wildlife Diseases’ 45, 128-143)

<sup>8</sup> Jenkins et al. (2007, ‘Journal of Applied Ecology’ 44, 897-908)

**It is striking that even the Minister's own model analyses<sup>9</sup>** (on which the Order is premised) **predict only modest benefits from badger culling.** At page 67 of the Annex the authors conclude that *"The model results strongly suggest that the long-term reduction of the confirmed-CHB [cattle herd breakdown] rate for a 5-year control would be only about 10% of the no-control value. With a pre-control CHB rate of around 5% of farms per annum [representative of model estimates for Pembrokeshire], that would mean a possible reduction of the CHB rate from 5% to 4.5% – representing a saving of just five CHBs in 1000. The figure is even smaller if we consider both confirmed and unconfirmed CHBs, where the saving would be about three CHBs in 1000."* These model predictions of the effects of badger culling on cattle TB are consistent with empirical estimates from the RBCT, which revealed that the overall benefits from badger culling were insufficient to offset the costs of conducting the culls.

Plainly, a cull cannot be lawful where there is evidence that, rather than "eliminating" or "substantially reducing" disease incidence, the beneficial effect is marginal, and the cost in terms of badgers (and possibly other protected species) culled is substantial. A disproportionate cull of badgers would frustrate the principal purpose of the Act.

*b) The IAPA is not sufficiently isolated to prevent increase in disease through badger perturbation*

The issue of boundary permeability is an important one which amounts to a further fatal flaw in the culling plans. The Minister has stated<sup>10</sup> that in order to maximise its effectiveness culling would be conducted within geographical boundaries which impede badger movement. This consideration is based upon ISG analyses - which were accompanied by the caveat that few such isolated areas occurred in TB-affected parts of Britain in any event.<sup>11</sup>

Therefore, the Minister commissioned an analysis of the degree of isolation of all parts of Wales. This analysis, conducted by the Central Science Laboratory (CSL, now FERA) and referred to in the Minister's evidence<sup>12</sup> for making the Order, combined well-established methods in geographical modelling with expert opinion on the permeability of various Welsh landscape features (expert opinion being the best available information in the absence of systematic empirical data).

One might say that the Minister was between a rock and a hard place given that in any event there are scarcely any suitably large and isolated areas of TB-affected land in which to establish her Intensive Action Plan Area. However, **in all of the scenarios modelled<sup>13</sup>, the North Pembrokeshire area is revealed as one of the least isolated parts of Wales.** Due to this choice of location if the proposals go ahead, culling is expected to prompt a medium-term increase in cattle TB incidence on adjoining lands.

The Minister's TB team subsequently appear to have abandoned their previous commitment to culling within a geographically isolated area, concluding in section 4.4.2 of Annex 1 that:

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<sup>9</sup> 'Badger Control Model - Comparison Of Strategies For Wales Badger Culling To Reduce Cattle-Herd Tb Breakdowns In Wales (Uk) - Spatial Model To Compare Strategies.' CSL - <http://wales.gov.uk/docs/drah/research/090916annex4en.pdf>

<sup>10</sup> This is referred to in many sources including at page 12 of <http://wales.gov.uk/topics/environmentcountryside/ahw/disease/bovinetuberculosis/tbconsultations/tborderresponses/summaryofresponses/?lang=en>

<sup>11</sup> Para 10.20, Bourne et al., 2007 [www.defra.gov.uk/animalh/tb/isg/pdf/final\\_report.pdf](http://www.defra.gov.uk/animalh/tb/isg/pdf/final_report.pdf)

<sup>12</sup> 'An assessment of relative landscape isolation for badgers (*Meles meles*) within Wales' - <http://wales.gov.uk/docs/drah/research/090916annex7eng.pdf>

<sup>13</sup> These are summarised in Figure 6 of Annex 7 *ibid*.

*“A number of areas have been identified that satisfy the criteria of having a high density of cattle TB, where an intervention may have the greatest effect. However, most of these areas are not sufficiently isolated in terms of badger migration, which has implications for a badger culling strategy as neighbouring un-culled land may experience an increase in cattle TB breakdowns as a result of culling.*

*It is likely that an area in southwest Wales will be the most suitable location for an IAPA, in terms of having a high density of cattle TB, and shared TB strains between badgers and cattle.”*

This abandonment of the Minister’s former commitment to culling within a geographically isolated area, further undermines the overall benefits that can be expected from badger culling. Consistent findings from ten similar culls in the RBCT allow a confident prediction that culling in North Pembrokeshire will lead to a medium-term increase in cattle TB on adjoining lands, and an increase in the prevalence of infection in badgers. This will almost certainly preclude either “elimination” or “substantial reduction” of infection in the region.

*ii) The proposed cull is not “necessary” to reduce the incidence of disease*

Necessity is a deliberately high threshold set by statute. It clearly does not mean that the Minister has a general public law discretion to cull. It means that there is absolutely no alternative to culling.

There is simply no basis on which the Minister could have reached a conclusion that it was “necessary”.

As set out above, the cull proposed will spread rather than reduce disease and therefore is certainly not necessary in order to prevent the incidence or spread of disease.

*iii.) The cull is not the most appropriate way having regard to the need to avoid unnecessary suffering*

Before the Minister may authorise the killing of a badger for the purpose of eliminating or substantially reducing the incidence of disease, section 21 requires that the Minister must be satisfied that such killing is necessary and is *“the most appropriate way” “having regard to all relevant considerations and, in particular, the need to avoid causing unnecessary suffering.”*

In relation to alternatives available, the only statutory consultee, the Countryside Council for Wales, said this: *“CCW is of the opinion that vaccination, for either cattle or badgers, represents the best long-term strategy for the management of bTB. Modelling work has demonstrated that vaccination is a viable alternative to badger culling for the control of TB in cattle.”*

Vaccination constitutes a more humane and appropriate alternative. Given that injectable vaccinations are due to be available in May 2010 and given the proposed time frame which incorporates a closed season in the next few months, it is simply

unnecessary to proceed with a cull which risks spreading TB and will cost at least £4 million<sup>14</sup>.

The Minister commissioned an analysis<sup>15</sup> of the ethics of badger culling, which concluded that culling was justifiable because both cattle and badgers would benefit from the eradication of TB. Unfortunately, this analysis ignored the wealth of evidence that badger culling will not eradicate TB. Indeed, as stated above, culling is very likely to increase TB incidence in cattle in adjoining areas, and to increase prevalence in badgers inside the culling area, thereby causing unnecessary suffering to both species.

Accordingly, we do not consider that the test under section 21(4) has been satisfied either.

*iv. The Order was made in violation of the Bern Convention*

In our letter of 13 May 2009, we asked that the Minister:

*“provide confirmation of the numbers of badgers which are likely to be killed over the four year period and confirmation of whether there is information on what percentage will actually be carrying TB. If this is known, please confirm the percentage and what evidence this is based upon.*

*What percentage of the Welsh badger population will be killed over the four year period? Which percentage of the Pembrokeshire badger population will be killed over the four year period? We ask this question in light of the Minister’s strict obligations under the Bern Convention, which prohibits the local extinction of the protected species *Meles meles*.”*

In the Minister’s response of 15 September 2009, it was noted that initial surveys had not yet even been carried out and that exact numbers were unknown. As of that date, an ecological assessment had not been completed either.

In the CCW’s response to the consultation, it also expressed concern about the potential for an adverse impact on the badger population. It advised that there should be no adverse effect on the favourable conservation status of badgers as a result of any cull conducted. The CCW warned that any local reduction must be temporary and expressed concern that the proposed cull was entirely open ended.

This remains a concern for our clients too, as does the apparent lack of statistical information about how many badgers will be killed. Without this information, it is impossible for the Government to know if it is risking the *“local disappearance or serious disturbance to”*<sup>16</sup> a protected species.

The Bern Convention Standing Committee is apprised of the matter and is currently investigating how it squares with the Government’s obligations.

*v. Conclusions*

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<sup>14</sup> This figure is set out in the Minister’s website information sheet regarding the IAPA. However, any costs estimates provided by the Minister are just that, given that the area to be culled is still unknown.

<sup>15</sup> See Annex 1 -

<http://wales.gov.uk/topics/environmentcountryside/ahw/disease/bovinetuberculosis/?lang=en>

<sup>16</sup> Article 8 Bern Convention

The ISG report - the most thorough, wide-ranging scientific study of bovine TB carried out in the UK, which cost the lives of 11,000 badgers - concluded that *“badger culling can make no meaningful contribution to cattle TB control in Britain”*.

The Minister has referred to no other evidence that credibly contradicts these findings, which are, supported by a substantial number of reputable scientists and groups. Moreover, there has been no new empirical data published on the effectiveness (or otherwise) of culling since the ISG report, other than Jenkins et al. in 2008<sup>17</sup>, which concurred.

The Minister’s own expert, the Head of Research at FERA, has also advised that the proposed cull will actually spread TB rather than reduce it. His view accords with the preponderance of the scientific evidence available. As a viable alternative he advocates vaccination.

Accordingly, there was no sufficient evidence on which the Minister could reasonably conclude that the Order will achieve the aims set out in the Animal Health Act 1981:

- The proposed cull cannot “eliminate or substantially reduce” the incidence of disease (as required by section 21(2)(b)).
- It has certainly not been demonstrated that destruction of badgers is “necessary” (as required by section 21(2)(b)).
- The proposed cull risks spreading disease amongst badgers, cattle and other animals, all of which would be unlawful.
- There are viable alternatives which would prevent the spread of disease more effectively and be more appropriate having regard to the need to avoid causing unnecessary suffering to badgers (as required by section 21(4))

In consequence the Order cannot be valid pursuant to section 21 of the Act and would be wholly contrary to the policy of the Act itself. No evidence has been provided to say that it is not in breach of the Bern Convention.

It is a matter of public record that the farming community of Wales, on whom the Minister relies for support, has been extremely vociferous in its calls for a badger cull. Our clients are also most sympathetic to their plight. However, this does not entitle the Minister to disregard the scientific evidence or to act in breach of statute.

### **The details of the action that the proposed Defendant is being asked to take**

We ask that:

1. the Minister take such necessary steps in order to revoke the Order and prevent any steps being taken to give effect to any cull under the Order;
2. in any event, that the Minister agrees to postpone any cull while she considers the legal position and responds to this letter.

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<sup>17</sup> Jenkins et al. (2008, ‘International Journal of Infectious Diseases’ 12, 457-465)

### **The details of any interested parties**

We confirm that the following organisations may potentially be interested parties.

1. Countryside Council for Wales.
2. Royal Society for the Prevention of Cruelty for Animals.
3. Pembrokeshire Against the Cull.
4. National Trust.
5. Wildlife Trusts.
6. National Farmers' Union of Wales.

### **Proposed reply date**

12pm on Thursday 19 November 2009 (The Defendant's solicitor agreed on 30 October 2009 that this should provide a reasonable time for reply.)

### **Concluding remarks**

Our clients remain committed to finding an acceptable alternative to culling, and confirm their willingness to enter into a discussion for this purpose. We look forward to hearing from you by 19 November 2009.

Yours faithfully

A handwritten signature in black ink that reads "Bindmans LLP". The signature is written in a cursive, slightly stylized font.

**BINDMANS LLP**