



28 November 2012

Professor Glyn Davis,
Vice-Chancellor;
Professor Ken Hinchcliff,
Dean of Veterinary Science;
Professor Robert Saint,
Dean of Science; and
Professor James Angus,
Dean of Medicine, Dentistry and Health Sciences
The University of Melbourne
Victoria 3010

By email: vc@unimelb.edu.au
hkw@unimelb.edu.au
rsaint@unimelb.edu.au
jamesaa@unimelb.edu.au

Dear Sir/Madam

CONSCIENTIOUS OBJECTION

Lawyers for Animals (**LFA**) writes this letter with reference to the University of Melbourne Animal Protection Society's campaign for the University of Melbourne to adopt a conscientious objection policy.

LFA is a volunteer-based organisation dedicated to upholding animal rights and improving welfare through education and the law. The organisation's objectives include:

- ⌚ alleviation of the suffering of animals by engaging with those who create or administer laws in Australia in order to strengthen legal protection for animals; and
- ⌚ promotion of better animal welfare practices among animal-related industries in Australia.

LFA does not provide legal advice and the information contained in this letter is provided by way of general legal education only. For more information, please refer to our website: www.lawyersforanimals.org.au.

While there are many philosophical reasons why universities might implement a conscientious objection policy, this letter focuses on the legal issues arising out of a Victorian university's refusal to allow conscientious objection by their students to the use of animals in experimentation or vivisection. LFA hopes that the University of Melbourne may find our analysis of these issues helpful and we would be pleased to discuss this further.

In summary, this letter considers whether:

- ⌚ there is a real risk that a blanket prohibition on conscientious objection breaches a university's obligations under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**) if such a policy restricts students' right to freedom of thought, conscience and belief;
- ⌚ coercing students to perform vivisection, contrary to their deeply held ethical beliefs, may breach a university's duty of care to its students at common law; and
- ⌚ disallowing conscientious objection may constitute indirect discrimination.

A Charter of Human Rights and Responsibilities

Conscientious objection is a natural corollary of freedom of conscience and belief, a bedrock principle of liberal democracies. This principle is enshrined in s 14 of the Charter, which provides as follows:

- (1) *Every person has the right to freedom of thought, conscience, religion and belief, including-*
 - (a) *the freedom to have or to adopt a ... belief of his or her choice; and*
 - (b) *the freedom to demonstrate his or her ... belief in ... observance, practice and teaching, either individually or as part of a community, in public or in private.*
- (2) *A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a... belief in ... observance, practice or teaching.*

As a "public authority", the Charter applies to any university [s 6(2)(c)]. It is unlawful for public authorities to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right [s 38(1)]. That is, it is unlawful for universities to act incompatibly with its students' right to freedom of thought, conscience, religion and belief (including the *demonstration* of such beliefs through observance and practice), and it is unlawful for universities to coerce or restrain students in a way that limits their freedom to observe or practise their beliefs. Moreover, universities must give proper consideration to such beliefs when making decisions, including, relevantly, a decision whether to adopt a conscientious objection policy (and the content of any such policy).

Opposition to vivisection is plainly a matter of conscience and belief. Most people who oppose animal experimentation do so on the basis of a deeply held philosophical objection either to the deliberate infliction of animal suffering, or to the use of animals as means to human ends, generally. Students who hold this view wish to observe and practise their belief by not participating in animal experimentation. Coercing students into performing experiments on animals limits their freedom to observe and practise this belief.

It may be contended that there is no limitation on students' freedom, because students with objections to vivisection may simply choose to study another university course that does not require animal experimentation. In LFA's view,

this is analogous to an argument that accommodation or service providers should be allowed to discriminate on the basis of (for example) race, religion or sexuality, because the victim is able to go elsewhere. Contrary to this view, it is still a limitation on students' freedom, notwithstanding the availability of other university courses, because a policy prohibiting conscientious objection essentially precludes a group of students from following their preferred career path on the basis of their beliefs.

For these reasons, LFA believes that a blanket prohibition on conscientious objection may breach a university's obligations under the Charter.

B Duty of care

Universities owe a duty of care to their students under the common law. Any reasonably foreseeable harm which a university causes to its students is a breach of this duty. LFA is concerned about the psychological harm that may be caused to students who are forced to participate in activities that run contrary to their strong ethical beliefs, particularly if those activities are frequent, occur over a number of years, or involve the infliction of intense suffering on the animal subjects. There may also be significant psychological harm caused by the negative reactions and consequences that students experience when they object to carrying out animal experiments, such as ridicule or lecturers threatening to give them a fail mark.

C Discrimination

The *Equal Opportunity Act 2010* (Vic) (**EO Act**) prohibits both direct and indirect discrimination on the basis of certain protected attributes. These attributes include "political belief or activity" (s 6(k)). In the High Court decision of *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, Kirby J stated as follows (at [217]-[218]):

The concerns of a governmental and political character must not be narrowly confined. To do so would be to restrict, or inhibit, the operation of the representative democracy that is envisaged by the Constitution. Within that democracy, concerns about animal welfare are clearly legitimate matters of public debate across the nation. So are concerns about the export of animals and animal products. Many advances in animal welfare have occurred only because of public debate and political pressure from special interest groups. The activities of such groups have sometimes pricked the conscience of human beings.

*Parliamentary democracies, such as Australia, operate effectively when they are stimulated by debate promoted by community groups. To be successful, such debate often requires media attention. Improvements in the condition of circus animals, in the transport of live sheep for export and in the condition of battery hens followed such community debate. Furthermore, **antivivisection and vegetarian groups are entitled, in our representative democracy, to promote their causes, enlisting media coverage, including by the appellant. The form of government created by the Constitution is not confined to debates about popular or congenial topics, reflecting majority or party wisdom. Experience teaches that such topics change over time. In part, they do so because of general discussion in the mass media.***

(emphasis added)

It follows that opinions about animal experimentation are political beliefs. As Kirby J indicates in the above quote, animal welfare concerns have a “political character” and clearly form part of legitimate public debate. Whether or not animals should be used by humans in medical or scientific research is a controversial, widely contested political issue.

Indirect discrimination on the basis of political belief

Under s 38 of the EO Act, an “educational authority” (such as a university) must not discriminate against a student-

- (a) *by denying or limiting access to any benefit provided by the authority; or*
- (b) *by expelling the student; or*
- (c) ***by subjecting the student to any other detriment.***

(emphasis added)

Of course, a university’s requirement to perform experiments on animals applies to students of all political beliefs; students who oppose vivisection are not singled out in this regard. It is thus not direct discrimination.

The EO Act, however, also prohibits indirect discrimination [s 9]. This is where a person imposes a requirement, condition or practice that has, or is likely to have, the effect of disadvantaging persons with a protected attribute, and that is not reasonable. Importantly, the person who imposes the requirement, condition or practice has the burden of proving that it is reasonable [s 9(2)].

In this context, if a university imposes a requirement that students undertaking certain courses of study perform experiments on animals in order to pass, this has the effect of disadvantaging students with certain political beliefs (ie opposition to vivisection). In LFA’s view, such a requirement would also be unreasonable. Under s 9(3) of the EO Act, whether a requirement is reasonable must be assessed against the following factors, which are discussed in turn:

- (a) *the nature and extent of the disadvantage resulting from the imposition ... of the requirement* – compelling students to perform experiments against their ethical principles has a severe impact on those students, as would any requirement that forces people to act against their beliefs. This could include, for example, stress, social exclusion, guilt and ridicule;
- (b) *whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the requirement* – it would seem not be proportionate where there are adequate alternatives to animal experimentation available (see (c) and (e) below);
- (c) *the cost of any alternative requirement* – the alternatives to vivisection include models, videos and images. It is not apparent that these would be unduly costly;
- (d) *the financial circumstances of the person imposing ... the requirement* – universities tend to be large, well-resourced institutions; and
- (e) *whether reasonable adjustments or reasonable accommodation could be made to the requirement ... to reduce the disadvantage caused, including the availability of an alternative requirement ... that*

would achieve the result sought by the person imposing ... the requirement ... but would result in less disadvantage – as stated above, there are available alternatives to vivisection. Using these alternatives, students could still satisfactorily acquire the knowledge and skills required by their course of study.

It is also relevant that the *Australian Code of Practice for the Care and Use of Animals for Scientific Purposes* [7th edition, 2004] states that “(t)echniques that totally or partially replace the use of animals for scientific purposes must be sought and used wherever possible”. In other words, universities are already under an obligation to replace animal experiments with other techniques; and in light of this, it is difficult to see how a “no exceptions” policy for animal experimentation within universities could be reasonable.

For these reasons, by disallowing conscientious objection, a university may be breaching the indirect discrimination provisions of the EO Act.

Duty to eliminate discrimination

Under s 15(2) of the EO Act, universities are also required to take “reasonable and proportionate measures to eliminate” discrimination “as far as possible”. This is a positive obligation; it requires a university not only to avoid actual discrimination, but to seek proactively to eliminate it.

By adopting a robust conscientious objection policy, a university would be complying clearly with its obligation to take the requisite reasonable and proportionate measures to eliminate discrimination. Specifically, it would be adopting a measure to eliminate indirect discrimination against people with a particular political belief, namely opposition to vivisection.

D Conclusion

It follows that if universities adopt policies allowing for conscientious objection, they will reduce their risk of breaching their obligations under the Charter, the common law, and equal opportunity legislation. Perhaps more importantly, a conscientious objection policy would signal that the university supports and respects independent thought and the freedom of its students to develop and practise their own political and ethical beliefs.

LFA thanks the University of Melbourne for considering this letter, and if invited would be pleased to discuss the above matters further. If you have any queries, please contact David Glasgow whose details are set out below.

Yours sincerely

per: David Glasgow
Executive Member
LAWYERS FOR ANIMALS INC

Email: david@lawyersforanimals.org.au