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FOOD, ANIMALS, AND THE LAW: DO WE HAVE A MORAL OBLIGATION TO PROTECT THEM FROM THE SUFFERING THAT THE LAW DOES NOT?

SUSAN ARBON & ZACH DUNCALFE*

The legal dominion of mankind over all animals imports an obligation to behave morally and ethically, and our acceptance of this obligation reflects directly on our dignity as humans. Man creates laws to guide acceptable behaviour, and those with wealth or influence often use the law to further their own economic interests. Animals are a food source for humans and are viewed as property by the law. This paper illustrates how animal welfare laws in Australia purport to protect animals from unnecessary, unjustifiable, or unreasonable suffering but largely fail to protect animals that are used as a food source. The reasons for failure are explained. It is imperative that we recognise our moral and ethical obligations and responsibility to the welfare of animals. Animals deserve to be treated with respect. Just because we are in a position to dominate and oppress other creatures does not mean we should. The legacy of mankind should not be founded on the suffering of other creatures. It is a matter of dignity.

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I INTRODUCTION

Man's legal dominion over all animals imports a moral and ethical obligation not to abuse the position. Our acceptance of this obligation reflects directly on our dignity. Mankind creates laws to guide acceptable behaviour, and those with wealth or influence often use the law to further their own economic interests. The common law categorises animals as personal property. This has detrimental consequences for animals, as the state is reluctant to interfere with property rights. Therefore, the animal becomes a commodity to be dealt with by the owner. As a result, the law facilitates and supports commercial interests over those of animal welfare.

The broad objectives of state and territory Animal Welfare Acts are the prohibition of cruelty and the encouragement of proper treatment of animals. Unfortunately, the definition of cruelty is couched in language such as 'unnecessary', 'unjustified', and 'unreasonable' suffering.¹ These words are problematic when the welfare of the animal is balanced against perceived human needs. The treatment of the animal can often be justified and therefore deemed necessary. Furthermore, agricultural animals are largely exempt from statutory protection if farming methods conform to certain codes of

¹ See, *Animal Care and Protection Act 2001* (Qld) ss 17-18; *Prevention of Cruelty to Animals Act 1979* (NSW) ss 4-7; *Animal Welfare Act 1985* (SA) s 13; *Animal Welfare Act 2002* (WA) s 19(2).

practice. People are the gatekeepers of the law and what is acceptable, but when animals are treated solely as a means for human ends, their value is measured in terms of their usefulness to humans. As a result, trivial human interests prevail when balanced against those fundamental to an animal. Because the law does not criminalise the maltreatment of animals, the only appeal that can be made for their decent treatment is on moral and ethical grounds. Thus, it is imperative that a culture of respect toward an animal's wellbeing and life is developed through social and political changes. This requires adopting high ethical standards that reflect the treatment of those who are in our care. Legislative reform can limit cruel practices and provide greater transparency of farming practices, giving consumers an informed choice when purchasing animal products.

This paper illustrates how animal welfare laws in Australia purport to protect animals from unnecessary, unjustifiable, or unreasonable suffering, but largely fail at protecting animals that are used as a food source. The reasons they fail are explained, and why it is imperative that we recognise our moral and ethical obligation and responsibility to the welfare of animals is outlined.

II THE LAW

The common law categorises animals as personal property, which has several detrimental consequences. It gives complete autonomy to the owners to do as they please with their property because the state is reluctant to interfere with personal property rights; the concept of property converts the animal to a commodity; and producers will take shortcuts with animal welfare to be more commercial.² The property status of animals is unlikely to change in the short term. Therefore, the most pragmatic approach to protect animals is to create and address protective standards, which legislation in Australia appears to attempt. It assumes the property status of animals but places constraints on the rights of animals that are considered property.

The majority of animal welfare issues are under state jurisdiction. The Commonwealth has no legislation on animal welfare, and at present only presides over the live export of farmed animals and trade in wildlife under the trade and commerce power.³ Despite the

² Michael Radford, *Animal Welfare in Britain: Regulation and Responsibility* (Oxford University Press, 2001) 124–6.

³ *Australian Constitution* s 51(i).

differences in each individual state's legislation, the prevailing animal welfare model has the broad objective to prohibit cruelty and encourage proper treatment of animals.⁴ The inclusion of an imposition of positive duties on those who have animals under their care recognises that animal welfare can require more than a prohibition against cruelty.⁵ For example, s 17 of the *Animal Care and Protection Act 2001* (Qld) requires that reasonable steps be taken to meet an animal's needs, including: the provision of food, water, and suitable accommodation; the animal must be able to display normal behaviour; and disease or injury must be treated.

Offences are generally one of two types: acts of cruelty towards animals, or a breach of duty of care to animals.⁶ The statutes take the form of criminal laws that are not species-specific. It therefore appears that the law addresses animal cruelty and welfare. Unfortunately the definition of cruelty under the legislation is couched in language such as unnecessary, unjustifiable, and unreasonable suffering. These terms are ambiguous and become problematic when the question of what actually constitutes unnecessary, unreasonable, or unjustifiable suffering arises. If the welfare of an animal is balanced against perceived human needs, an act can often be justified and deemed necessary.

A Why Farm Animals Are Not Protected

Animal Welfare Acts in all states and territories provide an exemption to practices that could be regarded as cruel if the acts are against agricultural animals and they conform to certain standards or codes of practice.⁷ The codes can therefore be used as a defence to acts of cruelty, effectively excluding the farm animals from the protective reach of the legislation that purports to protect their welfare. Consequently, these codes create a double standard. Farming practices committed against animals used for production are allowed, but if the same practices were committed against a companion animal, they

⁴ *Animal Care and Protection Act 2001* (Qld) s 3; *Prevention of Cruelty to Animals Act 1979* (NSW) s 3; *Animal Welfare Act 2002* (WA) s 3; *Prevention of Cruelty to Animals Act 1986* (Vic) s 1; *Animal Welfare Act 1999* (NT) s 3.

⁵ Steven White, 'Legislating for Animal Welfare: Making the Interests of Animals Count' (2003) 28 *Alternative Law Journal* 277.

⁶ Queensland and Tasmania explicitly include a duty of care for a person in charge of an animal.

⁷ For instance, compliance with the relevant Codes constitutes a defence. See, *Animal Welfare Act 1992* (ACT) s 20; *Animal Care and Protection Act 2001* (Qld) ss 38, 40; *Animal Welfare Act* (SA) s 43; *Animal Welfare Act 2002* (WA) s 25; *Prevention of Cruelty to Animals Act 1986* (Vic) s 6; *Animal Welfare Act 1999* (NT) s 79.

would be deemed a criminal offence.⁸ For example, the codes' defence shield effectively allows castration, teeth clipping, and the lopping of tails to all occur without anaesthetic within Australian farms, simply because they are accepted animal husbandry practices and deemed necessary.⁹

The welfare paradigm is based around a utilitarian balancing exercise, where the welfare needs of the animal are balanced against the broader society's perceived needs.¹⁰ Because man has power and privilege over all animals, we are the arbiters of whether harm inflicted on animals is acceptable. Legislation copes with this dominion and balance by using the words unnecessary, unjustifiable, and unreasonable suffering. This is an admission that it is acceptable for man to use animals for their own purpose and if any suffering caused can be explained then it will be deemed justified.

If harm is inflicted for no wider social benefit, and seems to be the whim of a sadistic individual, the law will usually view the act as unnecessary and favour the animal. This could be due to a societal repulsion or fear of a senseless violent act, perhaps because of an underlying fear that, if unchecked, the individual may lose control and extend the violence toward people in the community.¹¹ However, castration or tail lopping without anaesthetic is justified in society's eyes because a reason is given for the cruelty. This embeds further the notion that it is acceptable for animals to be used by man. When this utilitarian balancing exercise is used to assess the cruelty meted out to farm animals, the extent of their suffering is at the whim of man's mercy. Often, relatively trivial human interests will prevail even when balanced against an animal's fundamental interests (for example, to not experience pain or be able to move freely).

Several factors in the utilitarian balancing exercise, when combined, diminish the protection afforded to farm animals. These factors include: the perceived purpose of the animal, the economical drive for increased profits, and the law.

⁸ Deborah Cao, *Animal Law in Australia and New Zealand* (Thompson Reuters, 2010) 207.

⁹ Michael Kirby, *Michael Kirby Calls for Change in The Australian* (29 November 2012) Voiceless <<https://www.voiceless.org.au/content/michael-kirby-calls-change-australian>>.

¹⁰ Peter Sankoff, 'The Welfare Paradigm: Making the World a Better Place for Animals?' in Peter Sankoff and Steven White (eds), *Animal Law in Australasia: A New Dialogue* (Federation Press, 2009) 7, 7-28.

¹¹ Gareth Norris and Paul Wilson, 'Relationship of Criminal Behaviour and Mental Illness in Young Adults: Conduct Disorder, Cruelty to Animals and Young Adult Serious Violence' (2003) 10 *Psychiatry, Psychology and the Law* 239.

1 Purpose of the Animal

Animal welfare laws differentiate farm animals from other animals by classifying them, either expressly or impliedly, as stock or livestock.¹² When animals are defined as stock or livestock, their purpose for being becomes that of an object to generate profit or food, essentially converting the animal from a sentient being to property and a commodity.¹³ The Australian Animal Welfare Strategy definition of a sentient animal is 'one that has the capacity to have feelings and to experience suffering and pleasure. Sentience implies a level of conscious awareness.'¹⁴ It is now broadly accepted that animals are sentient beings.

This personal property or commodity status is imported into provisions designed to protect the welfare of animals, excluding farm animals from certain protections under the law.¹⁵ For example, the generally expressed requirement that animals receive adequate exercise does not apply to stock in both New South Wales and the Northern Territory.¹⁶ This exemption allows animals such as pigs in factory farms to be confined in giant sheds, with the sows spending most of their reproductive cycle in stalls that provide room to only stand and lie down.¹⁷ Scientific evidence suggests pigs are intelligent social animals.¹⁸ If the same treatment was meted out to dogs, there would be public outrage. The only real difference between these sentient animals is that one is bred for consumption or commercial gain and the other largely as a companion animal. Because pigs are bred for consumption their welfare is valued less than that of dogs. Thus, denying pigs sunshine and the ability to turn around is deemed reasonable.

¹² See, *Prevention of Cruelty to Animals Act 1979* (NSW) s 4(1); *Animal Care and Protection Act 2001* (Qld) s 13(2)(e); *Animal Welfare Act* (SA) Sch 2; *Prevention of Cruelty to Animals Act 1986* (Vic) ss 15A(3), 24D; *Animal Welfare Act 2002* (WA) s 26; *Animal Welfare Act 1992* (ACT) s 17(4); *Animal Welfare Act 1999* (NT) s 4.

¹³ Gary L Francione, *Animals, Property and the Law* (Temple University Press, 1995) 17–49, 253–61.

¹⁴ Department of Agriculture, Fisheries and Forestry, *The Australian Animal Welfare Strategy — Revised Edition June 2008* (Department of Agriculture, Fisheries and Forestry, 2008) 7.

¹⁵ Katrina Sharman, 'Farm Animals and Welfare Law: An Unhappy Union' in Peter Sankoff and Steven White (eds), *Animal Law in Australasia: A New Dialogue* (Federation Press, 2009) 35, 49.

¹⁶ *Prevention of Cruelty to Animals Act 1979* (NSW) ss 4, 9(1)(a); *Animal Welfare Act 1999* (NT) s 11(3).

¹⁷ Productivity Commission, 'Safeguards Inquiry into the Import of Pigmeat — Accelerated Report' (Report No 42, Productivity Commission, 14 December 2007) 16, 26

<<http://www.pc.gov.au/projects/inquiry/pigmeat-safeguards/docs/acceleratedreport>>; Primary Industries Standing Committee, *Model Code of Practice for the Welfare of Animals: Pigs* (CSIRO, 3rd ed, 2008) Appendix III.

¹⁸ Elise T Gieling, Rebecca Nordquist and F Josef van der Staay, 'Assessing Learning and Memory in Pigs', (2011) 14 *Animal Cognition* 151.

2 *Economics*

According to the Coase Theorem, people are rational maximisers of their satisfaction, so if voluntary exchange is permitted, resources will tend to gravitate to their most valuable uses.¹⁹ This gravitation toward increased value or productivity has resulted in the rapid corporatisation of farming. Corporations have legal personhood and therefore can own property. Corporate personhood and animal “thinghood” together operate to allow corporations to own animals. Directors and officers of a corporation have a fiduciary duty to act in the best interests of the company. As a result, both the law and markets direct managers and directors of corporations to make the most productive use of their property to maximise profits.²⁰ In recent decades, this has resulted in profit-maximising behaviour and the consolidation of economically efficient factory farming methods of production. More than 80 per cent of chickens, two-thirds of all pig-meat, and one-third of beef cattle are owned by large corporations that employ factory-farming methods of production.²¹ These methods significantly reduce the animals’ ability to exercise, to the point where some are unable to stretch their limbs or even walk a step or two.²² This corporatisation of animal production has institutionalised animal suffering.

The objective of profit-maximisation cannot be easily reconciled with animal welfare, because the employment of the utilitarian balancing exercise invariably favours human interests. The legal standard for determining what constitutes unnecessary, unjustifiable, or unreasonable suffering is not determined by some moral ideal but by the perceived legitimacy of the use to which the animals are put. Virtually all uses of animals that generate social wealth are considered legitimate.²³

3 *The Law*

The legal framework for animal welfare comprises the primary legislation, subordinate regulations, and codes of practice on animal welfare. Model Codes of Practice have been developed by the Primary Industries Ministerial Council. These codes are typically either

¹⁹ Francione, above n 13, 27.

²⁰ Darian M Ibrahim, ‘A return to Descartes: Property, Profit and the Corporate Ownership of Animals’ (2007) 70 *Law & Contemporary Problems* 89, 98.

²¹ Sharman, above n 15, 37–9.

²² Peter Singer, ‘Animal Liberation at 30’ (15 May 2003) 50(8) *New York Review of Books*.

²³ Francione, above n 13, 29.

directly incorporated or adopted in a revised form by the states and territories.²⁴ The differing approach by the states and territories on how the codes are adopted has resulted in the failure to achieve a nationally uniform approach to animal welfare and the treatment of farm animals. Inconsistencies in both code content and applicability are evident.²⁵ Most jurisdictions allow compliance with a code be used as a defence for a prosecution of cruelty under animal welfare legislation,²⁶ and compliance with codes is voluntary except in South Australia.²⁷ The codes and regulations define the minimum acceptable animal welfare practices. Significantly, 'these minimum standards may be lower than the "non-cruelty" standard established in offence provisions in the primary legislation.'²⁸ For example, most jurisdictions expressly set out minimum sizes for battery cages, which permit confinement of chickens that barely allows them to stretch their wings for the duration of their life.²⁹

Despite extensive proliferation of regulations and codes of practice on animal welfare, the treatment of farmed animals has largely failed to improve. Possible reasons for this include: the time it takes to write or redraft codes, the institutional actors involved in creating the code content, and the factors addressed when drafting codes.³⁰ The codes of practice created for minimal standards of accepted animal husbandry practices usually take the form of delegated legislation. The people utilised to create the codes include personnel from animal industry interests and government primary industry departments, with only a small percentage representing animal welfare agencies.³¹ Both the personnel from animal industry interests and government primary industry departments have a vested interest in the dollar-value of the animal, and how that value can be maximised through industrialised food production. Therefore, a conflict of interest arises between profitability of the Australian agribusiness and animal welfare,

²⁴ Steven White, 'Regulation of Animal Welfare in Australia and the Emergent Commonwealth: Entrenching the Traditional Approach of the States and Territories or Laying the Ground for Reform' (2007) 35 *Federal Law Review* 347, 347, 354–6, 369–70.

²⁵ Arnja Dale, 'Animal Welfare Codes and Regulations — The Devil in Disguise?' in Peter Sankoff and Steven White (eds), *Animal Law in Australasia: A New Dialogue* (Federation Press, 2009) 174, 176–7.

²⁶ In NSW compliance with a Code is not a defence but is admissible evidence, and in Tasmania the legal status of Codes is unclear.

²⁷ Dale, above n 25, 177–8.

²⁸ White, above n 24, 355.

²⁹ *Prevention of Cruelty to Animals (General) Regulation 2006* (NSW) cl 17; *Animal Care and Protection Regulation 2002* (Qld) cll 5, 15; *Animal Welfare Regulations 2000* (SA) reg 13N; *Animal Welfare Regulations 1993* (Tas) reg 6; *Prevention of Cruelty to Animals (Domestic Fowl) Regulations 2006* (Vic); *Animal Welfare Regulation 2001* (ACT) cl 8.

³⁰ Dale, above n 25, 181.

³¹ *Ibid* 181–5.

often to the detriment of the animals involved. Due to this, accepted animal husbandry practices are often exempted, effectively legalising and institutionalising cruelty.³²

Apart from the law effectively legalising certain acts of cruelty, enforcement of the law is often ineffective. This is the case even when animal welfare laws have clearly been breached. There is no national body to investigate and prosecute crimes, resulting in an ad hoc approach to law enforcement on animal welfare. Enforcement agencies within each state and territory that play a role in law enforcement of animal welfare include: the Royal Society for the Prevention of Cruelty to Animals ('RSPCA'), Departments of Primary Industries ('DPI'), and the police.³³

Resource constraints and conflicts of interest significantly impact on the prosecution of those flaunting the law.³⁴ As a result, the RSPCA shoulders the bulk of the prosecution burden. Unfortunately, the RSPCA is a private charity with minimal government assistance and must carry the cost of litigation. The prosecutorial burden of proving a case beyond a reasonable doubt and the fear of costly proceedings act as a disincentive for litigation.³⁵ Therefore, only the worst cases are chosen to prosecute. Usually there is a memorandum of understanding that the DPI, not the RSPCA, will deal with commercially farmed animals. Unfortunately, these departments have an inherent conflict of interest because of the dual obligation to monitor animal welfare and nurture agribusiness clients. State and territory police have to prioritise resources, and animal welfare is not a high priority when they have to deal with violent acts against people, such as murder or domestic violence. Further, most farming practices are on private property, away from the public eye, which makes animal cruelty difficult to detect due to trespass laws.

Thus, it has been demonstrated that the law is inadequate in protecting animals used for production and consumption, as harm and suffering are relative terms determined under the law through a proportionality test of whether the suffering is necessary. Human demands always dominate. If one can justify a reasonable need to inflict suffering, it becomes necessary. This legitimacy of purpose makes animal suffering permissible whenever 'the purpose for which the act is done is to make the animal more

³² Cao, above n 8, 208.

³³ Sharman, above n 15, 51-2.

³⁴ Cao, above n 8, 219.

³⁵ White, above n 24, 359.

serviceable for the use of man'.³⁶ The legitimacy of means is permissible if it is due to economic efficiencies. The combination of the purpose and means test essentially makes necessary mean legitimate. Animal welfare becomes subjugated to economic efficiency, whereby cruel practices are legally sanctioned through codes allowing accepted animal husbandry standards. This, together with resource constraints, endemic conflicts of interest, and trespass laws, all render the law ineffective in stopping farm animal suffering. For these reasons the law needs to change.

4 Justified, Necessary, & Reasonable Suffering

Attempts to justify the industrial exploitation of food animals and the inevitable suffering inflicted in the process are made in a number of ways. It is often with the use of financial considerations at the forefront, as industrial farming generates great wealth for the economy. In Australia, this is generally well over \$10 billion per year for the slaughter of around half a billion animals.³⁷ The profits of industrial farming are not only enjoyed by the corporations that own the factory farms and slaughterhouses. They are shared with the manufacturing companies providing the steel for the cages and sheds, and the pharmaceutical companies supplying the antibiotics essential for modern day farming practices,³⁸ among others. The suffering of animals in industrial farming is also financially viable for the consumer. Owing to industrial farming's central ethos of maximum profit using minimum land area,³⁹ the intense methods and extreme confinement of animals result in cheap meat being available for purchase,⁴⁰ making meat a financially affordable product.⁴¹ This financial rationale is perhaps not common knowledge but it is no secret. A familiar objection to animal rights discourse is that if industrial farming was significantly restricted or abolished people would be deprived of their livelihood. A Senate committee appointed to conduct an inquiry into the live export

³⁶ *Murphy v Manning* (1887) 2 Ex D 307, 314.

³⁷ Sharman, above n 15, 55.

³⁸ Harriet Schleifer, 'Images of Death and Life' in Peter Singer (ed), *In Defense of Animals* (Blackwell, 1985) 64.

³⁹ Peter Singer and Jim Mason, *The Ethics of What We Eat: Why Our Food Choices Matter* (Text Publishing, 2007) 21.

⁴⁰ Ruth Harrison, *Animals in Factory Farming and Their Legal Rights* (E Leavitt, 3rd ed, 1978) cited in Steven M Wise, 'Of Farm Animals and Justice' (1986) 3 *Pace Environmental Law Review* 191, 192.

⁴¹ Steven J Haverkamp, 'Are Moderate Animal Welfare laws and a Sustainable Agricultural Economy Mutually Exclusive?' (1998) 46 *Drake Law Review* 645, 648.

of sheep in 1985 after claims of immense animal suffering found that live export must continue because of 'economic and other reasons'.⁴²

Modern animal welfare legislation, by generally only punishing and labelling cruel abuses of animals that waste the animal's instrumental value can be illustrated with the contrasting of two examples.⁴³ In the case of *RSPCA v Hamilton*,⁴⁴ after more than 2000 cattle and goats in Hamilton's care were found either starving to death or the victims of parasites, Hamilton was found guilty of more than 100 charges of animal cruelty and received a jail sentence. The law recognised his actions as causing suffering that could not be justified. To contrast, there is a practice condoned in the Domestic Poultry Code that provides for the disposal of surplus (male)⁴⁵ and unthrifty (weak)⁴⁶ newly-hatched chicks by means of gassing (asphyxiation) or maceration (grinding alive). Because the chicks are seen as having no value to industry, and therefore no instrumental value,⁴⁷ they are destroyed. This is a practice that kills literally hundreds of thousands of chicks *every day* in Australia.⁴⁸ Surely this practice is cruel, but because it is outlined in the code as accepted, the law views it as legal. It is a justified suffering.

The qualification of unnecessary in the legal framework is primarily used to feign concern for animal interests, which are ultimately ignored in favour of those of humans. There is nothing to support the idea that animal suffering is necessary. The theory is pure fiction and extensively erodes the protection afforded to food animals in Queensland.⁴⁹ The legal framework pertaining to food animals in Queensland is basically utilitarian in the sense that it balances the interests of humans and the interests of food animals in order to allow acceptable practices and prohibit objectionable ones.⁵⁰ Where this legal framework fails to be truly utilitarian is in its inherently biased nature. The

⁴² Senate Select Committee on Animal Welfare, Parliament of Australia, *Export of Live Sheep from Australia* (1985) 185, cited in Laura Morfuni, 'Pain For Profit: An Analysis of the Live Export Trade' (2011) 16 *Deakin Law Review* 497, 500.

⁴³ The value the animal has in relation to human requirements — measured in what the animal can do for a human.

⁴⁴ *RSPCA v Hamilton* [2008] NSWLC 13.

⁴⁵ Primary Industries Standing Committee, *Model Code of Practice for the Welfare of Animals: Domestic Poultry* (CSIRO, 4th ed, 2002) s 14.1.

⁴⁶ Primary Industries Standing Committee, *Model Code of Practice for the Welfare of Animals: Domestic Poultry* (CSIRO, 4th ed, 2002) s 14.3.

⁴⁷ Francione, above n 13, 24.

⁴⁸ Alex Bruce, *Animal Law in Australia: An Integrated Approach* (LexisNexis Butterworths, 1st ed, 2012) 225.

⁴⁹ Michael Allen Fox, 'On the "Necessary Suffering" of Nonhuman Animals' (1997) 3 *Animal Law* 25, 25.

⁵⁰ Utilitarianism purports to select the outcome that provides the greatest good to the greatest number.

interests of animals are practically always second to the interests of humans, regardless of their fundamentality.⁵¹ The first interest that tips the balance in favour of humans is that of taste. This is weighed against an animal's interest in freedom of movement and choice (at the most fundamental level), and in freedom from mutilation and pain (at the least fundamental).

To provide an example from the least fundamental end of the spectrum, it is recommended in the relevant code that male piglets are to be castrated without anaesthetic,⁵² or indeed, any pre-operative measures bar being restrained for the procedure.⁵³ This castration is performed for the singular purpose of consumer demand.⁵⁴ The meat from male pigs left uncastrated reportedly has a gamey taste that consumers do not like.⁵⁵ The endorsement of piglet castration in the code,⁵⁶ and therefore the legislation, evidences that the balancing of human and animal interests in this case has resulted in the human interest of preferring a particular taste in pig meat being considered more important than the animal's interest to avoid pain and mutilation. It can be truthfully stated that according to the animal welfare framework in Queensland, it is necessary for male piglets to suffer for this comparatively trivial human interest.⁵⁷

In an attempt to control the amount of panic and suffering an animal experiences during slaughter, it is a requirement that animals be stunned immediately prior to their death.⁵⁸ However, Queensland's primary animal welfare instrument has a wide offence exemption for the slaughter of animals under religious faith.⁵⁹ This allows legal slaughter according to religious doctrine, even if such doctrine does not meet the animal welfare standards expressed in the codes or the Act. It is a common feature of both the Kosher (Jewish) and Halal (Islamic) methods of slaughter that an animal is required to

⁵¹ Harlan Miller, 'No Escape' in Paola Cavalieri, *Death of the Animal: A Dialogue* (Columbia University Press, 2008) 59, 69.

⁵² Primary Industries Standing Committee, *Model Code of Practice for the Welfare of Animals: Pigs* (CSIRO, 3rd ed, 2008).

⁵³ *Ibid* 5.6.6.

⁵⁴ *Id* 5.6.5.

⁵⁵ Singer and Mason, above n 39, 46.

⁵⁶ Above n 52.

⁵⁷ Miller, above n 51, 69.

⁵⁸ Primary Industries Standing Committee, *Model Code of Practice for the Welfare of Animals: Livestock at Slaughtering Establishments* (CSIRO, 2001), 2.6.2.

⁵⁹ *Animal Care and Protection Act 2001* (Qld) s 45.

be fully conscious when its throat is cut to bleed it to death.⁶⁰ Even though stunning is not completely effective in removing panic or the ability to feel pain,⁶¹ it is likely that the practice has some positive welfare outcomes for the animal. For the legal framework to expressly allow stunning to be discarded under the auspices of a religious faith is a severe failure to take animal interests into account.⁶²

Further damage is done to the robustness of the unnecessary/necessary dichotomy when one looks to cruel practices considered necessary in Queensland but outlawed in other agricultural nations. An example of this is the banning of battery cages for hens in Switzerland, where an aviary system has been adopted.⁶³ For the legal framework to insist that battery cages and the resulting suffering of hens (who clearly prefer more natural conditions)⁶⁴ is necessary, when it has been proven to not be, denigrates the term itself to near meaninglessness.⁶⁵

Practices that cause food animals' suffering in a factory farm setting, that could be considered reasonable by industry, generally revolve around the modification of animals. These modifications are both for the purposes of suiting their surroundings, such as the debeaking of hens and the tail docking of pigs,⁶⁶ and also for profit, such as modification of diet,⁶⁷ and selective breeding.⁶⁸ The debeaking of hens is still a legal practice in Australia.⁶⁹ It is undertaken to curtail certain undesirable hen behaviours in both the broiler (meat) and layer (egg) industries, and is done by partially removing the upper and lower beak of hens with a heated blade without anaesthetic.⁷⁰ The process is painful for the hen,⁷¹ and potentially causes a lifetime of suffering,⁷² yet is considered a reasonable measure to prevent the occurrence of feather pecking and cannibalism.

⁶⁰ Alex Bruce, 'Do Sacred Cows Make the Best Hamburgers? The Legal Regulation of Religious Slaughter of Animals' (2011) 24 *UNSW Law Journal* 351, 351, 352.

⁶¹ Singer and Mason, above n 39, 24.

⁶² *Animal Care and Protection Act 2001 (Qld)* s 45.

⁶³ David Wolfson, 'Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food Production' (1996) 2 *Animal Law* 123, 142.

⁶⁴ Marian Stamp Dawkins, 'The Scientific Basis for Assessing Suffering in Animals' in Peter Singer (ed), *In Defense of Animals* (Blackwell, 1985) 35.

⁶⁵ Fox, above n 49, 28.

⁶⁶ Jim Mason, 'Brave New Farm?' in Peter Singer (ed), *In Defense of Animals* (Blackwell, 1985) 96.

⁶⁷ Singer and Mason, above n 39, 57.

⁶⁸ Bruce, above n 60, 225.

⁶⁹ Primary Industries Standing Committee, *Model Code of Practice for the Welfare of Animals: Domestic Poultry* (CSIRO, 4th ed, 2002) s 13.2.2.

⁷⁰ Sharman, above n 15, 43.

⁷¹ Peter Singer, *Animal Liberation* (Avon, 2nd ed, 1991) 102.

The paradox here is that these undesirable behaviours are primarily caused by the unnatural conditions in which the hens are kept;⁷³ rooted, with an inability to establish a social hierarchy or merely escape the presence of more aggressive birds.⁷⁴ Regardless, the legal framework in Queensland operates to make debeaking a reasonable and legal practice. The modification of diet for food animals is regularly practiced in cattle feedlots,⁷⁵ and is covered in the relevant code.⁷⁶ A popular diet modification is where cows are fed grain because it converts to weight quicker than grazed grass.⁷⁷ As the grain is an unnatural source of food for the cow, it results in a number of health problems.⁷⁸ A grain diet for cows has been likened to a human living exclusively on candy bars,⁷⁹ and has the potential to cause great suffering. The relevant code also makes allowance for feeding cattle wastes, such as poultry litter,⁸⁰ and presumably also slaughterhouse wastes (forcing a form of cannibalism), as this is a common cost-saving practice.⁸¹ The code does not prohibit such an act, but allows for it.⁸²

III MORAL AND ETHICAL OBLIGATION

English philosopher Jeremy Bentham, in the 19th century, stated that animals, like humans, are sentient beings capable of experiencing pain and suffering, and therefore require moral consideration commensurate with their sentience.⁸³ We, as a society, have an ethical obligation and moral duty to ensure that the animals we rear for food are treated humanely. It is a direct reflection of our society's morality and dignity; Kant

⁷² Sharman, above n 15, 43.

⁷³ Steven M Wise, 'Of Farm Animals and Justice' (1986) 3 *Pace Environmental Law Review* 191, 191.

⁷⁴ Sharman, above n 15, 45.

⁷⁵ See, Jeremy Rifkin, *Beyond Beef: The Rise and Fall of the Cattle Culture* (Plume, 1993) 93–9.

⁷⁶ Primary Industries Standing Committee, *Model Code of Practice for the Welfare of Animals: Cattle* (CSIRO, 2nd ed, 2004) s2.2.5.

⁷⁷ Singer, above n 71, 139, 140.

⁷⁸ Singer and Mason, above n 39, 57.

⁷⁹ *Ibid.*

⁸⁰ Primary Industries Standing Committee, *Model Code of Practice for the Welfare of Animals: Cattle* (CSIRO, 2nd ed, 2004) s2.2.5.8.

⁸¹ Singer and Mason, above n 39, 57.

⁸² Primary Industries Standing Committee, *Model Code of Practice for the Welfare of Animals: Cattle* (CSIRO, 2nd ed, 2004) s2.2.5.8.

⁸³ Ibrahim, above n 20, 92.

suggested humans' treatment of animals is significant to the extent it becomes a marker of the moral character of humans.⁸⁴

The law is a manmade concept and construct. It reflects man's perception of where we fit in the world, our morals, ethics, and our culture. It has been suggested that animal rights will only be recognised once the acceptance of change is already achieved and legislated.⁸⁵ It is also proposed that 'the law does not change society, society changes the law'.⁸⁶ Therefore, both social and political forces must work together to collectively enforce change.

A Creating Change

Most people believe animals should be treated with respect, consideration, and empathy. The public perception is that animals are protected by animal welfare laws,⁸⁷ when in fact they are not. Consequently, there is a veil of secrecy maintaining public ignorance and preventing public outrage. There is a need for greater transparency and education of the population. The law can provide for greater transparency in farming practices. For example, free-range eggs can easily be defined and labelled appropriately if legislation so demands,⁸⁸ enabling consumers to be informed when purchasing eggs. Brian Sherman endorses empowering consumers by lifting the veil on farming practices and revealing to the public the harsh truth of factory farming methods used in our country.⁸⁹ A public armed with knowledge can force political change.

A total chain approach has been suggested whereby everyone — consumers, primary producers, supermarkets, food manufacturers, and governments — accept the shared

⁸⁴ Steven White, 'Exploring Different Philosophical Approaches to Animal Protection in Law' in Peter Sankoff and Steven White (eds), *Animal Law in Australasia: A New Dialogue* (Federation Press, 2009) 79, 86.

⁸⁵ *Ibid* 92.

⁸⁶ Jonathan R Lovvorn, 'Animal Law in Action: The Law, Public Perception, and the Limits of Animal Rights Theory as a Basis for Legal Reform' (2006) 12 *Animal Law* 133, 149.

⁸⁷ A 2006 national survey found participants had a shallow understanding of animal welfare and many made assumptions regarding animal welfare including enforcement of legislation to protect animals: Angela Southwell, Amarylise Bessey and Barbara Barker, 'Attitudes Towards Animal Welfare' (Research Report, TNS Social Research Consultants, July 2006) 12.

⁸⁸ ACCC, 'ACCC Not Satisfied with Proposed Free Range Egg Standards' (Media Release, 2 November 2012).

⁸⁹ Brian Sherman, *Calling a Halt to Factory Farming* (2 January 2013) Voiceless <<https://www.voiceless.org.au/content/calling-halt-factory-farming>>.

responsibility of achieving animal welfare for all animals.⁹⁰ The government sets minimal standards of animal welfare; it is up to the legislators to reflect public opinion and set standards that regard animals as sentient beings, worthy of our respect and humane care. These standards need to be set from a moral and ethical standpoint, not through the utilitarian balance test. Society should remove the acceptance of human privilege; higher efficiency or economic production does not justify cruelty. Only then will we be able to change the cultural norms currently accepted.

Limits on economic efficiencies can and should be imposed through legislation to prevent poor treatment of animals. Codes and regulations should set standards that morally and ethically consider the wellbeing and sentience of the animal. For example, minimum enclosure sizes, maximum numbers of animals per enclosure size, and even the complete phasing out of some animal husbandry practices, such as gestation stalls for pork farmers.⁹¹ A quality-assurance endorsement could be added to packaging to inform the public that the meat they are choosing to eat is from an animal whose welfare, whilst alive, was prioritised over farming efficiencies. This animal quality of life assurance has already been implemented through the labelling of free-range eggs. Colloquially, the public is now choosing free-range over caged eggs. This is not because the eggs necessarily taste better; people generally choose to not participate in the cruelty of animals once informed. There has been a steady growth in public concern about animal welfare.⁹² Corporations will not operate at a loss; the costs will be passed to consumers. Consumers have a choice when purchasing food, therefore if meat becomes more expensive due to the welfare of the animal being considered, there are ample choices, including many vegetarian options. A reduced cost of meat should not equate to greater animal suffering.

⁹⁰ Peter Stevenson, *The Economics of Factory Farming: A Paper by Compassion in World Farming* (July 2002) *Compassion in World Farming*

<https://www.ciwf.org.uk/includes/documents/cm_docs/2008/e/economics_of_factory_farming.pdf>.

⁹¹ Australian Pork Limited, 'World First for Australian Pig Producers' (Media Release, 17 November 2010).

⁹² Peter Stevenson, *Setting of Humane Farm Animal Standards: Principal Concerns about Industrial Farming Systems & Practices* (November 2002) *Compassion in World Farming*

<http://www.ciwf.org.uk/includes/documents/cm_docs/2008/a/animal_welfare_and_industrial_farming_systems.pdf>.

IV CONCLUSION

Mankind will always have dominion over animals, and for the foreseeable future we will continue to use animals as a food source. It is imperative that a culture of respect toward an animal's wellbeing and life is developed through social and political changes, so that our society reflects high moral character and ethical standards. We are the animals' guardians and the gatekeepers of the law — they deserve to be treated with respect and dignity. We judge people by the way they treat animals, and correspondingly judge countries on their provision of animal welfare. Therefore, animal law is not only a matter for public concern, it is a global concern. The current legislation on animal welfare with regard to animals of production and consumption is inadequate. The welfare paradigm is based on a utilitarian balancing test between perceived human needs and animal welfare needs. The law endorses this proportionality test by utilising ambiguous words such as unnecessary, unjustifiable, and unreasonable suffering. The balancing test is heavily weighted toward human interests simply because we are the arbiters and animals are at our mercy. It is time the veil of secrecy surrounding industrial farming practices is lifted so the public at large can make informed choices and voice their opinion on current practices. Through this, political and legislative changes could be implemented to more closely reflect our society's moral standing on the ethical treatment of animals.

Peter Sankoff stated, 'we exploit the other animals and cause them suffering because we are more powerful than they are',⁹³ but just because we can, does not mean we should. The legacy of mankind should not be founded on the suffering of other creatures. It is a matter of dignity.

⁹³ White, above n 84, 79.

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