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John Mancy



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Editor: John Mancy
Assistant Editor: Jacquie Mancy-Stuhl

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Australia's first animal law journal

The *Australian Animal Protection Law Journal* (AAPLJ) is intended to be a forum for principled consideration and spirited discussion of the issues of law and fact affecting the lives of non-human animals.

“The greatest threat to animals is passivity and ongoing acceptance of the status quo; a status quo most easily maintained through silence,” as Peter Sankoff says in a note on the imminent publication of *Animal Law in Australasia: A New Dialogue*.

This inaugural issue of the AAPLJ illustrates some of the width and depth of issues arising under animal law.

Arguably, as Ian Weldon writes, animal protection laws in all Australian states fail to protect “most animals from routine and systematic ill treatment”. Examples of this apparent statutory ineffectiveness, and some reasons for it, are scrutinised by Malcolm Caulfield (intensively farmed pigs) and Katrina Sharman (‘battery hens’). Tara Ward discusses whether ‘human’ rights could protect the interests of non-human animals more effectively than current anti-cruelty laws.

The paradox of a continuing dearth of information about the millions of animals used annually in research and education, despite calls for more transparency, from researchers as well as animal advocates, is considered by Siobhan O’Sullivan

Subsequent issues of the AAPLJ will provide space for concise letters in reply to any of the articles published.

The *Australian Animal Protection Law Journal* logo was drawn by Christine Townend. - **JM**.

GUIDELINES FOR CONTRIBUTORS

All contributions (apart from brief case notes, letters and book reviews) are subject to peer review. Reviewers are not made aware of the contributing authors' identities and the reviewers remain anonymous to all but the Editor.

Articles must be original and should be accurate as to matters of fact and law. They may be generally informative or they may take a critical or analytical perspective. The best guide to the style is to closely read articles as published in the AAPLJ. Of course, contributors should write in plain English.

There is no recommended length of articles, but if they exceed about 6,000 words referees may consider whether the article is worthy of publication regardless of the length, or whether it could be shortened. Case notes, if they are simply reportage, should be concisely stated. Articles/briefs which take a critical or analytical perspective on interesting cases are particularly welcome.

The AAPLJ style generally follows The Australian Guide to Legal Citation (see <http://mulr.law.unimelb.edu.au/aglc.asp>).

All material submitted should be marked "Attn: AAPLJ Editor" and may be emailed to mancyj@gmail.com, preferably in MS Word or Rich Text Format (RFT).

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Turn up the dialogue

Peter Sankoff*

Much as it might pain some of us to admit it, significant social justice changes rarely happen overnight. Reform designed to rectify injustices against slaves, women, children and other disadvantaged groups took centuries, and no one should be surprised that achieving meaningful gains for animals is also taking considerable time. Still, the glacial process of change can be disconcerting for those working on the front lines. Progress often feels slow and elusive, generally confined to an occasional flurry of steps forward, or – even worse – back.

To avoid the disappointment of everyday reality, it is critical to recognize areas where real change *is* occurring; where the movement is making strides and creating momentum. Indeed, in these relatively early stages, progress is best measured not through the number of laws changed or court victories won – as these occurrences will be few and far between for the foreseeable future – but by assessing the developing strength of the movement’s foundation, the addition of new people and ideas, and the enhanced prospect of future gains. It is these successes that should pave the way for more tangible change in the years to come.

By this measurement, animal law is making real strides in the Australasian region. It is particularly noteworthy that this article is being written for Australia’s first journal devoted entirely to the law relating to animals, a journal whose emergence should permit some much needed scrutiny of how the law currently fails to protect against animal abuse. And this is hardly the only development of note. Several advocacy groups have established “legal arms”, hiring lawyers to begin fighting for change in the court of public opinion – if not actually in courtrooms just yet.¹ Volunteer legal groups have sprung up across Australia and New Zealand,² and the groundwork is set for even further growth. Animal law is now taught at six universities, and planning for several

* Senior Lecturer, Faculty of Law, University of Auckland

¹ Eg. Voiceless, the fund for animals: www.voiceless.org.au. The next step is obviously for barristers to work on cases of this nature full-time. This should occur within the next 5-10 years, with the United States already providing a model for this type of activity. See the Animal Legal Defence Fund: www.aldf.org.

² Eg. The Animal Rights Legal Advocacy Network (ARLAN), New Zealand; Lawyers for Animals (Victoria based), Australia.

more courses is underway, replicating a worldwide trend.³

It is crucial that this momentum be sustained, as lawyers will have an enhanced role to play in advancing the interests of animals through legal reform and litigation in the near future. However, to effectively take on that role the animal law movement must continue to educate students and lawyers about the issues at stake and build on the growth that has been generated over the past few years.

For that to occur, certain obstacles must still be overcome. Despite the progress made so far, many in the mainstream legal community still regard the term “animal law” as something mysterious, scary or to be mocked. One of the primary inhibitors for students and lawyers interested in this area of law remains the shortage of educational options and dearth of serious animal law scholarship.⁴ The situation exists in large part because many lawyers and academics continue to view animal law as a discipline unworthy of legal study.

In early September 2007, a small group of academics and practitioners took one step in altering this perception and further developing the emerging field by participating in *Animal Law in Australasia: A New Dialogue*, the first major workshop in the region devoted entirely to animal law. The weekend forum featured ten of Australasia’s leading experts and an invited international guest (Peter Stevenson of Compassion in World Farming in the U.K.) discussing and debating a number of animal law issues. The project was developed by myself and Steven White, with funding generously provided by Voiceless, the fund for animals, the University of Auckland, and the Socio-Legal Research Centre at Griffith Law School.

The workshop had two major objectives. First, it brought together the growing number of academics and lawyers with a passion for animal law scholarship currently working in isolation across Australia and New Zealand, and allowed them to share strategies, ideas and inspiration with the objective of spurring more advanced legal research. The second goal was more practical: to provide the foundation for participants to produce the first scholarly work on animal law published in the Southern Hemisphere, a task that is currently underway. The book version of *Animal Law in Australasia: A New Dialogue* should be available for purchase in early 2009 through Federation Press.

³ See Peter Sankoff, “Charting the Growth of Animal Law in Education” (2008), 4 *Journal of Animal Law* 105. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1081230. As of 2008, there are over 100 universities worldwide offering a course in animal law.

⁴ Notwithstanding the recent growth, it is important to keep in mind that less than 20% of Australasian law faculties offer a course in animal law, and only a very small number of faculty members conduct research in this area.

Release of this book should signal a new era for the animal law movement in Australasia. Finally, we will have a text of our own that focuses not on the American or European framework, but rather on issues and problems specific to this part of the world. The hope is that this book will help inspire a new generation of Australasian scholars to regard animal law as a rich area of legal inquiry and a useful way of stimulating long-term, meaningful change for animals in this part of the world. In short, *Animal Law in Australasia: A New Dialogue* is intended to lay another keystone in the foundation of a stronger animal law movement, and as the name of the project implies, the primary objective is to stimulate further discussion and debate. This goal remains a critical one, as the greatest threat to animals is passivity and ongoing acceptance of the status quo; a status quo most easily maintained through silence.

Why doesn't animal protection legislation protect animals?

(and how it's getting worse)

Ian Weldon*

All Australian jurisdictions have statutes whose titles suggest that they exist to protect animals from cruelty or to promote their welfare.⁵ None of them is very effective. As Malcolm Caulfield has demonstrated elsewhere in this journal, that is partly a question of enforcement. But that is not the only reason. Even with well-resourced investigation and competent prosecution, most instances of animal suffering are beyond the reach of legislation which, in theory, is designed to prevent them. This cannot be because the Acts are all out of date or poorly drafted. These statutes do not protect most animals because, fundamentally, parliaments have chosen not to.

It would of course be politically unthinkable to repeal this legislation. It has an important part to play in assuaging the public conscience. Rightly, it proscribes deliberate and overt cruelty, which most people find offensive. As a result, and almost incidentally, it helps a few fortunate animals. But it does virtually nothing to protect most animals from routine and systematic ill treatment. Intensively farmed pigs and hens in laying cages are two obvious examples. The phenomenon is well known. It was the subject some time ago of an ABC *4 Corners* television program, "Out of sight, out of mind".⁶ The contrast was sharply drawn between the enthusiastic protection afforded to companion animals and an almost total lack of interest in the welfare of farm animals. The distinction is not seriously in doubt. To keep a dog or cat in conditions which are commonplace for pigs or hens would certainly attract prosecution and public censure. No feature of the animals themselves explains this different treatment. Pigs and hens have been domesticated for many years.

* Barrister. I am grateful for the helpful and constructive comments of Dr Malcolm Caulfield who read this article in draft and whose assistance greatly improved it. Responsibility for any errors remains mine.

⁵ *Prevention of Cruelty to Animals Act* 1979 (NSW); *Prevention of Cruelty to Animals Act* 1886 (Vic); *Animal Care and Protection Act* 2001 (Qld); *Prevention of Cruelty to Animals Act* 1985 (SA); *Animal Welfare Act* 2002 (WA); *Animal Welfare Act* 1993 (Tas); *Animal Welfare Act* 1992 (ACT); *Animal Welfare Act* (NT). Typically, these have been described by the acronym POCTA.

⁶ ABC, 2004. Producer Janine Cohen.

They are fascinating and intelligent animals. Given the chance, they have a complex social structure and the ability to learn. They can and occasionally do make excellent pets. Nothing about them justifies their exclusion from the protection afforded to other, more favoured species.

The legislation

There is no great subtlety in any of this. The mechanisms by which this dichotomy and duplicity is achieved are not difficult to see. A combination of artificial definitions and broad statutory exemptions operates to emasculate the animal protection statutes and keep them in a state of forlorn impotence.

Most statutes give some indication of their purpose, typically found in the long title. The *Animal Welfare Act 2002 (WA)* (the **AWA**) has as its long title

“An Act to provide for the welfare, safety and health of animals, to regulate the use of animals for scientific purposes, and for related purposes.”

Few who have a genuine concern in the interests of animals would accept that the Act comes close to achieving these laudable aims. They might reasonably ask why that is so.

The answer lies in the social and political background which commonly informs the development of animal protection legislation. Animal welfare bodies are usually given a voice, but so are representatives of agriculture and food production. Self-evidently, the main interests of these latter groups are not in animal welfare or protection. If they were, they would not need to be represented; they could safely leave those issues to the entities who make this their primary concern. Unashamedly, these representatives participate in the legislative process in order to limit the extent of the legislation and, so far as possible, to exclude themselves from its effects.

As already mentioned, there are two significant devices which operate to subvert the suggested intention represented by the titles of the AWA. One is the interpretation section of the AWA. The other lies in the AWA's recognition of usual practices. With an absence of critical thinking that might elsewhere be considered striking, this latter approach allows a procedure to be continued, irrespective of its merits, simply because it already exists.

As examples, in Western Australia, the term ‘animal’ excludes fish.⁷ This artificial division has a social, not a scientific, basis. Zoologically, fish are certainly vertebrate animals.⁸ But recreational fishing groups are politically active in Western Australia, and in any event the practices of commercial

⁷ AWA, s 5(1). The term ‘fish’ is defined in the Fish Resources Management Act 1994.

⁸ Otherwise, of course, it would be unnecessary to exclude them by an artificial definition

fishing, where fish usually die by suffocation or being crushed, seem plainly cruel.⁹ In New South Wales, some parts of the *Prevention of Cruelty to Animals Act 1979* apply to animals but not to “stock animals”.¹⁰ All captive animals in New South Wales must be fed and watered, but seemingly only domestic pets need exercise. Conversely, it is unlawful to poison an animal, but only if it is a domestic animal.¹¹ No one sensibly suggests that wild or feral animals feel any less pain when they are poisoned, but generally they suffer conveniently out of sight. Clearly, distinctions like this are based on the sensitivities of people and not on the needs or welfare of animals.

In addition, most Acts contain provisions which provide defences to a charge of cruelty based on compliance with an industry practice.¹² Sometimes these are found in codes of practice, which in some jurisdictions have the status of subsidiary legislation.¹³ Codes of practice vary in the protection that they afford, but typically they have been based largely on industry standards. They have as their foundation no greater philosophical support than the political strength of the intensive food production industry. In effect, this industry, to a very great extent, makes its own laws.

To many readers of this journal, none of this will be new or surprising. It is, in many ways, a statement of the obvious. The article was intended as an introductory piece for the launch of the Australian Animal Protection Law Journal. Originally, in draft, it concluded with an unremarkable paragraph suggesting that animal protection laws are not really designed to work, and urging the development of more effective legislation.

In fact, that somewhat anodyne conclusion turned out to be both complacent and optimistic. The true position is actually more serious. The legislation is

⁹ The fact that fish feel pain and stress was demonstrated by Lord Cranbrook in a seminal report published in the United Kingdom some twenty years ago. Fish are animals in New South Wales (POCTA 1979, s4), Victoria (POCTA 1986, s3), Queensland (*Animal Care and Protection Act 2001*, s11), Tasmania (*Animal Welfare Act 1993*, s3) the ACT (*Animal Welfare Act 1992*, s2 and the dictionary) and, if they are kept in captivity, in the Northern Territory (*Animal Welfare Act 1992*, s4). They are not animals in Western Australia or South Australia (POCTA 1985, s3).

¹⁰ *Prevention of Cruelty to Animals Act 1979* (NSW), s9(1A). An exception is also provided for ‘animals usually kept in ... a cage’. This is similar to the animal husbandry exceptions. Essentially these provisions mean that if something is done often enough and as a matter of routine, it somehow becomes acceptable.

¹¹ *Prevention of Cruelty to Animals Act 1979* (NSW), s15(2).

¹² For example, in Western Australia, s23 of the AWA.

¹³ For example, in Western Australia see s5 and s94 of the AWA. In Western Australia, compliance with a code of practice is a separate defence: AWA s25.

not static and ineffective ; it is changing and getting worse.

The *Al Kuwait* and its aftermath

In 2003, Animals Australia examined the conditions of sheep being exported on the ship *Al Kuwait*. They discovered evidence of malnutrition, eye disease and traumatic injury, which they documented. The *Animal Welfare Act 2002* (WA) includes a provision making it unlawful to transport animals in a way likely to cause harm.¹⁴ The history of what happened next is tortuous, but in summary Animals Australia was unable to persuade either the police or the RSPCA in Western Australia to prosecute. A writ of mandamus in early 2005 directed to the Department of Local Government (the only other entity in Western Australia able to bring a prosecution)¹⁵ resulted in the Department's launching a prosecution, by then only a few days before the limitation period expired. The case was heard in February 2007 and a decision was delivered in March 2008. Crawford M found one of the three allegations proved on the facts, but this charge related to the fact that so-called fat sheep had been transported in the latter half of the year. Crawford M accepted expert evidence that this transport was likely to cause harm, and so it was cruel under s19(3) of the AWA. However, she also found that the numbers and type of sheep that could be exported were the subject of detailed licence conditions. Licences to export livestock are granted under the *Australian Meat and Live-stock Industry Act 1997* (Cth) (the **AMLIA**); some other matters relating to live export are dealt with in the *Export Control Act 1982* (Cth) (the **ECA**). Licences to export livestock are granted under the *Export Control Act 1982* (Cth) (the **ECA**). In the *Al Kuwait* case, the exporter had a Commonwealth licence to export exactly those sheep that were the subject of the prosecution. The ECA is expressed to be generally complementary to compatible state law, so that it has not displaced the AWA. But in relation to the particular charge that had been proved, there was an operational inconsistency. Crawford M held that it was not possible simultaneously to obey both the Commonwealth law (permitting the export of

¹⁴ AWA, s 19(3)(a). There are provisions to similar effect in the *Animal Welfare Act 1993* (Tas), s7: "a person who has the care or charge of an animal must not use a method of management of the animal which is reasonably likely to result in unreasonable and unjustifiable pain or suffering to the animal"; s8: "a person must not do any act or omit to do any duty which causes or is likely to cause unreasonable and unjustifiable pain or suffering to an animal". *Prevention of Cruelty to Animals Act 1986* (Vic), s9(1)(c) "a person who...does or omits to do an act with the result that unreasonable pain or suffering is caused or is likely to be caused to an animal...commits an act of cruelty upon that animal...". *Animal Care and Protection Act 2001* (Qld) s18(1) "a person must not be cruel to an animal"; s18(2) "cruelty" includes "transporting an animal ...without appropriate preparation...or when it is unfit for the transport"

¹⁵ AWA, s82.

fat sheep during this period) and the state law (making their export, in the circumstances, unlawful). On this charge, therefore, AWA was ineffective under s109 of the Commonwealth Constitution.

Since 2003, the Commonwealth has supposedly tightened further its controls on export, generally in response to the Keniry report. As a result, the scope for the application of state law is correspondingly reduced. Although the Commonwealth maintains its position that the AMLIA and the ECA do not cover the field, there is in practice little room for state laws to operate. Essentially, the systemic organisation and treatment of animals in live export - issues of loading, housing, stocking levels, feeding, veterinary supervision and cognate measures - are matters of Commonwealth attention. Probably, state laws are now confined, for example, to acts of deliberate cruelty.

Several issues arise from all of this. First, the Commonwealth does not have an express power to make laws for animal welfare. Its legislation in this area is valid because it is incidental to the Commonwealth power to legislate for exports generally.¹⁶ Necessarily, this limits the potential scope of the legislation. In the event, though, this may not matter very much. Following Keniry, it is tolerably clear that the impetus behind expanded Commonwealth control was to address animal welfare issues, but only to the extent necessary to make live export politically acceptable and therefore sustainable. This has an obvious resonance with the attitudes discussed in the earlier part of this article. The focus of the relevant legislation is not animal welfare for the sake of the animals involved in live export. Cynically, it is to provide for the minimum standards of animal welfare that will not attract public opprobrium. From an animal welfare perspective, that is hardly a promising start.

Secondly, as the *Al Kuwait* decision demonstrates, the AWA has been largely sidelined. Despite its flaws, the AWA was one of the more recent animal protection statutes and is unique in including in the definition of cruelty the transport of animals in a way likely to cause harm. Following *Al Kuwait* there were calls from the live export industry to have this provision removed from the AWA, but in the event the industry may find this unnecessary. As explained, any prosecution under the AWA based on the general management of stock would now almost certainly fail. Prosecutions of this sort, though, are the most significant for animal welfare, because they have the potential to affect the whole live export trade. Given that Western Australian ports remain a main source of live export, the fact that the AWA has been effectively neutralised is obviously disappointing.

Thirdly, most ominously, the legislation reflects a disturbing modern trend.

¹⁶ Probably most obviously the trade and commerce power. Since the decision in *New South Wales v Commonwealth* [2006] HCA 52; 81 ALJR 34; 231 ALR 1 (the WorkChoices case), the practical reach of Commonwealth power has of course been much increased.

Order 2.54 of the Export Control (Animals) Order 2004 is made under regulation 3 of the Export Control (Orders) Regulations 1982. In turn, these are made under the *Export Control Act* 1982. Order 2.54 says that

(3) If an authorised officer is satisfied that...(g) each of the live-stock is fit to undertake the proposed export voyage without any significant impairment to its health ... The authorised officer may grant ... permission to leave for loading.

At first blush, this seems unexceptionable. However, Order (3B) says that

"for paragraph (3)(g) [of O 2.54], an authorised officer may be satisfied live-stock are fit to undertake a proposed export voyage *without needing to be assured of the fitness of every animal in a herd.*" [emphasis added]

George Orwell might have been proud, or possibly embarrassed, to suggest that someone can properly be satisfied that "each of the live-stock is fit ... without needing to be satisfied of the fitness of every animal". Undoubtedly, this is a version of Newspeak. It is both semantically and logically unsound.

Plowman K, Pearson A & Topfer J in their article "Animals and the law in Australia: a livestock industry perspective" in *Reform* (2008) state that:

The AAWS [Australian Animal Welfare Strategy] recognises that the importance of POCTA¹⁷ legislation for specific acts of cruelty will remain, however, POCTA legislation alone is essentially outdated in terms of modern farming practices, because it focuses mainly on the individual animal versus caring for the herd and does not provide for broader-based standards... The revised MCOP [Model Code of Practice] for pig welfare has been designed to support this strategic direction...[i]n other words it aims to support the development and maintenance of management systems to prevent undesirable animal welfare outcomes occurring, rather than simply intervening in cases of cruelty and punishing the culprits." (at page 27)

The export control provisions and the *Reform* commentary should be read together because they have the same provenance, and the same alarming suggestion. Whatever the suggested attitude of the AAWS, the importance of POCTA legislation will not remain if it is displaced by provisions which restrict or remove its operation. Unremarkably, the food industry sees animals as units in its systems of production and indeed, that is exactly what they are. But each one is also an individual animal with instincts, feelings and the capacity to suffer. This trend to concentrate on 'the herd' at the expense of individual animals is a disturbing development in legislation which supposedly provides, and on which animals depend, for animal welfare and protection.

¹⁷ See n 1.

Transparency in Australian animal research regulation - How are we doing?¹⁸

Dr. Siobhan O'Sullivan*

In April 2008, the negative effect of animal research on animal research subjects was briefly propelled into the media spotlight.¹⁹ Such exposure is noteworthy because it is a rare occurrence. A month long media analysis conducted in May 2004 shows that animals used for research and education receive only one quarter as much media exposure as companion animals. Furthermore, the media attention research animals do receive tends to focus exclusively on the research project's outcomes, and does not include a critical analysis of the impact of the research on the animals involved. This situation is troubling because one of the few ways the community can learn about how animals are used in research and education is via the mass media.

For more than three decades professionals who use animals in research, and policy makers who regulate that use, have asserted their desire to see the practice of animal experimentation become more transparent. From the perspective of both animal researchers and the government, transparency is thought to help garner support for animal experimentation, particularly in the face of criticism from animal rights advocates. Such an approach assumes that opposition to animal research is partly a result of public ignorance, meaning the more people understand the scientific process, the more likely they are to support animal experimentation.

Almost twenty years after an Australian Senate Select Committee enquiry into animal experimentation concluded that it is important for research institutions

* School of Political Science, Criminology & Sociology University of Melbourne

¹⁸ For earlier versions of this paper see: O'Sullivan, S., (2005). Animal research policy, public perceptions, and the problem of transparency. In: A. Armstrong, ed. *Beyond fragmented government: governance in the public sector*. Melbourne: Centre for International Corporate Governance Research (Victoria University), and O'Sullivan, S., (2006). Transparency and animal research regulation: an Australian case study. *Animal Liberation Policy and Philosophy Journal*. IV (I).

¹⁹ For example see Hale, E. (2008), 'Dogs and pups operated on, then killed', News.com.au [online], viewed 17/04/08, <<http://www.news.com.au/story/0,23599,23530922-2,00.html>>

to be ‘open and forthcoming’ about their animal use, this paper reflects on the extent to which the Australian research sector is in fact accountable to the public. It is concluded that to date, the animal research community has not adequately increased its level of public accountability, nor have policy makers imposed transparency enabling legislative upon the research sector. Although most people would be likely to agree that it is appropriate for a democracy such as Australia to take an inclusive approach to animal research regulation – to ensure the community can judge for itself whether animal research practices meet community animal welfare expectations – it is not clear that transparency in Australian animal research regulation will be a reality anytime soon.

Community exposure to the impact of animal research on the animals involved

On Sunday April 13, 2008, the news broke that Melbourne University’s Faculty of Veterinary Science uses healthy dogs in non-recovery surgery, as part of its veterinary training program. Of course, Melbourne University’s Faculty of Veterinary Science, which was established in 1853, has probably used healthy animals in non-recovery surgery since its inception. Moreover, data collected by Honorary A/Prof. Rosemarie Einstein, suggests that Melbourne University is in all probability currently using less animals in its education programs than ever before. Einstein’s research shows that the University of Sydney has reduced the number of animals it uses in its teaching programs by 99.77 per cent, in the real terms, since 1971. Indeed, in 1971, the University of Sydney used 2,200 dogs for educational purposes (Einstein 2006)²⁰ whereas the 2008 media reports about the University of Melbourne’s use of dogs spoke of ‘dozens of dogs’ being used each year²¹. Yet despite a dramatic reduction in the number of animals used by Australian universities for educational purposes, it is likely that many of the people watching the news on April 13 realised only for the first time that healthy, complex, social animals die as part of Australian university degrees. The *Australian Code of Practice for the Care and use of Animals for Scientific Purposes 7th Edition* (the Code), requires that those who use animals in research and education weigh a research or education project’s anticipated benefits against the immediate cost to the animal. The Australian community rarely gets the chance to do likewise, because publicly accessible information about animal research practices is scarce.

²⁰ The real reduction figure was calculated by factoring in the increase in the number of students enrolled at the University of Sydney since 1971. Einstein presented her findings at the Australian and New Zealand Council for the Care of Animals in Research and Teaching (ANZCCART) 2006 annual conference. Following the conference I requested a copy of Einstein’s presentation directly from her.

²¹ Hale 2008.

With the exception of people enrolled in a select number of education programs such as veterinary medicine, biological science, psychology or pharmacology, very few non-researchers in Australia have access to, or knowledge about, the Australian animal research sector. The modern animal research sector is commonly viewed by animal advocates as the most secretive of all animal use industries. For example, the British Union for the Abolition of Vivisection (BUAV) accuses the animal research industry of being ‘closed to public scrutiny’²². What that accusation alludes to is that few people are privy to the workings of research laboratories or their governing bodies.

A considerable amount of Australia’s animal research takes place within universities. That means that one of the main ways non-animal researchers can learn about the animal research sector is via articles published in academic journals. However, this places a considerable limit on the number, and type, of people realistically able to acquire such knowledge. Academic journals are expensive to purchase, difficult to access, and hard to understand, especially for non-academics. Moreover, only a small number of experiments ever make it into highly competitive academic journals. A 1965 report commissioned by the British Government found that details pertaining to only one-quarter of all animal experiments appear in print.²³ That amount has probably since decreased. Furthermore, as Prof. Peter Singer argues, the results that do withstand peer review are:

“inevitably more favourable to the experimenter than reports by an outside observer would be... the experimenters will not emphasize the suffering they have inflicted unless it is necessary to do so in order to communicate the results of the experiment, and this is rarely the case”.²⁴

If Singer is correct, academic journals don’t tell the whole story. Furthermore, academic articles are generally silent on how the animal was housed, fed, or disposed of once the experiment was complete. What’s more, academic journals have nothing to say about research projects that either generated no results or projects where the animal had an unexpected adverse reaction. The most anyone can hope to learn about animal research via academic journals is limited information about the best experiments that went entirely to plan.

Articles published in the mass media have a broader reach. However, the popular press carries news of only the most important peer-reviewed work and is equally unlikely to provide a well-rounded understanding of the animal

²² BUAV, nda.

²³ cited in Singer, P., (1995). *Animal liberation*. 2nd ed. London: Pimlico, 41.

²⁴ Singer 1995: 41.

research process. To learn precisely how often animal research is discussed in the mass media, in May 2004, four widely circulated Sydney newspapers were monitored for animal-related stories. The papers surveyed were: *The Sydney Morning Herald*, *The Daily Telegraph*, *The Sun-Herald* and *The Sunday Telegraph*. The full survey results are provided in Table I.

| | <i>The Sydney Morning Herald</i> | <i>The Daily Telegraph</i> | <i>The Sun-Herald</i> | <i>The Sunday Telegraph</i> | Total |
|---------------------------------------|----------------------------------|----------------------------|-----------------------|-----------------------------|------------|
| Wildlife | 18 | 20 | 7 | 3 | 48 |
| Companion animals | 9 | 19 | 5 | 14 | 47 |
| Exhibited animals | 6 | 7 | 0 | 6 | 19 |
| Agricultural animals | 6 | 4 | 2 | 2 | 14 |
| Research and education animals | 7 | 4 | 1 | 0 | 12 |
| Other animals | 3 | 1 | 1 | 2 | 7 |
| Law enforcement animals | 2 | 3 | 0 | 0 | 5 |
| Total | 51 | 58 | 16 | 27 | 152 |

Table I: Animal-Related News Stories over a One-Month Period (May 2004)²⁵

The data shows that animals used for research and education are discussed in the media at a fraction of the rate of wildlife and companion animals, and less often than exhibited animals and animals used in agricultural production.

²⁵ *The Sydney Morning Herald* and *The Daily Telegraph* are published in New South Wales Monday to Saturday. *The Sun-Herald* and *The Sunday Telegraph* are published on Sundays. Excluded from the analyses in all papers were the following sections: Letters to the Editor, the Editorial, and the greyhound and horseracing guides. In the Saturday edition of *The Sydney Morning Herald*, the following sections were analysed: News, News Review and, *The Good Weekend*. Of *The Sun-Herald*, the following sections were analysed: Domestic News, World News, Opinion, *Sunday Life Magazine*. In *The Sunday Telegraph*, the following sections were analysed: Domestic news, International news, Opinion, and *The Sunday Magazine*. Only articles and images pertaining to animals in a living state were included. No recipes for meat or other food-related items were included. In cases where a story related to animals from more than one category, the story was scored against each relevant category. Where the same story appeared twice in the one edition of a paper, it was only counted once. This tended to occur especially in the case of the weekend edition of *The Sydney Morning Herald*, where it is common practice to run the same story in both the news and the News Review sections.

Indeed, the only type of animal to receive less media exposure than animals used in research and education are animals used for law enforcement, such as police horses and sniffer dogs. Yet in 2006, Australia had 47 sniffer dogs²⁶ compared to an estimated 4,613 dogs used in research or education, (in 2004).²⁷ The volume of media reports about animals in research neither reflects the numbers of animals used, nor the seriousness of the impact that use can have on the animals involved. This means the community's exposure to animal research does not adequately reflect the size or depth of the Australian animal research industry.

Of the 12 stories published in May 2004 that made mention of animals used in research and education, five were accompanied by a picture. Of the articles that carried a picture, the photo associated with one article was not of an animal. The other four all carried photos of animals. Of the four photos, three of them were of healthy animals: one was of an albatross flying through the air; another was of a gecko sitting on a human finger and the third was a series of three photos depicting how a capuchin monkey can aid people with disabilities. The fourth image was the only one where the animal was not in good health. It was a photo of a jewfish who was clearly dead. However, the fish was intact and there were no obvious signs of injury. Pictorially this does not reflect the reality of animal research for those animals who endure painful or prolonged harm. In the year 2005/06, the New South Wales Department of Primary Industries (DPI) reported that 53 animals used in research and education in NSW experienced 'major physiological challenge'.²⁸ 'Major physiological challenge' is defined as 'interference with the animal's physiological or psychological processes. The challenge causes a moderate or large degree of pain/distress that is not quickly or effectively alleviated'.²⁹ None of the animals depicted during the media analysis period could be described as having experienced anything approaching 'major physiological challenge', yet that is what occurs in NSW at a rate of more than one animal per week.

In most cases the references made to the animals in the articles was incidental, or intended to demonstrate the beneficial outcomes expected to be

26 AQIS, (2006). Detector dogs [online], viewed 4 December 2006, <<http://www.daff.gov.au/content/output.cfm?ObjectID=68ED30F2-40A7-4071-B7ACB49621780C0A&contType=outputs>>.

27 AAHR, (nda). Statistics [online], viewed 20 October 2006, <<http://www.aahr.asn.au/statistics.html>>

28 NSW Department of Primary Industries, (2007). Animal Research Review Panel New South Wales annual report 2004-05 [online], viewed 20 April 2008, <<http://www.agric.nsw.gov.au/reader/annualreportsarrp-2006.pdfMIvalObj=29106&doctype=document&MItypeObj=application/pdf&ext=.pd>>: 29.

29 NSW Department of Primary Industries: 30.

generated by a particular piece of research. For example, a small article titled 'New Tissue Technique' stated that 'tissue engineers could already cause pigs to grow their own replacement tissue. It was only a matter of time before the technique could be used for humans'.³⁰ Another stated that artificial sweetener has 'previously been shown to cause illnesses, including cancer, when given to animals in massive doses'.³¹ A third article reported that sperm carries genetic codes which may be important to offspring development, meaning cloning may not be a viable way of producing future generations. The article reported that '[l]ast month scientists in Japan and Korea reported creating the first mammal without using sperm – a mouse that is the daughter of two female mice'.³²

None of the articles made mention of the impact of the research on the animals involved. Indeed, a number of the reports emphasised the benefits the research would have for animals. For example, three of the articles focused on wildlife research and the research's forecast beneficial outcome. One article was about efforts by researchers at the Australian Museum to protect geckos. Another was about work to track the flight path of migratory albatross. That article concluded with 'the birds face many threats but the biggest was illegal longline fishing boats'.³³ The final article reported on efforts to restock NSW waterways. The article stated that the purpose of the project was to 'test the species' survival and breeding.' It noted that 'each fish had a non-harmful purple dye injected into its head to track its progress'.³⁴

Given the substance of animal research related stories recorded in May 2004, it seems that not only does the level of reporting about animal research not reflect the extent of the practice, but the articles do not provide the community with adequate information about the full range of animal research practices. Most notably absent were accounts of serious animal harm, suffering or confinement. This omission is significant because it suggests the community is politically disenfranchised when it comes to animal research. How can anyone be expected to have a coherent view about animal research and how it is regulated in the absence of detailed information about the practice?

³⁰ Daily Telegraph, (2004). New tissue technique. *The Daily Telegraph*, 4 May, p.3.

³¹ Dasey, D., (2004). Sweet tooth proves a danger to young Australians. *The Sun-Herald*, 9 May, p.3

³² Reaney, P., (2004). Here's proof: there is a need for men after all. *The Daily Telegraph*, 14 May, p.17.

³³ Cummings, L., (2004). Jerry Hall and a Race of Big Birds. *The Daily Telegraph*, 1 May, p.11.

³⁴ Sydney Morning Herald, (2004). Mulloway, Mulloway, Mulloway...they're all Bound for Botany Bay. *The Sydney Morning Herald*, 11 May, p.5.

The argument in favour of transparency in animal research policy

A great deal of ink has been spilt over the issue of transparency and the use of animals in research. Different stake-holders have their own reasons for thinking transparency is important. Some people think it is a way of holding the research community accountable for their actions. Others see transparency as providing the public with the information it is rightfully entitled to because public money funds much of the research sector. Others speak of educating the public about the benefits of animal-based research, and still others think of the issue in terms of protecting the interests of research animals through public debate and enhanced awareness. However, regardless of the terminology employed or the perspective from which the issue is approached, transparency, its elusiveness, and the benefits it could bring, have been at the centre of the animal research debate in Australia for the last 30 years.

The tussle over transparency in animal research has engaged all three human stake-holders: those who oppose the use of animals in research; those who make their living from animal-based research; and public policy makers who mediate between the two. Relations between animal advocates and animal researchers have been likened to a state of war.³⁵ However, when it comes to the question of increased transparency, according to the rhetoric employed by both camps, there appears to be a level of consensus. Researchers and activists appear to believe that enhanced transparency is in their best interest. Raising the level of transparency is a goal to which both parties claim to aspire. Policy makers have also encouraged animal research institutions to move in that direction. In the following section, the attitudes towards enhanced transparency in the animal research sector espoused by each stake-holder group are examined and reasons why each group may consider it to be in their best interest are suggested.

Animal Advocates

Animal advocates are strongly in favour of knowing as much detail about animal research as possible. In their case the word ‘detail’, does not mean they are content to learn about animal research practices through journal articles once an experiment is complete. Rather, animal advocates are keenly interested in knowing what research is being approved, by which institutions, and for what reason. They do not wish to acquire that information after the fact, but rather they would like to receive it in a timely manner, preferably before the research commences.

³⁵ Pifer, L, Shimizu, K., and Pifer, R. (1994) “Public Attitudes Toward Animal Research: Some International Comparisons”, *Society & Animals* [online], Vol. 2, No. 2, viewed 26 May 2005 <<http://www.psyeta.org/sa/sa2.2/pifer.html>>

advocates want to see what takes place in laboratories. They also want the public to be exposed to images of animals undergoing research procedures.

In 1996, independent filmmaker Zoe Broughton worked as a laboratory technician for Huntingdon Life Sciences (HLS) in the United Kingdom (UK). She took the position so as to secretly film conditions inside the laboratory. Her footage resulted in two technicians being charged with ‘cruelly terrifying dogs’. Broughton’s is a well-known case because the resulting footage was widely distributed.³⁸ Animal groups regularly put time, energy, and expense into obtaining footage and information from inside laboratories. At the same time Broughton worked at HLS UK, HLS laboratories in the United States (USA) were being infiltrated by People for the Ethical Treatment of Animals (PETA).³⁹ More recently, PETA Europe obtained footage from inside Germany’s Covance Laboratory. However, in both PETA cases the results have not been as widely publicised because of legal action initiated once the infiltrations were uncovered.⁴⁰

Not all animal protection groups have the means or expertise to gain access to research facilities, but many feel such activity is necessary in order to bring about greater transparency in animal research. Influential British anti-animal research organisation the British Union for the Abolition of Vivisection (BUAV) states on its website:

The animal research industry is responsible for the deliberate infliction of pain, suffering, distress and death on billions of animals every year around the world. By its very nature, it is an industry that remains closed to public scrutiny. It operates behind closed doors and in secrecy.

The BUAV, in its determination to break through this secrecy, not only pioneered the use of investigative work in the UK but also, at an international level, leads the field with its expertise to expose the plight of laboratory animals (BUAV nd).

Similarly, in Australia, Animal Liberation NSW carries a message on its web site claiming:

Hundreds of thousands of animals are used in experiments each year in NSW - including pain experiments and poisons testing. But the details are hidden behind a veil of secrecy. And despite serious breaches of the Act, no

³⁸ Broughton, Z. (2002) “Seeing is Believing”, *The Ecologist*, vol. 31 i2.: 31.

³⁹ Broughton: 31.

⁴⁰ Broughton 31 and Covance cruelty (2005) *Court Rules that PETA Europe Should be Allowed to Show Video of Monkey Abuse Inside Covance Lab* [online], viewed 26 May 2005, <<http://www.conancruelty.co.uk/courtRules.asp>>

Animal advocates are also interested in learning who makes the decision to approve research, why scientists believe the research should be carried out, what species of animals will be used, and how the animals will be affected. Importantly, animal advocates also want to know how the animals are treated while in the laboratory and what will happen to the animals once the protocol is complete. The detail of how a procedure is carried out is often of greater interest to the animal advocate than the aim of the protocol or the research findings. As one observer argued, animal advocates tend to be focused on the animals' suffering, whereas animal researchers tend to prioritise the benefits that may flow from their research project.³⁶

In October 2002, New Zealand Greens MP Sue Kedgley, speaking in her capacity as Green Party Animal Rights Spokesperson, delivered a paper at a seminar hosted by the New Zealand Animal Rights Legal Advocacy Network (ARLAN) in which she effectively captured many of the sentiments commonly expressed by animal advocates who campaign in opposition to the use of animals in research. In favour of increased public transparency, she argued, in part, that the problem is that:

[E]ach year scientists and researchers in New Zealand carry out all manner of experiments, including cloning and genetically engineering animals, on about 300,000 animals a year. Of those 300,000 over 17,000 of these animals are subjected to severe or very severe suffering.

But we, ordinary New Zealanders, or even someone like myself who is a[n] [Member of Parliament] MP representing the public interest, have absolutely no idea what actual experiments are conducted on these 300,000 animals, or why? What happened to the 300 horses or 300 odd cats who were experimented upon last year? Did we really need to use 300 horses and 300 cats?

And was it really necessary to subject 17,265 animals to severe or very severe suffering?

We ordinary New Zealanders, have no idea because all the meetings of the Animal Ethics committees [AECs] which approve experiments are conducted in secret... their meetings are not advertised, and members of the public cannot even obtain copies of the agendas or minutes of their meetings - much less the details of the experiments they approve, or the reasons for the research and experimentation.

*The public cannot even find out who are members of Animal Ethics committees – even members who... are supposed to be representing the public.*³⁷

However, the animal protection community's concern over insufficient transparency does not begin and end with the application process. Animal

³⁶ Paul, E. (1995) "Us and Them: Scientists' and Animal Rights Campaigners' Views of the Animal Experimentation Debate", *Society & Animals* [online], Vol.3, Number 1, viewed 25 May 2005, <<http://www.psyeta.org/sa/sa3.1/paul.html>>

³⁷ Kedgley, S. (2002) "Lifting the Veil on Animal Experimentation Secrecy", *Seminar of the Animal Rights Legal Advocacy Network* [online], viewed 26 May 2005, <<http://www.greens.org.nz/searchdocs/speech6317.html>>

researcher has ever been prosecuted under it! Why not???

Most teaching and research are funded by taxpayers' dollars. The taxpayers have a right to know how their money is being spent - and that legal requirements are being met.⁴¹

The animal advocates cited above all agree that achieving enhanced transparency is important in advancing their agenda of protecting animals against the harms they suffer when used in research. To them, enhanced transparency means exposing the community to the conditions under which animals live and die in research laboratories.

Animal researchers

Influential sections of the animal research community also believe there is a need for enhanced transparency. Following Sue Kedgley's speech in 2002, the Australian and New Zealand Council for the Care of Animals in Research and Teaching (ANZCCART), whose mission is to 'provide leadership in developing community consensus on ethical, social and scientific issues relating to the use of animals in research and teaching' (ANZCCART nd), convened its 2003 conference under the banner *Lifting the Veil*. Following the meeting, a press release was issued which stated that delegates had recommended that:

increased transparency of animal research and testing procedures would be of value to the public, and that more information should be provided as long as such disclosure does not compromise personal safety of scientists. The preferred means for providing this information is by publication of a plain language summary of all research projects approved by animal ethics committees.

annual statistics published by [Ministry of Agriculture and Forestry] MAF should provide more detail on different types of animal research, testing or teaching.

balanced information on the value and need for animal research and testing must be made available to the public at all levels.⁴²

Since that time, ANZZCART, through its publication *ANZCCART News*, has continued to air debate concerning the pros and cons of enhanced transparency. In 2005 Graham Nerlich, Emeritus Professor of Philosophy at the University of Adelaide, argued that the research community must act to raise its level of

⁴¹ Animal Liberation NSW (1999) *Demonstration Against Animal Research* [online], viewed 26 May 2005, <<http://www.animal-lib.org.au>>

⁴² ANZCCART (2003) Media Release: Scientists to push for more public information on animal research [online], viewed 26 May 2005, <<http://www.rsnz.org/advisory/anzccart/releaseSept03.php>>.

public accountability, because if enhanced transparency does not come from within, it will be imposed from without, meaning researchers may not be in a position to define their own terms of reference.⁴³ In response John Schofield, Director of Animal Welfare at the University of Otago (New Zealand) argued that enhanced transparency poses a threat to researchers and research.⁴⁴ Such arguments are not unique. However, beyond such overt political manoeuvring, there is another sense in which the animal research community claims that enhanced transparency is necessary, and indeed in their best interest.

One of the most frequently recounted arguments in favour of enhanced transparency, put forward by the research community, is that because animal rights ‘extremists’ have hijacked the debate over the use of animals in research, the only way to bring balance back to the debate is to educate the public about animal research. Underpinning that idea is the belief that animal rights advocates use public ignorance to benefit their cause. Thus, the only way to counter the damage done to the animal research community’s image is to increase the lay community’s understanding of research practices. For example, writing in *BioScience* Miller and Strange argued that:

Because animal rights activists play off public ignorance, biologists should educate themselves about the movement and also educate the public about biological research. For example, people unfamiliar with science do not understand why repeating experiments is important, not redundant.⁴⁵

Likewise, in a series of influential articles published in the UK edition of *New Scientist Magazine*, written by researchers, and based on interviews with 43 scientists who engage in animal-based research, Birke and Michael⁴⁶ concluded that:

Animal experimentation is a legitimate topic of public debate, and that the public has the right to know what is done in its name. We call for greater openness on the part of scientists and civil servants as the only effective way to allay public concern.⁴⁷

More recently, the RDS (formerly Research Defence Society) a UK-based peak body representing the interests of medical researchers, wrote on their web site, in relation to changes to the British Freedom of Information Act (FOI):

⁴³ Nerlich, G. (2004) ‘Letters to the Editor’, *ANZCCART News*, Vol. 17 No.1: 11-12.

⁴⁴ Schofield, J (2004) “Letters to the Editor”, *ANZCCART News*, Vol. 17, No. 2: 14-15.

⁴⁵ Miller, J. A. and Strange, C. (1990) ‘Taking the Offensive for Animal Research’, *BioScience*, v40 n6: 431.

⁴⁶ Birke, L. and Michael, M. (1992) “The researcher’s dilemma”, *New Scientist*, 1815, 25-28

⁴⁷ Birke and Michael: 25.

RDS welcomes the greater openness that FOI will bring to discussions about animal research. With more good quality information about how and why animals are used, people should be in a better position to debate the issues (RDS 2005).

According to animal researchers, transparency is an important tactic that should be employed to protect their interests against misinformation, and to counter general public ignorance. In the minds of researchers, opposition to animal research does not occur because people know what takes place in animal research laboratories, but rather opposition is a result of people not understanding the importance of the research community's work.

Policy makers

Policy makers have also expressed the view that enhanced transparency should be the aim of all animal research institutions. In support of that stance policy makers often engage similar arguments to those employed by researchers. That is, that opposition to animal research is in large part due to public ignorance, and the only way to counter that opposition is to allow the public to engage with research through enhanced transparency.

In 1989, the Australian Senate Select Committee on Animal Welfare handed down a report into animal experimentation. As part of the Committee's enquiry, evidence from 162 individuals was heard.⁴⁸ A further 50 people completed questionnaires on animal research practices, and research facilities were inspected.⁴⁹ The Committee's report strongly and repeatedly called for information concerning the use of animals in research to be made widely available for public consideration. The Committee stated:

*The evidence taken then [1984] made it clear to the Committee that publicly available information on the extent and nature of the use of animals in experiments in Australia was extremely limited.*⁵⁰

The Committee went on to argue:

[I]t has been the secretive approach in the past and the reluctance to provide public information about their use of animals in experiments which has lead to the public misapprehension about the nature of animal experimentation in this country. Secrecy breeds suspicion and the media feed on suspicion. What

⁴⁸ Senate Select Committee on Animal Welfare (1989) *Animal Experimentation: Report by the Senate Select Committee on Animal Welfare*, Canberra, Australian Government Printing Service: 285-291.

⁴⁹ Senate Select Committee on Animal Welfare: 2.

⁵⁰ Senate Select Committee on Animal Welfare: 2.

*might have been a misunderstanding becomes a crisis.*⁵¹

The Committee concluded that:

*All people and bodies involved in animal experimentation and in its administration and control need to be accountable for their action, otherwise the system may be brought into disrepute.*⁵²

And:

*The ethics committee is also a key element in the system for public accountability. By having animal welfare and community views on an ethics committee, the community has more confidence that the ethical attitudes of the community are being reflected in the judgments and decisions of the committee.*⁵³

The Australian Senate Select Committee on Animal Welfare, however, did not have the authority to implement its recommendations. In the next section consideration is given to how effectively transparency has been achieved in the Australian animal research sector since the Committee produced its report in 1989.

Current levels of transparency in the Australian animal research sector

With such strong support for enhanced transparency in animal research one would imagine it is easy to achieve. In the following section, some of the ways in which animal researchers are said to have increased their level of transparency are discussed. In each case, it is argued that, despite some progress in key areas, the Australian animal research sector could not be described as suitably transparent or adequately publicly engaged.

The Animal Ethics Committee system

In 1989, the Senate Select Committee on animal experimentation made 20 recommendations. Those recommendations were wide in scope. However, the most relevant to the current discussion called for the publication of national statistics on animal use and the expansion and strengthening of Australia's Animal Ethics Committee (AEC) system.⁵⁴

At the time the Senate Select Committee handed down its findings, there

⁵¹ Senate Select Committee on Animal Welfare: 6.

⁵² Senate Select Committee on Animal Welfare 1989: 245.

⁵³ Senate Select Committee on Animal Welfare 1989: 262.

⁵⁴ Senate Select Committee on Animal Welfare 1989.

was a question-mark over the reliability of the newly developed AEC system. The Committee noted that:

*The history of ethics committees in Australia, as evidenced by the Committee, is one of varying levels of success, with some acting merely as a façade to keep authorities and community at bay.*⁵⁵

The Committee went on to observe that:

*There has been reluctance on the part of the institutions to appoint non-scientists to ethics committees. With few exceptions, ethics committee membership has included the minimum number of animal welfare or community representatives.*⁵⁶

The AEC system has come a long way since that time and it is likely that in Australia research proposals are overwhelmingly approved by an AEC which is properly constituted and which takes the task seriously. Where a proper AEC is not in place, it would be widely construed as a serious breach of statutory requirements.

However, although the AEC system has developed strongly, it is not self-evident that it facilitates transparency in significant ways. The AEC system has consistently been presented as one of the pillars of enhanced dialogue between the research community and the public. Yet, the extent to which AECs provides the wider community with a timely and detailed understanding of animal research practices is questionable. Indeed, the link between AECs and enhanced transparency is difficult to interpret.

The structure and function of Australian AECs is dictated by the *Australian Code of Practice for the Care and use of Animals for Scientific Purposes 7th Edition* (the Code). The Code stipulates that a properly constituted AEC must be made up of a veterinary scientist, an animal researcher, a person with a demonstrable commitment to animal welfare, and an independent person who does not have a research background or affiliation to the AEC's research institution. It is the inclusion of an independent, normally referred to as a 'Category D' member which is often seen by policy makers and the animal research community as the lynchpin which allows the public to engage with the animal research process. However, beyond the involvement of 100 or so individuals who sit on Australian AECs as Category D members, the ability of interested parties to learn about the detail of animal research remains highly restricted.

AEC meetings are not public forums and the detail of what is decided, and why a particular decision is reached, is not publicly available. Of even greater

⁵⁵ Senate Select Committee on Animal Welfare: 228.

⁵⁶ Senate Select Committee on Animal Welfare: 235.

concern is the high level of secrecy imposed on AEC members. All AEC members are subject to institutional confidentiality⁵⁷ and in NSW members of the Animal Research Review Panel (ARRP)⁵⁸ and others involved in administering the Act 'shall not disclose any information obtained in connection with the administration or execution of this Act' except under limited circumstances.⁵⁹ That means that if an issue of concern does arise, only a handful of people in Australia are privy to the detail of that problem.

It is possible that a welfare concern pertaining to an animal used in research in Australia could be identified, reported, investigated and concluded, with no more than ten people being aware of the incident. That figure is calculated on the basis of the following fictional scenario: a researcher has approval to carry out recovery surgery on cats. As part of the protocol, the researcher is required to monitor the cats' recovery every hour for the first ten hours and euthanise any animals who appear to be suffering as a result of the surgery. However, due to teaching commitments, the researcher is not always able to check on the animals every hour and in some cases cats are left unmonitored for up to two and a half hours post-surgery. Another researcher becomes aware of the practice and is concerned because she believes some cats are suffering as a result. She decides to anonymously inform the NSW DPI that a researcher at her institution is carrying out research contrary to the conditions of the research licence. She speaks to a veterinary officer at the DPI's animal welfare unit. He records the details and then informs his supervisor, his unit manager and the chair of ARRP. The veterinary officer then arranges a meeting with the head of animal research services and the chair of the AEC at the relevant institution. The DPI officer notifies the two institutional representatives that an anonymous complaint has been made. He instructs the institution to undertake its own investigation into the allegation. It does so, and in the process also notifies the animal house manager and the researcher's superiors that a complaint has been made. The researcher admits she had not been monitoring the cats hourly as per the protocol and voluntarily agrees to suspend her research activities in order to avoid the matter being taken further.

In that scenario where the issues are efficiently resolved it may be acceptable for only a small number of people to be aware of what was happening. Now consider the same scenario, but imagine the researcher does not admit culpability, but rather denies having failed to meet the terms of the

⁵⁷ Australian Government and the National Health and Medical Research Council (2004) *Australia code of practice for the care and use of animals for scientific purposes 7th edition*, Canberra, Australian Government: 12.

⁵⁸ I was a member of the NSW Animal Research Review Panel for three years from 2003 until 2005.

⁵⁹ NSW Government (1985) *NSW Animal Research Act*, Government Printing Service.

protocol.

In the absence of sufficient evidence those in authority may be unwilling to act. If the researcher who first reported the alleged breach of protocol felt her concerns had not been adequately addressed, strenuous confidentiality requirements would limit her ability to act to shield the cats from harm. For example, Australian animal research laws make it illegal for her to report her concerns to the RSPCA. As discussed in the next section, this high level of confidentiality, including in relation to animal welfare concerns, has serious implications for the enforcement of the law.

Animal use statistics

The second pillar of transparency in animal research policy is the provision of publicly available statistical data by Australian research institutions on the number of animals used, species type and the procedure's level of invasiveness/harm. One of the most persistent criticisms made of the animal research sector, by animal advocates, during the late 20th Century was that data advising of the number of animals used in research and education was not made available to interested parties. In the 1970s, in order to formulate a picture of the number of animals used in research and education, animal advocates had to carry out their own calculations using secondary sources such as shareholder information published by animal breeding companies.⁶⁰ Since that time the animal research sector has moved to address that criticism and in the early 21st Century many governments, including Australia, routinely publish animal use statistics.

In NSW, all licensed animal research institutions (with the exception of primary and high schools) record the number of animals they use and grade that use against a prescribed invasiveness scale. That data is then lodged with the NSW DPI which produces an annual tabulated report covering all research activity in the State. The correlated data is published in ARRP's annual report which is distributed to stakeholder groups and made available on ARRP's website.

Although the statistical reporting system allows the public to engage with animal research in a way previously not possible, the reporting system is not without its shortcomings. For example, the format in which the NSW data is published does not facilitate a quick interpretation of the statistics, nor does it allow casual observers to readily conclude how many animals were used in total. Furthermore, States tabulate the data in different ways and release the information at different times. There is no national accounting system.

In 2004, animal protection organisation Australian Association for Humane Research (AAHR) developed its own national table using statistics from all

⁶⁰ Singer 1995: 37.

available jurisdictions. It concluded that close to six and a half million animals were used in research and education in Australian states that year (AAHR nda). The organisation issued a press release commenting on the increase in the number of animals used. According to Helen Rosser, Executive Director of AAHR, the story was not picked up by any media outlet.⁶¹ In the same communication Rosser also noted that:

While it would be anecdotal only, much of the feedback we have received about our new DVD (about to be released) has been of shock – that so many animals are used and that the research industry is of such a large scale. It has reinforced our view that very few people are aware of what is happening.⁶²

Presuming the DVD contains factual information, that response also suggests that the community knows little about how animal research is conducted in Australia.

However, even if a national database were in place, statistics alone reveal little about the research process. Most problematically, the Code and the AEC system both require that the cost to the animal be weighed against the research's anticipated benefit. Yet, for the majority of people who are not members of an AEC, there is no mechanism available to allow them to arrive at their own conclusion as to whether the cost/benefit analysis is being carried out appropriately. Publicly available data on animal research has to be considered in isolation, so it is impossible to form a clear picture as to whether decisions reached by AECs were reasonable or not. The public knows new drugs come onto the market. They also know animals are used in research. But under the current system there is no way of putting the pieces of the puzzle together.

The problem of enforcement

The low visibility status of research animals and limited regulatory requirements for transparency pose a challenge to the perception that the law is being enforced and the actual ability of law enforcement officers to carry out that task. This problem is compounded by the fact that in Australia, the RSPCA has no power in relation to animals used in research and education. RSPCA officers are not permitted to enter research facilities for the purpose of carrying out animal welfare inspections, and all complaints received by the RSPCA in relation to research matters are automatically referred to the DPI or another comparable agency. This is problematic because the RSPCA is the primary animal protection law enforcement agency in Australia.

⁶¹ Rosser, H. (helenrosser@aaahr.org.au), 20 October, 2006. Re: Animal use statistics media release. E-mail to O'Sullivan, S. (siobhano_s@hotmail.com)

⁶² Rosser, personal communication, October 20, 2006.

Between 1985, when the NSW *Animal Research Act* was introduced, and 2006, the NSW DPI did not bring a single prosecution against an animal researcher or an institution conducting animal research. That stands in contrast to the RSPCA's record. In the period 2002–03, the NSW RSPCA undertook 112 prosecutions for animal cruelty.⁶³ British political scientist and animal protection expert Robert Garner argues, in relation to the British *Animals (Scientific Procedures) Act* 1986, that 'the secrecy surrounding the administrative machinery makes it very difficult... to assess the effectiveness of the legislation'.⁶⁴ The same may be said of the Australian animal research regulatory process. Indeed, there is no way of knowing whether the reason no Australian researcher has faced charges under the NSW *Animal Research Act* is that no significant violation of the legislation has taken place or whether they have taken place and the perpetrators have not been prosecuted.

Conclusions

In the UK, where both the government and the research community also articulate a desire for enhanced transparency in animal research, the Home Office has developed a system whereby information on every approved research protocol is publicly available. Information takes the form of an anonymous and abridged version of all research licences accessible via the Home Office's website. Furthermore, in 2005, the UK's Animals in Scientific Procedures (ASP) Inspectorate's annual report was made public for the first time. On the Home Office's web site it is stated that the 'report provides previously unavailable information and highlights a commitment to transparency and openness in animal research – for both medical research and animal welfare'.⁶⁵ Interestingly, moves to remove the confidentiality clause from the UK's *Animals (Scientific Procedures) Act 1986* were obstructed by animal researchers.⁶⁶ Yet, in this case the public's right to know trumped the research community's right to confidentiality.

So what about Australia? Although the research community and the animal protection communities both claim to be in favour of enhanced transparency,

⁶³ Moore, C. (2005) 'Prevention of Cruelty to Animals Amendment Bill', NSW *Legislative Assembly Hansard*, 23/3/05 [online], viewed 26 May 2005, <<http://www.parliament.nsw.gov.au/prod/parlament/hansart.nsf/V3Key/LA20050323005>

⁶⁴ Garner, R., (1998). *Political animals: animal protection politics in Britain and the United States*. London: Macmillan Press: 192.

⁶⁵ Home Office (2005) *Inspectorate Published First Annual Report into Animal Research* [online], viewed 23 February 2006, <<http://www.homeoffice.gov.uk/about-us/news/inspectorate-animals>

⁶⁶ Home Office 2004: 6.

the research community has not moved swiftly to ‘open the laboratory door’. This suggests that if enhanced transparency is to occur in Australia it is most likely to come about as a result of changes in public policy. In turn, this suggests that those who inform that structure of animal research policy need to decide what they consider the value of transparency in animal research to be. The animal advocacy community believes enhanced transparency will result in public opinion more strongly opposing the use of animals in research. The research community believes enhanced transparency will result in stronger public support for research, yet appears unwilling to actually test that hypothesis. If policy makers do not move to enforce enhanced transparency it is likely we will never know who is right – animal rights advocates or the animal researchers. However, if policy makers do force enhanced transparency upon the research community the public attitude that will flow from that change is likely to be a fair and reasoned response to the reality of animal research. Arguably, that would be the best result for a democratic society. One of the principles underpinning democratic political arrangements is the notion that citizens should influence political decisions. Citizens are only capable of influencing the policy process to the extent that they are exposed to, and understand, a particular policy area. Currently, that exposure is seriously limited in the case of animal research.

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Animal cruelty law and intensive animal farming in South Australia – light at the end of the tunnel?

Malcolm Caulfield *

Australian jurisdictions to a greater or lesser extent follow the English model of policing animal cruelty laws. Usually, the RSPCA gets the guernsey in terms of enforcement.⁶⁷ If we were attempting to set up animal cruelty laws for the first time today, would the natural thing be to give the enforcement powers to a private organisation? Of course not. The reason the English RSPCA ended up involved in enforcement is simply because there was no police force in that country in 1824 when the SPCA (as it then was) was founded. The Metropolitan Police was only established 5 years later.⁶⁸ In other words, the role of the RSPCAs in Australian jurisdictions is a legacy of our colonial past.

Because the RSPCA in Australia has long been involved in enforcement, the various states' and territories' RSPCAs have achieved 'sacred cow' status regarding that role. Anyone perceived to be criticising the setup is regarded with deep suspicion. A lawyer contemplating this problem might consider it inappropriate that the various RSPCAs enforce part of the criminal law of a state or territory. As private organisations, the RSPCAs are accountable to their members, but there is no real accountability to parliament.⁶⁹

* Legal Counsel, Animals Australia

67 But note that none of the relevant Australian anti-cruelty statutes impose a *duty* on the RSPCA to enforce the law - so the RSPCA can not be the subject of a writ of mandamus.

68 Radford, M (2001) *Animal welfare law in Britain – regulation and responsibility* Oxford: Oxford University Press, at p40.

69 In some jurisdictions, including South Australia and Queensland, the RSPCA and the government department responsible for enforcing the relevant animal cruelty statute have entered into an agreement relating to investigation and enforcement of animal cruelty complaints. This may arguably allow someone concerned with the behaviour of the RSPCA to take action against the minister concerned (for example a writ of mandamus) for failing to ensure that the terms of the contract are complied with by the RSPCA. Regardless, this can not substitute for proper accountability, as would be the case, for example, with the police force. A similar comment can be made about the possibility which appears to exist of requesting an ombudsman to review the actions of an inspector.

Recent events in South Australia suggest that the RSPCAs should not be involved in enforcement of animal cruelty law, and that the intensive farming industry should be the subject of considerable scrutiny regarding its treatment of animals in so-called ‘factory farms’..

What the eye don't see the heart don't grieve over

Keeping animals in factory farms raises major animal welfare issues. Not only are animals kept in close physical confinement, they are often subjected to cruel “procedures” in order to maximise commercial gain. Examples in the setting of factory-farmed pigs are the confinement of pregnant sows in a stall little bigger than the sow's body and the castration of piglets without anaesthesia or pain relief.⁷⁰

Animals in factory-farms are kept well out of the view of the public. Intensive farmers are generally opposed to unannounced inspections, by those who have powers to enforce an animal cruelty statute, or anyone else.

The South Australian RSPCA (which I will refer to in the rest of this paper as “the RSPCA”) in 2003 prepared a review of the *Prevention of Cruelty to Animals Act 1985* (SA) (“**the Act**”), with focus on issues relating to enforcement. On completion of that review, the RSPCA wrote to the responsible Minister⁷¹ proposing that certain changes should be made to the Act. In 2005 the Minister put out a paper for public discussion. One of the key proposals was that inspectors should be allowed to routinely inspect intensive animal farms. Such a power, exercisable without the need for prior notification of an inspection, may be seen as essential for the proper enforcement of animal cruelty law.

So, what provisions of the Act relate to inspections? Section 29 of the Act says (relevantly)

“...an inspector may...at any reasonable time enter any premises or vehicle that is being used for holding or confining animals that have been herded or collected together for sale, transport or any other commercial purposes.”

Given that the Minister in the Second Reading Speech introducing the *Prevention of Cruelty to Animals Bill* (1985) said that inspectors “...will have the power to enter...premises where animals are kept for commercial purposes”,

70 See, for example Caulfield, M (2008) *The law and pig farming* Reform 91, 22; Caulfield, M & Cambridge, H (2008) *The questionable value of science-based “welfare” assessments in intensive animal farming – sow stalls as an illustrative example* Aus Vet J (in press).

71 Minister for Environment and Conservation

one might have thought that there was already power in the Act allowing inspectors to carry out, in effect, unannounced inspections. The RSPCA in Tasmania, where there is a very similar provision, certainly thinks that is so.⁷² However, the RSPCA in South Australia thinks that their inspectors “cannot enter a farm unless they obtain a warrant after receiving evidence of an offence or unless they receive an invitation by the owner to inspect the farm.”⁷³

Notwithstanding this, the public discussion paper proposed the Act be amended to “empower animal welfare inspectors to routinely inspect intensive farming establishments...”.⁷⁴ After receiving about 70 submissions, the government prepared a draft Bill which was released for public consideration in November 2006. That Bill contained sections effectively empowering routine inspection of “premises ... that an inspector reasonably suspects is being used for or in connection with a business ... involving animals, with “reasonable notice” to the occupier.

Peeking behind the veil

While all this was happening, others with an interest in the welfare of intensively-farmed animals were gathering information about how well the Act was working in relation to those animals.

Wasleys piggery

In June 2006, Animal Liberation NSW obtained video footage of sow stalls in Wasleys piggery in South Australia. They obtained evidence that pigs were being kept in under-sized stalls.⁷⁵ That visit was the subject of much media

72 Section 16(2) of the *Animal Welfare Act* 1992 (Tas) says “[a]n officer, authorized by the Minister to do so, may, at any reasonable time enter, search and inspect any premises where animals are sold, presented for sale, assembled or kept for commercial purposes (Dr Richard Butler, Chief Executive Officer, RSPCA Tasmania; personal communication).

73 See “Intensive piggeries – the RSPCA’s position” on the RSPCA website at <http://www.rspcasa.asn.au/page?pg=445&stypen=html> (accessed on 4 April 2008).

74 See the Department website at <http://www.environment.sa.gov.au/animalwelfare/issues.html#pocataa> (accessed 4 April 2008).

75 Uniquely in Australian jurisdiction, regulations made under the Act require compliance with a range of “animal welfare codes”, including one for pigs which specifies minimum dimensions for a sow stall: *Prevention of Cruelty to Animals Regulations* 2002 (SA), reg. 10 and Schedule 2.

attention, including programs aired by Channel 7's *Today Tonight*. Two TAFE⁷⁶ students who had done work experience at the piggery came forward and gave evidence to the RSPCA of other instances of what appeared to be serious cruelty. This writer has seen copies of the statements taken by the RSPCA but considers them of little or no evidentiary value. The students subsequently provided detailed written statements to Animals Australia's Lyn White (a former SA police officer of more than 20 years experience). Animals Australia supplied those statements to the RSPCA.⁷⁷ *Today Tonight* also recorded footage (taken from a helicopter) indicating that large numbers of pigs and piglets had been killed and buried. By the time the RSPCA got around to investigating the piggery (ie three days after what appeared to be a "clean up"), all they could find was that several stalls were smaller than the dimensions referred to in the relevant Code of Practice.⁷⁸ The RSPCA (and subsequently the Minister, in response to a complaint from Animals Australia) asserted that because the relevant code "suggested minimum space allowances ..." for sows in stalls, use of stalls smaller than the dimensions in the code would not constitute breach of the relevant regulations.⁷⁹ I disagree with this view. According to that logic, sows could be kept in stalls smaller than their body! From the legal point of view, because the pig code was adopted as part of the law of South Australia (under the regulations), a court will seek to give meaning to a provision which is otherwise uncertain. Because the same approach must be taken to the interpretation of the code as is taken to the Act,⁸⁰ a construction that would promote the purpose or object of the Act will be preferred.⁸¹ It is my opinion that keeping a sow in a stall less than the minimum dimensions as specified in effect by the regulations will breach those regulations.⁸² In any case, were a

⁷⁶ technical and further education.

⁷⁷ The RSPCA has since indicated to Animal Liberation (NSW) that it does not consider the evidence justifies commencing a prosecution.

⁷⁸ *Model Code of Practice for the Welfare of Animals – Pigs* 2nd edition (2003) CSIRO Publishing

⁷⁹ See footnote 11.

⁸⁰ see *Whitaker v Comcare* (1998) 86 FCR 532.

⁸¹ see sections 14A(2)(a) and 22 of the *Acts Interpretation Act* 1915 (SA).

⁸² Martin Bennett, a prominent WA barrister, prepared a legal analysis which came to this conclusion. That advice was provided to the Minister.

prosecutor able to establish that keeping a sow in a stall *per se* is cruel,⁸³ if indeed the wording of the pig code relating to sow stall dimensions is void for uncertainty, the defendant would be unable to rely on the defence, available under the Act, of compliance with the code.⁸⁴

Arguably, on the basis of the foregoing, the operators of Wasleys piggery could have been prosecuted for breaching the Act.

Greens upper house MP Mark Parnell responded to the allegations of cruelty (going unpunished) at Wasleys by bringing a motion to establish a select committee to inquire into various issues relating to the Act, including the appropriateness of the RSPCA being responsible for the enforcement of part of the criminal law of the State (ie the Act).⁸⁵ The motion was defeated on 6 December 2006.

Ludvigsen piggery

In January 2007⁷ Animals Australia was contacted by Jason Shaw, an employee at a piggery in Owen, South Australia, owned and operated by Ludvigsen Family Farms Pty Ltd (“Ludvigsen”). Mr Shaw alleged that he had witnessed various incidents of cruelty (mainly concerning failure to properly look after pigs),⁸⁶ and had sent a complaint to the RSPCA via its website. He had telephoned the RSPCA to see what was being done and was told that the complaint was being looked into. The RSPCA has since said that it did not pursue this complaint because it appeared to be vague and because it was obviously made by a disgruntled employee.⁸⁷ It would appear that the RSPCA regarded these as sufficient reasons for not pursuing a complaint of animal cruelty. Another reason given by the RSPCA for its lack of action was that it did not have proper resources available.

This writer went to South Australia, spoke to Mr Shaw and other workers at

83 and would in any case breach section 13(2)(b)(i) of the Act, which says that a person ill treats an animal if that person...being the owner of the animal...fails to provide it with appropriate...exercise (read together with section 13(1): a person who ill treats an animal is guilty of an offence).

84 section 43 of the Act says “nothing in this act renders unlawful anything done in accordance with a prescribed Code of Practice relating to animals”.

85 Legislative Council Hansard 27 August 2006

86 section 13(2)(b)(i)

87 RSPCA Internal Memo 7 March 2007, referred to by Mark Parnell MP in his speech to the South Australian Legislative Council on 14 March 2007.

the Ludvigsen piggery and obtained detailed evidence of alleged failures to properly provide for animal welfare. In February 2007, I was contacted by Colin Bugg, one of those workers, to say that for about a week he had been trying to look after a sick sow which was not taking food and was very ill. Mr Bugg claimed to have made a requests to piggery management that the sow be euthanased, but that he been told to keep going with attempts to feed her. Mr Bugg complained to the RSPCA about that pig a few days later. An RSPCA inspector rang him some hours after his call and took some details, but apparently did not ask whether there was any way of identifying the pig concerned (there was – it had a numbered ear tag). Mr Bugg had understood that the RSPCA would treat his complaint as confidential and that the next step would be for the RSPCA to carry out an unannounced inspection of the site (which of course would have the effect of maintaining his anonymity). However, the director of Ludvigsen, Greg Ludvigsen, was told that a complaint had been made about a pig and was given sufficient information to be able to identify which pig was the subject of concern. According to Mr Bugg, Mr Ludvigsen immediately moved the pig to another area. The RSPCA reported on its website that the pig had made a full recovery. Perhaps the subject pig had been substituted with another one?⁸⁸ In any case, there were only a few piggery workers at that piggery, only one very sick pig and only one person who had been complaining to management about it. A few days later, Mr Bugg was sacked. The RSPCA claimed that Mr Bugg had given the relevant inspector permission to contact his employer.⁸⁹ Mr Bugg denies this and has told Mark Parnell MP and this writer that he did not give the RSPCA permission to contact Mr Ludvigsen.⁹⁰ The RSPCA inspected the piggery nine days after the initial complaint and gave it a ringing endorsement.⁹¹ Mr Bugg's evidence was

88 as pointed out by Mark Parnell MP in his speech to the South Australian Legislative Council on 14 March 2007; Legislative Council Hansard page 1630; see <http://www.parliament.sa.gov.au/Historic/HistoricHansardAugust1993toSeptember2007.htm>.

89 Footnote 87.

90 Mark Parnell MP's speech to the South Australian Legislative Council on 14 March 2007; personal communication.

91 The statement on the RSPCA website (<http://blog1.rspcasa.asn.au/>) reads like an advertisement for Ludvigsen, including the remarkable claim that “the farmer told us has [sic] in fact spent over \$700,000 on improvements to the farm so that he can meet the expectations of the new Pig Code of Practice...”. This is surprising, given the final version of the Code was not in fact approved until April 2007 (so it is difficult to see how he could have known what he needed to do to meet its “expectations”) and more to the point, there are in effect no requirements in the new Code which would have required him to spend money on upgrades.

apparently disbelieved and Mr Ludvigsen's position taken to be true.⁹²

Animals Australia responded by complaining to the RSPCA, the Minister and police - and by alerting the media. Mark Parnell MP took up Mr Bugg's dismissal and the question of the behaviour of the RSPCA in the South Australian parliament,⁹³ calling for an independent investigation into the RSPCA's conduct. Parnell made the point that employees of intensive animal farming establishments were often the only persons to know the conditions of the animals, so as to be in a position to report any cruel practices. It was essential that workers who complained to an enforcement authority should be protected.

One consequence of all of this was that the Minister instructed the Chief Executive of the Department of Environment and Heritage to conduct an investigation. The main conclusion of this inquiry,⁹⁴ was that the RSPCA had "acted appropriately" in these cases. However, the report made several recommendations indicating that protocols followed by the RSPCA in such situations were not appropriate. Those recommendations included that complainants must be advised of "confidentiality protocols", the processes used by the RSPCA for raising the matter with the person that is the subject of the complaint and a "prompt" to make sure that questions must be asked to enable the identification and location of any animals referred to in the complaint.

But there was more to come. At the beginning of April 2007, the writer had a call from another Ludvigsen worker who alleged that there were several pigs in bad condition, including one with a lesion on its leg which he thought was gangrenous. Despite raising the matter several times with management, nothing had been done. The writer decided that it was necessary to obtain incontrovertible evidence, preferably video footage, to ensure the complaints would be taken seriously. A person subsequently attended the Ludvigsen piggery with the worker (taking various precautions to ensure that there would be no risk of breach of "biosecurity"). Video footage of the subject pig was taken and a complaint lodged at the RSPCA in Adelaide. This time the RSPCA responded by attending the piggery within hours of the complaint. However, in the meantime, it seems that the piggery worker had been mulling things over and told Greg Ludvigsen about the complaint. By the time the RSPCA arrived the subject pigs had disappeared. However, the RSPCA were able to exhume several freshly-killed pigs from the "dead pile", which they took back to Adelaide.

92 Mr Bugg later made a complaint to the Equal Opportunity Commissioner pursuant to section 9 of the *Whistleblowers Act* 1993 (SA).

93 South Australia Legislative Council Hansard 14 March 2007.

94 Letter dated 9 November 2007 from Minister Gago to Animals Australia.

The timelines now get interesting.

Minister Gago, after considering submissions received in response to the draft Bill, on 31 July 2007 introduced into Parliament the *Prevention of Cruelty to Animals (Animal Welfare) Amendment Bill 2006*. But, from what was said in the Second Reading Speech, it appeared that the Minister had been persuaded to draw the teeth of the proposed “random inspection” provision. In her speech, the Minister referred to a “Memorandum of Understanding” between the agencies involved with the animal industries which specified that “intensive industries establishments will not be the subject of a routine inspection more than once each year and, if a quality assurance program is in place, desk top audits of the program will be undertaken more frequently than site visits”.

At this point, despite requests from Animals Australia and Mark Parnell MP, the report into the RSPCA's handling of the Ludvigsen affair had still not been released.⁹⁵ Animals Australia and Mark Parnell had informed the Minister about the third complaint.

In August 2007, the RSPCA told the complainant it was going to prosecute Ludvigsen in relation to the third complaint. In September 2007, the case was heard before the Magistrates Court in Elizabeth. Greg Ludvigsen pleaded guilty to three charges. The charges related to the pig seen by the complainant, as well as two other (dead) animals, one of which was found to have a foot missing. The RSPCA presented evidence from an expert pathologist that all of the subject animals should have been euthanased several weeks before the complaint was made. The RSPCA did not seek a penalty, but only sought its costs. The defence included the novel contention that the pig with the missing foot was either born that way or lost it at an early age. Ludvigsen was fined \$1,500 and ordered to pay the RSPCA's costs of \$1,300.⁹⁶

On 13 November 2007, the *Prevention of Cruelty to Animals (Animal Welfare) Amendment Bill* was debated in the SA Legislative Council. Points made by Mark Parnell, arising from the Ludvigsen affair, included that:

- it was inappropriate for the RSPCA, an unaccountable body, to be the mainstay of investigating multi-million dollar agribusiness animal operations;⁹⁷
- the evidence-gathering procedures of the RSPCA were inadequate;

95 And it was not released until November 2007.

96 Personal communication from Animal Liberation (SA) made 7 September 2007.

97 He also said that the most recent AGM of the RSPCA (of which he is a member) had voted in favour of unannounced inspections – but that the RSPCA Council did not support this.

- where a “whistleblower” complains about animal cruelty, and there is no system of unannounced routine or random inspections, the “whistleblower” will always be at risk;
- the objection of industry that “biosecurity” breaches were an obstacle to unannounced inspections was a complete ‘furphy’ (inspectors can in any case take any precautions required);
- the “memorandum of understanding” which would, if implemented, have the effect of excluding intensive animal industries from routine inspections, could be regarded as illegally fettering the powers of inspectors under the Act.

The consideration of the Bill moved to the committee stage in February 2008. There was considerable debate about the issue of routine inspections and in particular whether notice should be given. The Liberal opposition wanted 72 hours notice to be given.⁹⁸ Family First wanted 24 hours. The Greens wanted none. The government wanted “reasonable notice”. Mark Parnell quoted the Ludvigsen case as an example of how little time an operator of an animal factory farm needed to hide the evidence. The outcome was that the Act as amended would say that an inspector must give an operator “reasonable notice”. Mark Parnell, for the Greens, also succeeded in inserting a provision into the amended Act which would have the effect of requiring an inspector to report back to a complainant the action taken in response to a complaint. He was instrumental in persuading the government to insert a provision giving protection to persons who made complaints of cruelty under the Act (ie “whistleblower protection”).

98 The opposition spokesperson stated that one of the reasons for this was there is “only one specialist pig vet in Australia”. This, presumably, will come as something of a shock to the Australian Association of Pig Veterinarians, whose membership appears to have shrunk to one (see the Australian Veterinary Association website at http://www.iimage.cim.au/ava.com/au/main.php?c=0&mt=SIG&new_c_id=2).

And to conclude...

The events concerning the Ludvigsen case and the debates in the South Australian parliament associated with the amendments to the Act support the following conclusions:

- the RSPCA should not be involved in policing anti-cruelty laws;
- intensive animal industry facilities should be able to be inspected without giving notice which would allow perpetrators of cruelty to hide the evidence;
- industry “whistleblowers” need protection from the revenge of their employers.

Putting the chicken before the egg; layer hen housing laws in Australia

By Katrina Sharman*

*"... Future generations will ... look back at the way that we have caged chooks in batteries, simply to drive down the price of eggs for consumers, as if price is the only thought in consumers' minds when they buy food... I want to hear you say that you, as Minister, are going to do something about banning that practice, not just making their cages a little bit more comfortable like some sort of glorified Guantanamo Bay."*⁹⁹ - Kim Booth MHA Tasmania.

While scientists and philosophers continue to debate the age-old dilemma of 'which comes first, the chicken or the egg', the answer for Australia's ten million caged layer or 'battery' hens is patently clear.¹⁰⁰ Despite increasing community awareness about the plight of battery hens, the vast majority of Australia's egg-laying flock today spend their short lives warehoused with hundreds of thousands of others, confined in small cages in which they are unable to preen, nest, stretch their wings or exercise the bulk of their natural behaviours. Many layer hens also live in a permanent state of disfigurement, following the forced removal of part of their beak, being the sensory organ with which they make sense of their world.¹⁰¹

* Katrina Sharman is the Corporate Counsel for Voiceless, the fund for animals, a non-profit organisation established by Brian Sherman AM and Ondine Sherman to protect animals in Australia (www.voiceless.org.au). Special thanks to Peter Stevenson (CIWF) and to Sarah Kossew, Clay Preshaw, Rasha Skybey and the team at Voiceless for assisting with research relating to this article.

⁹⁹ Tasmania, *Parliamentary Debates*, House of Assembly, 12 March 2008, 38.

¹⁰⁰ Figures are approximate as flock sizes and the percentage of birds in different housing systems fluctuate annually; RSPCA Australia, 'Make a choice: Battery Cages' <http://www.rspca.org.au/campaign/battery.asp> at 27 April 2008.

¹⁰¹ Farm Animal Welfare Council, 'Opinion on Beak Trimming of Layer Hens', November 2007, 1. www.fawc.org.uk/pdf/beak-trimming.pdf at 27 April 2008.

In a time when Australia purports to be a ‘world leader in animal welfare’,¹⁰² the widespread acceptance of such practices highlights a failure on the part of our lawmakers to keep pace with international animal law reforms aimed at phasing out the worst aspects of institutionalised animal abuse or ‘factory farming’. The purpose of this paper is to provide an overview of how Australia’s regulatory framework perpetuates the suffering of battery hens and to highlight recent legislative initiatives that seek to provide hens with greater protection.

Legislative framework for layer hen welfare

In Australia, as in many other industrialised nations, millions of chickens are bred each year specifically for the purpose of egg production.¹⁰³ The law classifies these animals as property or ‘live stock’.¹⁰⁴ This is often reflected in the way that they are marketed; as products with ‘favourable genetic characteristics’ such as high output or producers of superior quality eggs.¹⁰⁵ It is also reflected in the way they are treated; as egg-laying machines that need to be maintained with minimum levels of food, water, shelter and veterinary care.

Due to the focus on maximising egg production, many modern farming methods appear to disregard the fact that chickens are sentient beings with the capacity to suffer. However there is ample research to demonstrate that chickens, like humans, experience physical sensations such as pain and emotional responses such as fear, anxiety, pleasure and enjoyment.¹⁰⁶ Studies have also shown that chickens are highly social animals with complex cognitive

¹⁰² Australian Government Department of Agriculture Fisheries and Forestry, ‘Animal and Plant Health Home’ <http://www.daff.gov.au/animal-plant-health> at 27 April 2008.

¹⁰³ For example, there were 16.45m hens in Australia in June 2006. See: Australian Egg Corporation Limited, 2007 Annual Report, 3.

¹⁰⁴ Farm animals are also referred to as ‘stock’ in some jurisdictions. See: *Prevention of Cruelty to Animals Act 1979* (NSW) s 4(1); *Animal Care And Protection Act 2001* (QLD), s 13(2)(e); *Prevention of Cruelty to Animals Regulations 2000* (SA), Schedule 2; *Prevention of Cruelty to Animals Act 1986* (VIC) s 15A(3) and 24D; *Animal Welfare Act 2002* (WA), s 26; *Animal Welfare Act 1992* (ACT), s 17(4); *Animal Welfare Act 1999* (NT), s 4.

¹⁰⁵ Inghams Enterprises, ‘Love’em Ingham— Home’ <http://www.inghams.com.au/layers/sitedocument.aspx?docId=395> at 27 April 2008.

¹⁰⁶ Dr Jacky Turner, *Stop- Look- Listen, The Sentience of Farm Animals*, CIWF Trust (2006) (discussing the sentience of chickens).

abilities.¹⁰⁷ These factors must be borne in mind when considering the ability of Australia's current legislative framework to meet their needs.

Australia has no federal law that applies to the raising or slaughter of poultry, including chickens. Consequently it is left to each State or Territory to regulate their welfare. As each jurisdiction's animal welfare law purports to apply to all animals, *prima facie*, chickens appear to be protected from cruelty. Despite this, any close examination of State and Territory animal welfare legislation reveals that chickens, like many other animals used for food production purposes, fall largely outside the reach of the law when it comes to the most meaningful of protections.

This is perhaps best illustrated at the commencement of an egg-laying chicken's life, when chicks are sorted, sexed and vaccinated in hatcheries before being transported to egg production farms. At this point, male chicks who cannot lay eggs, are designated an industry waste product and are 'destroyed', generally by gassing or maceration (disposal in a high-speed grinder).¹⁰⁸ While some may deem this a humane animal welfare measure¹⁰⁹, the facts remain that the most fundamental of all liberties, the right to life, is withheld from up to 12 million chickens each year.¹¹⁰ This practice occurs largely beneath a veil of secrecy. In other words, it is not disclosed to egg consumers and is simply omitted from animal welfare legislation.

For those chickens that remain, namely hens, the animal welfare statutes of each jurisdiction permit a series of encroachments on bodily liberty and bodily integrity in the interests of maximising egg production. These abuses are entrenched by the presence of the Federal Model Code of Practice for the Welfare of Animals: Domestic Poultry¹¹¹ (the Poultry Code), a document endorsed by Federal, State and Territory Primary Industries Ministers, which underpins the primary animal welfare law to different degrees in each

¹⁰⁷ Lesley J. Rogers, *The Development of Brain and Behaviour in the Chicken*, CAB International (1995).

¹⁰⁸ Primary Industries Ministerial Council, *Model Code of Practice for the Welfare of Animals- Poultry*, (4th edition) (2002) ('the Poultry Code'), cl 14.

¹⁰⁹ RSPCA Australia, 'Policy B- Farm Animals', *RSPCA Policies and Position papers*, (2006), para 3.6.2(b), 77.

¹¹⁰ This figure is based on the assumption that approximately half of all chickens hatched are male and that about 12 million female hens are required to be 'added' to Australia's laying flock each year. Culling usually takes place when the chicks are a day old. See: Queensland Egg Farmers Association Inc, 'Our response' (28 July 1999) <http://www.eggfarmers.org.au/response/default.html> at 9 May 2008.

¹¹¹ Poultry Code, Above n 10.

jurisdiction.¹¹² Some examples of practices which battery hens are lawfully subjected to are outlined below.

Permanent confinement

While free-ranging chickens were once a common feature of the Australian agricultural landscape, the corporatisation of animal production in recent decades has resulted in the concentration of egg production in giant facilities with up to 500,000 birds per farm.¹¹³ On these factory farms, hens are confined indoors in conventional or 'battery cages', which are stacked in tiers on top of each other. Each hen has between 3 and 20 cage mates.¹¹⁴ Hens in battery cages spend their lives in artificially lit surroundings designed to maximise laying activity.¹¹⁵ They are allocated the space equivalent of little more than an A4 sized piece of paper, which is insufficient room to exercise most natural behaviours such as preening, nesting, foraging and dust bathing.¹¹⁶

As hens raised in battery cages spend their time continually standing on sloping wire floors designed to facilitate egg collection, many experience chronic pain from the development of lesions and other foot problems.¹¹⁷ Permanent confinement combined with the unnaturally high demands of egg

¹¹² *Prevention of Cruelty to Animals Act 1979* (NSW), s34A; *Prevention of Cruelty to Animals (General) Regulation 2006* (NSW), reg 24; *Animal Care and Protection Act 2002* (QLD) s16; *Animal Care and Protection Regulations 2002* (Qld), Schedule 1; *Animal Welfare Act 1993* (Tas), s 44; *Animal Welfare Act 1992* (ACT), ss 20, 22. *Animal Welfare Act*, (NT) ss 24, 79. Western Australia and Victoria have enacted variations of the Poultry Code which adopt many of its provisions. See: *Code of Practice for Poultry in Western Australia* March 2003 enacted pursuant to *Animal Welfare Act 2002*, s 94(2)(d); *Animal Welfare (General) Regulations 2003* (WA), reg 6 and Schedule 1; and, *Code of Accepted Farming Practice for the Welfare of Poultry* (version 2) enacted pursuant to *Prevention of Cruelty to Animals Act 1986* (Vic), s6. The Poultry Code has not been given legislative effect in South Australia.

¹¹³ Poultry Hub, 'Chicken Layer Industry' (2008) www.poultryhub.org/index.php/Chicken_layer_industry at 27 April 2008.

¹¹⁴ Dr David Witcombe, 'Layer hen welfare: a challenging and complex issue' (Speech delivered at Animal Welfare Science Centre, Department of Primary Industries, Atwood, Victoria, 8 June 2007).

¹¹⁵ Poultry Code, Above n10, cl 5.

¹¹⁶ Heather Pickett, *Industrial Animal Agriculture*, CIWF Trust, (2003), 2 www.ciwf.org.uk/publications/reports/Industrial_Animal_Farming_bklt.pdf at 27 April 2008.

¹¹⁷ Michael C. Appleby, *Do Hens Suffer in Battery Cages*, Institute of Resource Management and Ecology; The University of Edinburgh (October 1991), 4. <www.ciwf.org/publications/reports/do_hens_suffer_in_battery_cages_1991.pdf> at 27 April 2008.

production may also result in physical disabilities such as reduced bone strength and muscle weakness.¹¹⁸ Hens raised in barren battery cage environments generally live for about 12 months before being slaughtered due to reduced productivity.¹¹⁹ However in some instances, to increase cost-efficiency, producers induce a process called forced moulting. This involves feeding hens a modified diet, intended to restore shell quality and productivity. It generally results in hens being kept alive, albeit in confinement, for a further year.¹²⁰

The legislation of most Australian jurisdictions expressly sanctions the permanent confinement of hens in battery cages by enshrining minimum floor space requirements of 550cm² per bird.¹²¹ In those jurisdictions where caged housing is not expressly provided for, such as Western Australia and the Northern Territory, it is impliedly accepted due to endorsement of the Poultry Code.¹²² Practices such as moulting are not expressly provided for in animal welfare laws but are set out in the Poultry Code.¹²³ Western Australia's animal welfare law also allows producers to claim that certain normal or accepted husbandry practices (such as battery hen farming and moulting) are defensible provided that they are carried out in a 'humane manner'.¹²⁴

Mutilations or 'surgical procedures'

Due to the suppression of many of their natural instincts and social interactions, chickens raised in battery cages often become frustrated. This may

¹¹⁸ Animals Australia, 'Meet Betty the Battery Hen' (2007) <www.animalsaustralia.org/freebetty/battery_hens.php> at 2 February 2008;

¹¹⁹ Anthony Browne, 'Ten weeks to live', *The Guardian* (March 10, 2002).

¹²⁰ Department of Primary Industries and Fisheries, 'Moulting – how, when and why chickens moult', Queensland Government (2004) www.dpi.qld.gov.au/cps/rde/xchg/dpi/hs.xsl/27_2709_ENA_Print.htm at 2 February 2008.

¹²¹ *Prevention of Cruelty to Animals (General) Regulation 2006* (NSW) reg 17H(4)(a); *Animal Care And Protection Regulation 2002* (QLD), reg 10(2)(a)(ii); *Prevention of Cruelty to Animals Regulations 2000* (SA), reg 13N(2)(b)(c); *Prevention of Cruelty to Animals (Domestic Fowl) Regulations 2006* (VIC) reg 8(c); *Animal Welfare Regulations 1993 (Tas)*, reg 6(1)(c); *Animal Welfare Regulation 2001* (ACT), reg 8(3)

¹²² *Code of Practice for Poultry in Western Australia*, Appendix 1 (A1) enacted pursuant to the *Animal Welfare (General) Regulations 2003* (WA), reg 6 and Schedule 1 (16); Poultry Code, Above n 10, Appendix 1 (A1) enacted pursuant to *Animal Welfare Act*, (NT) s24 and Northern Territory of Australia Government Gazette, No. G18, 3 May 2006.

¹²³ Poultry Code, Above n 10 cl 9.5.

¹²⁴ *Animal Welfare Act 2002* (WA), s 23. Note that the Act does not define 'humane'.

trigger the development of stereotypical behaviours such as pecking, bullying and cannibalism.¹²⁵ Producers consider these to be behavioural ‘vices’ because they can lead hens to injure themselves or other birds. Consequently chicks are routinely beak-trimmed or ‘de-beaked’,¹²⁶ which involves the partial removal or burning off of the upper and lower beak through the application of an electrically heated blade.¹²⁷ Those hens who are considered to be excessively aggressive may be beak trimmed again at 8 to 12 weeks of age.¹²⁸ Beak trimming is also considered desirable by producers as it increases profitability by improving feed conversion and reducing food wastage.¹²⁹

Despite the fact that de-beaking is known to cause acute and chronic pain (particularly in older birds) due to tissue damage and nerve injury,¹³⁰ no State or Territory law requires pain relief to be used in conjunction with the procedure. There is also no legal requirement for the procedure to be carried out by a veterinarian or a stockperson with specialised training.¹³¹ Although it may be argued that mutilations of this kind constitute acts of animal cruelty, or certainly would do so if a comparable level of pain was inflicted on a companion animal, they appear to be routinely carried out on the assumption that they constitute ‘necessary’, ‘reasonable’ or ‘justifiable’ cruelty, all of which is permitted under

125 Heather Pickett, Above n 18, 2; Philip Glatz et al, Beak Trimming Training Manual RIRDC, (July 2002), 1 <www.aecl.org/Images/SAR-35A.pdf> at 28 April 2008.

126 Poultry Code Above n 10, cl 12.5 and 13.2.

127 Philip Glatz et al, Beak Trimming Training Manual RIRDC, (July 2002), 1 <www.aecl.org/Images/SAR-35A.pdf> at 27 April 2008. Continuing welfare concerns regarding the use of a hot blade for beak trimming has prompted research into the development of alternative methods including laser trimming. See: Philip Glatz, Laser Beak Trimming; A report for Australian Egg Corporation Limited, (July 2004), <http://www.aecl.org/index.asp?pageid=431#d> at 27 April 2008.

128 Philip Glatz et al, Above n 29.

129 For example, see Inghams Enterprises, ‘Love’em Ingham– Beak Trimming’ http://www.inghams.com.au/layers/sitedocument_alt.aspx?docId=492 at 28 April 2008.

130 Farm Animal Welfare Council, Opinion on Beak Trimming of Layer Hens (November 2007), 9 www.fawc.org.uk/pdf/beak-trimming.pdf at 2 February 2008.

131 Despite this, commercial egg producers accredited by Australian Egg Corporation Limited’s ‘Egg Corp Assured’ program are required to engage beak trimmers accredited in accordance with guidelines specified in the industry’s Beak Trimming Manual. See: Australian Egg Corporation Limited, Egg Corp Assured: QA Manual (January 2006), s3.10.

each jurisdiction's animal welfare legislation.¹³² Furthermore, the Poultry Code does not expressly prohibit the practice of de-beaking and, in addition to this, a number of Federal and State bodies actually provide 'best practice' guidelines for how to carry out the procedure.¹³³

Alternatives

Although it is more profitable to raise hens in battery cages, increased consumer demand for 'cage-free eggs' has led to the development of two alternative housing systems, namely the barn-laid system and the free-range system, which account for 5% and 15% of Australian egg production respectively.¹³⁴ Certain jurisdiction's animal welfare laws refer briefly to the keeping of hens raised in cage-free systems,¹³⁵ These are supplemented by more detailed requirements (but not comprehensive) provisions, in the Poultry Code.

In brief, the Poultry Code requires that hens in barn-laid systems be housed in sheds in which they are free to roam.¹³⁶ They may be provided with nest boxes and litter areas in which to dust bathe¹³⁷; however like battery hens, they are confined indoors for their entire lives and they may also be warehoused with up to 5,000 others at any one time.¹³⁸

The Poultry Code requirements applicable to free-range systems also provide that hens should be housed within sheds, however access must be

¹³² *Prevention of Cruelty to Animals Act 1979* (NSW) s 4(2); *Animal Care And Protection Act 2001* (QLD), s 18; *Prevention of Cruelty to Animals Act 1985* (SA), s 13; *Animal Welfare Act 1993* (TAS) s 8; *Prevention of Cruelty to Animals Act 1986* (VIC) s 9; *Animal Welfare Act 2002* (WA), s 19; *Animal Welfare Act 1992* (ACT), ss7-8; *Animal Welfare Act 1999* (NT), s 6.

¹³³ Phil Glatz & Michael Bourke, *Beak Trimming Handbook for Egg Producers*, Landlinks Press (2006). Philip Glatz et al, Above n 29.

¹³⁴ Dr David Witcombe, Above n 16.

¹³⁵ For example, see: *Prevention of Cruelty to Animals (General) Regulation 2006* (NSW) regs 17L -17O; *Animal Care And Protection Regulation 2002* (QLD), regs 13,14, 16,17,21 and 24; *Prevention of Cruelty to Animals Regulations 2000* (SA), reg 13O; *Prevention of Cruelty to Animals (Domestic Fowl) Regulations 2006* (VIC) reg 6, 10 and 11; *Animal Welfare Regulations 1993 (Tas)*, reg 6(1)(c); *Egg Labelling and Sale Bill 2001* (ACT), Schedule 1.

¹³⁶ Poultry Code, Above n 10, cl 2.1.1.2.

¹³⁷ *Ibid*, cl 2.4.2.1.

¹³⁸ RSPCA Australia, 'Choose Wisely' <http://www.rspca.org.au/campaign/choosewiselyfaq.asp> at 30 April 2008.

provided to an outdoor area to enable hens to carry out their natural behaviours.¹³⁹ While neither the barn-laid nor free range housing systems allow hens to live a life free from human interference (in fact practices such as beak trimming may still be carried out in these systems), they go some way towards addressing the widespread suffering associated with the confinement of the battery cage.

Legislative attempts to ban the battery cage

While little interest has been demonstrated at a national level in banning battery cages, a number of attempts have been made to implement a state-wide ban over the last decade. The first of these, which took place in the ACT, involved the introduction of legislation by the ACT Greens, designed to ban the production and sale of battery eggs in that jurisdiction.¹⁴⁰ The ACT Government passed this legislation in September 1997; however it was ultimately stymied by other Australian jurisdictions who relied on the *Mutual Recognition Act 1992* (Cth) to support their claim that the new law breached national competition policy principles.¹⁴¹

While the ACT's attempts to ban the battery cage in the late 1990s were unsuccessful, the campaign surrounding the legislation prompted significant debate about the pain and suffering that hens endure in battery cages. This led to the initiation of a national review of layer hen housing systems, which was carried out in 1999 by the Agriculture and Resource Management Council of Australia and New Zealand (now the Primary Industries Ministerial Council).¹⁴² The Review explored a range of issues relating to layer hen housing systems but ultimately failed to recommend a prohibition of battery cages. Its most notable recommendation, which was adopted by all States and Territories, was to increase the minimum floor space allocation per chicken from 450cm² to 550cm² for all cages commissioned after 1 January 2001.¹⁴³ This incremental increase, which many animal protection groups have deemed vastly inadequate,

¹³⁹ Poultry Code, Above n 10, cl 2.4.5.

¹⁴⁰ *Animal Welfare (Amendment) Bill 1996*, presented on 26 June 1996, gazetted as *Animal Welfare (Amendment) Act 1997* (ACT) on 19 September 1997,

¹⁴¹ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 26 August 1999, 2522; Productivity Commission 1998, [Battery Eggs Sale and Production in the ACT, Research Report, Ausinfo, Canberra.](#)

¹⁴² Department of Agriculture, Fisheries & Forestry, 'Review of Layer Hen Housing and Labelling of Eggs in Australia', <http://www.daff.gov.au/animal-plant-health/welfare/reports/layer-hen> at 30 April 2007.

¹⁴³ *Ibid.*

is now in effect.¹⁴⁴

In light of ongoing controversy regarding the battery cage, in 2007 the ACT Greens introduced a further Bill designed to ban the battery cage. Unlike the 1997 Bill, the Animal Welfare (Amendment) Bill 2007 did not seek to prevent the import of battery eggs into the ACT but merely to close down battery hen farms in the ACT.¹⁴⁵ In the lead up to parliament voting on the Bill, a survey found that 84.6% of all respondents felt that it was cruel to keep hens in battery cages, and 73% of all respondents felt that there should be a ban on the keeping of hens in battery cages.¹⁴⁶ Despite the obvious community support, the Bill was adjourned because the ACT Government was of the view that in the absence of a nation-wide ban, the 2007 Bill would simply shift production interstate.¹⁴⁷ The ‘compromise’ proposed was for government to offer \$1m in industry assistance to help local producers convert to barn facilities and to undertake to only provide cage-free eggs in its agencies, including hospitals, schools and canteens.¹⁴⁸

In March 2008, following the lead of the ACT Greens, the Tasmanian Greens introduced the Animal Welfare (Ban Battery Hens) Amendment Bill (the Tasmanian Bill) which seeks to impose a ban on battery cages in Tasmania. At the time of writing, the Tasmanian Bill has yet to be debated. Preliminary discussions about battery hen farming (which have taken place during debate concerning a review of the State’s Animal Welfare Act 1993) suggest that, although the Tasmanian Minister for Primary Industries is opposed to battery hen farming, he is likely to follow the ACT lead in demanding that any ban on battery cages involve a nation-wide approach, overseen by the Primary Industries Ministerial Council.¹⁴⁹

International legislative outlook for layer hens

The continuing refusal by Australian State and Territory Ministers to take a leadership position with respect to the banning of battery cages stands in stark

¹⁴⁴For example, see: Brian Sherman, ‘Cage Still Cruel’ Letters, *Sydney Morning Herald*, 5 November 2007, 12.

¹⁴⁵ *Animal Welfare Amendment Bill* 2007, presented to ACT Legislative Assembly on 2 May 2007.

¹⁴⁶ Orima Research Report 2005, Free-Range Eggs - Community Survey Report, September 2005.

¹⁴⁷ ABC News, ‘Ministers reject proposal to ban battery eggs’ (April 18 2008) www.abc.net.au/news/stories/2008/04/18/2220978.htm at April 29, 2008.

¹⁴⁸Jon Stanhope, ‘\$1m Offer to Pace To Abandon Battery Cages’ (Press Release, 25 September 2007)

¹⁴⁹Tasmania, *Parliamentary Debates*, House of Assembly, 12 March 2008, 38.

contrast to developments overseas. For example, in the European Union, the phase out of battery cages is in progress following the passing of a Council Directive in 1999. Under the EU Directive, the installation of new battery cages has been prohibited since January 2003. Additionally, EU member countries are required to phase out all battery cages by 2012.¹⁵⁰ Certain nations such as Sweden and Austria for example, have taken proactive steps to ban battery cages prior to the Directive taking effect.¹⁵¹ Under the Directive, battery cages are to be replaced with alternative systems known as ‘enriched’ cages, barn or free-range systems.¹⁵²

The ‘enriched’ cage system provides each hen with 600cm² of usable space per hen, which is 50 cm² more than the current Australian standard for battery cages.¹⁵³ Enriched cages can also be differentiated from battery cages in that they contain nesting boxes, litter to enable foraging, and perches. While these are important symbolic improvements, enriched cages still condemn hens to a life of confinement and fall short of meeting the behavioural needs of hens.¹⁵⁴

Although it is important to acknowledge the legislative progress made for hens in the EU, the real victory to date lies in the support that consumers are demonstrating for alternatives to the battery cage system of egg production. In recent times sales of cage-free eggs have overtaken sales of battery eggs in the UK and Ireland.¹⁵⁵ While cage-free egg sales in Australia are notably lower (at less than 30% of total egg production¹⁵⁶), free-range and barn laid markets have expanded significantly in recent years. As more Australians continue to support cage-free production, they send a strong message to politicians to fall into line with popular expectations by bringing an end to the widespread abuse associated with battery cage production.

¹⁵⁰ Council Directive (EC) 1999/74/EC of 19 July 1999, Laying Down Minimum Standards for the Protection of Laying Hens [1999] OJ 203/53. (‘The EU Directive’).

¹⁵¹ Swedish legislation already bans battery cages and battery cages will be banned in Austria from 2009; *Animal Welfare Ordinance (Sweden) 1988:539* (Consolidated text as last amended by SFS 2007:484 of 7 June 2007 – unofficial translation), s9; *Federal Act on the Protection of Animals (Animal Protection Act)* (Austria), s18.

¹⁵² EU Directive (EC), above n52, Article 5(2).

¹⁵³ EU Directive (EC), above n52, Article 6(1) (a).

¹⁵⁴ Compassion in World Farming, ‘EU Ban on Battery Cages For Egg-Laying Hens Under Threat’ (Press Release, 18 September 2006), <<http://www.ciwf.org/publications/prs/NR1606.pdf>> at 30 April 2008.

¹⁵⁵ For example, 51% eggs bought in the UK in March 2008 were free-range. See: Martin Hodgson, ‘Free-range outsell battery eggs’, *The Guardian*, (Tuesday, April 1, 2008).

¹⁵⁶ Australian Egg Corporation Limited, 2007 Annual Report, Above n 5.

Conclusion

While a number of legislative efforts have been made to secure greater protection for layer hens in Australia in recent years, to date these have been largely unsuccessful. Consequently the current regulatory framework for layer hen housing continues to sanction the permanent confinement of chickens, mutilations without pain relief and other forms of systemic cruelty. Despite efforts to portray itself as an animal welfare leader, an analysis of farm animal reforms in the European Union suggests that Australia continues to lag shamefully behind when it comes to providing meaningful improvements in hen welfare. In light of this, increasing retail support for cage-free eggs in domestic markets should be construed as a message to our legislators that Australians care about the treatment of animals and that the time has come to place the chicken before the egg.

Suffering under the law: could 'human' rights be used to protect the basic interests of all animals ?¹⁵⁷

Tara Ward *

Non-human animals figure everywhere in our human lives. While vast use of them is made for food, clothing, research, and amusement, most humans would acknowledge that non-human animals are not merely things, and that they can feel pain and suffer. As a consequence, statutes purporting to protect animals from human-inflicted cruelty have been enacted in almost all modern Western societies including Australia. Yet our use of non-human animals has continued unabated since the introduction of these 'anti-cruelty' laws. It therefore seems timely to consider whether animals are suffering from our use. If this is the case, we need to understand why the main forms of legal protection afforded them in Australia are not working, and to ask whether humans need to change the way they consider animals' interests. After a brief 'utilitarian' analysis of the need to consider animals' interests equally with our own, the main focus of this paper will move to an assessment of whether 'human' rights could protect those interests more effectively than current anti-cruelty laws. Which animals might hold rights will then be discussed, and some suggestions as to what rights they might hold will be offered.

Regulation of animal use in Australia

There is no doubt that humans in industrialised societies use an astronomical number of other animals to test products, to conduct experiments, to export live for slaughter or breeding, and to produce a range of goods such as meat, clothing, wool and pets. The largest user of other animals is the food industry. In Australia 8.2 million cattle, 20.2 million lambs and 453.9 million chickens were slaughtered for human consumption in 2006-07, while over 4 million live sheep were exported from Australia for slaughter and consumption in other countries over the same period (Australian Bureau of Statistics 2008).

On account of the extent to which humans use non-human animals, various laws have been introduced over the last two centuries in Western societies to

¹⁵⁷ I would like to thank Geoffrey Bloom for his encouragement and help with this paper.

* Lecturer in Animal Law, University of New South Wales.

regulate this usage. The existence of such laws may in a sense seem odd, given that animals used by humans are generally ‘owned’ in the same way as other items of personal property. Yet the ostensible purpose of these laws is to prevent cruelty to animals and to ensure that animals used by humans are treated humanely.¹⁵⁸ These ‘anti-cruelty’ laws range from the various animal welfare statutes such as the *Prevention of Cruelty to Animals Act* (POCTAA) 1979 (NSW), to laws that regulate how animals may be exhibited in zoos, or the kinds of experiments that can be carried out on animals other than humans.¹⁵⁹

The rationale for these laws is that, unlike other items of property we own, animals are not merely things. Rather, they are regarded as beings capable of feeling pain and distress. Of course, this view of animals has not always been accepted. Perhaps the best known assertion of animals’ ‘thingness’ was by René Descartes (1596-1650) who claimed that animals do not have a mind, and as a mind is necessary to feel pain, animals cannot feel pain (Branham 2005). This objectification of animals was firmly rejected over a century later by Jeremy Bentham (1748-1832), and in 1824 the first animal welfare society was created in England (the Society for the Prevention of Cruelty to Animals, gaining its royal status in 1840). The purpose of the society was to enforce a law (known as ‘Richard Martin’s Act’), which had been passed in 1822 by the British parliament to prevent cruelty to farm animals, particularly cattle.¹⁶⁰ Therefore, by the beginning of the nineteenth century it was recognised that animals were beings capable of feeling pain and distress and whose interests in avoiding pain and in not suffering at the hands of human beings deserved to be protected by law. Given this recognition of animals’ interests in avoiding pain and suffering, and the enactment of ‘anti-cruelty’ laws to protect these interests against incursions by humans, one might assume that the use of non-human animals by humans could not entail the infliction of *any* pain or suffering on other animals. But do these laws actually work to protect non-human animals from all or even most suffering and pain inflicted by humans? To answer this question, two of the largest practices involving other animals today (namely, the meat and research industries) will be briefly examined.

As seen above, the number of animals killed to eat in Australia is enormous.

¹⁵⁸ See for example the *Prevention of Cruelty to Animals Act 1986* (VIC) (s1): ‘the purpose of this Act is to prevent cruelty to animals; and to encourage the considerate treatment of animals; and to improve the level of community awareness about the prevention of cruelty to animals.’

¹⁵⁹ See for example the *Exhibited Animals Protection Act 1986* (NSW), and Part 2 ‘Use of animals for scientific purposes’ in the *Animal Welfare Act 2002* (WA) or Part 4 ‘Teaching and research involving animals’ in the *Prevention of Cruelty to Animals Act 1985* (SA).

¹⁶⁰ ‘An Act to prevent the cruel and improper Treatment of Cattle. 22d July, 1822’ Available online at www.animalrightshistory.org/library/mar-richard-martin/1822-britian-cattle.htm
See also RSPCA (UK) Online: www.rspca.org.uk [Both sites visited 2008 April 15].

The most common method for converting other animals into food for humans in Australia today is intensive livestock facilities. Most animals born into these factory conditions are confined indoors with little, if any, room to move around, are artificially distorted by ‘biological manipulation’ (Gruen 2003, 7), have body parts removed from them without anaesthetics, and are transported long distances before being slaughtered, sometimes while still conscious. There is little doubt that the conditions in which these animals are raised and killed cause them vast amounts of suffering (Francione 2000; Singer 1995). For example, under the prevailing guidelines, or ‘Code of Practice,’ for the slaughter of livestock in Australia, chickens can be suspended head downwards from shackles for up to three minutes before being stunned by having their heads and necks immersed in electrified ‘water baths’ (SCARM 2001). Under the current guidelines for intensive housing of pigs, sows in Australia can be confined in concrete and metal sow stalls for their entire pregnancy. The stalls can be as small as 0.6 metres wide and two metres long, which means the sow has barely enough room to take a step forward or back, and cannot turn around (SCARM 1998, 10). As breeding sows are kept continually pregnant or lactating, most of their three to four years of adult life are spent in these cramped concrete stalls.¹⁶¹ Their offspring can be castrated and tattooed, and their tails docked and teeth clipped, without anaesthetic (SCARM 1998, 9). Moreover, as a form of ‘humane destruction’ permitted under the guidelines, a ‘hammer or other blunt, but heavy, object’ can be used ‘to make a blow to the skull’ of ‘small, easily controlled’ piglets (SCARM 1998, 13).

The number of animals used for scientific experiments and research is also significant.¹⁶² Animals used in research are forced to undergo invasive procedures which can lead to death. The 2005-06 Annual Report for the NSW Animal Research Review Panel (NSW Department of Primary Industries (DPI) 2007) categorises the procedures used on animals in terms of the invasiveness or impact of the work. Only one of the nine procedures listed does not involve pain, suffering or death (DPI 2007, 29). The other categories range from ‘minor or brief’ levels of pain, to a ‘moderate or large degree of pain or distress that is not quickly or effectively alleviated,’ or to ‘death as an endpoint’ (DPI 2007, 29). Pain and death are therefore accepted as part of the range of experiments that can be legitimately carried out on consenting non-human animals.

In sum, a large number of practices involving the suffering and death of

¹⁶¹ The confinement of sows in stalls will continue to be allowed under the third edition of the *Model Code of Practice for the Welfare of Animals: Pigs*, due in May 2008.

¹⁶² In the absence of a national database for animal experimentation statistics, the Australian Association for Humane Research estimates the national 2005 figure to be approximately 5 million animals: www.aahr.asn.au/statistics.html [2008 April 15].

billions of animals takes place in Australia today, despite the existence of laws that purport to protect animals' interests in not suffering. Given the widespread nature of these practices, it could be assumed either that they occur in defiance of these laws, or that the problem lies with the laws themselves. In other words, is our animal protection legal framework itself defective?

In general, standard animal protection laws aim to prevent cruelty to non-human animals. Yet a closer examination of these laws in Australia reveals that, despite the broad acceptance that animals feel pain, such laws often only apply to certain categories of animals, or specifically exempt animals used for particular purposes. The most frequent exemptions involve animals used for agricultural purposes. For example, in the Northern Territory's *Animal Welfare Act*, an animal must not be confined in a cage that is too small to allow the animal a reasonable opportunity for adequate exercise, *except* where the animal is a stock animal (s11(3)).¹⁶³ Victoria's POCTAA specifically states that it does not apply to 'any act or practice with respect to the farming, transport, sale or killing of any farm animal ...' (paragraph 6(1)(b)), as such acts are permissible provided they are undertaken in accordance with the prevailing Code of Practice. 'Research' animals are also placed beyond the reach of anti-cruelty laws,¹⁶⁴ as are animals classified as 'pests'.¹⁶⁵

Codes of Practice are another feature of our animal protection framework that limits the 'protection' such a framework actually provides. These Codes are guidelines that set out the standard of care for most practices in commercial animal industries. As guidelines, the Codes themselves do not have any legal force, and generally permit lower standards of care than those prescribed under State or Territory animal welfare laws. Yet in jurisdictions such as Western Australia, acting in accordance with the relevant code of practice is a defence to a charge of animal cruelty under the local animal protection statute (*Animal Welfare Act 2002* (WA), s25). In New South Wales Codes must be 'referenced' in legislation before they can be used as evidence to establish the accepted minimum standard in a particular context of animal usage (POCTAA (NSW), s34A). Yet the majority of Codes, including the Codes dealing with pigs and slaughtering establishments referred to earlier, are not referenced in legislation,

¹⁶³ NSW POCTAA contains a similar exemption for 'a stock animal other than a horse' (paragraph 9(1A)(a)).

¹⁶⁴ In the NSW POCTAA persons are not guilty of any offence under the Act if they were 'carrying out animal research' (subparagraph 24(1)(e)(i)). A similar exemption occurs in the 'Serious animal cruelty' offence in the *Crimes Act* (NSW) (s530(2)(a)).

¹⁶⁵ Under s24 'Defence – killing pests' in the *Animal Welfare Act 2002* (WA), it is a defence against the general prohibition against cruelty to animals if any allegedly cruel acts were undertaken while attempting to kill 'pests' in a 'usual and reasonable' manner. See also s42 'Feral or pest animals' in Part 6 'Exemptions' of the *Animals Care and Protection Act 2001* (QLD).

which further limits any ‘protective’ force they may have had.¹⁶⁶

Another feature of animal protection laws that prevents them from adequately protecting animals against human-induced suffering is the qualified nature of the prohibitions against pain and suffering. For example, the purpose of the Queensland animal protection statute is merely to ‘protect animals from unjustifiable, unnecessary or unreasonable pain’ (*Animal Care and Protection Act 2001* (Qld), paragraph 3(c)). To determine what might be ‘unnecessary’ pain, animal welfare laws are underpinned by a requirement to balance animals’ interests with those of humans. For instance, one of the purposes of the Queensland statute is to ‘provide standards for the care and use of animals that achieve a reasonable balance between the welfare of animals and the interests of the persons whose livelihood is dependent on animals’ (subparagraph 3(b)(i)). The usual outcome of such a ‘balancing’ process is that almost any act involving animals is considered necessary, provided there is an ‘identifiable human benefit’ (Francione 1996, 448; Lubinski 2004).

There are other aspects of our Australian legal systems that prevent the prevailing anti-cruelty legal framework from providing any meaningful level of protection for non-human animals. Enforcing the legislation is usually left to charitable organisations such as the local RSPCA, rather than publicly funded government bodies or law enforcement agencies. For example, in NSW, the RSPCA was responsible for 90 per cent of the prosecutions made under the POCTAA in 2006-07.¹⁶⁷ Even inter-state trade relations can be said to have thwarted attempts to strengthen anti-cruelty laws, as illustrated by the fate of the law passed by the ACT government in 1997 to phase out battery hen cages in the Territory.¹⁶⁸ To make the prohibition against battery cages meaningful, the law also sought to stop the sale of battery eggs in the Territory. Yet such a ban required the agreement of the other States and Territory under the *Mutual Recognition Act 1992* (Cth) (MRA), and as the relevant State and Territory ministers never agreed to the ban, the amendment is at the time of writing still listed in the ACT’s animal welfare statute as ‘uncommenced’.¹⁶⁹ In 2007 a

¹⁶⁶ The NSW Department of Primary Industries website lists 18 current model Codes of Practice dealing with the husbandry of livestock species, only seven of which are adopted by reference in reg 24 of the POCTA Regulation (2006): www.dpi.nsw.gov.au/agriculture/livestock/animal-welfare/codes/general/national [2008 April 10].

¹⁶⁷ NSW, Parliamentary Debates (Hansard), Legislative Assembly, 13 November 2007. [Online] Available: www.parliament.nsw.gov.au/prod/PARLMENT/HansTrans.nsf/V3ByKey/LA20071113 [Visited 2008 May 17].

¹⁶⁸ *Animal Welfare (Amendment) Act 1997* (ACT).

¹⁶⁹ Section 9A in the ‘Uncommenced amendments’ part of the *Animal Welfare Act 1992* (ACT).

further amendment bill¹⁷⁰ was introduced into the ACT Legislative Assembly, again proposing to ban battery cage systems but also to repeal the prohibition on the sale of eggs in the ACT that have been produced in a way that would be unlawful in the Territory.¹⁷¹ The omission of this ban would have removed the apparent conflict between the MRA and the 1997 amendment. In January 2008, however, the ACT Government confirmed it would not support the Bill in its current form, on the grounds that it would simply shift egg production interstate.¹⁷²

Our obligation to protect animals' interests

A combination of the structural defects of our animal welfare laws, and our unquestioned propensity to privilege most human interests and desires over even the most basic interests of other animals, means that these laws do not adequately protect other sentient beings' interests in avoiding human-induced pain or suffering. Yet it is arguable that, as beings capable of moral actions, humans have an obligation to protect other sentient beings' fundamental interests, or at the very least to put their basic interests on a more even footing with our own. Such an obligation is said to be due to the 'moral force of pain' (Gruen 2003, 6), which dictates that any being with an interest in not suffering deserves to have that interest taken into consideration. This apparent moral imperative is captured in the ethical (or 'utilitarian') principle of the equal consideration of interests, which simply requires that when beings such as humans and other animals have similar interests (for example the interest in avoiding pain), we must consider those interests as we would our own, unless there is a justifiable reason for not doing so (Singer 1993, 57; Francione 2000, 82). Again, such an idea is not new: Jeremy Bentham was a strong proponent of this 'sentientist view of moral considerability' (Gruen 2003, 5), according to which if a being is sentient, or can feel pain or pleasure, it deserves our moral consideration. Moreover, if we ignore or discount the interests of other beings simply on the grounds that they do not belong to our particular group (in this case, our species), the logic of our position is taken to be similar to the position of those who discriminate against other races on the grounds that their own race is morally superior (Singer 2003). According to the principle of equal consideration of interests, humans are obliged to protect other animals from pain and suffering as we would protect humans, given that we are all sentient

¹⁷⁰ Animal Welfare Amendment Bill 2007.

¹⁷¹ Section 7 of the *Eggs (Labelling and Sale) Act 2001* (ACT).

¹⁷² ACT Government media release 'Progress on Non-Battery Eggs' 24 January 2008. [Online] Available: www.chiefminister.act.gov.au/media.asp?media=3357§ion=24&title=Media%20Release&id=24 [2008 April 15].

beings, and that the capacity for suffering is all that is needed to matter ‘morally’ (Francione 2000, 5).

As we have seen, anti-cruelty laws in Australia (and the legal framework within which they exist) currently allow millions of animals to suffer. It therefore seems clear that if the sentience interests of non-human animals are to be put on a more even footing with our own, then stronger legal protection is needed. Interestingly, there are signs of change in this respect elsewhere in the world. Various amendments to the laws of other countries or states have recently been made, ranging from major changes completely banning practices that cause non-human animals to suffer, to modest changes in the conditions of animals kept in confinement for eventual slaughter. One of the most significant increases in legal protection for other sentient beings has been the complete ban of the production and/or sale of foie gras from force-fed birds in several countries and in the US states of California and Chicago.¹⁷³ Meanwhile in New Zealand, special restrictions on the use of the great apes, or ‘non-human hominids’, in scientific research and experimentation were introduced in 1999 (*Animal Welfare Act 1999* (NZ), paragraph 80(1)(c) and s85),¹⁷⁴ and in 2003 Germany amended its constitution by adding the words ‘and animals’ to the clause obliging the state to respect and protect the ‘natural foundations of life’.¹⁷⁵

While these developments may go some way to reducing the pain and distress inflicted by humans on, and to changing our fundamental attitudes towards, non-human animals, it is clear that more is required if humans are really to protect the interests we share with them as sentient beings. To determine how such an objective might be achieved, a range of possible legal mechanisms will now be examined.

¹⁷³ See for example Senate Bill 1520, approved by Governor Schwarzenegger on 29 September 2004. On 26 April 2006 the Chicago City Council approved an ordinance banning the sale of foie gras in all ‘food dispensing establishments’. The full text of the California Senate Bill and the Chicago ordinance can be viewed at: www.stopforcefeeding.com/page.php?module=article&article_id=25 [2008 April 11]. One of the most well known national bans on the production of foie gras followed a landmark decision by the Supreme Court of Israel in 2003; [online] available: www.animallaw.info/nonus/cases/cas_pdf/Israel2003case.pdf [2008 April 11].

¹⁷⁴ Assessment of the benefits of any proposed research using non-human hominids must be confined to whether it is in the best interests of the individual non-human hominid or is in the interest of the species to which the non-human hominid belongs (New Zealand Government 2007b). Any research that is proposed must be approved directly by the Director General of the Ministry of Agriculture and Forestry. One research proposal on captive chimpanzees in Wellington Zoo was approved in 2003 (NAEAC 2007).

¹⁷⁵ See the amendment to Article 20a of Germany’s Basic Law made on 26 July 2003. An English translation of the amended clause is available online at: www.jurisprudencia.de/ [2008 April 14].

Possible Mechanisms for Better Protecting Animals' Interests

One obvious way of better protecting other sentient beings would be to increase the regulation of their use and welfare. According to this 'welfarist' approach, 'unnecessary' suffering could be defined with greater precision, more uses causing animals distress could be curtailed, or harsher penalties could be introduced. The main problem with this approach, however, is that it falls short of protecting other sentient beings against pain and suffering to anywhere near the extent to which we protect human beings. The goal of the welfarist approach is, after all, to regulate 'unnecessary' pain and suffering, not all or even most suffering (Lubinski 2004, 13). Moreover, by remaining within the structural confines of 'legal welfarism' these measures would not be able to avoid the systematic devaluing of animals' interests that is arguably inherent in that framework (Francione 1996). Perhaps instead we should briefly consider the main mechanism used by many legal systems around the world to protect our own interests – that is, human rights. Before considering human rights, however, we should look at rights in the abstract, as it were, so that we can assess whether they would be a suitable mechanism for protecting any being's fundamental interest in avoiding pain and suffering.

Where individuals interact with one another in a society or shared space, conflicts between the interests of the various individuals inevitably arise. To resolve such conflicts by 'civilised' means, a mechanism based on a set of principles can be used to evaluate the various claims. If the mechanism is based on individual (as opposed to collective) concerns, it will be a mechanism resembling our common understanding of a 'right' in Australia and elsewhere today (Francione 1995, 152). While there are a number of different theories about the nature of and basis for rights, a common aspect of almost all competing views about rights is that they are a particular way of protecting an interest – that is, a 'recognized entitlement or valid claim designed to protect or further its holder's interests' (Sapontzis 1987, 14). A feature of rights that makes them particularly relevant for our purposes is that rights are usually assigned to interests that are considered so important that they cannot be 'traded away' simply because of the beneficial consequences for another: 'a right places a sort of wall of protection around an interest, even if the consequences of abrogating that interest will benefit others' (Francione 2000, 132). Moreover, rights carry a 'special normative force' (Wenar 2005, 13), and dominate most modern understandings of what actions are proper. They are also recognised as establishing certain minimum standards for acceptable treatment of individuals, and as providing particularly powerful reasons that override reasons of other sorts in justification of that treatment. Rights can have an attitude-changing quality, and are often declared or enacted in law to change existing norms rather than merely to describe the agreed moral consensus (Nickel 2003, 12).

On the surface, therefore, rights seem to be an appropriate mechanism for

securing better protection for basic interests such as avoiding pain and suffering. Yet using rights to protect an interest can create more problems than it resolves. For a start, rights can establish hierarchies between the ‘haves’ and the ‘have nots’, thereby reinforcing existing forms of discrimination. It could also be said that the use of rights language may encourage people to make impractical demands, since one can assert a right without any attention to whether it is desirable or even possible to burden others with the corresponding obligations (Wenar 2005). These disadvantages should, however, be seen as deriving from the *use*, rather than the concept, of rights. For example, there is nothing in the concept or rights itself that is inherently discriminatory (Francione 2000, 149). Moreover, these disadvantages arising out of certain uses of rights could be avoided by ensuring that any right being claimed is based on clear, sound reasoning and is inclusive rather than exclusive.

To continue our assessment of whether rights would be an appropriate mechanism to protect non-human animals’ interests in avoiding pain and suffering, we should now reflect on some of the salient features of *human* rights as the most instructive example of legally enforceable rights protecting the basic interests of a specific group of beings.

Rights incorporated into a legal system are a particularly effective ‘wall of protection’ around human beings’ fundamental interests, as not only can the rights be enforced by law, but the act of bestowing legal rights upon certain members within the group can also be a powerful way to ensure their interests are recognised (Lubinski 2004, 6).¹⁷⁶ Another important feature of the various human-rights declarations and instruments is that they aspire to protect human beings from the worst examples of – rather than all – political, legal, and social abuses such as torture or imprisonment without trial. They also protect other fundamentally important civil and political interests such as the freedom of movement or of political expression by voting. The interests protected by human rights are therefore usually of a very high priority, which enables the rights to be supported by strong reasons that make their high priority and universality plausible (Nickel 2003). Finally, while the human interests protected by rights are generally considered to be fundamental, most rights are limited, even if they can only be infringed in fairly extreme circumstances. As the Preamble to the *Human Rights Act 2004* (ACT) states:

Few rights are absolute. Human rights may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. One individual’s rights may also need to be weighed against another individual’s rights.

Of course, while the ACT law alludes to the possible need to weigh (human)

¹⁷⁶ See for example the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and Convention on the Rights of the Child (CRC).

individuals' rights against each other, the crucial point is that if such a balancing process occurs, the individuals' rights will be considered *equally*.

Using rights to protect animals' interests

While rights are used to protect a range of fundamental interests of human beings, extending the mechanism of rights to protect the interests of other animals would not be uncontroversial. It might be argued that while rights are a valuable means to protect interests, they should not be used to protect the interests of non-human animals because rights themselves are inherently human. In other words, rights were invented by humans for humans, and therefore can only logically be applied to humans. This argument can be countered on two levels: one historical, and the other logical. Firstly, although rights as we know them today were originally 'invented' by, and used to protect, wealthy adult landowning males,¹⁷⁷ rights have since been extended to protect the interests of 'others' outside this group such as women, people of all races, and even those who cannot use or understand all of the known range of rights.¹⁷⁸ Secondly, while there is no denying that rights are a uniquely human invention, there is nothing intrinsic to them in any logical sense that means they can only be used for the benefit of humans.

Other arguments against extending rights to non-human animals are based on the idea that right-holders must have certain (uniquely human) capacities or characteristics, such as the ability to recognise obligations and duties, or the capacity to reason, or even simply being human (usually referred to by phrases such as the 'inherent dignity of the human person' (Convention Against Torture, Preamble). Again, such claims really espouse certain *theories* of rights rather than describing something inherent in the concept of rights itself. For example, a 'status', or 'natural rights', theory focuses on the status of humans as rights holders, and attempts to posit a uniquely human characteristic as the necessary prerequisite for meriting rights. A problem with such deontological theories is that there is much disagreement over precisely which attributes give rise to rights and whether such attributes are distinctly or uniquely human (Gruen 2003). Moreover, an 'instrumentalist' theory of rights could be pitted against the 'status' theory. Rather than starting with the nature (or status) of the rights-holder, the instrumentalist approach starts with the desired consequences (such as protecting an individual's interest in avoiding pain and suffering) and works

¹⁷⁷ Human beings who do not fall into this category have at various times been denied protection in any form resembling a right, such as slaves and 'barbarians' in Aristotle's time, African slaves in nineteenth-century America, or women and children until recently.

¹⁷⁸ See for example CEDAW, the International Convention on the Elimination of All Forms of Racial Discrimination, and CRC.

backwards to see how rights should be ascribed to produce those consequences. Similarly, positing the capacity for language or the ability to make moral choices as a prerequisite for holding rights presupposes a ‘choice theory,’ which can in turn be countered by a ‘welfare,’ or ‘interest,’ theory of rights (Torley 2005). According to the latter theory, rights protect and promote important *interests* of the rights-bearer, and as a consequence can be held by any being who has interests, rather than merely by those who can recognise such interests.

There does not therefore appear to be anything in the concept of rights itself that means they could not be used to protect the sentience interests of non-human animals. Claims that rights can only be used to protect humans merely subscribe to particular theories that tacitly support a view of rights as an exclusive mechanism for creating and maintaining hierarchies, rather than as an inclusive means of affording protection to all beings with interests. Indeed, ascribing rights to other sentient beings would appear to be appropriate for the purposes of seeking both recognition that they have interests of their own and, when embodied in law, direct enforceable protection of those interests. Accepting that rights would be suitable for our purposes, we should now consider what beings could be protected by rights, and precisely what rights should be ascribed to them.

Which animals should be protected by what rights?

As mentioned, current animal welfare laws often exempt certain types of non-human animals from the application of the whole statute, or from certain protections within it. These exemptions reflect the different status of animals in terms of their use or value to humans. Given that our aim is to protect the fundamental interests of *all* sentient beings, any differential treatment based on an animal’s relationship to human beings¹⁷⁹ must be rejected. Therefore in order to determine the membership – and in particular the outer limits – of our class of sentient beings, we would need to avoid any inclusion or exclusion based on an animal’s relationship to humans, and should instead be guided by our present scientific understandings of ‘sentience’. That is, we would need to establish from a neurobiological perspective where different species of animals fall along a putative spectrum from the ‘almost vegetable’ to the ‘highly sentient’. In working out where to draw the line, so to speak, we should start with the general premise that we intend to provide protection for all beings who are capable of experiencing pain or of suffering. This premise would dictate that we must take a different path from that of Steven Wise, whose quest for rights for non-human animals focuses on those animals whose intelligence and autonomy are closest to that of humans, and to whom our legal system would be most likely to extend rights in the shorter term (Wise 2000). Tom Regan’s well-known category of ‘subjects-of-a-life’, which only includes mammals of at

¹⁷⁹ As reflected in terms such as ‘stray’, ‘stock’, ‘companion’, ‘feral’, ‘pest’, etc.

least one year of age, would also be too restrictive for our purposes (Regan 1983, 78). Bentham's 'everything which breathes'¹⁸⁰ and Schopenhauer's 'all eyes that see the sun'¹⁸¹ are too nebulous to give any clear indication of the outer limits of our class of sentient beings. More recently, 'biocentric individualists' have proposed that all living organisms have moral standing or intrinsic value and therefore should be included in any class of protected beings (Torley 2005). For now, however, a slightly more conservative position will be adopted, and we will allow the outer limits of our protected class to be determined by current scientific and philosophical understandings of 'sentience'.¹⁸² While difficult to pinpoint exactly where the boundary lies, Steve Sapontzis' suggestion that 'somewhere between a shrimp and an oyster seems as good a place to draw the line as any, and better than most' (1987, 200) is appealing.

Having clarified the outer limits of our class of protected beings, we now need to turn to the 'highly sentient' end of the spectrum and consider whether we should include human beings. Conventionally, laws dealing with animals specifically *exclude* humans from their definitions of 'animal'. A typical definition is: "'Animal" means a vertebrate animal, and includes a mammal, bird, reptile, amphibian and fish, but does not include a human being' (*Animal Research Act 1985* (NSW) s3; *Exhibited Animals Protection Act 1986* (NSW) s5). This legal distinction between humans and non-human animals is reflective of the ethical divide between humans and (other) animals that underpins our Western culture and language. For centuries, 'human' and 'animal' have existed in an hierarchical relationship of opposites, in which humans are not only fundamentally different from all non-human animals, but are inherently superior (Dunayer 1995, 19). Yet the philosophical and linguistic dominance of the term 'human' over 'animal' is not *logically* necessary, as 'animal encompasses human' (Dunayer 1995, 23; Grosz 1989). For our purposes, humans and non-humans share a capacity to suffer, and therefore an interest in avoiding pain and suffering, so there is no logical reason to exclude humans from our class of beings whose sentience should be protected by rights. Adopting an inclusive approach and including humans in our class of sentient beings would also help undermine, or subvert, the human/non-human paradigm

¹⁸⁰ 'Why should the law refuse its protection to any sensitive being? The time will come when humanity will extend its mantle over everything which breathes ...' (Bentham 1789).

¹⁸¹ 'Cursed be any morality that does not see the essential unity in all eyes that see the sun' (Arthur Schopenhauer *On the Basis of Morality* 1841).

¹⁸² For an application of such an approach in an existing anti-cruelty statute, see New Zealand Government (2007a, section 1): 'The Animal Welfare Act 1999 has a much wider definition of animal than the Animals Protection Act 1960. It includes most animals capable of feeling pain and applies to all such animals whether domesticated or in a wild state. It excludes animals such as shellfish and insects as there is insufficient evidence that they are capable of feeling pain'.

that still permeates our dealings with the natural world. Even the recent legal measures regarding non-human hominids in New Zealand were firmly positioned within this paradigm, as the additional protections were extended to the great apes only because they ‘share similar qualities with humans’ (New Zealand Government 2007b, s5.3) – in other words, they are more like ‘us’ than ‘them’.

To include humans in our class of protected beings, we do not have to claim that humans and animals are the same or equal in every respect, and neither must we dismiss any particular characteristic about humans. Rather, we are merely focusing on our shared capacities to feel pain and to suffer, and on the corresponding need to protect those capacities equally with our proposed ‘sentience rights’. Moreover, including humans in our class of protected beings neatly circumvents the argument that rights should not be given to animals because such protections would ‘come at the expense of humans’ (Lubinski 2002b, 2). Proponents of this view fear that humans would actually be less protected if other species were to be given legal rights and protections (Lubinski 2002a, 1). Such a view is based on the idea that recognising non-human rights would inevitably make animals ‘more important – more valuable – more deserving of compassion – than human beings’.¹⁸³ By adopting an inclusive approach to the membership of our class of protected beings, we avoid privileging one type of being over another, and end up with a class that is both biologically and philosophically consistent. To reflect this inclusive approach in law, we could model our definition on the meaning given to ‘animal’ in the *National Parks and Wildlife Act 1974* (NSW), which notably does not exclude human beings.¹⁸⁴ Finally, to ensure the class of beings is sufficiently flexible, we could also allow additional species or types of animals to be prescribed as our scientific and philosophical understanding of other beings matures.¹⁸⁵

¹⁸³ *Foundation for Animal Use Education* ‘Why we oppose animal rights’ [Online] Available: www.animaluse.org/html/why_we_oppose.html [2006 May].

¹⁸⁴ Section 5: ‘*animal* means any animal, whether vertebrate or invertebrate, and at whatever stage of development...’ Our definition would not, however, exclude any type of sentient fish. Note that fish are specifically referred to in the *Animal Welfare Act 1999* (NZ)’s definition of ‘animal’, which ‘includes most animals capable of feeling pain’ (New Zealand Government 2007a, s1).

¹⁸⁵ The *Animal Welfare Act 2006* (UK) contains an example of this type of provision (s1 ‘Animals to which the Act applies’):

... (3) The appropriate national authority may by regulations for all or any of the purposes of this Act—

(a) extend the definition of ‘animal’ so as to include invertebrates of any description;

... (4) The power under subsection (3)(a) ... may only be exercised if the appropriate national authority is satisfied, on the basis of scientific evidence, that animals of the kind concerned are capable of experiencing pain or suffering.

Turning to the issue of deciding which rights to ascribe to our protected class of beings, we would need to counter another common objection to the idea of including humans and other animals in the one normative group. Creating such a class would, according to this objection, inevitably mean extending all human rights as we know them today, to all sentient beings. Yet, as was made clear above, our objective is simply to provide greater legal protection in the form of rights to all sentient beings' broad interest in avoiding pain and suffering. Therefore, while we can use many principles of human rights to guide us in determining which rights we should ascribe to our class of protected beings, most of the actual human rights in existence today would be completely irrelevant to such a purpose. The rights to vote, to freedom of religion, and to take part in the conduct of public affairs are important civil and political rights for human beings, but would do nothing to protect the fundamental sentience interests of our class of protected beings. For human beings, the sentience rights we might ascribe could exist in addition to these human rights,¹⁸⁶ while for many other sentient beings they would offer much stronger protection than current anti-cruelty laws.

To determine exactly what rights to ascribe to our class of protected beings, we will use as a guide the general human-rights principles we examined earlier. Our sentience rights would therefore need to be of a high priority and able to be supported by strong reasons. As we have seen, the scale of pain and suffering inflicted on non-human animals by humans today is enormous, and the most basic sentience interests of non-human animals are regularly and routinely infringed in the process. Moreover, humans do not consider equally humans' and non-human animals' interests in avoiding pain and suffering, and yet we cannot justify this position because there is no valid moral reason for protecting our own such interests while infringing theirs. It is therefore reasonable to propose that any rights that we can establish to protect the interests of all sentient beings in avoiding pain and suffering will be of a high priority and can be supported by strong reasons justifying their existence.

Finally, to be compatible with the general idea of human rights, we would need to ensure that our rights set minimum standards, rather than attempting to achieve the best life possible for all sentient beings; that is, we should merely try to eliminate the worst direct abuses of the sentience interests of individuals in our class of beings, rather than attempt to eliminate *all* suffering. As minimum standards, our sentience rights would also need to be appropriate for all types of beings in our protected class and the type of situations in which they exist. In other words, whatever rights we establish to protect sentient beings' interests in not suffering must be appropriate for humans as well as for animals in the wild, domesticated animals, pets, and so forth. On this basis, most of the

¹⁸⁶ Such a principle is incorporated in the *Human Rights Act 2004 (ACT)*: "This Act is not exhaustive of the rights an individual may have under domestic or international law" (s7).

putative ‘freedoms’ for farmed animals, such as freedom from hunger, thirst, discomfort, injury, disease, and fear,¹⁸⁷ would not be suitable for our sentience rights because they would exceed our so-called minimum standards for sentience protection. Protections against these conditions would, for example, be inappropriate for wild animals, for while there are some things humans could be expected to do for these animals so as not to infringe their basic sentience interests (such as not trap them or shoot them for pleasure), ensuring they have enough food or are free from discomfort or injury would exceed even the highest standards of care we could ever hope to apply to animals in the wild. Moreover, even in the highly controlled context of intensively farmed animals, the freedoms function as ‘ideal states rather than standards for acceptable welfare’ (Farm Animal Welfare Council 2007). Similarly, the ‘right’ of (wild) animals to their own homeland or habitat¹⁸⁸ may also exceed our minimum standards on the grounds that habitat destruction by humans is in some senses an indirect cause of pain or suffering to individual animals, and because it may not be appropriate to some animals such as pets.¹⁸⁹ That is not to say, however, that protection of animals’ habitat could not be considered as a possible sentience right at some time in the future.¹⁹⁰ Thus, having determined the sort of rights that would be beyond the scope of at least our initial sentience rights, and continuing to bear in mind relevant human-rights principles, we should now be able to determine precisely what rights all sentient beings should have to protect their fundamental interests in avoiding (human-inflicted) pain and suffering.

Basic rights for all sentient beings

Broadly speaking, fundamental protection for all beings with an interest in avoiding pain and suffering would consist of protecting their rights to a life free from torture or cruel treatment, to freedom of movement, and to express natural instincts and behavioural patterns. To define these rights in precise terms we should again refer to the general theory of rights, according to which rights can be either positive (entitling holders to the provision of a good or service), or negative (entitling holders to non-interference in their life). According to Wenar, negative rights are easier to satisfy than positive rights because the

¹⁸⁷ See for example clause 1.1 in SCARM (1998), or Farm Animal Welfare Council (2007).

¹⁸⁸ Sapontzis states that ‘the idea that animals are “entitled” to habitats in which they can at least survive is current’ (1987, 156).

¹⁸⁹ See Webster (1994, 200): ‘It is not essential to the welfare of an animal that its lifestyle is natural; the issue is whether or not the animal can adapt without suffering to the environment and lifestyle to which it is exposed.’

¹⁹⁰ The ability to add new sentience rights to our basic list would again be modelled on human rights, which are expanded from time to time.

former ‘can be respected simply by each person refusing to interfere with each other’ (2005, 7). As we basically want all sentient beings to be free from the deliberate infliction of pain and suffering by human beings, our sentience rights should therefore be formulated as negative rights (Wenar 2005; Torley 2005).¹⁹¹ A further advantage of expressing our sentience protections in this way is that such a formulation would focus on the consequences for the rights holder, rather than proscribe any specific human activity such as the hunting or consumption of animals. In theory these activities could continue, but only by respecting the basic sentience rights of all beings in our protected class.¹⁹²

The first protection referred to above was loosely expressed as the right ‘to a life free from torture or cruel treatment.’ This right should be separated into two distinct rights, the first being a general right to life, since it is broadly agreed that a basic right to life is essential to sentient beings. As Francione has observed, ‘death is the greatest harm for any sentient being and ... merely being sentient logically implies an interest in continued existence and some awareness of that interest’ (2000, 137; Sapontzis 1987). Our right to life for all sentient beings could therefore be expressed as:

*No sentient being may be arbitrarily deprived of life.*¹⁹³

The right to be free from torture or cruel treatment occurs frequently in human rights instruments, and the various formulations of it would be readily adapted for inclusion in our sentience rights. This right is considered one of the very few ‘absolute’ rights held by humans, and should be unqualified for all sentient beings as well. Therefore, our right for all sentient beings to be protected from torture or cruel treatment could be declared as:

*No sentient being may be tortured or treated in a cruel, inhumane or degrading way.*¹⁹⁴

Protecting sentient beings’ freedom of movement is also fundamental if we are to protect their interests in avoiding the particular pain and suffering experienced by the billions of animals who spend their entire lives confined

¹⁹¹ See Francione: ‘I believe in a concept of negative rights for animals. That is, I think animals have rights not to be interfered with. ... Basically we ought to leave them alone’ (in Kempton 1995, 2).

¹⁹² See for example the growing interest, even on the part of the celebrity chef Jamie Oliver, in eating road-kill rather than animals reared in captivity for food (www.tv.com/jamie-oliver/person/81846/summary.html [2007 July 4]).

¹⁹³ See the *Human Rights Act 2004* (ACT): ‘Everyone has the right to life. In particular, no-one may be arbitrarily deprived of life’ (subs 9(1)).

¹⁹⁴ This right is expressed in similar terms to section 10 in the *Human Rights Act 2004* (ACT), and Article 5 in the Universal Declaration of Human Rights.

either in spaces barely larger than themselves, and/or with thousands of other animals. While existing animal welfare guidelines often include ‘freedom of movement’ in their lists of basic ‘needs’ for farm animals, this freedom is usually limited to a freedom of movement ‘to stand, stretch and lie down’ (SCARM 1998, clause 1.1). As this right merely to move on the spot arguably does not afford any protection against the suffering associated with confinement, the sentience right should instead be based on analogous protections in human-rights instruments. Even in this context, however, the right is not absolute, as humans can ‘forfeit’ this right if they commit a crime. Moreover, in some (increasingly rare) cases, mentally ill humans can be confined in order to protect themselves or the general community. Our right for all sentient beings to be protected from suffering caused by confinement could therefore be formulated as:

*No sentient being may be deprived of liberty, except for the due protection of itself or others and as a result of due process.*¹⁹⁵

Finally, sentient beings should be free to express their natural instincts and behavioural patterns, as the frustration of behavioural needs typically occurs when animals are used by humans and arguably causes pain and suffering.¹⁹⁶ To assess what constitutes ‘normal behaviour’ for species, the vast body of scientific knowledge already established to determine welfare needs for most ‘stock’ animals could be used, as well as other similar knowledge where available. The right for all sentient beings to be protected from suffering caused by the frustration of their natural behavioural patterns could therefore be declared as:

*No sentient being may be subjected to arbitrary interference with or frustration of its natural behavioural patterns.*¹⁹⁷

The purpose of the above rights would be to recognise that all human and non-human animals have certain interests that cannot be traded away. While our objective has not been to prohibit all human use of animals, and while the

¹⁹⁵ For similar wording see subs 18 (2) in the *Human Rights Act 2004* (ACT): ‘No-one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.’

¹⁹⁶ The link between good animal welfare and the capacity of an animal to express its instinctive behaviour patterns is explored by Pope (1999). One of the concepts of good animal welfare outlined by Pope (1999, 3) is based on ‘respecting the nature of animals, and allowing them to express their full behavioural repertoire.’

¹⁹⁷ This wording is loosely based on Article 12 of the Universal Declaration of Human Rights: ‘No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence...’ Perhaps the reference to ‘full development of the human personality’ in the Universal Declaration of Human Rights (Art 26 (2)) would be an analogous human right.

rights proposed are the bare minimum, there is little doubt that the rights would affect a wide range of current uses of animals, and therefore could, at least in the short-term, entail ‘massive social dislocation’ (Kempton 1995, 4) and ‘deep repercussions within the economy’ (Lubinski 2004, 16). While a thorough treatment of this important issue would be the subject of another paper, a number of ways to avoid, or minimise, such adverse consequences immediately come to mind. Firstly, the development and implementation of the proposed sentience rights would need to be accompanied by a lengthy and comprehensive program of community engagement and information.¹⁹⁸ Secondly, special transitional requirements could be built into any law so that they would only apply to new enterprises involving non-human animals, and/or existing uses could be allowed to continue for a certain finite period.¹⁹⁹ This sort of progressive implementation is often adopted where the immediate or short-term implementation of certain rights or standards is not yet feasible. In this sense the rights would be more like ‘goals’, and as such could happily co-exist with low levels of ability to achieve them, while still functioning to change attitudes (Nickel 2003, 22).²⁰⁰ And, as Alan Watson has observed, they would not be the first ‘goal’ rights to have ever been declared:

We must remember that when the U.S. Declaration of Independence proclaimed that ‘We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness,’ millions of persons within the borders of the new United States were held in slavery (Francione 2000, ix).

Thus we have seen that the mechanism of rights would be an ideal way of protecting certain fundamental interests shared by humans and other animals. Using human rights as a guide, a small but comprehensive group of sentience

¹⁹⁸ See for example the lead up in the ACT to the introduction of Australia’s first human rights statute (the *Human Rights Act 2004* (ACT)), where the ACT government appointed a special consultative committee and engaged in a long period of consultation, holding 49 public fora on the issue (Williams 2004).

¹⁹⁹ Such progressive implementation is already common regarding changes to animal practices – for example, egg producers in Europe have been given until 2012 to implement improvements in the way they house their hens.

²⁰⁰ For an example of goal rights, see the International Covenant on Economic, Social, and Cultural Rights (1966), especially Article 2.1:

Each State Party to the present Covenant undertakes to take steps ... with a view to achieving progressively the full realization of the rights recognized in the present Covenant ...

The Office of the High Commissioner for Human Rights has commented on Article 2.1 that ‘while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned’ (1990, clause 2).

rights has been formulated to give all sentient beings – whether human or non-human, domesticated or wild – greater protection of their interests in avoiding pain and suffering. These minimal but highly important rights would protect sentient beings against torture, arbitrary deprivation of their life and liberty, or frustration of their natural behavioural patterns. Moreover, by including humans in our class of protected beings, we would overcome not only the historical, philosophical and legal gulf separating humans from other animals, but also the morally unjustifiable practice of privileging the fundamental interests of one group of similar beings over another. Even if they were to be implemented as goals or standards, these sentience rights could perhaps start to give back to the rest of the animal creation what the ‘hand of tyranny’ is still withholding from them, more than two hundred years after Jeremy Bentham posed that famous question: ‘Can they *suffer*?’²⁰¹

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²⁰¹ Almost anything written today on the issue of animal rights contains some part of Jeremy Bentham’s celebrated quote: ‘The day *may* come when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. . . The question is not, can they *reason*? Nor can they *talk*? But, can they *suffer*?’ (Bentham 1789, 311; original emphasis).

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Home and Away by Elizabeth Usher

*How easy one finds it is to abhor
Cruelty, on a foreign shore;
Yet, simultaneously, to ignore
Cruelty at our own front door.*

*Take bile bears in Asia – or the clubbing of seals –
I'm sure you agree almost everyone feels
These practices horrifying, atrocious, barbaric;
Indeed, those responsible are thought to be sick:*

*'How could anyone lock up a bear
In a tiny wire cage, then just leave it there
Its whole sorry life, for the production of bile?
How unthinkable, unimaginably, undeniably vile!'*

*Yet, think now of an animal in Australian land,
Whose life, like the bile bears, could not be called grand;
Who lives, like the bile bears, in a tiny wire cage,
Confined and constrained at every stage
Of her poor sorry life. Do you know yet who I mean?
Whose normal instincts are to dust-bathe and preen?
To peck and to scratch, to stretch out her wings,
Which animal likes to do all these things?*

*Why yes, I'm referring to the battery hen,
Who survives – Lord knows how! – crammed four to a pen:
Pecked at by cage mates, despite being debeaked,
Taken to slaughter after productivity's peaked,
Her bones are so brittle she oft breaks her legs;
And all this, just in aid of producing cheap eggs!*

*So, if your heart aches for the caged bears, then,
Please spare a thought, too, for the battery hen.*

.....!

