

LEIGH DAY

By email

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YOUR REF:

OUR REF: MAT/RGA/00191552/42

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NOTE: This is not a consultation response and requires urgent attention

Dear Department for Environment, Food and Rural Affairs

Bovine TB: Consultation on proposals to evolve badger control policy and introduce additional cattle measures

We act for Badger Trust and Wild Justice. Badger Trust is a charity which exists to promote and enhance the welfare, conservation and protection of badgers, their setts, and their habitats. Wild Justice is a not-for-profit company set up to advocate on behalf of wildlife to further nature conservation in the UK, to encourage public participation in nature conservation issues and to ensure that UK laws, policies and practices protect wildlife.

Our clients are keen to respond to the above consultation and will do so as best they can by the published deadline. However, the materials published in and alongside the consultation do not contain sufficient information about what is proposed and the basis on which it has been put forward to allow consultees to provide an intelligible response on some material points. They have therefore instructed us to write to you now to identify omissions in the consultation materials and request that you urgently publish the missing information and allow consultees (not just our clients) sufficient time to respond to any additional information. Unless those steps are taken, our clients consider that a decision to proceed with the proposal taken on the basis of this consultation would be unlawful. As you are no doubt aware, the Northern Ireland executive's 2021 consultation on bTB measures was recently found unlawful because (among other things) the consultation materials had failed to include (of particular importance there) the business case which provided the economic rationale for the proposal to allow farmer-led groups to shoot free-roaming badgers: *Re Northern Ireland Badger Group's application for judicial review* [2023] NIKB 117.

Our clients consider that the consultation materials fail to provide sufficient information in the following respects. The specific request each case is set out in the bold text in each paragraph below. Please make clear in answering each request if the position is that the Secretary of State did not consider and/or did not have information on the point being asked about.

1. As an overarching point, no business case, impact assessment or other form of analysis is provided which sets out the costs and benefits of the preferred option. That is in spite of the fact that the main justification promoted for the preferred option is the

economic impact of bTB on farmers and the wider economy. Consultees cannot engage with that justification without understanding DEFRA's assessment (and the basis for such assessment) of the cost of bTB to farmers as against the cost of different intervention measures considered by DEFRA. For example, the ministerial forward to the consultation document begins by saying that bTB "has a cost to the taxpayer of over £100 million every year". That statement is repeated at paragraph 1.1/page 6. No explanation is provided as to how that figure was calculated and in particular what evidence was used to calculate it. If, say, a significant proportion of this sum is accounted for by the costs of the national bTB surveillance programme (which arises from an international treaty obligation and will presumably continue whatever measures are pursued for bTB prevention) then badger control measures will have no meaningful impact on this cost. Furthermore, no information is provided as to the cost of the preferred approach as compared with other approaches considered. We note that DEFRA considers that it is not presently able to produce a full impact assessment and that it will conclude one after an initial period of operation of its proposed scheme. That is not an answer here. We assume that DEFRA has some information on costs and benefits, even if that is not complete. Indeed it would be unlawful to promote a proposal by reference to economic claims without such information. Consultees need to be provided with that in order to be able to intelligibly weigh the purported economic savings of the proposed approach against other approaches. Whether those approaches cost more money or less, information about their cost should be provided so that consultees can provide their views of costs relative to benefits (for example, the advantage that the vaccination approach advocated by the government in 2021 would have in terms of humaneness). **Please provide the economic (including cost/benefit) information relied on by the Secretary of State in deciding to promote and in promoting this proposal (including the equivalent information relied on in relation to others that were rejected).**

2. Relatedly, no information is provided of the relative expected effectiveness of the preferred option as compared with other potential approaches (for example do nothing, bring in vaccination of cattle, bring in vaccination of wildlife etc). **Please provide the information, if any, relied on by the Secretary of State in deciding to promote and in promoting this proposal in relation to its effectiveness in relation to bTB (including the equivalent information relied on in relation to others that were rejected).**
3. The preferred option is for intervention, including culling, to be allowed in "clusters", i.e. "High-Risk Areas" and "Edge Areas", "with high levels of infection in cattle, and where badgers are a part of the local disease problem" (para 5.6/page 12). The consultation explains: "...where badgers are a part of the problem in the spread of disease to cattle, as supported by the underlying epidemiological evidence. Our intention is that if bTB is detected and linked to badgers, and those wishing to undertake a cull have met all of the other licence conditions as set out in Annex B, a cull will be permitted" (para 1.5/page 7). Consultees are not told how a link between bTB in badgers and bTB in cattle will be established on an area by area in that way. Nor, more importantly, are they told how it will be demonstrated that cattle have been infected by badgers rather than by other cattle or other domestic or wild species, for example through slurry or manure. Without this aspect of the preferred option being explained, consultees cannot intelligibly assess the costs and benefits of the preferred option. **Please explain the Secretary of State's current understanding (whatever it may be) in deciding to promote and in promoting this proposal how, on an area-by-area basis, (1) a link will be established between bTB in local badgers and cattle, including (2)**

how it will be concluded that those badgers have infected the cattle rather than the other way round.

4. Similarly, the criteria for determination of when intervention should end for a particular cluster, set out at para 5.12/page 14, are insufficiently defined. For example, it is not explained how large a sample of badgers will be required, or whether the badgers will be tested for particular strains of bTB in order to determine whether the strain is the same as in locally infected cattle. **Please provide the Secretary of State's current understanding (whatever it may be) in deciding to promote and in promoting this proposal as to how (i.e. on what basis and by whom) it would be decided to end the intervention for a particular cluster.**
5. Paragraph 5.16/page 15 of the consultation refers to a surveillance and monitoring system which is currently under development, and which will be used in the identification of clusters. No information is provided as to the nature of that system, except to say that "disease surveillance is complex" and that epidemiologists and veterinary science experts from the Bovine Tuberculosis Partnership "could" support the system. Without further detail regarding how the system will operate, consultees are unable to assess whether the method of identifying clusters will be effective. **Please provide the Secretary of State's current understanding (whatever it may be), in deciding to promote and in promoting this proposal, of the intended approach to surveillance and monitoring for cluster identification.**
6. The consultation refers to a new system for licensing organisations to carry out the culling, under which there would be an "organisational licence", as opposed to the previous "individual area licences" (para 5.29/page 19). The consultation explains that there would be a single licence for each cluster, issued annually. No further information is provided, although the consultation does assert that this "approach is wholly compatible with ensuring culling activity is safe, effective and humane, and would not impact the outcome of the licence, only the time taken to apply and process it". Consultees are not told who would be eligible for such a licence. This lack of information particularly affects farmers wishing to apply for licences. What would happen for example if a farmer wished to cull badgers on their land but did not wish the organisation for the relevant cluster to carry out the cull? Further information regarding the new licensing process is needed in order for consultees to assess the costs and effectiveness of the preferred option. **Please explain the Secretary of State's current intention (whatever it may be) in deciding to promote and in promoting this proposal as to the nature of (and limits to) the persons/organisations eligible to be licensed and the position for a farmer who wished to cull via a different licensee to that appointed for their area.**
7. No information at all is provided as to the humaneness of the various options considered. Nor is there any information on the exact measures which the preferred option will entail (e.g. free-shooting versus trap and shoot) even though this would have significant implications for the humaneness of the measures finally adopted. The Secretary of State himself draws attention in his ministerial forward to his opinion that the cull carried out over the past decade has been done humanely (page 4) and the consultation states that culling should be safe, effective and humane (para 5.28/page 19). However, consultees are not provided with DEFRA's views of the relative humaneness of the various options or any relevant information on relative humaneness which DEFRA considered in deciding on its preferred option. **Please provide the information, if any, considered and relied on by the Secretary of State in deciding**

to promote and in promoting this proposal as to the humaneness of what is being proposed and as to its relative humaneness compared to other approaches to tackling bTB that were considered but rejected.

8. No information is provided regarding the impact with the preferred option would have on badger populations in any identified cluster, and in particular whether and how DEFRA intends to ensure that there are no local extinction events. Furthermore, no information is provided as to measures which DEFRA has considered in order to monitor badger population levels. That is particularly concerning in light of the indication at paragraph 5.26/page 18 that the power to grant or refuse licences will transfer from Natural England to the Secretary of State, which may mean that Natural England's oversight of badger populations is diminished or undermined. Consultees cannot assess the potential implications of the preferred option without understanding what measures will be taken to ensure that it does not result in significant reductions in badger populations or, worse, local extinction events. **Please provide the information, if any, relied on by the Secretary of State in deciding to promote and in promoting this proposal as to the potential for (and steps to avoid) local extinction.**

Please publish the information which our clients have identified as lacking as soon as possible. Following that, the consultation deadline will likely need to be extended to allow sufficient time for consultees to consider the additional information and provide an intelligible response. Our clients consider that the current consultation window of just over five weeks, over Easter, was already neither reasonable nor proportionate in line with the Consultation Principles 2018 and Article 7 Aarhus Convention, particularly given the amount of complex scientific evidence which forms part of the basis for the preferred approach. They therefore request that you consider a longer window once the new information is published.

To the extent that DEFRA has considered the information which we have highlighted as lacking above, then it should be provided. We are conscious that some of this lacking information might not have been considered by DEFRA in developing its preferred option. If that is the case for any particular area of lacking information, then please indicate that in your reply.

Please indicate by reply to this letter whether DEFRA will publish the information identified as lacking, except for any of the identified information which was not considered by DEFRA in developing the preferred option, in which case please indicate that. In light of the short consultation window, we propose a response deadline of 28 March 2024.

Yours faithfully



Leigh Day