

**Public Interest Law conference – University of Melbourne
presentation in September 2010
“Animal rights law: philosophical and practical challenges”**

I'm conscious that I'm the only person at this conference that is speaking about an entirely imaginary area of law. Animal rights law, the topic of my presentation today, doesn't actually exist. Instead, it's an aspiration for activists working in this field that one day animals will have legally enforceable rights.

So because it's imaginary, the topic of my presentation is about the *challenges* in actually achieving animal rights law. What's holding us back? And I think these can be divided into two main areas – philosophical challenges and practical challenges. So I'll address these in turn.

INTRODUCTION

But first, what am I talking about here?

Animals are used in some of the most basic and significant areas of human life. We eat them for food, we use their skin and their fur for our clothes and accessories, we experiment with their bodies for cosmetic and medical research, and we use them for our sport and entertainment – such as horse-racing and zoos. Animal products are ubiquitous – they're even contained in items we wouldn't usually associate with animals, such as tyres, soaps and plastic.

But despite the fact that humans *use* animals in so many areas, we do recognise in the modern era that animals are thinking, feeling beings who can suffer. And so we have laws to protect animals.

In Australia, there is a primary animal protection statute in each state and territory – in Victoria that is called the *Prevention of Cruelty to Animals Act 1986*. These statutes prohibit acts of 'cruelty' as defined. For example, sub-paragraph 9(1)(a) of the Victorian legislation says that a person who wounds, mutilates, tortures, overrides, overdrives, overworks, abuses, beats, worries, torments or terrifies an animal commits an act of cruelty and is guilty of an offence.

There are also statutes dealing with specific types of animals or animals in specific areas – for example there is legislation in most states and territories that deals with domestic animals – dogs and cats – and there's also some legislation that deals with wild or feral animals.

But the anti-cruelty legislation is the main legislation of concern for an animal activist. Even though it sets up this simple regime of broadly defined cruelty offences, probably the most important provision in each Act is the one that creates 'Codes of Practice'. So, in Victoria, the Act states that it does not apply to the '*farming, transport, sale or killing of any farm animal*' in accordance with a Code of Practice, nor does it apply to the '*keeping, treatment, handling, transportation, sale, killing, hunting, shooting, catching, trapping, netting, marking, care, use, husbandry or management of any animal or class of animals*' in accordance with a Code of Practice.

And there are Codes for farming, scientific research, exhibition of animals, the use of animals in sport, etc. In other words, the general pattern is that the *institutionalised* forms of animal use are governed by Codes of Practice, leaving only the individual acts of cruelty committed against domestic pets governed by the anti-cruelty statutes.

In the farming area, the Codes are created under the auspices of the Primary Industries Ministerial Council, whose self-described objective is to ‘*develop and promote sustainable, innovative and profitable agriculture*’. No animal welfare or animal rights representatives are on the Committee that creates the Code. Instead, the RSPCA and Animals Australia are ‘consulted’ during the process.

In all states and territories other than South Australia, if you don’t comply with a Code, that’s not in itself an offence. However, in most jurisdictions complying with a Code provides a defence to an act of cruelty. I suppose this would be OK if the Code standards were set high, but they are not. Acts that would otherwise constitute cruelty offences if they were carried out on domestic pets are allowed in Codes – for example, keeping battery hens enclosed for the duration of their lives in a cage the size of an A4 sheet of paper, or castrating and cutting off tails without pain relief.

I don’t propose to go through all of the shortcomings of the current system, but this is just a snapshot overview of how animal cruelty is regulated in Australia. We have statutes that prohibit acts of cruelty, but the regime of Codes excludes the vast majority of animals from the reach of those statutes. So for the hundreds of millions of animals each year in Australia that are used for food, they don’t have the protection from cruelty that a dog or a cat has.

This introduction to the legal structure of animal cruelty regulation is a good segue into the philosophical challenges for animal law.

PHILOSOPHICAL CHALLENGES

The current legal system is a welfare model. The way I see a welfare model is that it doesn’t question the way we use animals in an institutionalised sense; it simply seeks to improve the treatment of animals within those institutions. So a welfare law won’t say it’s wrong to use animals for food or scientific research or clothing and so on. It will just say: when you’re keeping the animal for that institutional purpose, here’s how you have to treat him or her.

Contrast this with an animal rights perspective, which quite explicitly questions whether or not it’s acceptable that we use animals for these purposes, and seeks to enact laws that, at some point down the track, ban that use.

The animal welfare law asks: is this particular rearing technique or killing method or whatever causing unnecessary suffering, within the accepted paradigm of the animal’s use? The animal rights law will ask: is this paradigm, is the use of the animal itself, an unnecessary form of suffering?

This is a pretty crucial distinction for the animal protection movement because it shapes the sort of projects that an advocate will prioritise over others. It will also shape the arguments that advocates will use in seeking support for their views. Within the movement, you see the RSPCA at one end of the spectrum – which explicitly adopts a welfare perspective – and Animal Liberation Victoria at the other end of the spectrum, which advocates veganism as the only way forward for animals. A welfare advocate may simply seek to make improvements to the Codes of Practice so that animals used in institutional settings are treated better. A rights advocate will seek to abolish the Code system so that animals in institutional settings can receive the same or similar protections as other animals.

My personal view is that we need to question the institutional use of animals; that is, we need to adopt a rights-based approach. It makes no sense, in my view, to ask whether or not a particular kind of animal treatment causes unnecessary suffering without ever stepping back and looking at the whole enterprise and saying asking, hang on a minute, do we even need to use animal skin for our clothes, or whatever the question is?

But we need to be careful about what mean by ‘animal rights’. The concept of ‘animal’ is a broad one, encompassing anything from a chimpanzee to an oyster. It’s a bit of a conceptual problem with our language that we group all human animals in one category and then every other type of animal in another. So some animal rights advocates argue that *all* animals deserve to have a single basic right: the right not to be the property of another.

My view is that, at least at a theoretical level, we need to recognise that some animals may deserve a bundle of many different and quite complex rights, other animals may only deserve one or two key rights, and others may not deserve rights at all. An oyster, which cannot think or suffer, may not have any moral claims on us, while a chimpanzee – which can suffer, experience complex emotions, think conceptually, and so on – may be entitled to a range of sophisticated cultural and social rights.

This view is based on a so-called ‘capabilities’ approach to rights-based theory. We first assess what functions and capabilities are basic to a particular animal’s flourishing and wellbeing. And it is those capabilities – for example forming social bonds, exercising, having wide open spaces to explore – that can form the basis of the rights we ascribe different kinds of animals.

PRACTICAL CHALLENGES

So I’ve set up the overall picture of animal cruelty regulation in Australia, and the philosophical debates at the heart of the animal protection movement. Now I’m going to briefly talk about the practical issues that arise from this.

There has been, in recent times, a meteoric rise in animal law activism and advocacy in Australia. Propelled by a rising movement overseas – for example the Animal Legal Defense Fund in the United States – we have seen a number of organisations spring up in Australia: Voiceless, the Barristers’ Animal Welfare Panel, Lawyers for Animals, and the Pro Bono Animal Law Service at PILCH to name a few. We’ve also seen a number of major law firms hosting animal law events, including Mallesons, Allens, Minter Ellison and Corrs. And universities are starting to teach animal law as a subject, including this university. While no doubt it is still a somewhat fringe movement in comparison to other areas of social justice, it is unquestionably much more mainstream now than it was even five years ago.

But this growing movement faces enormous obstacles.

The first major barrier is economic. In Australia, the egg and chicken meat industries alone are worth several billion dollars per year. By the time you add up all the other meat sectors, the biomedical sector, the sporting sector and so on, we are talking about an economic powerhouse. You see this barrier play itself out in advertising, where an ad produced by animal activist groups gets a little bit of airplay on here and there, while ads by the meat industry – which use Sam Neill to state that red meat is essential to brain growth – are played for months on end on prime time TV.

There are also large psychological and historical barriers. Humans are well and truly accustomed to treating animals as means to our ends, and it’s difficult to overcome the entrenched view that animals exist to serve humans, which derived from religious values but remains a latent view even among those who have long ago dispensed with the religious doctrines that support that notion.

There are also obstacles that are inherent in the very nature of the fact we are dealing with animals, as opposed to other marginalised groups. First and foremost, animals are inherently

unable to advocate for themselves. They depend on the support and advocacy of human adults.

Not just that, when we achieve anything for animals, it is very easy for that achievement to be taken away, because we are not making animals any more powerful in the process. Granting animals rights simply means failing to exercise the power over them that we could exercise at any time if we chose to do so. They are still just as vulnerable and susceptible to our dominance as before. A good example of this is fur. Despite years of campaigns and, in my view, a pretty successful attempt by the movement to brand fur as cruel and push it out of the mainstream, it keeps on making a comeback.

There are many other practical impediments and challenges, but the last one I wanted to mention today is that the movement simply doesn't have a sufficiently large base level of support at this stage. Even among what we could loosely call the progressive left – the intellectual movement that pretty universally supports certain causes such as environmental protection, refugee rights, women's reproductive rights, and so on – there is still a lot of scepticism about the animal rights cause, a perception that even if there's some legitimacy behind it, it's a marginal distraction from more important human causes.

Therefore, one of the challenges for the movement is simply to create a sufficient base level of support, which will result in it being taken more seriously by governments.

FUTURE SUCCESS

I've briefly outlined one of the major structural shortcomings of our animal law system, the philosophical debate at the heart of the animal protection movement, and some of the challenges in the real world that the movement faces in having its voice heard.

To finish off I wanted to reflect on the future of animal rights law, and how we might see some success stories as the movement grows and continues to penetrate the mainstream of public debate.

One of the things we've seen over the last several years is a consumer movement that is having far greater success than its corresponding legal movement. Documentaries, newspaper articles, and television 'exposes' of animal cruelty in the factory farming environment have led to consumers increasingly demanding organic and free-range animal products, and major food chains like Woolworths and Coles responding – most recently with Coles announcing a phase-out of all pork products that were produced using sow stalls.

I think this where we're likely to continue seeing a lot of activism. It's the sort of grassroots consciousness-building campaigning that a lot of animal organisations have conducted that will bear the most fruit in the long run.

One of the hallmarks of modern Western society is that animal cruelty is largely invisible. Outside of domestic pets, we in the West have very little interaction with animals. Because of this, we're outraged when we see cruelty to animals but we hardly ever actually see it. Much like the feminists of a few decades back, whose slogan 'the personal is political' brought the problem of hidden abuse into the light, today's animal rights campaigners need to make that which is invisible and private, visible and public.

Human beings have an ambivalent relationship with other animals. On the one hand we see them as fascinating, as cute, cuddly, our friends. Children love them. We have soft toys of animals, most cartoon movies involve animals, and animal cruelty is something that most people instinctively despise. But on the other hand, we eat them, we use them for all sorts of things – science, entertainment, etc. There is some kind of cognitive breakdown here, some

failure to bring the empathy that people feel for animals in one sphere across to the other. This is where I think the future of animal activism lies – in drawing out that latent empathy and compassion.

All this talk of empathy and compassion doesn't seem to fit lawyers very well at all, but I don't think that we're entirely irrelevant to the movement. Lawyers have skills in working with governments, creating a perception that an area of activism is moderate and respectable, presenting arguments clearly and logically. The sort of work that lawyers often do, like writing submissions to government and conducting public interest litigation, are not wasted in this movement, even though in the present climate a lot of submission writing is roughly equivalent to banging one's head against a brick wall. Short of a coup that overthrows our system of government and ushers in an animal utopia, we have to work within the structures we have, and that's no bad thing.

What it does mean, though, is that public interest litigation has to be selected carefully in this context. Animal laws, by and large, are deliberately stacked against animals and those who advocate on their behalf. The damage that can be done to the movement from a case that is lost is quite immense, and there is a lot of strategising that goes on within the movement about different types of cases we could run and how likely they would be to succeed. We are acutely aware of the challenges that public interest litigation poses, and many of these are familiar in other contexts. The problem of achieving standing to sue, the ever-present danger of adverse costs orders, and the mere fact that the law is so terrible that there may be a blatant injustice before our eyes but absolutely nothing we can do about it within the boundaries of the current legal framework.

So, to sum up, I think I've probably gotten the point across that the animal protection movement has a lot of challenges in its way, both philosophical and practical. But, in my view, ultimately this movement is about fighting to extend the arm of justice to those who have been excluded in the past. I think it's continuing the work of other great social justice movements in expanding the circle of moral concern, and I think you'll hear even more about it in the coming years as its profile continues to lift.