



HoC COMMITTEE STAGE OF THE IVORY BILL, 2018

VIEWS OF THE DAVID SHEPHERD WILDLIFE FOUNDATION¹

General Comments

1. The Bill is clearly intended to ban most ivory commerce within the UK, and this is welcome. Whether it will achieve this effectively will depend on achieving a strong enough text during the passage of the Bill by minimizing the scope for exemptions and maximising the chances of full implementation and enforcement when it enters into force.

2. The Bill is unexpectedly long given that it deals with one product from 2 protected CITES species: a forty-two clause Bill with 2 Schedules, and signalling at least 6 areas where further Secondary Regulations will be needed.² By comparison, the Act which brought CITES into force in the UK for many thousands of species of animals and plants, the Endangered Species (Import and Export) Act 1976, had just 13 clauses. The length of the Bill may make its passage more difficult as critics, including those whose motive is to maintain the ivory trade, will have more areas they can attempt to challenge and weaken. DSWF hopes that the cross-party support for tight controls evident from the Second Reading debate will be an effective counterweight to this risk.

3. We believe that some of the provisions to guarantee the rights of ivory owners are excessive. In particular there will be an appeal system under Section 5 (potentially to an independent body) for anyone whose application to sell “outstanding” artistic/cultural/historic ivory is rejected by Defra after already taking expert independent advice. This is inconsistent with general wildlife trade licensing in the

¹ DSWF is submitting this paper to the Chairs of the Bill Committee and to Defra as a supplement to the collective views submitted separately on behalf of a group of NGOs including EIA (and DSWF).

² Secondary Regulations will or may be needed on at least application fees (twice), approved institutions, appeals, names of museum bodies, meaning of ivory, and Schedule 1 monetary penalties. Most regulations will be subject to the Negative procedure (as are about 90% of SIs). The SI to set a date for the Act to come into force is NOT subject to affirmative or negative procedure - ie the Minister can simply sign it. A Guidance document(s) will also have to be issued by Defra according to the Bill.

UK under the original 1976 Act or the current EU CITES Regulations, where there is no formal appeal system. Establishing one for ivory would be an unwelcome and unnecessary precedent which could undermine protection for other species in future and lead to demands for unnecessary appeals bureaucracy to be retrofitted to our wildlife legislation. As an independent expert will already have given advice to Defra on the original application, an appeal system for antique ivory seems disproportionate and unjustified.

4. Some provisions are too weak. For example, there is no registration system for items exempted under Section 2, ie “pre-1918 items of outstanding artistic etc value and importance”, which means they can be traded repeatedly. It should be made clear that all items under all exemptions must be registered. Enforcement provisions in the case of breaches are also too weak and do not provide a clear pathway for the authorities and the Courts to apply increasingly stringent sanctions for repeat offenders. Better parallels for penalties can be found in legislation dealing with serious crime - for example drugs. The entire thrust of Government policy, which also reflects resolutions passed in the United Nations and other international bodies, is that the poaching, smuggling and illegal sale of wildlife products are part of global organised crime. The enforcement and penalty provisions should reflect this.

Specific Comments and Suggestions

Suggested Preamble

5. Unlike the Endangered Species (Import and Export) Act 1976 the new law is not framed openly in a CITES context. Adding this would make the Ivory Act more resilient against judicial challenge as well as explicit in its justification under international law. **This could be achieved in the same fashion as the 1976 Act through a short preamble, stating that the new provisions on ivory will be a stricter measure under Article XIV of the Convention, and a specific response by the UK to the recommendation to close domestic ivory markets agreed by CITES Parties at their Conference in 2016.**³

Sections 2-5 This is clearly a passport system allowing a certificated pre-1918 artefact of outstanding artistic etc value and importance to be traded repeatedly and NOT requiring individual registration for each commercial deal. Earlier statements by the Government - and indeed the Bill’s Explanatory Notes - suggest that this exemption would only be applied to the ‘*rarest and most important*’ items. Yet the Bill sets up a new bureaucratic system with certificate-passports, secondary regulations, guidance and even an appeal mechanism - all of which seems to imply that a lot of applications are expected to be received and may ultimately obtain permanent certificates. **DSWF advocates that the registration system under Sections 10 and 11 should apply to all exempted items, and that fresh**

³ CITES Resolution Conf. 10.10 (Rev. CoP17), paragraph 3.

registration should be required for each sale of items under exemption 2 (as with the other exemptions).

We further consider that provisions on proof of ownership and documentation to support applications should be stricter.

The statutory guidance on criteria for the artistic etc exemption to be issued by the Secretary of State under Section 2 (3) will be crucial. **We seek assurances during the passage of the Bill that there will be public consultation on its provisions,** and have concerns that the guidance can be issued, and subsequently amended, by current or future Ministers without recourse to Parliament. **We believe there should be no opportunity for the legislation to be weakened without Parliament's agreement.**

Section 3 (6) Much as in the ESA 1976, the Minister, ie Defra, has the last word. In the past Defra and its predecessors have very occasionally overruled advice from a scientific adviser (eg NCC/NCC) by granting or refusing a licence: so this provision is consistent with precedent. However it will open up Defra to arguments, eg if the Department's expert assessor says the ivory artefact item is not outstanding etc but the applicant finds an institution to claim that it is. On the other hand it may allow NGOs to submit alternative expert advice to Defra supporting the refusal of an application (as implied by Section 4 (3) below).⁴

Section 5 is prescribing a legalised, formal appeals system for the refusal of licences under this exemption, which will apparently be laid out under secondary regulations subject to the weaker negative procedure. An appeals system conflicts with normal practice for CITES and other wildlife trade licensing systems as implemented in the UK for several decades, for example under the Wildlife & Countryside Act. We appreciate that the Government has cited the European Convention on Human Rights as grounds for the system proposed in Section 5, but we consider that the Bill's other provisions, (a) to mandate an independent assessment of applications by an expert from a prescribed institution and (b) to permit a new application for the same item, are more than adequate protection for owners of ivory antiques, in addition to wider individual rights to seek Judicial Review of decisions, or refer any maladministration to the Ombudsman. **DSWF seeks the deletion of the appeals provisions in Section 5 as they are unnecessary, disproportionate and an unwelcome precedent for other endangered species, including those in trade.**

⁴ The alternative would be to remove the Minister's discretion. The Bill would be amended to say that the Minister should act in accordance with the official assessor's advice. A variant would be to restrict discretion to allow refusals only: ie the the Minister could refuse an application even if the assessor says the artefact is outstanding (perhaps because the Minister may have received conflicting expert advice submitted via NGOs on a particular item). This argument would be stronger if the provisions in Section 5 on appeals are allowed to stand although we advocate their removal (qv). An applicant will have a formal right of appeal under Section 5, so the procedure on the first application should not allow (in effect) an earlier stage of appeal by trying to persuade the Minister to overrule the Assessor's advice to reject.

Sections 6-11 define the four other exemptions which are only allowed if the items are registered. In contrast with Section 2 exemptions, this is NOT a passport system, and items must be registered again if ownership changes hands. In the case of portrait miniatures, low content of ivory and musical instruments, the nature of the item will define its registration, and effectively exclude most carved ivory. However in the case of the museum exemption, this is not the case. It appears to be possible for an owner of carved ivory (even modern items) who might wish to sell to an accredited museum (including an overseas one) to be able to register the item speculatively and then try to find a qualified buyer using the registration as an incentive for the museum to purchase it. There is a further risk that any registered ivory item could be more easily sold (illegally) on the open market using the registration document issued by the Government under Section 10 (4). **This is an incentive for the sale of ivory carvings of any age. A way should be found to close or reduce it during the Committee stage of the Bill.**

As noted above, we consider that **the registration system detailed in Sections 10 and 11 should apply to all ivory items under all the exemptions**, including exemption 2 for pre-1918 items of outstanding artistic etc value and importance.

We further consider that provisions on proof of ownership and documentation to support applications under all of the exemptions should be stricter. We are also concerned that the licensing and registration systems for exemptions under the Bill will be far too reliant on self certification. As fees are charged for all exemptions, it ought to be possible for adequate resources to be deployed for at least targeted checking of documentation.

Section 12 (2) and (3)

These are defences for people who might buy, sell or deal in ivory unknowingly. **We are concerned that such defences will make it harder to prosecute or penalise transgressors, and note that much other legislation dealing with criminal offences incorporates strict liability.** Section 27(3) of the Theft Act 1968 may provide a parallel for dealing in ivory. Evidence could then be adduced that the defendant has been involved in similar transgressions under the Ivory Act. This would be make it easier to apply appropriate penalties to multiple offenders using the “Two Strikes and Out” principle. Selling something you don’t know is ivory once may be a possibility, but this defence should not be available more than once.

We would prefer to see the defence of ignorance in Section 12 (2) removed.

However if it remains it should be strengthened so that the burden of proof will be on the persons dealing in ivory to prove that they had no reason to believe they might be committing an offence. There is a parallel here in legislation covering drug dealing: Section 28 of the Misuse of Drugs Act 1971. This places the burden of

proving that a person did not know that what he was selling was a prohibited substance on the defendant who has to persuade the jury on a balance of probabilities.⁵

In any event DSWF **considers that strict liability should be incorporated, especially for repeat offences and offences involving internet trade since there is currently no provision in the draft Bill to ban trade in ivory over the internet, which is rife in Europe and almost impossible to police.**⁶ (See further comments below on Schedule 1, Civil Sanctions).

Section 35 (5) puts the burden of proof on the owner to prove that an item of animal ivory item is in fact not made of elephant ivory (eg from mammoth or walrus). **DSWF believe this should be retained (and a similar provision adopted in Section 12 - see above).**

Schedule 1 The material about Civil Sanctions is extensive, and to some extent novel for wildlife crime. We assume that their incorporation means that Defra may choose simply to impose a civil fine on people caught breaking the rules, rather than prosecute them unless (say) there are repeat offences. **Overall, we consider the enforcement provisions in the draft Bill too weak. As currently drafted, the provision on civil sanctions could allow repeat offenders to avoid criminal action and pay a nominal fine or no fine.** Section 10 on Enforcement Undertakings allows those suspected on reasonable grounds of an offence to undertake not to transgress again, or to take prescribed action, without even a monetary penalty. **We are opposed to this, and consider that first time offences should incur a significant penalty, and that repeat offences should be prosecuted criminally with strict liability.**

All licenses and registration will require fees, and this income should justify stronger, proactive enforcement, including adequate funding and permanency for the UK National Wildlife Crime Unit, as well as checking documentation (see above).

Schedule 2 On Search Warrants DSWF understands the need for proportionate powers and safeguards against abuse, but as illegal ivory trading is a serious and lucrative crime, we would seek assurances that in addition to the provisions in the Bill, premises could be urgently searched without a warrant under Part 2 of Schedule

⁵ The key case is Regina -v- Lambert [2001]UKHL37, available at: <https://publications.parliament.uk/pa/ld200102/ldjudgmt/jd010705/regina-3.htm>

⁶ See new IFAW report on wildlife cybercrime which found nearly 20% of 5,381 advertisements for protected wildlife were for ivory and suspected ivory specimens. <https://www.ifaw.org/international/news/disrupting-wildlife-cybercrime-europe-and-russia-%E2%80%93-new-report-uncovers-scale-online-wildlife-tr> and <https://www.theguardian.com/environment/2018/may/23/illegal-online-sales-of-endangered-wildlife-rife-in-europe>

1 by a Police or Customs officer under their own powers as officers of the law in order to ensure evidence is not lost. **If this is not the case, we would seek to ensure that provisions comparable with those available for drugs or others serious offences are added to the Bill.**

Other enforcement Issues

6. Whilst there is mention of forfeiture following conviction there is no specific mention of the application of the Proceeds of Crime Act 2002 (recovery of criminal assets) which would be a major deterrent to an illegal ivory dealer as the Court can order payment of large sums arising from illicit trade or imprisonment in default. This is a powerful sanction available to the court. In drugs cases we understand that the offender will often serve a longer sentence under POCA than for the offence itself. POCA only applies to offences tried in the Crown Court or committed there for sentence. This is an 'either way' offence - the defendant can elect summary trial or trial on indictment. It would be important at the outset that the Magistrates are made aware of the value of the crime so that a defendant may be either sent for trial to the Crown court on the basis of seriousness or sent there for sentence following conviction. This strengthens our view about the need for strict liability. **It needs to be made clear that POCA will be applied to significant ivory offences.**

Data about the Application of the Act

7. We would seek an additional clause in the Bill to require the Secretary of State to publish an annual report on the implementation of the Act, which should include specific details of each ivory item granted a certificate under Section 2 of the Act, and of the number of items registered under Section 10 of the Act. This would provide greater transparency and allow conservation organizations to monitor the volume of continuing trade under the 5 exemptions.

David Shepherd Wildlife Foundation
11th June 2018