Introduction

This is a response to the invitation by the Committee for Calls for Written Evidence on the Bill and specifically in respect of: ‘The ethical basis for the Bill, as opposed to other justifications such as animal welfare’ http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/104956.aspx

The Bill is proposed not as an animal welfare measure but rather on ‘ethical’ grounds and I will therefore first address the question of ethical justification as such before turning to the relationship between ethics and welfare and then to the particularities of the Bill.

I am writing as a Professor of Organisational and Business Ethics whose empirical research concentrates on the travelling circus. Examples of my research include my 2017 award of research funding from the British Academy/Leverhulme Trust for a study on the career choices of circus performers and previous studies have been published in academic journals including ‘The Journal of Business Ethics’. I co-convene the ‘Circus Research Network’ (Britain and Ireland).

In the interests of full disclosure, I should also state that my brother and two nieces work in travelling circus and that I have been a Liberal Democrat Councillor in Gateshead Metropolitan Borough Council since 1996.

Ethics as Justification

Ethics understood as the systemisation of ideas about proper conduct, right and wrong, good and evil, operates at a number of levels in human action. It manifests in emotional responses, ongoing preferences and it animates civil and political action. Crucially it also provides resources for justifying decisions and when used in this way it can be understood as a particular type of decision-making practice with its own history, norms and requirements that are equivalent to but operate in a different domain from other decision-making processes from rules of logic to cost-benefit analysis, smart systems and many others. The implication of this is that when one claims ‘an ethical basis’ for anything whatsoever, one must observe the relevant norms and requirements just as one must observe relevant routines in conducting an investment appraisal.

In all of these cases, the history of the practices is one in which challenge to existing norms and the development of new norms is a regular occurrence. However, for new norms to displace old requires that an account can be given for why the use of this or that system is understood as preferable to those of its predecessors. The result is that for practices involving decision-making (sciences, arts, games and so on) one can provide a narrative account both of the development of such practices and of the conceptualizations of their goods and purposes in light of which a new approach, a new technology, a new understanding of relevant questions and so on,
has displaced its predecessors. At the same time one can also determine the boundary conditions within which such fields of endeavour exist and indeed, must exist for the type of ongoing practice and dialogue to be meaningful. Certain presupposition must be shared between practitioners and decision-makers in each and every domain for such practices to be intelligible.

It is important then to know what the norms and requirements are for specifically ‘ethical’ action justification for if, as I shall argue, the action justification falls outside the relevant norms and requirements, then we can only conclude that the action is not intelligible in its own terms.

What then are the norms and requirements for ethical justification? In the four pages that respondents are allowed under Parliamentary procedures it is not feasible to provide an exhaustive list but one shared feature of all systems of ethical justification is that they be generic. What this means is that from the first annotation of systematic ethical rules in religious texts up to and including classical sources in ethics, the scholastic medieval tradition and post-enlightenment deontological and utilitarian traditions which inform such contemporary notions as rights and welfare; every ethical system has sought general, and most often universal, application. It is this presupposition that informs so much of our taken-for-granted assumptions such as the self-defeating nature of hypocrisy, the rejection of retrospective legislation, opposition to arbitrary judgment and so on.

In order to claim that either a rule, such as the prohibition on murder or a utilitarian calculus such as is used to determine the introduction of new medical treatments, is ‘ethical’, one must also claim that this prohibition or this procedure applies to all relevant cases, and for the most influential post–Enlightenment ethicists, Kant and Jeremy Bentham, this has meant – in all cases. Indeed, a centrepiece of Kant’s ethics is that the only ethical rules are those that are both universal and binding. By universal, we mean that whole, relevant categories are treated in the same way.

The Animal Rights movement is a contemporary example of this. Seminal to this movement is Peter Singer’s text ‘Animal Liberation’ (Harper Collins: 1975), which has proven both highly durable and influential. Singer combines a utilitarian commitment to weighing harms and benefits with an understanding of human and non-human animals that experience pleasure and pain as having equivalent moral status. In other words, he expands the universality of the utilitarian calculus to all sentient creatures. This is a book of ethics in part because of the universality of its claims. Those who concur with Singer’s premises must and often do then commit themselves to veganism, to not keeping pets, to not wearing or otherwise using animal products and so on. They do so consistently because they are acting on a binding moral rule.

Such is the nature of ethical discourse and practice; ethics must be universal or it ceases to be ethics. Even those post-modernists who have critiqued Enlightenment ethics, of whom Jacques Derrida is probably the most note-worthy, have created their own universality condition for their understanding of ethics – in Derrida’s case the category of the ethical only comes in to play in the face of dilemmas so intractable that moral rules cannot guide us. Derrida’s reasoning of course differs markedly from Singer’s and Kant’s but all are ethicists in that all are engaged in
locating generic conditions in which rules or procedures must be consistently applied.

The conclusion to be drawn from this necessarily brief introduction is that to claim that some decision, some result of reasoning, and indeed some piece of legislation, has an 'ethical' basis, is to claim that its exercise should have universal application. Having established grounds for this argument I turn next to the distinction between the ethical basis claimed for the Bill and the grounds of animal welfare.

**Ethics and Animal Welfare**

The claim that the basis for the Bill is ‘ethical’ rather than on ‘welfare grounds’ is relatively straightforward to understand because it is clear that there are insufficient welfare grounds to provide warrant for prohibition. As has been noted in the SPICe Briefing (p7), the Radford Report “concluded that there appears to be little evidence to demonstrate that the welfare of animals kept in travelling circuses is any better or worse than that of animals kept in other captive environments.”

Four types of problem have attended the ‘welfare’ case for prohibition. First, there is a sparsity of evidence, second the evidence that there is points to circus animals successfully engaging in the type of activities that indicate flourishing – crucially including breeding and an extended lifespan and thirdly the conceptualization of welfare is itself contested. Fourth, if welfare were to be the criterion for animal protection then other activities such as horse-racing in which, according to Animal Aid, over 1500 horses have died in the last decade in the UK and Ireland (http://www.horsedeathwatch.com/) and organised hunting and fishing provide far stronger cases for legislating on welfare grounds. The Scottish Government is therefore correct to implicitly concur that welfare grounds provide insufficient warrant for prohibition.

If however welfare grounds provide insufficient warrant, the question is whether there are grounds beyond welfare that do provide such warrant and here the Government points to ‘ethical arguments’. Two questions should be asked of this: first, what kind of ethical justification does not involve the welfare of its objects and second, how do such arguments provides sufficient grounds for complete prohibition?

The Government’s policy memorandum outlines 3 arguments (paragraphs 23-25) whose combination, it is claimed, creates a unique ‘challenge to Scottish society’ (p5). The first argument, ‘Impact on respect for animals’ claims that ‘Many people now consider it outdated and morally wrong to make animals perform tricks’ and that animal presentation ‘could inhibit the development of respectful and responsible attitudes towards animals in the future’ (ibid.). There are four problems with these as ‘ethical’ arguments for the Bill. First, the opinion of any number of people provides no ethical warrant for anything whatsoever. People differ enormously on what they consider to be morally blameworthy – the question in ethics is the justification of the opinion, not the opinion itself, no matter how widely it be shared. Second, the concluding argument (p5) is empirically unsupported (hence ‘could’); third, this argument does not differentiate wild from domestic animals and hence provides no coherent grounds for this restriction and fourth, it does not discriminate static from travelling circuses whereas the former are excluded from the purview of the Bill.
The second argument, ‘Impact of travelling environments on an animal’s nature’ (telos), is perhaps even less coherent. First, the concept of ‘an animal’s nature’ rests on the notion of the continuity of that nature across environments. The coherence of the argument that an environment might change an animal’s nature undermines the concept on which it depends; that of an unchanging nature. Second, the argument that what is good is what is natural, that ‘ought’ can be derived from ‘is’, which provides the ethical ground for the claim that it is right to leave nature unmolested; is itself highly contentious. Its most celebrated opponent is the great philosopher of the Scottish Enlightenment, David Hume, who demonstrated that the assertion that something’s existence guarantees its goodness is logically fallacious – other grounds are needed. Third, the proposition that we should leave nature untouched and allow animals to flourish in their natural environment meets the universality criterion but if we accept it, then we are morally bound by all of its strictures, in the manner of the Jain religion or of fruitarians i.e. that any interference with the natural world is prohibited. The grounds that this argument provides for the prohibition of the exhibition of animals for human entertainment is no stronger and no weaker than the argument for prohibiting the consumption of eggs. We can only coherently use this as an ethical argument if we do both, and much else besides.

The third argument, ethical cost v benefits is not an argument but a decision procedure and to conduct it requires precisely the arguments from welfare which have been shown not to provide sufficient warrant for a ban.

We can conclude that the Government has identified a number of spurious arguments for legislating on non-welfare ethical grounds and makes only two serious arguments: namely the principle of non-interference in the natural world and the manipulation of citizens’ attitudes towards supporting this principle. Far from providing a ‘unique’ combination of grounds that ‘present a cumulative ethical challenge to Scottish society’, the arguments fail to show how any of the particulars of the exhibition of wild animals contravenes an ethical principle that is not also contravened by hunting, fishing, meat-eating, horse-racing, dog shows, falconry, show-jumping, pet-keeping and any and every other human manipulation of animals. The arguments made by Singer do provide a coherent case against all such manipulation but unless that case is accepted in full, and many contest it, there are no ethical grounds independent of animal welfare, that would justify prohibition.

The Ethics of the Bill

I have so far demonstrated (1) that any argument claiming to be ethical must be generic in scope (2) that this Bill is not generic in this way because (3) the Bill provides no arguments for action that do not apply equally to all forms of human manipulation of animals. The Bill proposes not a ban on the use of animals but only of wild animals, and not a ban on their exhibition in static circuses (for such would apply equally to zoos) but only when they are transported. As the Government notes (p9), there are currently no wild animal acts in Scotland and hence the claim that a phenomenon that does not even exist ‘uniquely, present[s] a cumulative ethical challenge to Scottish society’; is frankly risible.

Liberal democratic societies which adhere to human rights norms do so on the basis of an ethical tradition which limits the rights of governments and majorities to impose their will on fellow citizens. Prohibition of activities and criminalisation of their
participants normally and rightly applies only to practices with significant and far reaching effects which are overwhelming in the damage they inflict on citizens. As a result societies have not banned such harmful activities as smoking tobacco, drinking alcohol, participating in dangerous sports, and so on.

The question the Committee should ask itself is whether the presentation of wild animals in travelling circuses has such significant, far reaching and overwhelmingly negative effects as to warrant prohibition and thus breach an ethical principle, that of the liberty of the citizen, which genuinely is universal. Many people find animal acts in circus distasteful although it is notable the number of respondents to the consultation – 2,043, is dwarfed by the numbers attending one animal circus – Zippos, every summer in Scotland (c. 70,000). There is a contested ethical argument for banning all manipulation of non-human by human animals but the consensus of the social order we inhabit is that distaste does not provide ground for majorities to impose their will on minorities and that manipulation of non-human by human animals is allowable so long as animal welfare is protected.

In short, there is no sound ethical basis for the prohibition proposed by this Bill.