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Comment

Professor David Weisbrot,
President, ALRC

This year marks the 200th anniversary of the passage of the *Slave Trade Act 1807* (UK), representing the successful effort of Lord Wilberforce and others finally to persuade the British Parliament to outlaw the slave trade—meaning, basically, the transportation of slaves to the British colonies, especially in the West Indies. (Slavery *itself* was not abolished by statute until 26 years later, with the passage of the *Slavery Abolition Act 1833*—although in 1772 Lord Chief Justice Mansfield ruled in the case of *James Somersett* that slavery was 'an odious practice' that was contrary to the Common Law).

This year also marks the anniversary of the (rare) successful federal referendum in 1967, which amended the Australian Constitution to authorise the Commonwealth (and not merely the states) to make laws in respect of Aboriginal and Torres Strait Islander people, and to include Aboriginal and Torres Strait Islander people in the national census—meaning, effectively, that they would have the same rights as other Australian citizens for the first time.

One of the most frequent comments made during the various commemorative events and media stories surrounding the 27 May 2007 anniversary of the referendum was—notwithstanding the sad, continuing legacy of Aboriginal disadvantage—that it is very difficult for people operating under a contemporary sensibility to believe that it was only 40 years ago that Aboriginal and Torres Strait Islander peoples were non-citizens in their own homeland *as a matter of Constitutional law*.

At the Sydney meeting of the Australasian Law Reform Agencies Conference in April 2006, over 100 institutional law reformers from 32 law reform agencies in 25 Commonwealth countries endeavoured to identify the 'over the horizon issues' that would occupy them in the coming decades. These issues included: the environment and sustainability (especially global warming and water resources); the telecommunications revolution and the new media; changing demographics, such as the ageing population base in developed countries, and the worldwide scourge of HIV-AIDS; the challenges of ensuring national and international security without departing from human rights protections; and, finally, animal welfare and animal rights—described by speakers as perhaps 'the next great social justice movement'.

This issue of *Reform* is devoted to exploring the parameters of this emerging consciousness about the need to treat non-human animals with dignity and respect. Previous issues of *Reform* routinely feature a range of distinguished scholars, thinkers and practitioners. However, we are most deeply honoured to be able to open this issue with a piece from John M. Coetzee, Nobel Laureate in Literature and author of *Lives of Animals* (1999) and *Elizabeth Costello* (2003).

We are also honoured to present an article by Steven Wise, a pioneer in the field of animal law and litigation, and author of *Rattling the Cage: Towards Legal Rights for Animals* (2000) and *Drawing the Line: Science and the Case*

for Animal Rights (2002)—as well as many other leaders in this field from Australia and overseas.

The ALRC approached a diverse group of potential authors, with the aim of presenting a wide range of views on animal welfare and the law. Of the potential contributors from the farming and food production industries, only one body accepted the ALRC's invitation — and the ALRC is grateful to Alan Pearson, Kathleen Plowman and John Topfler for their contribution.

As with other social justice movements, activists are seeking to push the existing boundaries and achieve law reform through a range of strategies, including: lobbying for legislative change; utilising targeted and test-case litigation; undertaking community and professional education campaigns; and harnessing the power of consumers in the marketplace.

In recent years, we have witnessed dramatically changed social attitudes—and practices—towards such activities as tobacco smoking, energy consumption, water use, and food production. Little of this change has been driven by law. Some of this change has been prompted by the use of economic disincentives (such as taxes), and some through the use of direct sanctions (such as in relation to illicit drug use). This has involved successful efforts at good community education and consciousness-raising—for example, persuading people that tobacco smoking is very harmful to their health.

Once convinced, it is notable that many people are willing to vote with their pocketbooks and pay *more* for green power, water saving devices, and organic and humanely-produced food. (It is also evident that, within the family, children usually make the best compliance officers!)

Once awareness has been raised, how can we offer people of good will the ability to act on their consciences? One legal strategy might involve the development of good food labelling laws that address and reward the ethical and human treatment of animals. In this part of the world, for example, the Australia New Zealand Food Standards Authority (ANZFSA), operates an independent, joint statutory authority that sets food standards in a Code with legal force (as regulations), breach of which can attract penalties.

To date, the focus of food standards has been on human health, with no additional consideration of the treatment of animals in the farming and food process. A task for law reformers would be to determine how to integrate and balance animal welfare issues with public health concerns and industry economics in the setting and enforcement of food standards.

An alternative or additional strategy might be to develop and utilise a 'trustmark' or logo which assures consumers of the ethical and humane treatment of animals. For example, the National Association for Sustainable Agriculture, Australia (NASAA), a non-government organisation (NGO) established in 1986, manages the right to mark foods as 'certified organic'. Similarly, the Fairtrade Labelling Organisation International (FLO)—an NGO based in Germany—is responsible for maintaining the rules, registers, and annual inspections that authorise the use of the 'Fairtrade' logo for coffee products.

A quick visit to the local supermarket, indicates that marketing efforts are sometimes aimed at confusing rather than educating and assuring. For example, a model code of practice for animal welfare sets out minimum standards for the production of 'free range eggs'—but the shelves are also full of boxes of factory-farm produced eggs misleadingly stamped 'farm fresh', 'all natural', 'barn raised' and so on.[1] Reform is clearly needed in this area, to provide greater clarity and protection to consumers seeking to exercise an informed choice.

Another useful law reform exercise would be to examine the effectiveness of the legislation covering animal welfare and anti-cruelty (which in Australia is a matter for the states and territories)—both in terms of policy and practice. For example, s 530(1) of the *Crimes Act 1900* (NSW) is fairly typical of such laws insofar as it prohibits 'serious animal cruelty', an offence committed where a person, 'with the intention of inflicting severe pain: (a) tortures, beats or commits any other serious act of cruelty on an animal, and (b) kills or seriously injures or causes prolonged suffering to the animal'. On its face, this would appear to provide more than adequate protection, especially since the maximum penalty for breach is imprisonment for up to five years. However, a major loophole is provided in sub-section (2), according to which persons are not criminally responsible if they have

acted in accordance with 'routine agricultural or animal husbandry activities, recognised religious practices, the extermination of pest animals or veterinary practice', or with legal authority under the *Animal Research Act 1985* (NSW). And, perhaps not surprisingly given the size, influence and economic importance of the agriculture and livestock industry in Australia, such practices as factory farming and battery egg production are regarded as 'routine activities' for the purposes of the law.

In more recent times, there has been a push from activists to go substantially further than improving such laws, and instead seeking to shift from an 'animal welfare' model towards an 'animal rights' model.

It should be noted that legislative recognition of *human* rights has been slower to develop in Australia than in virtually every other developed country, with no entrenched statutory or constitutional charter of rights. Federal anti-discrimination legislation is relatively recent, covering racial discrimination (1975), sex discrimination (1984), disability discrimination (1992), and age discrimination (2004).

The emerging effort in Australia is largely patterned on the Animal Legal Defense Fund's effort to petition the US Congress for an 'Animal Bill of Rights', premised on the basis that:

> animals, like all sentient beings, are entitled to basic legal rights in our society. Deprived of legal protection, animals are defenseless against exploitation and abuse by humans.

The Petition then states that, as 'no such rights now exist', Congress should pass legislation in support of the following basic rights for animals:

- THE RIGHT of animals to be free from exploitation, cruelty, neglect and abuse.
- THE RIGHT of laboratory animals not to be used in cruel or unnecessary experiments.
- THE RIGHT of farm animals to an environment that satisfies their basic physical and psychological needs.
- THE RIGHT of companion animals to a healthy diet, protective shelter, and adequate medical care.
- THE RIGHT of wildlife to a natural habitat, ecologically sufficient to a normal existence and self-sustaining species population.
- THE RIGHT of animals to have their interests represented in court and safeguarded by the law of the land. [2]

As the many articles in this issue of *Reform* highlight, we are at a relatively early stage of consideration of these issues, and it is hoped that this volume will help to stimulate informed community debate and discussion. Just as we now look back on the past 40 years with some bewilderment—and embarrassment—that we were so slow to recognise the human rights of indigenous people, children, people with a disability, older people and others—it is intriguing to wonder whether our children will look back in 40 years and wonder how we possibly failed for so long to take animal rights seriously.

Endnotes

1. See *From Label to Liable: Lifting the Veil on Animal-Derived Food Product Labelling in Australia* (A report prepared by Voiceless, May 2007), available at <http://www.voiceless.org.au/index.php?option=com_content&task=view&id=459&Itemid=388>. Turn to page 37 for article by Voiceless.
2. Animal Legal Defense Fund, Winning the Case Against Cruelty: Animal Bill of Rights (2007), available at <http://www.aldf.org/billofrights/index/php>.

Commission news

Privacy Inquiry

The ALRC released Discussion Paper 72 (DP 72) *Review of Australian Privacy Law* and *Review of Australian Privacy Law: An Overview*, on 12 September 2007. The 1,977 page Discussion Paper contained 301 proposals for reform of the federal *Privacy Act 1988*.

The ALRC received well over 200 written submissions in response to the release of the Discussion Paper, making a total of over 550 submissions to the Inquiry. To accommodate for late submissions, the closing date for written submissions was extended by three weeks from 7 December to 21 December 2007.

The Privacy Inquiry involved the largest consultation process in the Australian Law Reform Commission's history, with 170 consultation meetings conducted prior to the release of DP 72 and a further 58 targeted meetings held in Sydney, Melbourne, Canberra and New Zealand as part of the consultation process for the final report, which is due to be delivered to the Attorney-General by 31 Mach 2008.

Talking Privacy Website

The Talking Privacy website, specifically aimed at young people, has been updated to include information on the key proposals in DP 72 relating to children and young people. The site has received a total of 6,245 hits since its launch in February 2007, and is proving to be a valuable consultation resource for the Privacy Inquiry.

Client Legal Privilege Inquiry

Discussion Paper 73 (DP 73), *Client Legal Privilege and Federal Investigatory Bodies* was released on 26 September 2007, with 42 proposals for reform.

The ALRC received 40 submissions in response to DP 73, and a total of 116 submissions over the course of the Inquiry. Following the release of DP 73, the ALRC conducted 12 further consultations in Sydney, Canberra and South Australia with various stakeholders, including federal bodies, judges, legal practitioners and academics. A total of 51 consultations were held in various states and territories for the Client Legal Privilege Inquiry.

By letter dated 6 December 2007, Attorney-General Robert McClelland agreed to a short extension of the reporting date for the Inquiry from 3 December 2007 to 24 December 2007. The Final Report (ALRC 107), containing 45 recommendations for reform, was delivered to the Attorney-General on 24 December 2007. The Report will become public once it is tabled in Parliament, which must occur within 15 parliamentary sitting days of its receipt by the Attorney-General.

FOI Inquiry

The ALRC received Terms of Reference from the Attorney-General of Australia to examine the *Freedom of Information Act 1982* and related laws on 24 September 2007. Following the announcement, work has commenced on identifying and gathering relevant resources for the Inquiry. An Issues Paper setting out questions for consultation is expected to be published in the first half of 2008, and stakeholders are invitied to make submissions to the Inquiry. The Final Report is due to be delivered to the Attorney-General's Office by 31 December 2008.

Farewell Justice Susan Kiefel

Following the announcement of her appointment to the High Court of Australia, Justice Susan Kiefel resigned from her position as a part-time member of the ALRC. Justice Kiefel had been a member of the ALRC since 7 April 2003, and had made important contributions to the ALRC's inquiries into Gene Patenting and Human Health, Sentencing of Federal Offenders, Uniform Evidence Law, Sedition, Privacy, and Client Legal Privilege. ALRC Commissioners and staff warmly congratulate Justice Kiefel on her elevation to the High Court.

Welcome Justice Berna Collier

Justice Berna Collier was appointed as a part-time Commissioner of the ALRC for three years commencing on 2 October 2007. Justice Collier has been a Justice of the Federal Court of Australia, based in Brisbane, since February 2006.

Internship Program

The ALRC internship program continues to provide law students with an opportunity to work alongside ALRC staff to develop an understanding of law reform work. During the second half of 2007 the ALRC benefited from the work of four Australian students—from the University of Sydney, Macquarie University and the University of NSW—as well as two overseas students—one from the University of Maryland and one PhD student from Cambridge University. Each student intern was allocated to the Privacy, Client Legal Privilege or Freedom of Information inquiry team, and completed an internship either one day per week over a university semester or for six weeks full-time.

Solomon Islands Law Reform Commission Visit

The ALRC is committed to assisting other law reform commissions both within Australia and internationally, and was therefore keen to extend an invitation to the Executive Director of the Solomon Islands Law Reform Commission (SILRC) and three legal officers visit Sydney for a series of administrative and organisational briefing sessions with the NSW Attorney-General's Office, the NSW Law Reform Commission and the ALRC in November 2007.

ALRC staff gave a series of presentations to the SILRC staff, with a view to providing an insight into the history, role and organisational structure of the ALRC; consultation and research processes; development of reform recommendations and writing of reform papers and reports; communications and media liaison; and general management issues.

The SILRC staff acknowledged the trip as being extremely valuable.

Launch of Australian Academy of Law

The official launch of the Australian Academy of Law (AAL) was held at Government House, Brisbane on 17 July 2007. The event was organised by the ALRC and hosted by Her Excellency, Ms Quentin Bryce AC, Governor of Queensland. A symposium entitled 'Fragmentation or consolidation? Fostering a coherent professional identity for lawyers', followed the launch. Over 80 Foundation Fellows, ex-officio members of the Academy and invited guests attended the launch and symposium.

The ALRC's *Managing Justice* report, released in 2000, recommended the establishment of the AAL owing to the problems associated with the lack of cohesion and direction in the legal profession. The AAL is an opportunity for some of Australia's leading legal thinkers, including senior judges, practitioners and academics, to collaborate on issues such as legal scholarship, education and training, and national ethical and practice standards.

Chief Justice of the High Court, the Hon Murray Gleeson, is the Patron of the new AAL.

The 2007 Kirby Cup

The 2007 Kirby Cup Competition winners were announced at the annual conference of the Australian Law Students Association (ALSA) in Canberra on 5 July 2007. The competition, organised by the ALRC in conjunction with ALSA, attracted a high calibre of submissions. Teams of two students provided a written submission relating to the ALRC's Client Legal Privilege Inquiry. Three teams were chosen to participate in an oral advocacy round which was held at the July conference. At the conclusion of the oral presentations, judges deemed Tom Smyth and Christian Strauch's submission 'The way forward for legal professional privilege' the winning entry. Tom and Christian will have their names engraved on the perpetual Kirby Cup, donated by the Hon Justice Michael Kirby AC CMG, who was

the Foundation Chairman of the ALRC. The winning submission is published on page 58.

Past reports update

ALRC 102—Uniform Evidence Law

Uniform Evidence Law (ALRC 102, 2005) was a joint report of the Australian Law Reform Commission, New South Wales Law Reform Commission and the Victorian Law Reform Commission. Law reform bodies from Queensland, Tasmania, Western Australia and the Northern Territory were also involved in developing the proposals. The Report recommended changes to the existing uniform Evidence Acts in place in the Commonwealth, New South Wales, Tasmania and Norfolk Island, and encouraged other jurisdictions to adopt the modified Act in its entirety.

In July 2007, the Standing Committee of Attorneys-General (SCAG) approved a Model Uniform Evidence Bill that incorporates the recommendations of the Uniform Evidence Law Report. The text of the Model Uniform Evidence Bill is available from the NSW Attorney General's Department's website.

New South Wales has moved to implement the recommended changes to the Evidence Act 1995 (NSW) with passage of the Evidence Amendment Act 2007 (NSW). The Bill received assent on 1 November 2007. It is expected that the provisions will not be proclaimed to commence until at least May 2008, in order to give lawyers and others time to become familiar with the amendments.

The then federal Attorney-General, Mr Philip Ruddock MP, indicated in July 2007 the Australian Government's general intention to implement the recommendations of the Uniform Evidence Law Report, and it was included on the list of proposed bills for 2007 prior to Parliament being prorogued for the federal election. Mr Ruddock also indicated, however, that the Australian Government at that time did not support the recommendations to extend to same sex de facto partners the ability to object to being compelled as a witness in a criminal matter against their partner, or the proposed broader definition of 'traditional laws and customs' to be applied in relation to exceptions to the hearsay and opinion rules.

Two recommendations of the Uniform Evidence Law Report have been enacted in the Evidence Act 1995 (Cth). The Evidence Amendment (Journalists' Privilege) Act 2007 (Cth) introduced a privilege to protect confidential communications between journalists and their sources, based on Recommendations 15–1 and 15–2 of the Uniform Evidence Law Report. The relevant provisions implementing the privilege commenced operation on 26 July 2007.

ALRC 96—Essentially Yours

There have been a number of publications in 2007 relevant to the implementation of recommendations in Essentially Yours: The Protection of Human Genetic Information in Australia (ALRC 96, 2003). In March 2007 the National Health and Medical Research Council endorsed and published the revised National Statement on Ethical Conduct in Human Research. The revision incorporates a number of recommendations made in the *Essentially Yours* Report, including improved waiver of consent and unspecified consent provisions, clearer guidance on identifiable, re-identifiable and non-identifiable data, more stringent conditions for the establishment and running of biobanks and genetic registers, and ethical issues specific to genetic research. (Recommendations 15–1, 15–2, 15–4, 16–1, 17–1, 18–1, 18–2, 18–3).

Recommendation 11–2 recommended the development of ethical standards for medical genetic testing. In 2006 the National Pathology Accreditation Advisory Council (NPAAC) circulated for public consultation the first edition of the Classification of Human Genetic Testing (A Supplementary Guide to Laboratory Accreditation Standards and Guidelines for Nucleic Acid Detection and Analysis). The final version of the document is expected to be finalised in late 2007, and take effect from 1 January 2008.

ALRC 80—Legal Risk in International Transactions

Legal Risk in International Transactions (ALRC 80, 1996) was completed before the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency was finalised. [UNCITRAL has a general mandate to further the progressive harmonisation and unification of the law of international trade]. The ALRC recommended that a high priority be given to Australian Government involvement in the UNCITRAL Working Group on Insolvency with a view to adoption of the Model Law.

UNCITRAL finalised and adopted its Model

Law on Cross-Border Insolvency in May 1997. Many countries have been working towards adoption of the Model Law, including Australia. In September 2007, the Cross Border Insolvency Bill 2007 was introduced to the federal Parliament to implement the Model Law into Australian law. The Bill lapsed with the prorogue of Parliament for the federal election.

On the right to life

By John M. Coetzee

The right to life is usually taken to mean the right to live, that is to say, to continue to live until one dies of natural causes or decides to put an end to one's existence. It is not usually taken to mean the right to have a life if one does not yet have a life—in parallel to the way in which the right to a roof over one's head, is usually taken to mean the right to have a roof, if one does not yet have a roof.

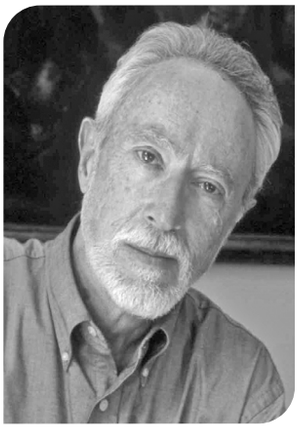
Only in the debate over abortion in certain Western countries where the Christian legacy is still strong, does the right to a life by those not yet born have any meaning. Even within that debate, the unborn are taken to mean those still at the embryonic stage of life, in the nine months between conception and birth. However it should be said that behind the abhorrence of contraception in some Catholic circles, there can be discerned the idea that contraception denies life—denies incarnation—to entities that can be imagined as disembodied souls.

But this common understanding of the right to life as the right to go on living needs to be broadened once we begin to talk about a right to life for animals, or for certain species of animals. This need is most obvious in the case of domesticated animals, livestock in particular—for the breeding of livestock is tightly controlled by the human beings who own them (own them body and soul, so to speak). Among livestock, most males are castrated soon after birth. Sexual intercourse is permitted only between those individuals designated by their owners as most fit to procreate, and only at times decided by their owners. Indeed, procreation is often achieved without sexual intercourse being permitted at all, by artificial insemination. We may even be looking at a future when breeding will be achieved via cloning.

In practice this means that animals are born, called into being, as dictated by the market, that is to say, the market for their 'products': the products of their life like their milk, and the products of their death like their flesh, their skin, and their bones and blood. Thus if tomorrow we—humankind in general, or certain national states—were thoughtlessly to approve and begin to enforce a so called *right to life* for livestock, the immediate effect would be a moratorium on births as the livestock owners who control breeding cut back on no longer profitable herds. In the extreme case of domesticated pigs, who provide no life products, only death products, a right to life of this kind would mean that within a decade or so the only individuals left on earth would be in zoos and sanctuaries.

For this reason any putative right to life for animals has to be considered in conjunction with a right to multiply, which I take to mean a right to some kind of autonomous procreative life and therefore some kind of autonomous sexual life—the kind of right that animals in the wild still exercise, except of course that in their case it is not a right but a power.

The notion that beings who do not yet exist, who exist only potentially as (to use a metaphor) unborn souls, may have rights attributed to them is not entirely foreign to the law as it stands at present. For the difference between mass murder and genocide is that in the case of genocide the intention of the killers, or the intention attributed to them, is to deprive the group or class or nation of their victims of the power to perpetuate themselves—to wipe



Professor John M. Coetzee is a South-African-born novelist, critic, and translator, who was awarded the Nobel Prize for Literature in 2003. He is the patron of Voiceless, The Fund for Animals

their victims off the face of the earth not only today but for all time. The essence of genocide is thus that it plans to liquidate not only the living but the unborn; and the exceptional sanctions that we have prescribed since 1945 for the offence of genocide recognise that in its attack on the unborn it is a particularly heinous crime.

When we speak of the right to life of human beings, we seem to mean not only the right of living human beings to go on living but the right of unborn human beings to enter life, a right claimed against all powers, in some cases even against their biological parents. But when we debate a right to life for animals, and in particular animals whose group and individual destinies have fallen under human control, there are huge and probably insurmountable practical objections to interpreting the right to life in this extended fashion. A world in which it would no longer be allowed to neuter cats or dogs, or to prevent their coupling, is simply—that is to say, humanly—unacceptable.

Furthermore, to argue for a right to life for livestock—animals called into being not for their own sake but solely to serve the interests of their owners—is tantamount to arguing for the extinction of some of the largest mammal and bird populations on earth.

In the hierarchy of rights, the right to life is at the top or close to the top. But when we move from speaking of a right to life for our own species—for each and every individual of our species—to a right to life for other species—for every individual within those other species—it soon turns out that the right we are arguing for is so qualified and so attenuated that we might doubt that right is the best term for it.

△For this reason any putative right to life for animals has to be considered in conjunction with a right to multiply, which I take to mean a right to some kind of autonomous procreative life and therefore some kind of autonomous sexual life, the kind of right that animals in the wild still exercise—except of course that in their case it is not a right but a power. △

The basic rights of some non-human animals under the common law

By Steven M. Wise

I once wrote a book about an invisible man who sued to be seen. This ghost's name was James Somerset and he was a slave in 1771 London. He wasn't literally invisible, but legally invisible. Because English slaves were property, judges could not perceive them. Then, as today, only legal persons counted in courtrooms, for only they existed in law for their own benefits.

Legal things existed for the benefit of persons. In 1772 this invisible man achieved judicial perceptibility through a lawsuit in England's Court of King's Bench. Slavery, said that court's Chief, Lord Mansfield, was 'so odious' that the common law would not suffer it. Because of Mansfield's judgment, James Somerset shed his legal thinghood and became legally visible, and that was the beginning of the end of human slavery.

Two hundred years later, one respected United States Circuit Court Judge, John T. Noonan, would write that '(a) major function of Anglo-American law for three hundred years (was) the creation and maintenance of a system in which human beings were regularly sold, bred, and distributed like beasts.' This comprehensive system was fatally wounded by the *Somerset* decision, though decades would pass before it expired. Today, human slavery is everywhere a terrible crime.

But there has been an overall increase in slavery. The creation and maintenance of a system in which it is the brutes who are brutalized has been a major function of Anglo-American law since before the Norman Conquest. Nearly two thousand years ago, a Roman jurist wrote '*Hominum causa omne jus constitum*' ('All law was established for men's sake'), echoed today in the pages of a modern jurisprudence treatise: '*(h)ominum causa omne jus constitum*. The law is made for men and allows no fellowship or bonds of obligation between them and the lower animals.' The major consequence of this archaic legal thinking has been that nonhuman animals are categorized as things and not persons and therefore lack all legal rights.

We first need to understand what rights are. During World War I, Yale law Professor Wesley Hohfeld gave an explanation that most embrace. A right, and there are four of them, is an advantage conferred by legal rules upon one legal person against another who bears the corresponding legal detriment. A *liberty* allows us to do as we please, but there is *no right* to have one's liberty respected. A *claim* demands respect by placing a *duty* upon another to act, or not act, in some way towards a claimant. A *power* affects the legal rights of another who is *liable* to be affected (the power to sue is perhaps the most important power). Finally, an *immunity* legally *disables* one person from interfering with another. In short, liberties and powers tell us what we may do, claims say what we must or must not do, and immunities tell us we cannot do. Thus you cannot enslave me, because human slavery is prohibited; humans are *immune* from enslavement. Such immunities as freedom from slavery and torture are the most basic kind of human legal rights. It's just these rights to which at least some nonhuman animals are most strongly entitled, at least under the common law, at least as most judges understand it.

Common law judges may differ in their legal values. 'Formal' judges decide cases the way judges have already decided them, just because judges decided them that way. The most formal of these judges—I call them

Professor Steven M. Wise is an internationally acclaimed animal protection advocate, author and lecturer on animal law

'Precedent (Rules) Judges' – prefer certain law to law that is correct. Valuing stability, certainty and predictability, they understand law as a system of narrow and consistent rules from which they can glean rules that can be mechanically applied. 'Precedent (Principles) Judges' also look backwards, but to a past that produced not narrow rules, but broad principles.

On the other hand, 'substantive' judges weigh social considerations, moral, economic, and political, present and future. They want law to express a community's present sense of justice and believe that judges must keep law consonant with contemporary public values, prevailing understandings of justice, morality, and new scientific discoveries. They don't want issues just settled, but settled right. Substantive Judges who predict the future effect of their rulings are 'Policy Judges.'They think law should achieve important social goals, such as economic growth, national unity, or the health or welfare of a community. 'Principle Judges' supremely value principles and moral rightness and may borrow those principles from anywhere, religion, ethics, economics, politics, even literature.

The argument for basic legal rights, humans and nonhumans, is most firmly grounded on principle. In arguing for the fundamental rights of a nonhuman animal, I rely upon those first principles of Western law, liberty and equality. Liberty entitles one to be treated a certain way because of what one is, especially one's mental abilities. Some irreducible degree of bodily liberty and bodily integrity are everywhere considered sacrosanct, and if we trespass upon those right, we inflict the graves injustice of treating persons as things. We may not enslave or torture. Yet these sacred places are the front line in the battle for the rights of nonhuman animals. Equality demands that likes be treated alike. Equality rights depend upon how one rightless being compares to another being with rights. An animal might be entitled to basic equality rights, even if she isn't entitled to liberty rights, because she is similar to someone with basic liberty rights.

One important aspect of liberty is autonomy or self-determination. Things don't act autonomously. Persons do. Philosophers often understand autonomy as Kant did two centuries ago. I call Kant's a 'full autonomy,' where fully autonomous beings act completely rationally and should therefore be treated as legal persons. Most moral and legal philosophers, and nearly every common law judge, however recognize that lesser autonomies exist and that a being can be autonomous if she has preferences and the ability to act to satisfy them, if she can cope with changed circumstances, make choices, even ones she can't evaluate well, or has desires and beliefs and can make appropriate inferences from them.

These lesser autonomies I call 'realistic' or 'practical.' 'Practical autonomy' is not just what most humans have, but is what most judges think is *sufficient* for basic liberty rights. I claim that a being has practical autonomy and is entitled to personhood and basic liberty rights if she can desire, can intentionally act to try to fulfill her desire, and possesses a sense of self sufficient to allow her to understand, even dimly, that is she who wants something and is trying to get it. Consciousness, but not necessarily self-conscious, and sentience are implicit.

How do we know that a being has practical autonomy? The more exactly the behavior of any nonhuman animal resembles ours and the taxonomically closer we are, the more confident we can be that she possesses practical autonomy. Chimpanzees, for example, are conscious, probably self-aware, possess have some or all the elements of a theory of mind (they know what others see or know), understand symbols, use a sophisticated language or language-like communication system, and may deceive, pretend, imitate, or solve complex problems that require mental representation. We can be confident that they possess practical autonomy sufficient for basic liberty rights.

Other animals may lack self-consciousness and every element of a theory of mind. But they may possess some simpler consciousness, be able mentally to represent and act insightfully, use symbols, think, use a simple communication system, have a primitive, but sufficient, sense of self, and not be too evolutionarily distant from humans. The stronger and more complex these abilities are, the more confident we can be that a being possesses practical autonomy.

Equality rights require a comparison. Since likes should be treated alike, something can only be equal to something or someone else. The strongest argument for equality rights is simple: even very young or severely cognitively-impaired humans possess basic legal right to bodily integrity, though they lack autonomy, because they are legal persons. We have seen that such animals as chimpanzees possess very complex minds, yet lack all rights, as they are things. This offends equality.

Now we arrive at a paradox. How does a legally invisible being present her case for personhood to a judge who doesn't see her? And so we return to where we began, with the case of James Somerset, for one answer is: by the common law writ of habeas corpus. By the end of the seventeenth century, the common law writ of habeas corpus had evolved into the usual procedure by which a legal person, or an entity claiming to be one, could test the legality of her detention by any private or public entity, in any place, under any circumstances. Extremely broad and impervious to technicalities, the writ of habeas corpus, in both its statutory and common law forms, continues to remain available to remedy every illegal restraint. The common law writ of habeas corpus was never limited to legal persons. To the contrary, it was used by petitioners who were understood to be legal things, but who alleged that the writ ought to apply to them. Most prominently, the writ was wielded by black slaves who were themselves legal things. James Somerset used it and so did other black slaves, both in England and in America, especially in the North. Southern judges, alas, continued to refuse to see the slaves who stood before them pleading to invoke the Great Writ.

One court started down this path. On April 10, 2005, Environmental Department prosecutors and others sought a writ of habeas corpus from a court in Bahia, Brazil on behalf of a chimpanzee named Suica, who was caged at a zoo.The petitioners claimed that 'in a free society, committed to ensuring freedom and equality, laws evolve according to people's thinking and behavior, and when public attitudes change, so does the law, and several authors believe that the Judiciary can be a powerful social change agent.' Before the case could be finally adjudicated, Suica died. Accordingly, on September 28, 2005, the judge dismissed the case. He explained, however, that he had taken the case.

> 'the theme is deserving of discussion as this is a highly complex issue, requiring an in-depth examination of 'pros and cons'. … One could, from the very topic of the petition, have enough grounds to dismiss it, from the very outset, arguing the legal impossibility of the request, or absolute inapplicability of the legal instrument sought by the petitioners, that is, a Habeas Corpus to transfer an animal from the environment in which it lives, to another. However, in order to incite debate of this issue ... I decided to admit the argument ... (and that) (a)mong the factors that influenced my accepting this matter for discussion is the fact that among the petitioners are persons with presumed broad legal knowledge, such as Prosecutors and Law professors ... (the) Law is not static, rather subject to constant changes, and new decisions have to adapt to new times.

Charlie the Tuna, and other 'suicide food' fallacies

Mark Kingwell is a professor of philopsophy at the University of Toronto. He specialises in theories of politics and culture.

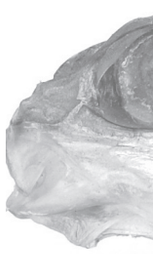
By Mark Kingwell

We've all seen them, adorning the signage of a local rib joint or charrusqueria: a laughing lamb pouring barbecue sauce on its leg, a cow wearing a bib happily slicing off steaks from its own haunch, a slouching chicken beckoning diners toward a char-broil spot. Charlie, the hipster beret-sporting tuna, longed to taste good enough for the picky StarKist canners. Kermit the Frog once angled to get a job shilling a fried frog's-leg restaurant. In Douglas Adams '*The Restaurant at the End of the Universe,* a talking cow recommends its own liver as main course.

These images, once funny or charming, have an increasingly ghoulish tinge now that humans are more and more uneasy about their position at the top of the food chain. Witness the recent spate of hand-wringing books and films about consumption, the slow and organic food movements, and the idea of lessening one's food-consumption footprint—even as obesity is on the rise throughout the developed world. What we eat is an ethical issue. But so is how we picture and package it.

Making animals publicists for their own digestion is the last revenge of humans on their food. Some bloggers bluntly label the images 'suicide food' and have collected an unnerving archive of them over the last year (see suicidefood.blogspot.com). 'Suicide food is any depiction of animals that act as though they wish to be consumed,' they write. Suicide food actively participates in or celebrates its own demise. Suicide food identifies with the oppressor. Suicide food is a bellwether of our decadent society. Suicide food says, 'Hey! Come on! Eating meat is without any ethical ramifications! See, Mr. Greenjeans? The animals aren't complaining! So what's your problem?' Suicide food is not funny.' The outraged-theorist tone of the prose may not be for everyone, nor the aggressive vegetarian position, but suicide food forces us all to examine our actions. Suicide food is a naturalizing myth. It makes animals complicit in our desires to eat them.

Anthropomorphising animals is a familiar move, and has its benefits. Satire often employs animals that are more human than human, for better and worse: Jonathan Swift's noble Houyhnhnms and Will Self's apes are both cruel reflections on our weakness. But naturalising myths cut both ways. The family-values boosters who saw the nuclear family defended by the staunchly faithful breeding in *March of the Penguins* may be shocked to hear of the polymorphous erotic antics of bonobo monkeys, our much nearer evolutionary cousins. (Nobody is likely to make a documentary called 'The Orgy of the Bonobos'.) Nothing is natural until we make it so, and we usually do that for self-serving reasons. We should defend the reasons, not hide behind the charming fictions.



Suicide food is vile because it adds cuteness to the common avoidance tactic of packaging dead animals in forms distant from their lived reality. We like animals better, can relate to them more easily, when they look and speak like cheerful cartoon versions of themselves.

than an actual pig. From Grimm to Disney, domestication of the animal world has been a staple of our story-telling; modern childhood is probably unimaginable without it.

At the same time, the death of winsome animals is harder to bear. Suicide food is thus a neat resolution of the cute-animal paradox. Depict a cute beast with a cartoon face (aw..), then have it cheerfully dispose of itself so...we don't have to (yay!). See, kids, the happy pig stripping bacon off its belly! Look how fetching, the lobster throwing itself into a pot!

The logical extension of suicide food is murder food. That's when one member of the target species offers up another member, usually on a platter, for human consumption. I always wonder who decides which pig gets to be the one in the apron and chef's toque, and which, the supine with an apple in its mouth—a variant of the Goofy/Pluto Conundrum, (why does one dog get to be the man while the other has to stay, you know, a dog?).

If you are going to eat animals, you must at least confront the truth of their lives—and deaths. We raise or hunt these creatures in order to eat them. The circumstances of their demise should not be a black box, decorated with lurid cartoons of them killing themselves. There are associated costs, too, in hectares of rainforest destroyed or square metres of carbon dioxide generated. Enjoying the fruits of a choice, especially a violent or damaging one, without bearing any of its costs is one definition of decadence, as the bloggers rightly claim. It is taking comfort without taking responsibility.

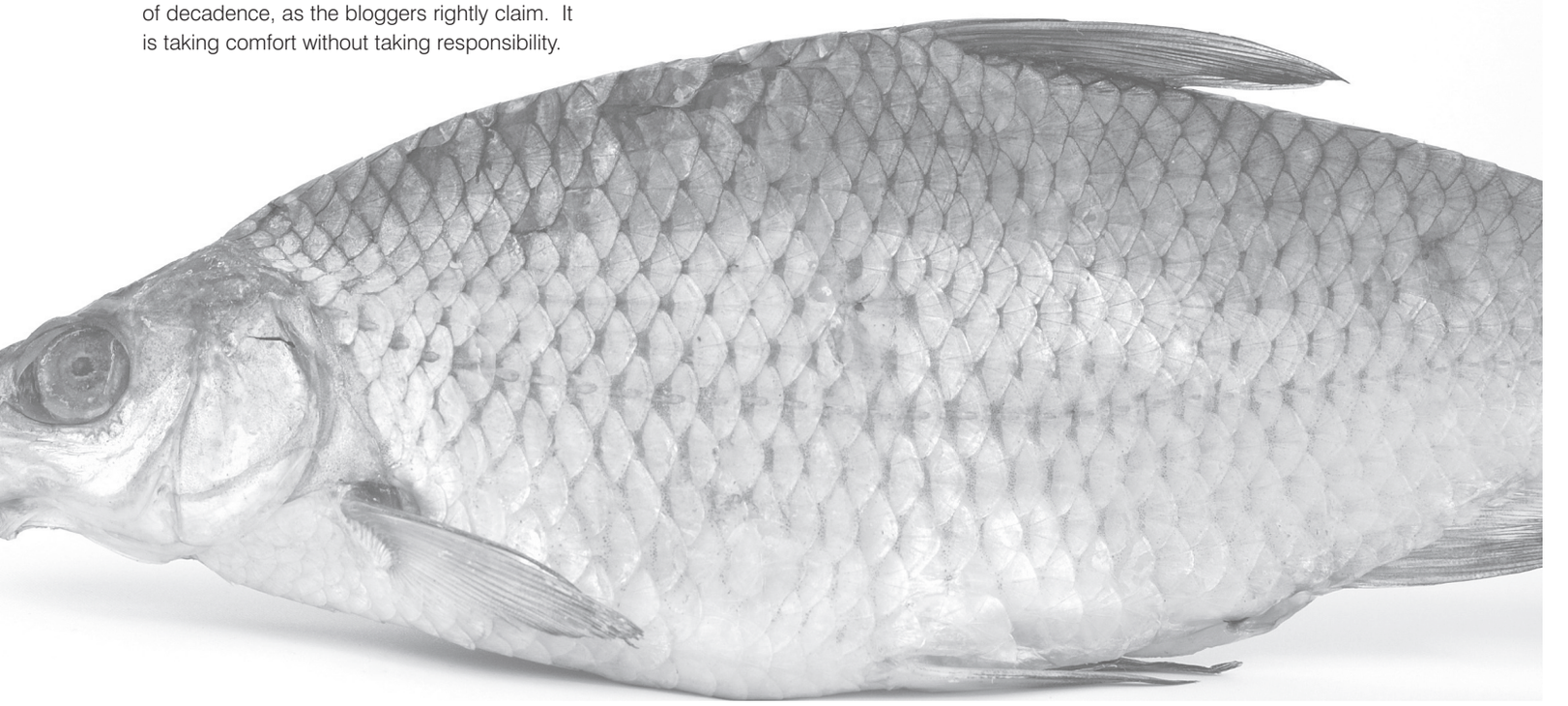
Decadence is not just about food, or even advertising. Suppose that you drive a large luxury SUV—this form of experience is impossible without a reliable supply of fossil fuel. Suppose further that this supply can be maintained only through military actions in which young men and women are killed daily. (Those actions are defended with reference to other reasons, of course, like liberation and justice and democracy). Now suppose, finally, that you have no wish to give up the first supposition because of your knowledge of the second. What would you do? Would you, perhaps to cover your discomfort or suppress your knowledge, decorate your vehicle with large yellow ribbons and flags and loudly express your 'support' for the dead?

The process of a society consuming itself, feeding off its own citizens by making them into digestible energy, is what the philosopher Paul Virilio calls endocolonization. Endocolonizers do not exploit distant peoples and resources, they mine their own populations. Suicide food is imagery that makes animals unwitting accomplices to their own death—we can presume they would object if they were able.

Our own forms of self-consumption are more confused and even more sinister.

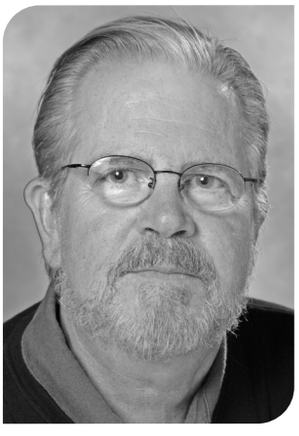
We know fossil fuel, like meat, comes from dead animals. But which species is actually being burned?

△ Witness the recent spate of hand-wringing books and films about consumption, the slow and organic food movements, and the idea of lessening one's food-consumption footprint—even as obesity is on the rise throughout the developed world. What we eat is an ethical issue. But so is how we picture and package it. △



What we learn from Alice

By Tom Regan



Tom Regan is an American philosopher and animal-rights activist.

This article is adapted from Chapter Five, "What We Learn from Alice," Empty Cages: Facing the Challenge of Animal Rights (Lantham, MD: Rowman and Littlefield) 2004.

Some opponents of animal rights give credit where credit is due. They don't agree with the idea. Not at all. They wouldn't be caught dead saying 'tofu' and 'let's eat' in the same breath. Nevertheless, they acknowledge that animal rights should be considered on its merits.

Despite stereotypes to the contrary, Animal Rights Advocates (ARAs) do not rest our case on clever slogans, what the tea leaves say, or indecipherable haiku incantations. Fair opponents of animal rights understand that they are obliged to answer the animal rights message rather than attack the animal rights messenger.

The major animal abuser industries think they have a better idea. In their minds, attack is preferable to address. The general public needs to be encouraged to view the controversy over animal rights as a contest between sensible animal welfare moderates (that would be the folks in the animal abusing industries), who favour humane treatment and responsible care, versus 'out-of-this-world' animal rights extremists, who favour no use and violent, terroristic tactics. To this end, the public relations arms of these industries feed the mass media their daily helping of positive press releases about the industries and negative stories about ARAs.

Having thus been enlisted, the media does its part (not always, but usually) by showing and telling the outrageous or unlawful behaviour of a handful of obliging ARAs, then showing and telling the many (it is assumed) good things done by the industries.

You don't have to be a dealer in Vegas to see that the rhetorical cards are stacked in favour of the major abusers. Who but irrational, misanthropic, law breaking, terroristic animal rights extremists can be against animal welfare, humane treatment, and responsible care?

This is not the question we should ask. The question we should ask is, 'How much confidence should we place in what spokespersons for the major animal abuser industries say about their industries?' The simple one word answer to this question is, 'None.'

Humpty Dumpty's arrogance

Say what you will about ARAs, we don't hold anything back. What we say is what we mean, and vice versa. We are forthright, if nothing else. Even people who disagree with us do not have any trouble understanding what we think. We think the major animal abuser industries are doing something terribly wrong. We think the only adequate response to what they are doing is to put them all out of business. Empty cages, not larger cages. It's hard for anyone to misunderstand that.

The same cannot be said for those who speak for the industries. When it comes to the meaning of words, these people apparently take their inspiration from Humpty Dumpty. Recall his famous exchange with Alice, in Lewis Carroll's Through the Looking Glass.

'I don't know what you mean by 'glory',' Alice said.

Humpty Dumpty smiled contemptuously. 'Of course you don't—until I tell you. I meant [by 'glory'] 'a nice knockdown argument for you'!'

'But 'glory' doesn't mean 'a nice knockdown argument for you',' Alice objected.

'When I use a word', Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.'

When industry spokespersons use words like 'animal welfare', 'humane treatment' and 'responsible care,' they must be thinking that, like Humpty Dumpty, they can make these words mean anything they choose. In fact, as Alice could have told them, they can't.

Consider the word 'humane'. Like other words in common usage, it does not have a vaporous meaning that is just hanging around, like an empty parking place, waiting for the next person to fill it with a self-serving definition of their choosing. Webster's Unabridged Dictionary defines it this way: 'marked by compassion, sympathy, or consideration for other human beings or animals'. The American College Dictionary's definition differs somewhat; 'humane' is defined as 'characterized by kindness, mercy, or compassion'. When spokespersons for the major animal abuser industries tell us that their industries treat animals humanely, we should expect to find industry practices that show compassion, sympathy, consideration, kindness and mercy. Why? Because (unless you're Humpty Dumpty) this is what 'humane' means.

Again, think about what it means to act in ways that pay due regard to another's welfare. The Random House College Dictionary defines welfare in terms of 'good fortune, health, happiness.' To this list the American Heritage Collegiate Dictionary adds 'well being'. No one who speaks common English will have any difficulty in applying these ideas to animals.

For example, if I tell you I treat my cat and dog with due regard for their welfare, you will have reasonable expectations about my behaviour. You will expect to see me making sure that their basic needs (for food, water, shelter and exercise) are satisfied; and you will not expect to see me deliberately do anything to harm them—like break their legs or burn their eyes out. If spokespersons for the major animal abuser industries say they treat animals with due regard for their welfare, we should have the same expectations. Why? Because (unless you're Humpty Dumpty) this is what 'concern for animal welfare' means.

Industry arrogance

Of course, nothing could be further from the truth. By way of example, consider how animals are treated in the biological and biomedical research (aka the vivisection) industry, not in exceptional circumstances but as a matter of routine practice.

- Cats, dogs, and other animals are drowned, suffocated, and starved to death.
- They are burned, subjected to radiation, and used as 'guinea pigs' in military research.
- Their eyes are surgically removed and their hearing is destroyed.
- They have their limbs severed and organs crushed.
- Invasive means are used to give them heart attacks, ulcers, and seizures.
- They are deprived of sleep, subjected to electric shock, and exposed to extremes of heat and cold.

Each and every one of these procedures conforms with the vivisection industry's commitment to promoting animal welfare and practising humane care. Each and every one of these procedures, in other words, shows the industry's scandalous disregard for the facts. (I leave it to psychiatrists to analyse the psycho-dynamics of people who live in such denial).

If this situation was unique; if what is true of the spokespersons for the vivisection industry was true only of these spokespersons; then, while this would be bad enough, it would not be as bad as it could be.

But what is true of the spokespersons for the vivisection industry is not true only of these spokespersons. It is true of all the spokespersons, for all the major animal abuser industries.

- The industries that turn animals into food.
- The industries that turn them into clothes.
- The industries that turn them into performers.
- The industries that turn them into competitors.

The spokespersons for all these industries talk the same talk as the spokespersons for the vivisection industry. Animals are treated 'humanely,' with due regard to promoting their 'welfare'.

Yes. Of course. Certainly. Absolutely. I mean, they are treated this way just as much as 'glory'

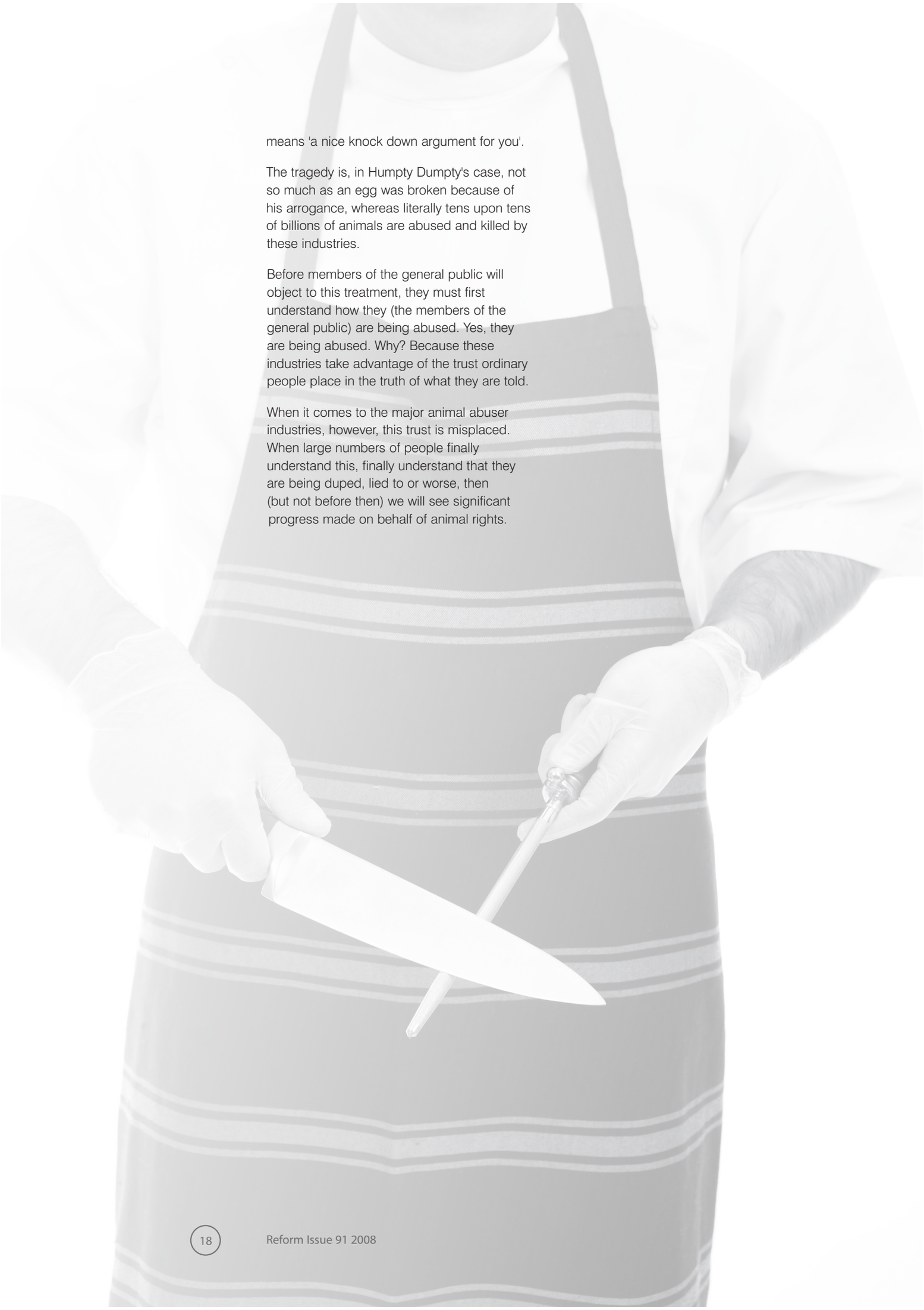
△When industry spokespersons use words like 'animal welfare,' 'humane treatment' and 'responsible care,' they must be thinking that, like Humpty Dumpty, they can make these words mean anything they choose. In fact, as Alice could have told them, they can't.△

means 'a nice knock down argument for you'.

The tragedy is, in Humpty Dumpty's case, not so much as an egg was broken because of his arrogance, whereas literally tens upon tens of billions of animals are abused and killed by these industries.

Before members of the general public will object to this treatment, they must first understand how they (the members of the general public) are being abused. Yes, they are being abused. Why? Because these industries take advantage of the trust ordinary people place in the truth of what they are told.

When it comes to the major animal abuser industries, however, this trust is misplaced. When large numbers of people finally understand this, finally understand that they are being duped, lied to or worse, then (but not before then) we will see significant progress made on behalf of animal rights.



Everyone is in favour of animal welfare

By Geoffrey Bloom

Everyone is in favour of motherhood... only, not everyone is in favour of motherhood in the same way. Conservative religious groups and feminists often favour different things about motherhood. Everyone is in favour of the environment...but those in favour of large scale development and those in the environmental movement express their favour in radically different ways.

So too with animals. You would be hard pressed to find anyone who is not in favour of animal welfare and protection from cruelty, who does not think that animals should be spared unnecessary pain. When it comes to animal welfare, or unnecessary pain, the modern animal protection movement claims that the proper realisation of these aims would entail modifying or abolishing most of the ways in which our society treats animals. Clearly, they define these aims differently from most people.

When I put together my Animal Law course at the University of New South Wales, the topics that seemed most important to cover were, on face value, fairly mundane in legal terms. The law is mainly statute, regulation and government policy. It stays fairly flat on the page, concerning itself with the procedural aspects of rearing, transporting and slaughtering animals for food, or accommodating them in zoos or circuses. There is little case law and even less that arouses conceptual interest.

An example: the centrepiece animal law, found in similar forms across the Western world, is anti-cruelty legislation. In New South Wales, it is the *Prevention of Cruelty to Animals Act 1979*. It contains the apparently unexceptionable basic offence in s 5(1) that 'A person shall not commit an act of cruelty upon an animal'. Obvious defences to this and similar offences include the one under s 24(1)(b)(ii) that a person is not guilty of an offence if an act or omission was in the course of, or for the purpose of, destroying the animal, or preparing the animal for destruction, for the purposes of producing food for human consumption, in a manner that inflicted no unnecessary pain upon the animal.

This basic formulation—of a prohibition on cruelty, together with a defence for socially sanctioned uses such as agriculture, if done without unnecessary pain—is the common approach to regulating human treatment of animals. My course looks at the various settings in which humans make use of animals, or otherwise impact on them. Those settings include use of animals in agriculture, for entertainment in zoos or hunting, companion animals, animals in research, and animals in the wild.

I also devote at least five of the 14 classes in my course to topics beyond the regulation of human treatment of animals in specific settings. Those five classes articulate the reasons why I went from having a casual lack of interest in animals, not extending much past our family pet, to developing a consuming passion against our society's unjust and cruel treatment of animals. And the reason why, beyond the apparent regulatory mundanity of laws relating to animals, I decided to create and teach Australia's first ever Animal Law course.

The five classes look at the ethics of human treatment of animals, jurisprudential theories, and the history of the legal status of animals. They propose a new perspective from which to

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Thanks to David Favre, Tara Ward and Ben Zipser for their helpful comments in the development of this article.

△They have the power to hurt and will do none, ... they rightly do inherit heaven's graces △

William Shakespeare

view our common practices. The perspective includes questioning our attitudes to and treatment of animals. Perhaps more than that, it entails realising that these topics are worthy of question in the first place. Viewed from this perspective, rather than the one most of us are raised with, I have found the way our society sanctions its treatment of animals through its laws deeply unsettling and in need of urgent reform.

Learning to look at our treatment of animals from a different perspective, for me, has entailed the same shift in gestalt experienced some years ago by one of the modern animal protection movement's most successful activists, Henry Spira. On his first exposure to modern animal protection arguments, he wrote that, 'I soon began to wonder about the appropriateness of cuddling one animal while sticking my knife and fork into others.' All but the most unreflective people have surely remarked on a certain oddness in the juxtaposition of these two activities. Encouraging people to go beyond that, to a genuine questioning of the ethical strangeness of this juxtaposition—termed 'moral schizophrenia' by Francione—is one of the tasks of my course.

So how is most of our society in favour of animal protection? In a recent report on community attitudes to animal welfare, commissioned by the Australian Government, most people were found to be generally positive about Australia's performance on the issues of animal welfare, with 42% rating it as good or very good, and a further 37% rating it moderately. Along with this was a finding of a complacency or apathy in relation to animal welfare by the wider community. It would appear that this position goes along with approval of the use of animals for farming, and acceptance or ignorance of factory farming to a sufficient degree to result in widespread consumption of its products.

Australian philosopher Peter Singer developed his utilitarian theory of ethics to challenge our society's uncritical and untroubled acceptance of the modern treatment of animals. He is often seen as the founder of the modern animal protection movement.

Singer's thesis is that 'despite obvious differences between humans and non-human animals, we share with them a capacity to suffer, and this means that they, like us, have interests. If we ignore or discount their interests, simply on the grounds that they are not members of our species, the logic of our position is similar to that of the most blatant racists or sexists who think that those who belong to their race or sex have superior moral status, simply in virtue of their race or sex, and irrespective of other characteristics or qualities.'

Singer used the term speciesism to describe this form of unjustified discrimination. While most humans have intellectual capacities superior to animals, there are many who do not. Infants and the severely mentally disabled are intellectually inferior to many mammals, and yet we (rightly) do not inflict painful deaths on them to test household products or eat them. The fact that humans do these things to animals is therefore arguably a form of speciesism.

Going further than Singer in proposing a different status for animals are philosophers like Tom Regan, who argue that animals, like humans, have basic rights of liberty and bodily integrity. At the very least, mammals greater than a year old, who are sentient and self-conscious, have those rights. In classic rights theory, a right trumps an interest. The more so where the right is a basic right. So, the basic right of an animal to bodily integrity, otherwise known in the common law tradition as *habeas corpus*, trumps the mere interest of humans in eating animals. The reason why the eating of animals is a 'mere interest' is that a vegetarian or vegan diet is nutritionally sufficient, and indeed healthier than an omnivorous one. So too, the basic rights of animals trump the mere interests of humans in being entertained by animals in circuses, on race tracks or in hunting.

Utilitarians like Singer, and rights theorists like Regan, come to most of the same policy prescriptions, albeit by different paths. Where they separate is where there is an argument that the overall welfare of many may be increased by the sacrifice of the welfare of a few, or, in the familiar utilitarian calculation, the greatest good for the greatest number.

Singer may countenance experimentation on animals where that may lead to major benefits for many humans, for example, experiments on chimpanzees for an HIV vaccine. Regan says that the violation of a basic right of a chimpanzee, the right to bodily integrity, is not justified by the upholding of a less significant right, the right to experiment in the hope of finding a cure, even where the less significant right is held by many more beings.

The divisions of opinion among lawyers echo those among ethicists. Mike Radford, a British legal academic, advances an animal welfare position that 'legislative intervention has made a positive difference, continues to do so, and reform has the potential to improve the situation further'. Criticising views of the modern animal protection movement, Radford argues that 'to suggest that we should somehow isolate ourselves from [animals] is not only fanciful, it is also a denial of the human condition. We are part of the animal kingdom, not separate from it, and, like all other forms of life, each of us has to exploit our environment in order to survive.'

Lawyers working in animal law pose challenges to a legal system with traditional views about animals. American lawyer Steven Wise, sometimes working with renowned chimpanzee researcher Jane Goodall, has sought to establish that higher primates should be recognised as legal persons. They argue that higher primates should have all the rights, and standing to vindicate those rights, that the status of personhood implies.

American lawyer Gary Francione locates the fundamental problem with the legal classification of animals as property, rather than persons. 'As a general matter, whenever we seek to resolve a perceived human-animal conflict, we balance our assessments of the human benefits to be derived from the animal use against the interests of the animal(s) that will be 'sacrificed' in the process ... The problem is that the balancing process is nothing more than an illusion in which the outcome has been predetermined,' by comparing 'human interests, which are protected by claims of right in general and of a right to own property in particular, against the interests of property, which exists only as a means to the ends of a person'. Francione would like to see a 'change in the property status of non-humans [involving] the recognition that animals have at least some non-tradable interests'.

Animals in agriculture account for about 95 percent of all animal use by humans. Especially in the post-Second World War period, agricultural use of animals has become increasingly industrialised or 'intensive'. Australia, unlike many other industrialised countries, still cultivates many of its farm animals out in the open, or 'extensively'. This is generally recognised as providing better welfare for animals. Yet in Australia, well over 90 per cent of chickens raised for eggs and meat, and over 90 per cent of pigs, are raised intensively, or factory farmed.

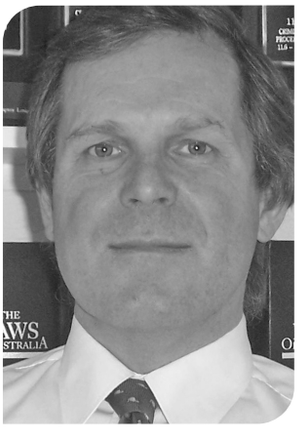
Factory farming has institutionalised the systematic maltreatment of animals to satisfy the industrialised world's desire for inexpensive animal protein. Factory farming includes practices like keeping sows pregnant for 10 months of every year of their adult lives in metal crates with concrete floors that allow one step forward at most and no side-to-side movement. They live their whole lives in sheds with little natural light, the air thick with ammonia from their faeces. Or keeping battery chickens in a space smaller than an A4 page, the sensitive nerve endings in their beaks burnt off to prevent hostile pecking, developing painful bone and organ disorders that come from living in impossibly cramped conditions during their unnaturally short lives. Or the export of live animals in cramped, frightening and generally awful conditions for weeks on end.

Think again about the typical anti-cruelty provision cited at the start of this article, which prohibits the unnecessary infliction of pain on an animal when slaughtering it. Francione would ask: how much of the cruelty that is inherent in the normal methods of production, including slaughter, could be called necessary, when the whole activity of rearing and slaughtering animals for food is itself not necessary?

While arguments for advancing the cause of animals will strike many as misconceived and the conclusions drawn as bizarre, the law has known other arguments which struck the majority so. Women in times past in the Western world have been chattels. The keeping of slaves, their status as property, and their inhumane treatment seemed perfectly justifiable in nineteenth-century United States. Closer to home, the clearing of Indigenous Australians from land desired by Westerners, their denial of citizenship, and the forced removal of infants from their parents was Australian law and policy well into the twentieth century. Advocates for animals cite these historical analogies in arguing that there may come a time when our society may change its mind on animals as well.

The law and pig farming

By Malcolm Caulfield



Malcolm Caulfield is the legal counsel for Animals Australia

Farmers keeping animals under intensive conditions are permitted by the law to inflict various forms of cruelty on those animals. The example of intensive pig farming illustrates the way the anti-cruelty legislation of Australia sanctions cruel activities.

It is a truism that laws are enacted for the good of people. It might be said that laws seeking to prevent cruelty to animals are an exception to this rule. However, there is a strong argument that animal cruelty laws, insofar as they apply to farm animals, conform to the general picture. They are for the good of farmers and others who make money out of animals. Any benefit to animals is an incidental result of looking after the interests of their keepers. This short article seeks to illustrate the point by reference to one aspect of Australian law relating to the keeping of pigs in intensive piggeries.

The pig industry in Australia is relatively small. In 2004-05 just over 5 million pigs were slaughtered,[1] representing a value of about 7% of the value of all livestock slaughterings.[2] In 2004 there were 318,594 breeding sows in Australia and about 76% of those animals will spend a significant part of their lives in a 'sow stall'.[3] Sow stalls are essentially metal cages little bigger than the body of the pregnant pigs they house. They were introduced by pig farmers purely on economic grounds – they are said to minimise fighting amongst sows (which it is claimed decreases their 'productivity') and to minimise the costs of managing the animals. The farmers like to say that keeping sows in these tiny cages allows animals to receive individual attention, which would otherwise be difficult to provide in a group housing situation and that it is good for their welfare. Not everyone is convinced by these claims.

Faced with a growing public outcry that putting pregnant sows into these tiny cages is cruel, the pig farmers have responded with the argument that there is no scientific basis for the claim that the welfare of sows is decreased by confining them in sow stalls. They have used this argument to convince politicians to continue the legalisation of this practice. This provides a good example of how Australian law-makers, pushed by the influence of the agricultural lobby, have become complicit in perpetuating and legalising cruel practices in intensive animal farms.

The failure of Australian law to protect the welfare of breeding sows

It is entirely rational to regard keeping pregnant pigs in sow stalls as reducing welfare for sows,[4] and as cruel.[5] The response to this, some 20 years ago, was for the farming lobby and the various government agencies responsible for farming to develop 'codes of practice' which sanctioned cruel farming practices including the use of sow stalls. The first *Model Code of Practice for the Welfare of Animals – Pigs (the Pig Code)*, for example, was published in 1983. These codes of practice, including the Pig Code, are endorsed by the Primary Industries Ministerial Committee (PIMC), which is a co-operative arrangement operating as part of the structure of the Council of Australian Governments.

Because anti-cruelty statutes are part of state and territory law (ie not Commonwealth law), those codes, being Commonwealth documents, are in themselves legally ineffectual. They acquire legal effect when adopted in some way by state or territory legislation. To date, adoption has been patchy and inconsistent. For example, breach of the

Pig Code is an offence only in South Australia. The Pig Code has no legal effect in New South Wales, Tasmania, the Australian Capital Territory or the Northern Territory. In South Australia, Queensland, Victoria and Western Australia, compliance with the provisions of the Pig Code (or the equivalent local version, which picks up the wording of the Commonwealth document) as they relate to sow stalls is a defence to a prosecution under the relevant anti-cruelty statute (insofar as it relates to cruelty occasioned by the act of keeping the sow in the stall). It is interesting to note in passing that the protestations of the pig farmers that keeping sows in sow stalls is not cruel are made somewhat less credible by the need for a statutory defence to prosecution responsible for the practice.

The pig farming industry recently initiated a review of the Pig Code, through the PIMC mechanism. This review was said to be based on industry worries that welfare concerns, perhaps stimulated by the recent review in Europe, which restricted sow stall use to 4 weeks of any pregnancy, would result in the imposition of unpalatable restraints in Australia.[6] The stated intention is that the new Pig Code, which was to contain mandatory standards relating to various matters, including sow stalls, would become enforceable by virtue of the mandatory standards being picked up in regulations in the various jurisdictions.

The process of review included the production of a Regulatory Impact Statement (RIS). This included what was said to be a scientific review of welfare issues relating to keeping sows in stalls. Oddly, this review, consisting of 10 pages, was not done by an independent panel of experts, as was the case with the earlier European Union review, but was carried out by the consultants who were contracted to prepare the RIS itself. This scientific review concluded that 'to date there is insufficient scientific justification to ban the usage of stalls completely and the ban by countries in Europe is a question of personal ethics, not science.' This clearly misrepresents the view of the eminent Scientific Veterinary Committee of the European Commission which produced an extensive review of the relevant scientific literature as at 1997. It is nearly 200 pages long, and makes reference to approximately 800 relevant scientific publications. After reviewing the positive and negative aspects of stall housing versus group housing, the report concludes: 'since overall welfare appears to be better when sows are not confined throughout gestation, sows should preferably be kept in groups'.[7]

The draft version of the new Pig Code which was the subject of the RIS included provisions to increase the length of the stall from 2.0 metres to 2.2 metres, with a width of 0.6 metres. Animals Australia is aware that nearly 45% of the sow stalls in Australia do not even comply with the dimensions specified in the old Pig Code (2.0 metres length; 0.6 metres width). It is perhaps not surprising in view of this that the new Code as endorsed by PIMC allows all existing sow stalls which do not comply with the new dimensions to continue to be used providing (in effect) the dimensions of the stall are no smaller than the dimensions of the animal in that stall. There is no mechanism for phasing out these stalls. In other words, the 45% of the stalls which would not comply with the dimensions of either the old or the new Pig Code can continue to be used until they fall apart. As the pig industry argued (during the Code consultation process) for a 25 year phase-in of new stall dimensions, it is reasonable to conclude that sows will continue to be kept in these undersize stalls for at least 25 years.

The new dimension requirement will only become compulsory for new stalls installed after April 2017. Also from April 2017, the new Code will permit sows to be kept in stalls for up to six weeks of a pregnancy (the gestation period in pigs is about 16 weeks). However, farmers will be permitted to keep sows in stalls for longer than six weeks where they are 'under special care by a competent stock person'. Would it be cynical to suggest that this will provide a loophole allowing farmers to keep sows in sow stalls for as long as they want?

The fact is that this shocking document, endorsed by PIMC on 20 April 2007 and which is intended to become law in Australia within the next two years, is a huge backward step for pig welfare. It flies in the face of developments in countries such as the UK, Switzerland, Sweden and Finland, which have either banned or will ban the use of sow stalls in the near future. It also flies in the face of changes by major overseas producers. For example, Smithfield Foods in the USA has responded to consumer pressure (reflected in pressure from Smithfield's customers, including McDonald's), by undertaking to phase out sow stalls by 2017. Smithfield alone produces 3 times as many pigs per annum as the entire Australian industry.

Despite this, the former Commonwealth minister responsible for the 'Australian Animal Welfare Strategy', Peter McGauran, had no problem describing Australian animal welfare standards as 'world class'. And in a letter to Animals Australia, the responsible minister in Victoria, Joe Helper, quaintly said (referring to the decision by Smithfield) that there was nothing in the law to prevent industry from phasing out sow stalls. One cannot but conclude that farm animals have few friends in government.

This sorry state of affairs is reflected throughout the provisions of the Pig Code. Other examples in the Pig Code of the sanctioning of cruel practices include tooth clipping, castration and tail docking of piglets, all without anaesthetic. The failure of the Pig Code review process to improve pig welfare is likely to be repeated in the outcomes of reviews of other Codes of Practice relating to the keeping of farm animals. There appears to be little political will for change, as both the major parties are reluctant to upset the farm animal industry lobby.

△Governments pay lip service to animal welfare concerns by ensuring that welfare organisations sit on relevant committees and are consulted. The fact that these organisations are in the minority means that their views are in effect ignored. △

The position is exacerbated by the repeated failure of those charged with responsibility (or who assume responsibility, in the case of the RSPCA) to properly enforce even the existing laws. In many jurisdictions the relevant primary industry department enforces the law as it applies to farm animals. The conflict of interest is obvious. In some jurisdictions the government has abrogated responsibility and appointed the RSPCA as de facto enforcing authority. No rational person would dispute that it is completely wrong to delegate the enforcement of a criminal statute to an unaccountable (and inevitably inadequately funded) private society.

The reason this has happened is that legislation relating to the welfare of farm animals is the province of those who represent farmers and promote their interests. Governments pay lip service to animal welfare concerns by ensuring that welfare organisations sit on relevant committees and are consulted. The fact that these organisations are in the minority means that their views are in effect ignored.

There is every reason why the interests of farmers should be considered and taken into account, but this should not be the primary consideration. The way forward is for each jurisdiction to firstly ensure that prevention of animal cruelty is the responsibility of ministers other than primary industry or agriculture ministers and secondly to establish independent statutory bodies to draft, review and enforce the legislation. Given the evident ability of the disparate Australian governments to enact uniform legislation (eg in the area of corporations law and defamation law), it is equally feasible to have a uniform animal cruelty law.

Finally, it is apparent from the biased nature and outcome of the review process for the Pig Code that an essential step for drafting and review of animal cruelty legislation and its application to farm animals is the appointment of an independent scientific review committee. This committee must include eminent independent overseas scientists, as there is simply not a sufficient number of adequately experienced independent scientists in Australia.

Despite the seemingly overwhelming bias in favour of intensive animal farmers and the seemingly hopeless plight of their animals, those of us who are concerned about this issue are encouraged that increasing awareness of these cruel practices will force change. The very fact that this issue of *Reform* includes reference to these matters is itself evidence that things are on the move. We live in hope.

Endnotes

1 Australian Pork Limited (2005) *Australian Pig Annual*

2 Australian Bureau of Statistics (2007) *Yearbook Australia*

3 Based on figures provided by Australian Pork Limited to the authors of the Regulatory Impact Statement associated with the review of the Model Code of Practice for the Welfare of Animals – Pigs.

4 EU Scientific Veterinary Committee (1997) The Welfare of Intensively Kept Pigs

5 see the comments of Justice Bell in the case of McDonald's v Steel & Morris ("McLibel") http://www.mcspotlight.org/case/trial/verdict/verdict_jud.html, which included the statement "I have no doubt that keeping sows in...sow stalls for extended periods is cruel".

6 Neumann, G (2005) Review of the Australian Model Codes of Practice for the Welfare of Animals (commissioned by the Commonwealth Department of Agriculture Fisheries and Forestry)

7 Note 4 above

Animals and the law in Australia: a livestock industry perspective

By Kathleen Plowman, Alan Pearson and John Topfer

As far as law and public policy are concerned, there are four key areas of law that affect all animal owners and industries in the livestock farming sector. Some of these areas also apply to companion and performance animals.

These four key areas are:

a) Animal welfare
b) Biosecurity
c) Food safety
d) Animals and the environment

This article focuses primarily on the interrelationship of animal welfare, food safety and the environment, aspects which are also covered in environmental protection legislation. Changes to farming practices and the regulations in one area cannot be viewed in isolation to these other aspects. To do so is a simplistic approach in what is a complex interrelationship between these key aspects and can put at risk public health, the environment and the very animals we are seeking to protect.

Legal status of animals

The legal status of animals has evolved in so-called 'developed' countries over the last 50 years. Changes in Europe particularly have been significant in this. Under the *Treaty of Rome*, the agreement that created the European Economic Community in 1957, animals were defined as 'agricultural goods' thereby creating a basis for European animal legislation to focus primarily on improving the quality of these agricultural goods. However, animal welfare groups have long been concerned about this definition.

The heads of all the Member States meet regularly at Intergovernmental Conferences (IGCs), where amongst other things, they can agree on amendments to the *Treaty of Rome*. In 1991, at the *Maastricht IGC*, the UK Government succeeded in getting a Declaration on the Protection of Animals added to the Maastricht Treaty. However, this declaration was not enforceable. Due to continuing pressure from animal welfare groups, however, a legally binding protocol was adopted in 1997 at the Amsterdam IGC. This protocol requires EU Member States to pay full regard to the welfare of animals as 'sentient beings' in their animal legislation.

By contrast, in the USA, animals are primarily regarded as 'property' rather than 'sentient beings'.[1] There is no formal animal protection legislation that covers farm animals at the federal level and in many states livestock are exempted from cruelty laws. Where such laws do exist, they are also often focused on the protection of the animal owner's rights.

Focus of animal laws in Australia

In Australia, animal laws are more aligned to the European model, whereby animals are recognised as living beings that are capable of experiencing pain and distress. Under this definition, 'humane treatment' of animals is a key concept. However, both internationally and domestically, what constitutes 'humane treatment' is open to debate and interpretation. This concept is strongly governed by what society expects within any given jurisdiction and hence is strongly influenced by cultural considerations.

Animal laws also focus on the control of animals and their living environments in relation to both the ecological environment and their role in the human food chain. These aspects

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are covered in biosecurity, food safety and environmental protection legislation.

Biosecurity laws focus on both the protection of animals from diseases or pests that may affect them directly and also on the protection of other animal species from pests or diseases that they may harbour or carry.

Food safety laws on the other hand focus on the prevention of harmful effects on humans from animal products. The way in which such effects are managed starts through ensuring that animals raised for the production of such products are kept in conditions and managed in ways that reduce such risks from occurring. This is backed up by food hygiene requirements that apply to the handling of the animal products, including slaughter and post-slaughter processes.

△Typically animal laws focus accountability on owners or persons in charge of animals and, as a result, such persons have various 'duties of care' in relation to animals under their control. △

Environmental aspects of animal laws focus on areas such as preventing animals from becoming unwanted pests and/or managing them in ways so that undesired consequences to the environment do not occur. Management of animal effluent is a key feature of environmental laws as it affects animals and animal industries. A novel feature that is now also emerging is consideration of carbon emissions released by animals into the atmosphere and their potential effect on climate change.

Both biosecurity and food safety legislation are in part governed by international treaties and conventions established under the auspices of the Organisation Internationale des Epizooites (OIE), otherwise known as the World Animal Health Organisation, and the Codex Alimentarius respectively. Australia is a signatory to these treaties and Australian legislation reflects the treaty provisions.

Typically animal laws focus accountability on owners or persons in charge of animals and, as a result, such persons have various 'duties of care' in relation to animals under their control. These 'duties of care' are further explained below in an Australian context.

Animal welfare legislation in Australia

Overall framework

Animal welfare legislation in Australia is enacted by the states. [2] Each state of Australia has animal protection legislation. The legislation generally is based on the concept of prevention of cruelty to animals by humans. These laws (Prevention of Cruelty to Animals legislation—'POCTA') are by no means uniform across Australia. Generally they make treatment of animals which might be considered as cruel or inflicting unnecessary pain or suffering an offence. The level of detail (and hence assistance to livestock industries) as to what particular conduct will be an offence varies from jurisdiction to jurisdiction.

In some circumstances it will be difficult for an individual to know whether particular conduct in relation to a particular animal amounts to an offence or not.

The POCTA legislation in each state is enforced by inspectors under the applicable POCTA Act. The Acts define who has inspectorial powers.

To assist in providing guidance for the livestock industries on what is appropriate treatment for animals and what is considered inappropriate or cruel, the Council of Australian Governments (COAG) has established Model Codes of Practice for the Welfare of Animals (MCOP). These MCOP are established under the auspices of the Primary Industries Ministerial Council (PIMC). There are specific MCOP for each species. For example, pig welfare in Australia is covered under the *Model Code of Practice for the Welfare of Animals (Pigs) —Revised* (2007). This document sets out standards, recommended practices and guidelines for pig owners and persons in charge of pigs under the three main husbandry systems used in the keeping of pigs: indoor, deep litter and outdoors.

In order for the requirements of an MCOP to be legally binding, they need to be adopted under state POCTA laws. States can modify the provisions of the MCOP to suit their particular local conditions if they so choose, however, the PIMC has made it clear that it does not expect this to be generally necessary. Recently revised MCOPs such as the pig Code have been specifically designed to promote national consistency.

As a consequence of the differences in the POCTA legislation between the states, failure to comply with mandatory provisions of an animal welfare Code will have different implications between the jurisdictions. In some jurisdictions failure to comply with the relevant Code is itself an offence. In others evidence of failure to comply with the Code will be prima facie evidence of the commission of an offence.

The uncertainty for livestock industries created by different approaches in the POCTA laws to application of the Codes is exacerbated by the fact that, in the past, Codes were generally not drafted with a high degree of technical and legal clarity. Instead they were written more in an advisory style.

The Australian pig industry has been a strong advocate and played a lead role to secure in the revised MCOP specific standards that must be met, separating these from the related advisory material. It is also intended that proof of compliance with a standard in the Code will be made a defence under state POCTA Acts.

Move from POCTA to standards-based legislation

The Australian Animal Welfare Strategy (AAWS), published by the Department of Agriculture, Fisheries and Forestry (DAFF) in 2004 under the auspices of COAG, sets out a framework for the future of animal welfare legislation in Australia. [3]

The AAWS has a goal of promoting consistency in the legislation as well as a move to underpin such legislation with agreed standards for the way in which animals are to be managed.

The AAWS recognises that the importance of POCTA 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 for pig welfare has been designed to support this strategic direction by providing stronger and clearer direction for owners and people in charge of pigs regarding their everyday responsibilities in pig care. In 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.

The Pig Code process and industry response

Development of the revised MCOP for the welfare of pigs has been a four-year process of policy analysis and consultation led by Australian Government officials, with extensive involvement of both industry and animal welfare groups in the process.

The outcome is a document that is essentially a 'stepping stone' to a full standards-based regulatory approach. The industry now has the challenge of implementing the requirements.

One of the main issues resolved by the MCOP is the appropriate standard for the housing of pregnant sows.

Key aspects of the revised Code are:

- a reduction of the use of individual stalls to house sows from up to their full 16 weeks of pregnancy down to a maximum of 6 weeks within 10 years;
- requirements for some other changes to housing space allowances to be introduced within 5 years; and
- staff training requirements to be introduced within 3 years.

The industry is fully supportive of these provisions, along with other changes required under the Code, however will need to undertake a significant program of work over the coming years to ensure that they are adopted.

A key aspect of the industry response is to ensure that all the requirements of the MCOP are incorporated within its existing Quality Assurance program, an independently audited program which addresses animal welfare, food safety and biosecurity. This focuses accountability for standards of animal care clearly with those responsible and provides a framework for auditing to ensure those standards are met. It also provides a vehicle for compliance and verification reports to regulators, the consumer and the larger community.

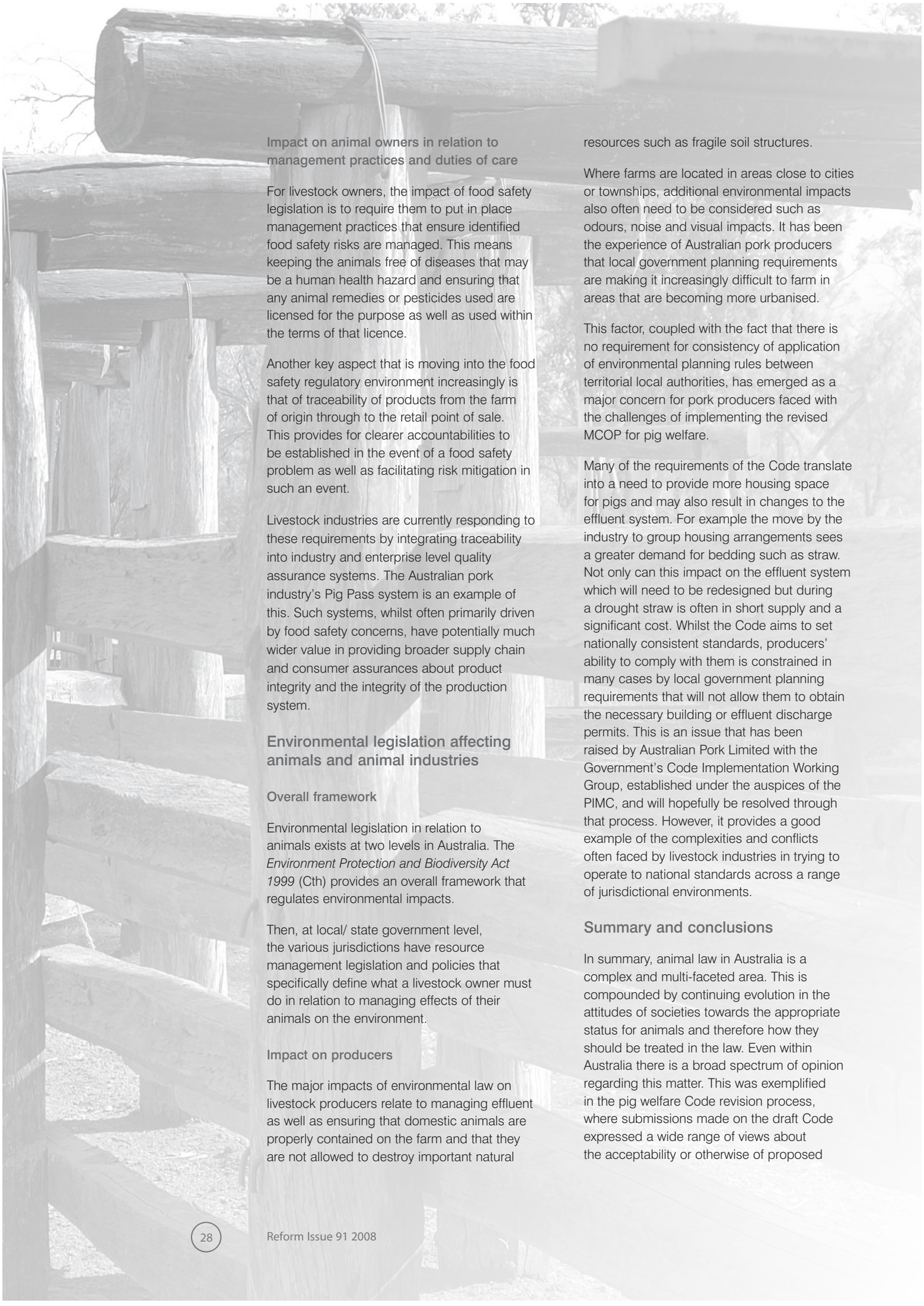
Food safety legislation

Overall framework

The food regulatory system is complex with a range of national, state and local agencies involved. Australian governments are committed to a consistent national framework for food safety policy and standards setting under the auspices of the Australian Quarantine Inspector Service for exports and Food Standards Australia New Zealand and the state regulatory authorities for the domestic food industry.

The important legislation governing food safety are the state Food Acts.

△The major impacts of enviornmental law on livestock producers relate to managing effluent as well as ensuring that domestic animals are properly contained on the farm and that they are not allowed to destroy important natural resources such as fragile soil structures.△



Impact on animal owners in relation to management practices and duties of care

For livestock owners, the impact of food safety legislation is to require them to put in place management practices that ensure identified food safety risks are managed. This means keeping the animals free of diseases that may be a human health hazard and ensuring that any animal remedies or pesticides used are licensed for the purpose as well as used within the terms of that licence.

Another key aspect that is moving into the food safety regulatory environment increasingly is that of traceability of products from the farm of origin through to the retail point of sale. This provides for clearer accountabilities to be established in the event of a food safety problem as well as facilitating risk mitigation in such an event.

Livestock industries are currently responding to these requirements by integrating traceability into industry and enterprise level quality assurance systems. The Australian pork industry's Pig Pass system is an example of this. Such systems, whilst often primarily driven by food safety concerns, have potentially much wider value in providing broader supply chain and consumer assurances about product integrity and the integrity of the production system.

Environmental legislation affecting animals and animal industries

Overall framework

Environmental legislation in relation to animals exists at two levels in Australia. The *Environment Protection and Biodiversity Act 1999* (Cth) provides an overall framework that regulates environmental impacts.

Then, at local/ state government level, the various jurisdictions have resource management legislation and policies that specifically define what a livestock owner must do in relation to managing effects of their animals on the environment.

Impact on producers

The major impacts of environmental law on livestock producers relate to managing effluent as well as ensuring that domestic animals are properly contained on the farm and that they are not allowed to destroy important natural resources such as fragile soil structures.

Where farms are located in areas close to cities or townships, additional environmental impacts also often need to be considered such as odours, noise and visual impacts. It has been the experience of Australian pork producers that local government planning requirements are making it increasingly difficult to farm in areas that are becoming more urbanised.

This factor, coupled with the fact that there is no requirement for consistency of application of environmental planning rules between territorial local authorities, has emerged as a major concern for pork producers faced with the challenges of implementing the revised MCOP for pig welfare.

Many of the requirements of the Code translate into a need to provide more housing space for pigs and may also result in changes to the effluent system. For example the move by the industry to group housing arrangements sees a greater demand for bedding such as straw. Not only can this impact on the effluent system which will need to be redesigned but during a drought straw is often in short supply and a significant cost. Whilst the Code aims to set nationally consistent standards, producers' ability to comply with them is constrained in many cases by local government planning requirements that will not allow them to obtain the necessary building or effluent discharge permits. This is an issue that has been raised by Australian Pork Limited with the Government's Code Implementation Working Group, established under the auspices of the PIMC, and will hopefully be resolved through that process. However, it provides a good example of the complexities and conflicts often faced by livestock industries in trying to operate to national standards across a range of jurisdictional environments.

Summary and conclusions

In summary, animal law in Australia is a complex and multi-faceted area. This is compounded by continuing evolution in the attitudes of societies towards the appropriate status for animals and therefore how they should be treated in the law. Even within Australia there is a broad spectrum of opinion regarding this matter. This was exemplified in the pig welfare Code revision process, where submissions made on the draft Code expressed a wide range of views about the acceptability or otherwise of proposed

standards.

A further confounding factor is the apparent dichotomy that occurs between citizens' general attitudes to animals as expressed verbally or politically and their behaviour as consumers. It has been shown through social and consumer research that consumers often buy products at point of purchase that are not consistent with their expressed ethical values or attitudes. [4]

Australian markets are increasingly opening to wider competition from imports through the World Trade Organization process. In the absence of any related international treaties on standards for animal welfare or the environment, it poses a particular challenge to regulators and industries alike when contemplating making changes that may be ethically or values-based, and will confer a higher cost structure into the supply chain.

Such factors as price, brand familiarity and visual appearance are often more important in point of purchase decision making than broader values based criteria.[5] This can lead to 'market failures' in such areas and provide a strong case for legislative intervention.

However, the challenge for legislators in contemplating such interventions is finding a way to balance up the requirements of the various stakeholders, within the constraints of the wider social and economic environment.

The everyday challenge for livestock industry operators on the other hand is integrating all the various legal and business requirements into a cohesive and balanced overall set of operating policies and procedures.

This has resulted in the Australian pork industry being pro-active in developing an integrated industry Quality Assurance scheme that will assist pork producers to comply with all the requirements and provide an audit trail to confirm compliance.

From the industry's perspective, development of a related legal framework for the production animal industries would be an ideal solution to resolve the current gaps and conflicts within existing legislation. Such a legal framework would prescribe all the duties and responsibilities of production animal owners in relation to their animals and allow for recognised quality systems to be legally sanctioned as a mechanism for compliance.

Endnotes

1.Tomaselli, P. M. (2003); *International Comparative Animal Cruelty Laws*, Animal Legal and Historical Center, Michigan State University – Detroit College of Law.

2.In this paper unless otherwise noted, a reference to states includes the ACT and the NT.

3. Department of Agriculture, Fisheries and Forestry; (2004) Australian Animal Welfare Strategy

4. Coleman, G.J., Hay, M., and Toukhstai, S.R.(2003) *Effects of Consumer Attitudes and Behaviour on The Egg And Pork Industry*; Monash University

5. Pearson, A. B. (2003); *Summary of Consumer Research on Animal Welfare* - an APL commissioned report; Prime Consulting International Limited

The challenge posed by feral animals

By Graeme McEwen

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The environment and animal movements have long agreed on the preservation of habitat for native wildlife. But they have never agreed on how to resolve the conflict which can arise between feral animals and the environment. It should now begin to be addressed.

Animal welfare and community concerns initially stem from current short-term methods of control (for example, poisoning, trapping, disease and aerial shooting). But with few natural predators or diseases, introduced animals can and do cause agricultural, environmental and other damage, and act as reservoirs of disease.

Increasing international focus on fertility control

In the last 20 years though, there has been an increasing focus internationally on fertility control as the major control method of feral animal populations. Afterall, exotic species have been introduced by design or through inadvertence in most parts of the world. Fertility control offers significant welfare benefits whilst honouring the objects of agricultural and environmental protection. This stands in stark contrast to the acute and widespread suffering caused by nearly all existing short-term control methods. In addition, fertility control techniques stand to be, or are, species-specific and capable of delivery on a continental scale. Plainly, the emphasis moves from the kill rate to the birth rate.

Immunocontraception is the process by which the immune system of an animal is induced to attack the reproductive cells of its own species, thus preventing the animal from breeding. Immunocontraceptive agents can be delivered as a vaccine in a disseminating system (ie viral or bacterial vectors), and/or a non-disseminating system (eg oral baits).[1] Where a vector is employed for distribution of a contraceptive agent, the process is known as virally-vectored immunocontraception.

National long-term strategy required

In short, such technology invokes the broader challenge to provide for humane, where possible non-lethal, long-term strategies, and thus, to not simply perpetuate the present short-term thinking on the basis of what is cheap and what is quick. This will require a national strategy with the necessary resources for a long-term focus, and the marshalling of expertise in a coordinated and unfragmented manner.

Local statutes

Relevant state and territory legislation can be readily ascertained .

In Victoria, for example, the protective reach of the *Prevention of Cruelty to Animals Act* 1986 does not extend to 'pest' animals. By s.6(1)(d) the Act provides that it does not apply to:

'(d) anything done in accordance with the *Catchment and Land Protection Act 1994*.'

One of the objects of the *Catchment and Land*

Protection Act 1994 is to provide for the control of noxious weeds and pest animals: see s4. In summary, responsibility for prevention and management of pest animals resides with landowners.

The Act is administered by the Department of Primary Industries. By Part 8 of the Act four categories of 'pest' animals are proclaimed: prohibited (s 64), controlled (s 65), regulated (s66) and established (s67). Rabbits and foxes, for example, are declared as established pest animals across Victoria. Landholders may be and are directed by the Department's Secretary to prevent their spread and, so far as possible, to eradicate them (see s.70B for example).

Further, s6.(1)(b), *Prevention of Cruelty to Animals Act 1986* does not apply to inter alia the treatment, killing, hunting, shooting, catching or trapping of animals which is carried out in accordance with a code of practice (except to the extent it is necessary to rely upon a code of practice as a defence to an offence under the Act). Relevant codes of practice are the *Code of Practice for the Use of Small Steel-Jawed Traps* (2001) and the *Code of Practice for the Welfare of Animals in Hunting* (2001). Section 15 of the Act prohibits large steel-jawed traps, with exceptions for wild dog control in certain counties. In summary, the codes of practice do not address the central welfare issue of such traps, or for that matter, their non-discriminatory impact in trapping non-target animals.

Further, new national codes of practice are proposed for feral animals, namely feral cats, wild dogs, foxes, feral goats, feral pigs, feral horses; and rabbits.[2] Interestingly, in the draft model code of practice for each of feral pigs, foxes, feral horses and rabbits, fertility control is canvassed as a possible alternative control technique and, in respect of rabbits is noted as being '... seen as a preferred method of broad-scale rabbit control as it offers a potential humane and target specific alternative to lethal methods.'

That said, codes of practice of any kind usually favour the interests of producers over animal welfare where there is a conflict and thus set low welfare thresholds. Further, compliance with a code of practice acts as a defence or exemption from prosecution under the Act for conduct which too often would otherwise constitute a cruelty offence.

In addition, the *Flora and Fauna Guarantee Act 1988* [3] provides not only for conservation of threatened species, but also for the management of potentially threatening processes. Section 3 of the Act defines a potentially threatening process as 'a process which may have the capability to threaten the survival, abundance or evolutionary development of a taxon or community of flora or fauna.' Schedule 3 lists predation by red foxes and feral cats as threatening processes.

The welfare challenge of existing short-term methods

Turning then to the challenge posed by feral animals, we could begin at the beginning, by dropping the label of 'vermin' or 'pest' so that they are thereby removed from any serious notion of humane control. Afterall, in each of the draft national model codes of practice it is acknowledged that:

> 'An ethical approach to pest control includes the recognition of and attention to the welfare of all animals affected directly or indirectly by control programs.'

Second, the dimension of the animal welfare problem or, put more directly, the 'quantity of suffering' permitted by our indifference, is enormous. In summary, whilst there appears to be no estimate of fox numbers, we know anecdotally they are trapped and hunted in large numbers. Otherwise, for example, there are 300,000 feral horses; perhaps more than a million donkeys, mainly concentrated in the Kimberleys; estimates of feral pigs (which inhabit 38% of Australia) range from 3.5 million to 23.5 million; about 300,000 camels, mainly in the Northern Territory; 2.6 million feral goats, mainly concentrated in central-eastern South Australia, Western Australia, southern Queensland and western New South Wales; perhaps as many as 12 million feral cats[4]; thousands of feral cattle in the Northern Territory; in 1985 it was estimated there were 350,000 feral buffalo in the Northern Territory; and some 200 million rabbits.

Third, it is worth briefly listing the current methods of feral animal control to reinforce how most are primitive and inhumane practices in need of reform:

- poison bait (1080, pindone, strychnine);
- trapping (including steel-jawed trap);
- mustering into yards for later transport – itself stressful;

△Despite the annual budgets for 'pest' control of the Federal, State and Territory governments running into many millions of dollars, no introduced species of animal has ever been eradicated from Australia. △

- shooting from ground or helicopter;
- electric fencing;
- dogging (rabbits and pigs);
- biological (disease);
- fumigation (rabbit burrows and fox dens);
- explosives (destruction of rabbit warrens).[11]

The number, kind and diversity of methods reveal the extent of the problems perceived[12], the reactionary and short-term genesis of their employment, and the frustration of those in charge of feral animal control. Yet none of these methods are entirely successful and most cause stress, trauma or suffering for the animals. And despite the annual budgets for 'pest' control of the Federal, state and territory governments running into many millions of dollars, no introduced species of animal has ever been eradicated from Australia. Existing or past methods such as poisoning, myxomatosis, trapping and shooting have all ultimately failed to stem the tide of particularly foxes, rabbits and pigs.

The most commonly used control techniques for various feral animal species are as follows:

- feral pigs: lethal baiting, shooting, trapping and exclusion fencing. In the case of lethal baits, non-target animals including native species, working dogs and livestock, can be exposed to poisons of high toxicity directly or indirectly. Poisons commonly used are sodium monofluoroacetate (1080) and yellow phosphorus (CSSP). Warfarin is also being trialled. No case whatever can be mounted for the use of yellow phosphorus and warfarin, having regard to the long periods of pain and suffering by the animal before death.

  The code of practice acknowledges the pain and suffering caused by 1080. Yet of the three categories of acceptability in respect of the various control techniques ('Acceptable', 'Conditionally Acceptable' and 'Not Acceptable), 1080 poison is labelled as 'Conditionally Acceptable'. 'Conditionally acceptable' is defined to be a technique which '…may not be consistently humane. There may be a period of poor welfare before death.' Apparently, at a stakeholders' workshop leading ultimately to the development of these draft national model codes of practice, remarkably, it was thought that the 'jury is still out' on the severity of pain caused by 1080, and thus it was decided that 'Conditionally Acceptable' should still apply. [5] No doubt the absence of a humane alternative bore upon this thinking.[5*]
- wild dogs: lethal baiting, shooting, trapping and exclusion fencing. Lethal baiting employs 1080 and strychnine. The draft national model code of practice states that strychnine 'is considered inhumane'. However, baiting with 1080 is deemed 'Conditionally Acceptable';
- foxes: lethal baiting, shooting, trapping, den fumigation and exclusion fencing. Lethal baiting is viewed as the most effective method of fox control;
- feral goats: mustering, trapping at water, aerial shooting, ground shooting and exclusion fencing. 'Judas' goats are also used. 1080 baits, whilst trialled, are not permitted by reason of inter alia the significant risk of poisoning non-target species;
- feral cats: shooting, trapping, lethal baiting and exclusion fencing. Lethal baiting is not widespread as it is viewed as reasonably ineffective because 'feral cats are often found in low densities and can have large home ranges. Also, they are naturally wary;[6]
- feral horses: mustering, trapping at water, aerial shooting and ground shooting.
- rabbits: lethal baiting, warren destruction and fumigation, shooting, trapping, exclusion fencing and biological control with RHDV and myxomatosis. Lethal baits used are 1080 and pindone. The draft national model code of practice for rabbits describes pindone as 'inhumane'.[7] and the use of chloropicrin for warren fumigation as 'highly inhumane' . Carbon monoxide is currently being investigated as a humane alternative to chloropicrin and phosphine in warren fumigation.

1080 poison then is the main poison of use for foxes, wild dogs (including dingoes), feral pigs and rabbits.

The toxins or poisons used for lethal control of feral animals are regulated by the Commonwealth's Australian Pest and Veterinary Medicines Authority and permits are issued under poisons and dangerous goods (or similar) Acts and Regulations in the different states and territories.

Relevantly, all states and territories have

agreed to phase out those control methods identified in the codes of practice as 'Not Acceptable', namely:

- steel-jawed traps: rabbits, foxes, dogs, cats;
- strychnine baiting: foxes, dogs;
- chloropicrin fumigation of warrens: rabbits;
- warfarin baiting: pigs; and
- yellow phosphorous (CSSP) baiting: pigs.[8]

Other problems with human intervention by killing include:

(a) first, that it requires continual intervention in the ecosystem—either massive kills every few years or an annual kill;

(b) second, that the natural response of survivors is increased fecundity and in any event, as most are highly mobile, they replace those killed with little difficulty; and

(c) third, the undesirable genetic selection of animals to kill—for example, where horses are shot (or darted) the result is craftier, harder to shoot animals next time around; or again, feral cats, which are naturally wary and readily trap or bait shy.

So these difficulties have led to a heightened desire for eco-controls.

Fertility control research

In the last 20 years six international 'Fertility Control and Wildlife Conferences' have been held at which scientists and others from around the world have reported on their research.

As long ago as the second 'Fertility Control and Wildlife Conference' in 1990 at Melbourne, Dr. Tyndale-Biscoe of the CSIRO noted how his research team was then developing an entirely new method for the rabbit and the fox, 'which, if successful, will block fertilization without interfering with hormone function and can be introduced to the population at minimum cost.

Within only a year or so, a reproductive immunologist (part of the research team) had isolated the fox-related protein and produced an antibody in a test tube which made foxes infertile. At the time Dr. Tyndale-Biscoe noted the exciting prospect it offered as a generic technology capable of application to feral cats and pigs, or possum control in New Zealand.

Yet it was originally believed that the research team's work would be unproductive.

Some 15 years later, in a paper prepared for the Prime Minister's Science and Engineering Council on 13 September 1996 entitled 'Rabbits-prospects for long term control: mortality and fertility control', four members of the CSIRO Division of Wildlife and Ecology and Cooperative Research Centre for Biological Control of Vertebrate Pest Populations said:

'All agents that increase the rate of death are effective in the short term but must be applied continually, particularly if the species is highly fertile as are rabbits. Therefore another approach which constrains the birth rate (or fertility) of the pest is being developed. Mathematical modelling predicts that it has excellent prospects for long term suppression of populations.'.[9]

The paper concluded that virally vectored immunocontraception was technically feasible. The paper also noted in respect of the rabbit:

> '…we cannot hope to eradicate it from this continent. Realistically we can only aim to reduce its numbers to levels where its impact is insignificant….
>
> The VVIC approach for fertility control is considered an important advance in scientific thinking…
>
> Furthermore, the enormity of the problems being experienced by Australia with the rabbit and the fox dictate that the research must be pursued to provide long term solutions for problems which are uniquely Australian.' [10]

A few years earlier, at the 2003 international conference on 'Fertility Control for Wildlife Management', and just as Dr. Tyndale-Biscoe had forecast, researchers from the New Zealand Marsupial Cooperative Research Centre at Land Care Research noted that immunocontraception offered an effective and humane alternative approach to possum management, and that possum fertility control baits should be available for use within eight years.

Also at the 2003 conference, seven members of the CSIRO's (then) Pest Animal Control Cooperative Research Centre noted that fox fertility control in Australia through vaccination with a bait-delivered anti-fertility vaccine was an important alternative to lethal fox control with 1080 poison to reduce their impact on native Australian fauna and livestock. They reported

on progress with a suitable potential vaccine vector (canine herpesvirus -CHV) and that an oral bait containing wildtype CHV could induce anti-viral immune responses in foxes.

Similar reports at this conference were provided, for example, on development of fertility control techniques for eastern grey kangaroos and free-ranging koalas, both immunological and endocrinal. The report concluded that both immunological and endocrinal techniques had shown dramatic progress in the last five years, suggesting that long-term broad scale fertility control was now within reach.

Australia's legislative and regulatory framework

With the advent of all this promising research, what then is Australia's legislative and regulatory framework? First, the Commonwealth has no express powers under the Constitution in respect of environmental matters. There are, of course, heads of power that may be called in aid, including:

(a) the trade and commerce power (s.51(i));

(b) the corporations power (s.51(xx));

(c) the taxation power (s.51(ii));

(d) the external affairs power (s.51(xxix));

(e) the quarantine power (s.51(ix));

(f) the posts and telegraph power 51(v));

(g) the power in respect of Commonwealth instrumentalities and the public service (s.52);

(h) the power in respect of customs, excise and bounties (s.90);

(i) the financial assistance power (s.96); and

(j) the territories power (s.122).

In addition, there is of course s.109.[11]

Second, the most important Commonwealth statute is the Environment Protection and Biodiversity Conservation Act 1999.[12] An objective of the Act is to promote a cooperative approach to the protection and management of the environment by governments, the community, landholders and indigenous peoples. This sharing of responsibilities reflects the cooperative federalism of the Intergovernmental Agreement on the Environment signed by the Commonwealth and all States and Territories in 1992.

The *Commonwealth Environment Protection and Biodiversity Conservation Act* 1999 provides a framework for the management of species other than native species by listing key threatening processes (s.183) and providing for threat abatement plans (s.270B).

Section 301A provides for the development of regulations for the control of non-native species, where they may threaten or would likely threaten biodiversity.

Another relevant Commonwealth statute is the Natural Heritage Trust of Australia Act 1997 administered jointly by the Department of Environment and Heritage and the Department of Agriculture, Fisheries and Forestry. The Trust's focus is upon a more targeted approach to environmental and natural resource management in Australia. The Natural Heritage Trust supports a National Feral Animal Control Programme managed by the Bureau of Rural Sciences. It was established to reduce the damage to agriculture caused by 'pest' animals.[13]

Apart from state legislation and state bodies (see above), local government also discharges a role in undertaking pest, plant and animal risk control measures. Indeed, local government bodies have made a large number of applications for National Heritage Trust grants.

The principal international convention

The principal international convention is the *Convention on Biological Diversity*, the objects of which include the conservation of biological diversity. It notes there is an urgent need to address the impact of invasive alien species. Plainly, the Commonwealth has responsibility. By Article 8(h) each Contracting Party shall, as far as possible and as appropriate:

> 'Prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species.' [14]

The *Convention on Biological Diversity* sets out a number of Guiding Principles for the prevention, introduction and mitigation of impacts of alien species that threaten ecosystems, habitats and species.

Against this background, I turn to the relevant Ministerial Councils, principally the Natural Resources Management Ministerial Council, but also the Primary Industries Ministerial Council. Ministerial Councils enable the national implementation of proposals where

the division of constitutional powers creates barriers. The objective of the NRMMC is to:

> 'Promote the conservation and sustainable use of Australia's natural resources.' [15]

Vertebrate Pests Committee

The principal relevant Ministerial Council committee is the Vertebrate Pests Committee,[16] which is a sub-committee of the Natural Resource Policies and Programs Committee created in early 2004. It acts as one of two major advisory committees in support of the work of the Natural Resource Standing Committee,[17] which in turn supports the work of the Natural Resources Management Ministerial Council.

In summary, direct control of feral animals still resides primarily with the states and territories, and extends to landholders and rural industry. The Commonwealth plays a coordinating control, particularly through the Vertebrate Pests Committee, Invasive Animals Cooperative Research Centre and the National Feral Animal Control Programme.

The 'Australian Pest Animal Strategy'

In 2007, the Vertebrate Pests Committee published its '*Australian Pest Animal Strategy: a national strategy for the management of vertebrate pest animals in Australia.*' Three brief observations may be made about this document. First, humaneness in the treatment of pest animals has a very low priority. At best, Key Principle no. 10 notes that:

> 'Where there is a choice of methods, there needs to be a balance between efficacy, humaneness, community perception, feasibility and emergency needs.'

Second, it purports to list 'the most useful pest animal control methods'.[18] They comprise the usual inhumane short term methods, save and except for 'fertility control' and one other method, namely, changes in land use including agricultural practices (eg timing of lambing or planting different crops).

This last method is entirely sensible. But fertility control is not discussed, and when the question of research is referred to, it is more about co-ordination than leadership.

Third, commercial harvesting of feral animals is sanctioned. As with commercial harvesting of kangaroos, this is contrary to proper population management and points up how the dollar prevails over animal welfare.

Suffice to say, commercial enterprises are keen to ensure their resource is stable. Once a species is reduced in density in an area, it becomes more expensive to capture or kill further animals. Again, this will mean animals are left to regenerate the depleted population in that area.

Recent federal parliamentary committee reports

There have been two recent federal parliamentary committee reports on feral animals.[19] Both reports recommend a national strategy and framework.

Whilst much useful factual material may be found in each report, overall animal welfare issues received scant attention or a low priority.

The 'extremely inadequate' research funding

In the report of the Senate Environment, Communications, Information and the Arts References Committee, it was noted that the CSIRO had argued that funding for the management of invasive species is inadequate and that funds delivery was generally provided year-to-year or for 18 months at a time, which did not allow for long-term strategic control measures to be planned.[20]

The Committee noted that it had heard that it can take more than 10 years for a biological control method to be developed from inception to implementation, and said:

> 'Long-term commitment to funding is essential especially for programs that are seeking to develop biological control responses to invasive species. Central to being able to plan and implement such a research activity is the need for a guaranteed commitment to funding.' [21]

Further, whilst research institutions are required to seek co-investment from external investors to match core funding, what private investor will be prepared to wait some 10 to 20 years for a product to be sufficiently developed to be introduced to the market, given the present low rate of funding by government? The CSIRO is no longer the primary research institution on pest animal research. It is now 'outsourced' to or carried out by a federal body called the Invasive Animals Cooperative Research Centre.

△All agents that increase the rate of death are effective in the short term but must be applied continually, particularly if the species is highly fertile as are rabbits. △

According to its website, its 'terrestrial products and strategies' include fertility control. The key question of course is whether this is or can be a priority, having regard to the bleak prospect of funding.

Conclusion

In conclusion, enough research and studied assessment exists to show that, when weighed against the historic failings of short-term inhumane measures, fertility control offers real hope as a long-term measure. At a minimum, it points up how more sophisticated attempts can and should be made to improve our treatment of these animals, and how this can be done whilst recognising the needs of our natural environment. If this much only were to be acknowledged, we would cease to reach for what is cheap and what is quick, and then perhaps begin to turn away from the inhumanity and the chaos we presently leave in our wake. For the present, the exemption of feral animals from the protective reach of animal protection statutes, and the adoption in the draft national model codes of practice of a 'Conditionally Acceptable' category which sanctions inhumanity in control methods and 'poor welfare before death', says it all.

Endnotes

1. L Hinds and P Cowan, 'Fertility Control for Wildlife Management: The Options' (Paper delivered at Fertility Control for Wildlife Management Conference, Christchurch, 4 December 2003).
2. The draft national model codes may be found at the website of Invasive Animals Cooperative Research Centre: <www.invasiveanimals.com/index.php?id=164>.
3. There is also the *Domestic (Feral and Nuisance) Animals Act 1994* (Vic) which is of only limited relevance, applying to nuisance dogs and cats and the powers of councils to deal with dangerous such animals or where they are found at large.
4. Parliament of Australia—House of Representatives Standing Committee on Agriculture, Fisheries and Forestry, *Taking Control: A National Approach to Pest Animals* (2005), [2.37]–[2.75].
5. A Braid and C Buller, *Final Report to the Vertebrate Pes Committee: Codes of Practice for Human Vertebrate Pest Control—Finalisation for Adoption by Australian States and Territories* (2007) Invasive Animals Cooperative Research Centre, 13.

5*. New and less inhumane and more animal specific toxins are apparently under development. It is not known whether they will be humane, as distinct from less inhumane: see further http://www.invasiveanimals.com/index.php?id=4.

6. *Model Code of Practice for the Humane Control of Feral Cats* (2007) Invasive Animals Cooperative Research Centre <www.invasiveanimals.com/index.php?id=164>, 6.
7. Ibid, 6–7.
8. Ibid, 1.

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Ethical perspectives in animal biotechnology

By Mickey Gjerris and Peter Sandøe

Animal biotechnology has developed rapidly over the past 20–25 years. Today the two main technologies typically included in definitions of modern animal biotechnology are genetic modification and cloning.

With animal cloning the goal is to reproduce as much of the genetic make-up from the original animal as possible. Ideally cloning would be to produce a copy.

On the other hand, genetically modified or, as they are often called, transgenic animals represent the attempt to use advanced biotechnologies to produce animals with a specific genetic alteration. There exist several kinds of transgenic animals. For example, animals may have had their genome modified by having genes knocked-out or copied, or they may have had genes not normally found in that species inserted into their genome. These genes can come from another species or be artificial constructs.

The technologies can be used for a variety of purposes but they are mostly used within basic and medical research. Here the animals are utilised to gain a better understanding of basic biological questions and to gain a better understanding of serious human diseases. However, there are also attempts made to utilise the technologies within agriculture with the purpose of increasing productivity, reducing environmental impact and improving animal welfare.

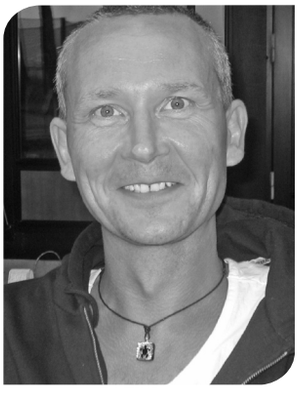
Both cloning and genetic modification are new technologies that still are in their infancy and both struggle with low efficiency and animal welfare problems. It is therefore difficult to assess the importance that the technologies will eventually have in different areas. But there can be little doubt that the influence of the technologies will grow in the coming years. And as this happens the ethical concerns that the technologies give rise to will become more and more urgent.[1]

The ethical concerns

To gain a picture of the ethical questions facing us in the light of the modern animal biotechnologies, we have divided these into the three main areas that are typically found in the literature. These areas, and the most important issues within each of them, are discussed below. The areas are: risks to humans and the environment; risks to animal welfare; and risks to animal integrity.

Humans and the environment

Concerns about potential risks to humans and the environment figure prominently in many discussions. Risks to humans are most often equated with risks to human health presented by medical products or food derived from biotech animals. There is substantial literature discussing what risks should be taken into consideration when such products are evaluated. In the medical area it is usually suggested that risk assessments ought to follow the approach by which newly developed drugs are conventionally tested. In the food area risks arising from changes in amino acids leading to allergenicity, toxic effects or changes in nutritional value will set important parameters.[2] Until now only food products from cloned animals and their progeny have been developed far enough to initiate serious attempts at conducting risk assessment. These assessments suggest that there are no new risks to human health related to such products,[3] but it should be noted that the



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research is limited.

Another area where the knowledge about the potential risks is less clear is the area of xenotransplantation. Here questions about the risk of transferring diseases from pig donors to human recipients are unresolved. Especially important is the question whether there is a significant risk that the porcine endogenous retrovirus (PERV), which lies dormant in the pig genome, might become active following transfer to the human body. There is no doubt that this could cause very serious health problems for humans, and the situation is often compared with the history of AIDS and SARS, but there is no agreement about how this risk should be evaluated. [4]

There are also potential risks to the environment. The concern here is that biotech animals might escape and breed with wild populations, thus spreading their genes in an uncontrollable environment. The most cited example here is that of transgenic fish—for example, salmon with genetic alterations that allow for faster growth. The concerns in this area can either be about the indirect consequences this might have for humans (in this case economic losses for the fishing industry) or direct concerns about the animals and the wider ecosystem. Whether one is concerned about this particular application of the technology because it constitutes a risk to human interests or because it constitutes a risk to other species or the integrity of the ecosystem, there is no doubt that the risk that transgenic animals will escape and evade human control and confinement is a socially important issue.[5]

Finally, it should be mentioned that there are concerns about the use of biotech animals being a step on to a slippery slope to unacceptable uses of biotechnology on humans. Although present uses of such animals mainly aim at gaining basic scientific understanding of molecular biology and studying human diseases, it is clear that the more skilled we become at applying biotechnology to animals the easier it will be to apply the same technologies to humans. What will prevent technologies from moving from the animal to the human sphere is not the technical limitations but rather an ethical objection; and people concerned about the slippery slope are worried that ethical objections will eventually have to give in to the technical possibilities. [6]

Animal Welfare

Biotech animals have so far mainly been used within basic biological research and as disease models. Often the goal is to produce animals that either under or over express certain genes, or that express a mutated, disease-causing human gene. In all these cases normal body function in the organism is in some way disrupted. Modifications can involve any part of the animal genome, and the effects on the animal's phenotype range from those that are lethal to those that have no detectable effect on the health of the animal. It is therefore impossible to generalise about the welfare effects of genetic modification. With cloning the goal is either to gain knowledge about basic reproductive mechanisms or to produce a genotypic copy of an existing animal. The welfare effects of cloning have been severe, but it is hoped that further development of the technology will lessen the impact.[7]

The effects that occur from using biotechnology on animals can be divided into two main categories: the intended and the unintended. Welfare problems stemming from intended genetic change are hard to avoid, since the very point of inducing the change is to affect the animal. Thus, the mouse carrying the human Huntington's disease gene will inevitably suffer welfare problems as it develops the disease, including rapid progressive loss of neural control leading to premature death. Unintended effects are connected with the present inaccuracy of the technology and our insufficient understanding of the function of different genes in different organisms. Both of these kinds of factor operate to create the rather unpredictable nature of genetic modification at the phenotypic level.

To deal properly with both intended and unintended effects on animal welfare it is important to monitor the animals and, when severe effects occur, to take action to alleviate or end the suffering of the animals. Within laboratory animal science it will be considered part of good practice to find ways to conduct experiments so as to minimise the discomfort and suffering imposed on the animals and to define so called humane endpoints, ie points at which animals have to be euthanised. [8]

There is wide agreement about the need to limit the discomfort and suffering imposed on animals. However, from a philosophical perspective it may be questioned whether

the only focus should be on avoiding pain and other kinds of suffering in animals (and perhaps promoting positive experiences). For it may be argued that animal welfare is also about the extent to which the animal is allowed to fulfil its species-specific potential, regardless of its subjective experience.

Very often this broader perspective on animal welfare will point to an additional group of considerations that have to be taken into account when we reflect on animal welfare. Concern about the animal's opportunity to engage in certain kinds of behaviour does not prevent one from caring about its subjective experiences. Nevertheless, occasionally, these two kinds of consideration are difficult to reconcile in practice. Considerations within a narrow perspective in which the subjective experiences of the animal alone matter might be outweighed by the other considerations in the broader perspective.[9]

Some of those engaged in the ethical debate regarding transgenic animals will go a step further and argue that welfare is not all that matters in our dealing with these animals. They may defend the view that we should also consider animal integrity.

Integrity

Integrity means wholeness or fullness. In the literature two notions of animal integrity are prominent. The first is based in a biological understanding, the second in a phenomenological understanding. The first stresses the genetic integrity of the animal and therefore focuses on the importance of not changing animal genomes to suit human purposes. The obvious objection to concerns about the violation of genetic integrity through gene technology is that the genome of an animal species is in constant flux both because of the naturally occurring evolutionary forces and through other and well-established breeding practices such as conventional selective breeding. A difference between genetic changes induced by natural selective forces and human-induced changes can be stated, but it is difficult to argue for a relevant difference between introducing genetic changes with modern biotechnology and introducing changes with older, conventional methods. [10] This fact has led some to conclude that transgenic animals raise no new, or additional, ethical concerns. Others claim that this alone gives us reason to re-examine conventional breeding methods with a more critical eye than hitherto. [11]

The second notion of integrity is based on an experience of the animal as an inviolable whole. Animal integrity can thus be understood as an inherent limit in the relationship between humans and nature—a 'red line' that governs what is ethically acceptable for humans to do to animals. Integrity here derives from an experience and understanding of animals as beings that in and of themselves set up an ethical requirement of non-interference. This demand may be violated only if the reasons are adequate from an ethical perspective. Integrity signifies a difference between the knowledge of the animal that we have through our understanding of its usefulness to humans and the knowledge we have when we conceive of the animal independently of our needs. A cow is a producer of hide, milk and meat; it holds no surprises when experienced from the perspective of human need. But when experienced in a non-reductionist perspective, the cow amounts to more than that. Respecting the integrity of animals is thus the polar opposite of wholesale reification of the animal as a natural resource. [12]

△Welfare problems stemming from intended genetic change are hard to avoid, since the very point of inducing the change is to affect the animal.△

Endnotes

1. M Gjerris, A Olsson and P Sandøe, 'Animal Biotechnology and Animal Welfare' in *Ethical Eye—Animal Welfare* (2006) Council of Europe, 89.
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Lifting the veil of secrecy on animal-derived food products

By Katrina Sharman

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Voiceless works to promote respect and compassion for animals, raise awareness of the conditions in which they live and take action to prevent them from suffering. This article is based on a Report produced by Voiceless in May 2007 entitled 'From Label to Liable; Lifting the veil on animal-derived food product labelling'.

Australians love food. From bacon and eggs at Bondi to Chiko Rolls and meat pies at the cricket. From traditional Sunday roasts to lazy TV dinners, food has been an important part of our cultural identity for generations. We sing about it, we write about it— it's the fabric around which we celebrate our trials and tribulations—in family, in business, in life.

Australia also claims to be a nation of animal lovers. Many people say that they care deeply about the treatment of animals. This appears somewhat paradoxical given that many of the animals they claim to love produce or comprise the core ingredients of the nation's most popular meals.

Are we all party to a form of wilful blindness or is the law simply making it too hard to see?

In the last 30 years, our society has experienced a food revolution [1] which has transformed the lives of more than half a billion farm animals who constitute the meat, milk and egg producing machines annually called on to satisfy our national appetite. [2] The nature of food production, especially the manufacturing of animal-derived food products, has changed dramatically as producers compete in domestic and international markets, on cost, scale and efficiency, to meet growing demand.

The interests of farm animals, who are classified in law as 'livestock' or property, have been largely disregarded in this relentless pursuit for profit. Many Australians still subscribe to the iconic image of a rustic farmhouse dotted with pigs wallowing in mud, happy chickens and a few cows watching on lazily in knee high yellow grass. However, in reality, Old MacDonald's farm has long been consigned to the dustbin of history. The bulk of animals raised in Australia today are suffering behind closed doors in large industrial facilities known as factory farms.

Most animals in factory farms live a life of confinement. They spend their time crammed into cages, sheds or feedlots and they never see the sun. Take for example the breeding pigs (sows), numbering about 300,000. [3] These intelligent, emotionally complex beings spend the bulk of their reproductive lives in stalls so small they cannot turn around. [4] The sole purpose of their existence, as determined by us, is to produce the five million pigs slaughtered every year to fill the mouths of our pork, ham and bacon lovers. [5]

In case you thought it was merely the pigs that Lady Justice forgot, spare a thought for our nation's 10 million caged layer hens, lawfully allocated a space so small they can barely preen or stretch their wings. [6] Or its 470 million broilers (meat chickens), crammed into sheds with tens of thousands of others—'hormone-free' but selectively bred to be fast-tracked from nest to nugget in a mere 35 days. [7] Australia's consumption of chicken meat has increased 600% over the past 40 years, with the average Australian now eating 36kg each year. [8]

In 2007, our nation is pumping farm animals along the 'invisible' factory farm assembly line faster than ever. We are mutilating baby animals without pain relief—the tails and teeth of piglets, the beaks of chicks, the horns of calves and the tails of lambs, because it's practical, cheap and lawful to do so. Our regulatory

environment is specifically designed to sanction and subsidise factory farming operations on the proviso that 'no unnecessary suffering' is caused.[9]

Things, however, are beginning to change. In recent years, the veil of secrecy which has shielded many factory farming operations from the public eye has been lifted by a range of factors, including the work of animal protection groups and an increased focus on the environmental and human health effects of factory farming. 'Ethical Eating' has become the subject of media speculation, literature, public discussion and debate.[10] Consumers everywhere are waking up to the plight of farm or 'production' animals. According to the European Union, increased awareness has caused a 'seismic shift' in public attitudes.[11]

This change in consumer consciousness is prompting a global demand-led revolution. For example, Burger King, Wholefoods and Ben & Jerry's (in the United States) and Marks & Spencer, McDonald's and Starbucks Coffee (in the United Kingdom) are some of a growing list of retailers adapting their product lines to supply humanely produced animal products.[12] Large corporations such as America Online (AOL), Google and more than 150 educational institutions across the US are also introducing 'cage-free' dining facilities.[13]

The consumer wave has now reached Australia. For example, the free-range egg market has more than doubled in size in the last six years.[14] It comprises 30.6% of the total retail/grocery egg market value.[15] The free-range pork and chicken markets have also grown, with free-range production lines emerging in major supermarkets. The organic industry, which consumers associate with the humane treatment of animals, is one of the fastest developing sectors in the food industry both in Australia and overseas, with growth rates expected to continue at 10% to 30% per annum.[16] Vegetarian and vegan food product markets are also rapidly expanding, reflecting a growth in the pool of consumers that wish to abstain from any food that had a mother or a face.

The big question is this; now that consumers are beginning to think critically about where their food comes from, is the current regulatory framework empowering them to make informed choices? Sadly it seems it is not. There are a number of reasons for this.

Firstly, our current legislative regime does nothing to lift the veil of secrecy which shields consumers from the truth about how animals are raised in factory farms. In fact it facilitates it by permitting factory farmers to remain silent about the production system used to create their end products. To make matters worse, it permits marketers to use positive imagery such as farmhouses, butterflies and happy cartoon figures on animal-derived food products. This encourages consumers to disassociate products from the horrendous reality of factory farming.

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Secondly, ambiguously worded food labels such as 'farm fresh' or 'naturally perfect' appear frequently on animal-derived food products. Similarly, words such as 'corn-fed', 'barn-raised', 'bred free-range', 'select free-range' and 'grain-fed' appear all over our sanitised supermarket produce. These words are not subject to any legislative definition. Consumers do not know what they mean. Producers have their own ideas. The truth is, these words mean different things to different people and they mean substantively very little at all. In allowing consumers to be bombarded with an abundance of terminology that seeks to harness their good will, the law reinforces the likelihood of consumers being misled as to the true origin of a product.

Finally, while Australia has consumer protection laws and food safety laws which cover many aspects of food labelling, there is simply no federal legislation which requires production systems for animal-derived food products to be identified on product labels.[17] State and territory legislation which requires compulsory labelling of animal-derived food products has been introduced in some jurisdictions, however it is limited to egg production labelling and, as such, does not sufficiently facilitate consumer choice.[18]

In order to make informed decisions, consumers need information about the production systems from which animal-derived food products are sourced. Codes

of practice and third party accreditation schemes have emerged to address consumer concerns about the treatment of farm animals, for example the RSPCA's food accreditation scheme and the Egg Industry's 'Egg Corp Assured Industry Quality Assurance Scheme'. However, these schemes do not offer uniform animal protection standards and consumers may in some cases overstate the significance of their animal welfare claims. In any event, such systems are no substitute for proper law reform.

We might well ask ourselves how our nation of animal lovers measures up internationally when it comes to our legislative framework for the labelling of animal-derived food products. The answer is not so well at all. Labelling of egg production systems has been mandatory in all European Union (EU) member countries since 2004.[19] The EU is now also giving serious consideration to the development of an Animal Welfare Label over the next 5 years. [20]

Australia is already lagging embarrassingly behind the EU in terms of animal welfare. The sow stalls which we recently endorsed for the next 10 years will be prohibited in the EU by 2012 (except for the first 4 weeks of pregnancy) and are already banned in England and Switzerland.[21] The battery cages that we have 'graciously' agreed to increase by 100cm^2 (the average size of a beer coaster) will be banned in the EU from 2012.[22] The installation of new battery cages has been prohibited in the United Kingdom, France, Germany, Austria, Spain, Belgium, Denmark, Sweden, Italy, Ireland, Germany, Luxemburg, The Netherlands, Portugal and Greece since January 2003.[23] The EU is phasing out both of these horrific aspects of the factory farming system in response to scientific evidence of animal suffering and consumer concerns.

Europeans are not the only people that care about the treatment of animals. Australians care too and for this reason they deserve laws that offer truth in product labelling. The Government has delivered on the labelling of Genetically Modified Organisms.[24] It has delivered on Country of Origin Labelling.[25] It is time to deliver truth in labelling of animal-derived food products. We need to move away from a system which confuses consumers and which enables producers to hide the horrible truth about how the majority of our animals are raised.

The law must bend to the will of Australians who want to take a stand against the institutionalised suffering of animals each time they eat. The law should empower us to take responsibility for the effect of our food choices on the lives of others. The time for wilful blindness has passed.

Endnotes

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Is common law the key to upholding an animal's right not to suffer?

By Nichola Donovan

During the last decade, Australia has endured a steep decline in animal rights—both human and non-human. Yet, while the erosion of human rights has been the focus of deep lament by our legal community, the dire situation of Australia's animals has been largely ignored.

Over time, Australia's formerly free-range farms have undergone a radical intensification, with most of our 'farm' animals now enduring life in cramped stalls, cages or feedlots, while some suffer the final indignity of live export.

Only if you are a practitioner of Orwellian doublespeak, will the 'Codes of Practice for the Welfare of Animals' seem aptly named. For the sake of minimal economic benefit, these Codes—compliance with which effectively confers immunity from anti-cruelty laws—permit the systematic abuse of farm animals: allowing them to be closely confined in stalls, cages or feedlots for almost their entire lives; and to suffer routine mutilations (such as teeth-clipping and castration) without anaesthetic or pain relief. It seems to be the same callousness that marked our federal leaders' dealings with vulnerable people in Australia, Guantanamo, and Nauru over the last decade; that is reflected in our state and federal legislatures' failure to protect millions of Australian livestock from undue harm. Minimising the suffering of animals that are used for food is a natural step on the path to civilisation, so let us consider how we might uphold an animal's right not to suffer, in Australia.

A glimmer of hope for human rights has resulted from the election of a new federal government (despite its dubious record on such matters in opposition). Can the animal rights movement capitalise on this spirit of reform, by taking a leaf out of the human rights history book? The backwardness of our major-party politicians, in relation to animal rights—exemplified by the endorsement of a draconian pig Code by all States and Territories in April 2007—inspires reflection on the utility of the common law as a tool for achieving significant legal reform. In this regard, it will be instructive to review the role that the common law has played in the development of human rights, to gauge its potential usefulness in the sphere of animal rights. It may also be helpful to sample some contemporary cases in animal law, to learn from example, and to develop a taste for things to come…

The abolition movements of Britain and the United States provide key examples of cases which acted as catalysts for social and legislative change: uprooting the ancient tradition that 'slaves exist to serve'. In *R. v. Knowles*, *ex parte Somersett* (Kings Bench, 1772) Lord Mansfield upheld a writ for *habeas corpus* in relation to a negro slave from Virginia, held in irons aboard a vessel on the Thames, bound for Jamaica. Although he merely ordered: 'the Black must be discharged' —and confined his (oral) reasons to the principle that a slave should not be made to leave England against his will—Mansfield was popularly feted with having first declared slavery unlawful throughout England. British abolitionists, encouraged by Mansfield's judgment, and the popular sentiment it stirred, pushed for legislative change. In 1792, the House of Commons voted for 'gradual' abolition, and in 1807, the trade in new slaves from Africa was formally outlawed in Britain. Eighty-five years later, in the 1857 case of *Dred Scott v. Sandford*, six out of eight justices of the United States Supreme Court concurred with Chief Justice Taney's view that the drafters of

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> 'beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect.'

Consequently, the Court ruled that neither Mr Scott, nor any other African American was entitled to the rights conferred by American citizenship under the Constitution, and concluded that the United States' Congress did not have the power to prohibit slavery in any federal territory. This decision produced a result opposite to that which the Court had intended: effectively marshalling opposition to slavery within the United States. In 1858, Abraham Lincoln delivered his 'House Divided' speech and by 1861 the American Civil War had commenced. When it ended, in 1865, the 13th Amendment to the Constitution was enacted, to abolish slavery throughout the United States. Unfortunately, Mr Scott died from tuberculosis in 1858, about a year after his emancipation was purchased by the sons of his original master. He did not live to see the long-term consequences of his infamous case.

Similar examples of judicial conservatism, acting as focal points for social and legislative progression, may also be drawn from the

history of Australian feminism, and from the history of child protection. In 1892, the South Australian Supreme Court ruled that a woman who left her husband due to domestic violence, was not entitled to a maintenance order. The Court found that only in circumstances where a woman had been abandoned by her husband, could an order for spousal maintenance be enforced. Public outrage over this case resulted in State Parliament's enactment of the *Married Women's Protection Act 1896* (SA), which empowered magistrates to make orders for the protection and maintenance of married women (and their children). Another example derives from 1992, when Justice Bollen of South Australia's Supreme Court, while presiding over a marital rape case, issued the following instruction to the jury:

> 'There is, of course, nothing wrong with a husband, faced with his wife's initial refusal to engage in intercourse, in attempting, in an acceptable way, to persuade her to change her mind, and that may involve a measure of rougher than usual handling.'

Public faith in the judicial system was called into question as a result of this statement and the attendant media frenzy. The Keating Government responded by establishing an Australian Law Reform Commission inquiry into 'Equality before the Law' and by committing significant resources to judicial education on gender issues.

In relation to the history of child protection, it is not without irony that the case of young Mary-Ellen, a ten-year-old girl from New York, comes to prominence. Mary-Ellen was brought before a New York court in 1874 under the provisions of animal cruelty legislation—there being no law against child maltreatment in existence at the time. She had suffered abuse and neglect from her adoptive parents, and her lawyer argued that she deserved protection in law, on account of her being a member of the animal kingdom. She was successfully ordered into care, and her case achieved popular acclaim, prompting the formation of the New York Society for the Prevention of Cruelty to Children.

With regard to the development of human rights through common law, we may deduce that although judges are seldom more progressive than their parliaments, the long-term repercussions of their judicial decisions—particularly if they coincide with budding social movements—can be tremendous. Let us now consider some contemporary cases in animal rights, that have pushed the legal boundaries.

In August 2003, Judge Elizabeth Laporte of the US Federal Court ruled favourably on an injunction sought by the National Resources Defense Council to restrict the use of Low Frequency Active Sonar (LFAS) by the *US Navy (National Resources Defense Council & Ors v U.S. Navy*–'the LFAS Case'). In about July 2002, the National Marine Fisheries Service (US) granted a permit to the US Navy to test and train with LFAS in 75% of the world's oceans. LFAS generates extremely loud 'pings', between about 120 and 240 decibels (at source), generally too low for human ears to detect, but audible over hundreds of thousands of square miles of ocean at any one time. The noise of a jet engine (at source) is around 120 decibels, but due to a logarithmic scale, 240 decibels is one billion times greater in volume than 140 decibels, and sound travels faster and farther in water than in air. Scientists allege that LFAS causes embolisms and tissue ruptures in the supersaturated blood and tissues of marine mammals, by activating the growth of microscopic bubbles (similar to 'the bends' in humans). It is also thought to cause haemorrhage by acoustic resonance. The US Navy previously accepted blame for the March 2000 stranding of 17 cetaceans (including 3 types of whale and 1 dolphin) in two ocean channels in the Bahamas, where naval exercises using LFAS had been undertaken. The terms of settlement of the LFAS Case were finalised in October 2003. They restrict the US Navy's use of LFAS to specific areas along the eastern seaboard of Asia (around North Korea and China), including portions of the Sea of Japan, the East and South China Seas, and the Philippine Sea. Within those areas, the Navy must observe year-round, seasonal, and coastal exclusions to protect migratory species and sensitive coastal ecosystems.

An action similar to the LFAS Case was filed in a US District Court in Hawaii in May 2007. The Ocean Mammal Institute is seeking to prevent the US Navy from using high-intensity, mid-frequency active sonar (MFAS) in antisubmarine exercises in Hawaii's waters, which are a winter breeding ground for thousands of endangered humpback whales (*Ocean Mammal Institute & Ors v Robert Gates & Ors*). The US Navy has acknowledged in its own Environmental Assessment that MFAS will reach whales at levels up to 215 decibels, at least a hundred thousand times more intense than the levels under which cetaceans

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stranded themselves in the Bahamas in 2000, and that the sonar will, at a minimum, probably significantly alter or cause the abandonment of the whales' migration, surfacing, nursing, feeding, or sheltering behaviours. At time of writing (December 2007), this case is ongoing.

Cetacean Community v George Bush & Donald Rumsfeld ('the Cetacean Case') represents an interesting, if inauspicious, parallel to the LFAS Case. In September 2002, Hawaiian attorney Lanny Sinkin filed suit seeking to compel the defendants to prepare an environmental impact statement for the use of low frequency active sonar (LFAS) during threat and warfare conditions. Unlike the LFAS Case, Mr. Sinkin sought to build upon previous cases in which the legal standing of certain animals was accepted, by lodging the case in the name of the animals themselves. However, in 2003 a District Court judge granted the defendants' motion to dismiss the case and found that the plaintiffs lacked legal standing. In October 2004, the plaintiff's appeal to the Federal District Court was unanimously dismissed by a panel of three judges. The joint decision was delivered by Judge William Fletcher, and states:

> 'We are asked to decide whether the world's cetaceans have standing to bring suit in their own name under the Endangered Species Act, the Marine Mammal Protection Act, the National Environmental Protection Act, and the Administrative Procedure Act. We hold that cetaceans do not have standing under these statutes…If Congress and the President intended to take the extraordinary step of authorising animals as well as people and legal entities to sue they could and should have said so plainly.'

This judgment 'clarified' a 1998 decision by three judges in *Palila v. Hawaii Department of Land and Natural Resources* ('Palila IV') by finding that judicial comments thought to have granted 'standing' to the Palila bird, were 'obiter dicta' or as Judge Fletcher stated: '…in context … little more than rhetorical flourishes.' Thus, the Appeal Court in the Cetacean Case effectively overruled two earlier decisions by single judges of district courts, which had held —in purported reliance on Palila IV—that the *Endangered Species Act* granted standing to certain animals (see: *Marbled Murrelet v. Pac. Lumber Co.)* and (*Loggerhead Turtle v. County Council of Volusia*). In a concession to animal rights advocates such as Mr. Sinkin, Judge Fletcher noted:

> 'It is obvious that an animal cannot function as a plaintiff in the same manner as a juridically competent human being. But we see no reason why Article III [of the US Constitution] prevents Congress from authorizing a suit in the name of an animal, any more than it prevents suits brought in the name of artificial persons such as corporations, partnerships or trusts, and even ships, or of juridically incompetent persons such as infants, juveniles, and mental incompetents.'

△ By recognising the standing of some animals (for instance, mammals) we will open the door to recognising their most basic rights – such as the right not to suffer. △

As a reversal of fortune on the issue of standing, the Cetacean Case presents a valuable lesson to all animal rights advocates: to beware the risk of judicial backlash, by carefully weighing that risk against any anticipated long-term gains, throughout the course of the litigation. Similarly, with the benefit of hindsight, a human rights lawyer involved in the 'Tampa Case' of 2001 (*Ruddock v. Vadarlis*) has suggested that the full legislative backlash comprising the 'Pacific Solution', might have been avoided, had the Tampa Case never been commenced. In retrospect, it seems that the Howard Government effectively transferred its own guilt (foreshadowed in Chief Justice Black's dissenting judgment) onto the Australian public, thus creating a sense of urgent defensiveness, to which Labor was drawn by their desperation for power. Avoiding a judicial and/or legislative backlash while simultaneously advocating for ethical law reform may not always be possible; but it would be hard to overestimate the long-term positivity of cases such as Tampa, which provided an outlet for reason during a crazed period in Australian politics.

The lack of 'standing' for animals, is not only the most obvious instance of speciesism in law (an animal is devoid of legal rights for no other reason than its species); but is also the key obstacle that must be overcome if our social and ethical progress is to be reflected in law. Intellectually impaired humans are given full legal standing through their appointed guardians; but non-human animals of equal (or greater) intellectual, emotional and physical capacity, are not. By recognising the standing of some animals (for instance, mammals) we will open the door to recognising their most basic rights – such as the right not to suffer. However, this door is definitely not a floodgate.

In view of the very gradual development of human rights, aside from likely progress toward legal recognition and interpretation of the internationally accepted 'Five Freedoms' of animals (freedom from hunger and thirst; freedom from discomfort; freedom from pain; freedom from injury and disease; freedom to express normal behaviour; and freedom from fear and distress); more extensive legal rights for animals cannot be expected anytime soon.

Given the importance of standing for the future of animal law, it is worth noting another case that has recently knocked upon its door, and which is currently on appeal to the Supreme Court in Austria. In February 2007, Dr. Martin Balluch of Verein Gegen Tierfabriken (the 'Association Against Animal Factories') applied for a guardianship order in relation to Hiasl, a 26 year-old chimpanzee, who had been abducted from his home in the jungles of Sierra Leone in 1982. Hiasl's status as a chimpanzee was not disclosed on the initial application. Hiasl's mother had been killed by poachers in Sierra Leone before he was sold to a laboratory near Vienna, for the purposes of HIV/hepatitis research. However, in April 1982, The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) entered into force in Austria, making the importation of wild chimpanzees unlawful. Upon his arrival in Austria, Hiasl was duly seized by Austrian customs officers, and placed with a human foster family. During the following years, the laboratory paid a fine for illegally importing Hiasl and also successfully sued for return of their 'property'. However, public protests convinced them to give up their claim, and Hiasl moved to a sanctuary when he was aged 10. In January 2007 Hiasl's sanctuary declared bankruptcy. A private benefactor donated 5000 euro to Hiasl and to Dr. Balluch (as co-beneficiary) on the proviso that they both decide how the money be spent. Hiasl is mentally incompetent to make such a decision, so he requires a guardian to do this on his behalf, before the funds can be accessed. It was hoped that Dr. Balluch's status as co-beneficiary would strengthen his claim to be appointed as Hiasl's guardian. Some 50 pages of expert evidence attesting to the legal personhood of Hiasl (and all other chimpanzees) was filed in support of the application. This included reports by eminent scientists who believe that chimpanzees and humans are so closely related, they ought be classified within the same genus.

In an unreported decision, on 18 April 2007 Judge Barbara Bart of Modling District Court, Lower Austria rejected the guardianship application of Dr. Balluch, ruling that: pursuant to the Austrian law of guardianship, no psychological illness or mental handicap could be discerned in Hiasl; nor was there any evidence of imminent harm that a guardian might prevent. Judge Bart avoided ruling on the legal personhood of Hiasl, noting that to do so would merely be academic in the circumstances, though she did signal that she was convinced on this point. Dr. Balluch appealed to the Provincial Court in Wiener Neustadt, Austria, which dismissed the case in late September 2007, finding that neither Dr. Balluch nor Hiasl had standing to appeal, because (ironically) only a 'guardian' would have such standing. At time of writing, this case is proceeding on appeal to the Austrian Supreme Court in Vienna.

Common law is one of three key elements that should be included in any broad strategy for the advancement of animal rights. It should be complemented by a community awareness campaign, and by the education of politicians and bureaucrats. Animal rights advocates of every persuasion may take comfort from the history of human rights, which demonstrates that even the most intransigent hurdles can be overcome, with time and effort. Advances in communications mean that our world is adapting much faster to social change, and that developed countries are less likely to experience the lags in legal development that were commonplace in previous centuries. Nevertheless, we must have patience, lest we become disillusioned and falter in our commitment to defend the defenceless.

Animals, guardianship and the local courts: towards a practical model for advocacy

By Ruth Pollard

Ruth Pollard is Principal Legal Officer at the Public Trustee NSW and in the year of its commencement undertook Australia's first animal law course at the University of New South Wales in February 2005.

The legal concept of guardianship has been invoked by some advocates as an avenue through which the interests or rights of animals can be promoted. In general these analogies for animal law have been drawn from legal principles concerning children and guardianship.

Guardianship evokes the imagery of a substitute adult standing in the place of the child's parents. However what has been lacking from earlier proposals is any discussion on the practical implementation of a model of guardianship for animals within the disputes resolution systems of either the Courts or Tribunals.

The modern legal concept of guardianship can be traced to religious and juridical concepts found in ancient Near Eastern and Greco-Roman cultures. Metaphors of guardianship appear in the Bible in various contexts such as provisions in the Torah that required the community at large to seek justice for orphans, or where trustworthy officials were appointed as guardians of the royal children.

Guardianship existed in both ancient Greece and Rome but it is in Roman law that we find it in a developed form. The original purpose of guardianship was to protect the property of the ward for the whole 'kin-group', which inherited on the death of the ward. This latter concern is reflected in contemporary theological discussions about humans as trustees of the earth, and in environmentalist discourses about the as-yet-unborn generations and the future of the planet.

In ancient Rome the role of guardian was held by a public official whose duty to the ward was to act as legal representative, provide food, clothing, housing and education and protect the property for the ward[1] himself. The guardian had a duty to promote the interests of the ward and to give account for the administration of the ward's property. There are similarities between Roman law and the modern law of guardianship both in relation to minors and adults.

Guardianship of animals

Joyce Tischler and David Favre have discussed applying a guardianship model to promoting and protecting the interests of animals in the context of US law. George Seymour has considered the guardianship model in the Australian context. To develop a practical working model for animal guardianship we must first consider some of their suggestions, and the legal language they invoke.

Tischler broke the ice with a model concerning only companion animals. The key point she made was that humans must act compassionately toward animals in the same ideal manner that we ought to treat people who are unable to defend themselves at law and in society:

> 'The essence of guardianship is 'care and compassion' and an acceptance of responsibility for both the physical and mental well being of the ward. The guardian is the protector of the ward, who by reason of 'weakness, incompetence, youthfulness, or other legally recognised disability,' needs an intermediary to put her on more equal footing with the rest of society.' [2]

The concept of animal guardianship has deepened with some very innovative ideas put forward by Favre. He explores concepts of property and equity to set up a model of equitable self-ownership for animals. As animals are living beings and not money or real estate, the legal owner takes on the guise of a guardian rather than a traditional trustee. [3] Favre suggests several guidelines of which the most striking concerns how a child is raised. His parallel thought is that the guardian of an animal should likewise work out what is in the best interests of the animal. A child needs discipline not abuse, a parent must allow for the mental development of the child as well as food, water, shelter and medical assistance. Animals have an essential and basic interest in surviving, and at the very least a human guardian must parallel the same nurture for a child in the case of an animal.

Aside from Tischler and Favre, other overseas discussions have ventured the idea of establishing a special minister for animals with a whole government department devoted to the interests of animals, which would be separate from agriculture and fisheries. There would be wide powers of inspection of businesses involving animals, and monitoring of the import and export of animals, and the registration of animals. Laws would be rationalised and there would be educational programmes run in places such as schools to enable the continuing reform and promotion of animal interests. [4]

The Australian states of Tasmania and Queensland have introduced the term 'duty of care' into their animal welfare legislation. Seymour examines the use of this term in both pieces of legislation. He supports a change in the legal status of animals from property to personhood, and makes the point that personhood is a legal fiction. Personhood has been bestowed upon entities such as corporations and ships but was once denied to women and slaves. He sees guardianship as a way forward to the granting of legal standing to animals. Animals, like some incapable people, cannot communicate their interests and so a guardian must represent their interests in court. He suggests that someone could represent the animal from his or her human family or, if not, then an animal protection organisation. Duty of care means that people who have care of an animal, in addition to not being cruel, must also look to the animal's welfare.

The language of duty of care has recently appeared in the Australian Government Department of Agriculture, Fisheries and Forestry paper, The *Australian Animal Welfare Strategy*. [5] It acknowledges the 'intrinsic value' of animals and their economic importance, and that all animals deserve humane care and treatment. All animal owners and carers owe a duty of care for animals that includes: understanding, support of, promotion of and application of animal welfare principles. It also affirms the need for international co-operation in drafting a Universal Declaration on Animal Welfare framed around 'five freedoms':

1.freedom from hunger, thirst and malnutrition
2.freedom from fear and distress
3.freedom from physical and thermal discomfort
4.freedom from pain, injury and disease
5.freedom to express normal patterns of behaviour

The Strategy also refers to the three 'R's', the reduction in animals, refinement of experimental methods and replacement of animals in experimental situations. The principal flaw in this document is that contradictory standards are upheld, namely business interests over the interests of animals, and this is where proper duty of care is sacrificed in favour of profits. The interesting point of both the Queensland and Tasmanian welfare legislation and the Government Strategy is the introduction of the neighbour principle of duty of care.

Lawyers may have forgotten that this principle derives from the story of the Good Samaritan, and if we take the next step as suggested by the preceding material then the implication is that animals are our 'neighbours' who are owed a duty of care.

Proposed model

In light of the preceding ideas about guardianship and duty of care, a practical system for animal guardianship could be developed in Australia that can be overseen by and enforced through the courts. It is proposed that the model of guardianship for animals be situated in the local courts and here some reflection is needed with reference to care for minors. The model of guardianship set up by the *Children's and Young Persons (Care and Protection) Act* 1998 (NSW) ('the Act') provides a possible platform. The Act was set up to promote the best interests and rights of children and young people in out of

home care. The principles underlying the Act are: the promotion of the best interests of the child, the provision of services to meet the individual needs of the child, the enhancement of the physical, emotional, cognitive, social and cultural development of the child, while giving recognition to the rights and responsibilities of the parent to be involved in making decisions for the child. The internationally recognised term 'best interests', is used when referring to the protection and welfare of children. This term is also gaining popularity with animal rights advocates.

The Act specifies that jurisdiction is vested in the Children's Court and cases are heard before a magistrate. The Court has authority to appoint a legal representative or a guardian *ad litem* for a child appearing before it. The Act gives power to make emergency care and protection orders and the police or the Director General can, without an order, remove children from a care provider if reasonably satisfied that there is danger of infringement of their rights.

△ Social commentators now speak of the 'fur family' as taking its place alongside the nuclear, single-parent styles of family. Animals are gradually being understood as bona fide members of households.△

Now the above system could be paralleled so that human actions concerning animals are catered for in a similar fashion. Legislation could cover the provision of duties, responsibilities and services required of humans to act in the 'best interests' of animals. It would specify the requirements of the community at large having a duty of care, and furnish retributive penalties that parallel sentences brought against child-abusers. It would be streamlining existing animal legislation so that all matters can be heard within the local court. It is acknowledged that currently NSW law provides for animal cruelty matters to be brought before the local courts but a revision and streamlining of the law incorporating the concepts of guardianship and best interests is proposed.

A court is necessary because a tribunal lacks the authority to punish wrongdoers. In a similar vein it is better to work via a local court than confer the responsibility of animal guardianship in the cumbersome bureaucracy of a government department. In the court model standing would be given to human guardians and animal welfare groups, with this latter group being supported by government funding in carrying out this role on behalf of the community, where the duty of care and the animal's best interests have been abused or breached.

The advantages of this model are that the local court provides an accessible and affordable service. The local court also records matters heard before it and transcripts can be made available. The need for such transcripts is necessary for the organic development of precedents and future judgments. It is also vital in providing an avenue by which public scrutiny and transparent accountability is facilitated for the body politic. As public awareness of the status of animals at law is virtually non-existent the availability of such records would play an important part in public discourses developing on the moral and legal issues about animals. Furthermore the treatment of animals in industrial, agricultural and laboratory settings is something largely hidden from public view and in some respects this has occurred because the legislation governing those settings has minimalist requirements for public accountability.

Social commentators now speak of the 'fur family' as taking its place alongside the nuclear, single-parent styles of family. Animals are gradually being understood as bona fide members of households. As this trend ensues the public will be receptive to further sensitising about animals in non-domestic contexts. A groundswell of opinion would surely surge forward as recorded court cases enter the public domain. In order for such a system to become reality, legal discourses need to be widened to inform and include the body politic. As the interests of animals become a broad matter of public concern, then governments are obliged to listen, and the court system provides a valuable avenue for resolving disputes concerning human duties toward animals.

Endnotes

1. D Walker, 'Guardianship, or Guardian and Ward,' in *The Oxford Companion To Law* (1980), 542-543. R Versteeg, *Law In The Ancient World* (2002).
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3. D Favre, 'Equitable Self-Ownership for Animals'(2000) 50 *Duke Law Journal* 473.
4. S Jenkins, *Animal Rights and Human Wrongs*(1992), 93-94; R Moss, *Europe Animal Welfare Concerns and Chaos* (1991).
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The emergence of animal law in Australian Universities

By Steven White

The teaching of animal law courses in Australian law schools is a very recent phenomenon, the first course only offered in 2005. Despite its newness, there are good reasons to be optimistic about a substantial growth in the field in the coming decade. Recent experience in the United States suggests that once a critical mass of courses is established, very sharp growth ensues.

The emergence of animal law as a legal discipline in Australia is very significant, reflecting a growing recognition that reform of the way in which we govern our relationship with animals is likely to be one of the key social justice movements of the early 21st century. As in earlier social justice movements, lawyers will have an important contribution to make to reform. In order to do so they will need to be informed and educated about the significant socio-legal issues which need to be addressed. The teaching of animal law, and the associated development of a well-developed research culture, can help to stimulate deeper thinking about these issues and creative, practical strategies for reform.

The United States experience—a precedent for Australia?

The discipline of animal law is now well established and widely respected in the United States. The growth in the teaching of animal law in the US has been quite staggering.[1] From a very low base in the early 1990s, the number of courses has steeply increased since, to the point where it is now taught in upwards of 70 law schools, more than a third of all US law schools. [2]

Accompanying the growth in courses has been the development of linked animal law activities for students, including national animal law moots, essay competitions, internships and so on.

The teaching of animal law in the United States has been underpinned by the emergence of a vibrant and growing research culture. There are specialist animal law centres (eg the National Center for Animal Law, part of Lewis & Clark Law School in Portland, Oregon). Three specialist animal law journals are published out of the United States, [3] with a fourth, from Stanford University, to commence shortly. [4] There are also several animal law textbooks published in the US.[5] Leading US legal academics have contributed to the literature on animal law issues, even if not actually teaching animal law courses themselves.[6]

Animal law in Australia

Geoffrey Bloom pioneered the teaching of animal law in Australia. He taught the first animal law course in Australia to postgraduate students at the University of New South Wales Law School in 2005. Since then courses have been conducted at UNSW for a second time, Southern Cross University in northern NSW (also taught by Geoffrey), and, in 2007, at Griffith University in Brisbane.

In 2008 courses will be offered at UNSW, Griffith University, and Wollongong University, with new courses on the agenda for 2009 at Sydney University, Monash University, Bond University and Flinders University.

As well, later year UNSW law students have the opportunity of undertaking placements with animal advocacy organisations, as part of a public interest internship scheme.

Steven White teaches law at Griffith Law School, and is completing a PhD on the regulation of animal welfare.

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So, while it is still very early days for animal law in Australia, there is a genuine momentum developing within the community of Australian law schools.

Those who have offered or are proposing to offer animal law courses report widely differing experiences in negotiating inclusion of animal law in the law school curriculum.

In some cases, senior law school staff members have been very supportive of inclusion of such a course. In other cases, proponents have been confronted with a range of hurdles. Senior staff have not comprehended, or actually trivialised, animal law as a legal discipline. Resource constraints have sometimes meant that proponents have been required to teach in allocated courses, usually core courses, at the expense of new elective courses. On occasion animal law courses have also been judged as being inconsistent with prevailing teaching and research streams within a law school.

Despite the existence of some institutional resistance, the number of courses offered is growing, even if, as shown above, from a very low base. It's likely though that institutional resistance will decline over time. Three factors will be critical in this eventuating.

First, as the number of courses gradually increases, a self-sustaining legitimising effect is produced.

Second, students are increasingly demanding that a course be offered within their law school. A broader emphasis on humane education in schools and colleges is likely to further stimulate demand, as will initiatives such as Voiceless Animal Advocates (VAA), a newly-established network of university student societies advocating for improved animal protection. One activity suggested for VAA members is lobbying of law schools to include animal law in elective offerings.

Third, Australian legal research and scholarship in the area is growing. Articles addressing animal law issues are now being published with increased frequency in leading Australian law journals, and books with an Australasian focus will soon be available. Australia's first animal law journal, *Australian Animal Protection Law Journal*, will soon be up and running. It will be published twice a year and be peer-reviewed. These developments are important for a couple of reasons. First, it legitimises animal law as a field of scholarly endeavour. Second, it provides accessible teaching materials, with an Australian orientation, for those contemplating offering a course in animal law.

Teaching animal law

Although risking over-simplification, it is possible to identify two common approaches to the teaching of animal law. The first adopts a traditional black letter law or survey approach. On this approach, the focus is close analysis of legislation and cases. The position of animals is considered according to traditional doctrinal areas (eg animals and negligence law, animals and property law, animals and contract law, and so on). A strict black letter law course provides little opportunity for reflection by students on the ethics of human and animal interaction, as manifested in law. Insights from other disciplines, such as politics, philosophy or ethics, are largely absent.

The second approach takes an interdisciplinary or law-in-context approach. On this approach, the legal status and regulation of the treatment of animals is central, rather than being regarded as a by-product of established categories of law. The legal status of animals is placed in a broader context, usually in an ethical or political context, but also an economic, scientific and/or environmental context. Insights from other disciplines are used to explain, critique and re-conceptualise prevailing law.

The courses taught so far in Australian universities have broadly reflected an interdisciplinary approach. As the number of animal law courses grows, there is likely to be a mix of pedagogical approaches, consistent with the teaching of law more generally.

Significance of animal law

Our relationship with animals is central to our lives, sometimes in obvious ways, but often in ways we are scarcely aware of. Many Australians regard their companion animals as 'members of the family'. Animals and animal products are central to the diets of most people. Animals are used in an incredible range of products, including plywood adhesives, fertilizers, cosmetics, lubricants, musical instruments, clothes and so on.

The exploitation of animals for our benefit raises profound moral, ethical and legal issues. The ways in which the law regulates the treatment of animals reflects, even if imperfectly, society's regard for animals.

Significantly the law is also constitutive of our understanding of the place of animals in the world.

For these reasons, animal law has a very strong claim to be part of the curriculum in all law schools, available, at the very least, to law students, but also to students and graduates in other disciplines.

To the extent that animal law does become an established part of the law curriculum, it is more likely that at least some law graduates will have spent a semester thinking about animals and the law. It is trite, but true, to say that these graduates will go on to become litigators and prosecutors, members of parliament and the judiciary, senior policy-makers within government departments, and senior managers in the private and not-for-profit sectors. In all these spheres there is the potential for a significant contribution to the reform of the status of animals.

It is, of course, still too early to gauge the extent to which the emergence of animal law as a distinct discipline will contribute to a reduction in the suffering of animals in Australia and abroad.

At the very least, though, animal law has the potential to sensitise lawyers to the need for a more compassionate ethic and to contribute to an environment of increased legal activism and public debate.

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Achieving national consistency in privacy regulation

By Jonathan Dobinson

Jonathan Dobinson is a Senior Legal Officer at the Australian Law Reform Commission. He is part of the team working on the ALRC's Privacy Inquiry.

On 12 September 2007, the ALRC released a blueprint with 301 proposals for overhauling Australia's complex privacy laws. *Review of Australian Privacy Law* (Discussion Paper 72) is just under 2, 000 pages, and is the product of the largest consultation process in ALRC history.

A key issue raised in the ALRC review of the *Privacy Act 1988* (Cth) has been that Australian privacy laws are multi-layered, fragmented and inconsistent. One of the main problems identified is that information privacy in Australia is regulated at the federal and state and territory level. The Discussion Paper (DP 72) sets out a number of reforms to Australia's privacy laws, including proposals aimed at achieving national consistency.[1]

Federal regulation of privacy

The *Privacy Act 1988* (Cth) regulates the handling of personal information by the Australian Government, the ACT Government and the private sector. The Act does not regulate the handling of personal information by the state governments or the Northern Territory Government, except to a very limited extent.

Other federal legislation also regulates the handling of personal information. For example, the *Freedom of Information Act 1982* (Cth) and the *Archives Act 1983* (Cth) restrict access to personal information held by the Australian Government in certain circumstances.

State and territory regulation of privacy

Each Australian state and territory regulates the management of personal information although not every state and territory has specific privacy legislation in place. New South Wales, Victoria, Tasmania and the Northern Territory have legislation that regulates the handling of personal information in the state or territory public sector.[2] The public sector in Queensland and South Australia is required to comply with an administrative privacy policy rather than privacy specific legislation.[3] The public sector in Western Australia does not have a privacy regime. However, state freedom of information legislation and public records legislation provide some privacy protection.[4]

Legislation in New South Wales, Victoria and the ACT regulates health information in the public and private sectors.[5] These Acts overlap with the private sector provisions in the *Privacy Act*. Regulation of health information in other jurisdictions is restricted to public sector agencies or is the subject of codes and guidelines.[6]

Personal information is also regulated under state and territory legislation that is not specifically concerned with the protection of personal information such as freedom of information legislation, public records legislation and local government legislation.

These state and territory laws are sometimes inconsistent with the *Privacy Act* and with each other. For example, there is inconsistency in the bodies and individuals regulated; the types of personal information regulated; and the privacy principles governing the handling of personal information.

Is national consistency important?

A threshold issue is whether national consistency in the regulation of personal information is important. It is the ALRC's view that national consistency should be one of the

goals of privacy regulation.[7] The ALRC has found that inconsistency and fragmentation in privacy regulation causes a number of problems including unjustified compliance burden and cost, impediments to information sharing and national initiatives and confusion about who to approach to make a privacy complaint.

All submissions to the ALRC Inquiry that addressed this issue strongly supported national consistency. Most focused on how a nationally consistent privacy regime would lessen unjustified compliance burden and cost. A large number of submissions identified that state and territory legislation regulating the handling of personal information in the private sector is a major cause of inconsistency, complexity and costs. Others, including state governments, supported harmonisation of privacy regimes between governments, and between the public and private sectors, but not uniform privacy laws that mirrored the *Privacy Act*.

A proposal for national consistency

The ALRC has proposed a flexible approach to achieving national consistency. In some areas, uniformity is a desirable policy outcome, for example, the adoption of uniform privacy principles at the federal, state and territory level. National consistency can also involve the interoperability of laws, or necessitate consistent approaches to the implementation of privacy laws and therefore require cooperation and coordination between privacy regulators.

A nationally consistent privacy regime will help to ensure that Australians' personal information attracts similar protection whether that personal information is being handled by an Australian Government agency or a state or territory government agency, a multinational organisation or a small business, and whether that information is recorded in a paper file or electronically. The ALRC is also mindful, however, of the need for flexibility in some areas. The ALRC acknowledges that some sectors require specific laws when dealing with personal information, for example, the health sector, the credit reporting industry and the telecommunications industry.

National legislation regulating the private sector

It is the ALRC's view that the Australian Parliament has the power under the *Australian Constitution* to legislate to the exclusion of the states regarding privacy in the state public and private sectors, subject to a number of express and implied constitutional limits.

A large number of submissions focused on inconsistency in the regulation of personal health information. Submissions suggested that various problems arise because the handling of health information in the private sector is regulated by the *Privacy Act* as well as state and territory legislation in New South Wales, Victoria and the ACT. Submissions noted that these laws are creating a significant compliance burden and cost, and are preventing the implementation of projects that are in the public interest, including important medical research. These submissions urged the ALRC to propose the enactment of national privacy laws that regulate the handling of health information.

One way these issues would be dealt with effectively is if private sector organisations were required to comply with a single set of principles in relation to the handling of health information. The ALRC has therefore proposed that the *Privacy Act* should be amended to provide that the Act is intended to apply to the exclusion of state and territory laws dealing specifically with the handling of personal information by the private sector. In particular, the following laws of a state or territory should be excluded to the extent that they apply to organisations: *Health Records and Information Privacy Act 2002* (NSW); *Health Records Act 2001* (Vic); and the *Health Records (Privacy and Access) Act 1997* (ACT).

Submissions from state and territory governments and others noted that there are various state and territory laws that regulate the handling of personal information in the private sector that would need to be preserved if the Australian Government enacted national privacy legislation. These laws include state and territory laws that require reporting for public health and child protection purposes. The ALRC believes that it is vital that the Australian Government consult with state and territory governments about the laws that should be preserved under an extended *Privacy Act*. The ALRC has proposed that the Australian Government, in consultation with state and territory governments, should develop a list of 'non-excluded matters' for the purposes of the *Privacy Act*.

Commonwealth-state cooperative scheme

It is the ALRC's preliminary view that national consistency will also be promoted if the Commonwealth and state and territory governments enter into an intergovernmental agreement in relation to the handling of personal information. The intergovernmental agreement should establish a Commonwealth-state cooperative scheme that provides that the states and territories should enact legislation that regulates the handling of personal information in that state or territory's public sector.

It is proposed that these laws adopt key elements of the federal legislation into state and territory privacy laws, including privacy principles and key definitions. The ALRC has also proposed that these laws should provide for the resolution of complaints by state and territory privacy regulators and agencies with responsibility for privacy regulation in that state or territory's public sector.

In addition, the ALRC has proposed the establishment of an expert committee to assist the Standing Committee of Attorneys-General (SCAG) to ensure national consistency in the regulation of personal information. The committee should comprise representatives from state and territory bodies with responsibility for privacy, as well as others with an interest in privacy issues.

A review

Given the importance of national consistency, it is the ALRC's view that the Australian Government should initiate a review in five years, time to consider whether the proposed Commonwealth-state scheme in relation to the handling of personal information in state and territory public sectors has achieved its goal. This review should consider whether it would be more effective for the Australian Parliament to exercise its legislative power in relation to information privacy in the state and territory public sectors.

Where to next?

The proposals outlined in DP 72 do not represent the ALRC's final views. They are preliminary views and the ALRC has welcomed feedback on whether they are practical and appropriate. To date, the ALRC has received over 550 submissions from stakeholders and other interested parties including federal, state and territory government agencies; local and international private sector organisations; lawyers; academics; community groups and individuals. The ALRC is currently considering these submissions and preparing a final report to the Attorney-General of Australia.

Endnotes

1. See Australian Law Reform Commission, *Review of Privacy Law* (DP 72, 2007), Ch 4.
2. *Privacy and Personal Information Protection Act 1998 (NSW); Information Privacy Act 2000 (Vic); Personal Information and Protection Act 2004 (Tas); Information Act 2002 (NT).*
3. Queensland Government, *Information Standard 42—Information Privacy (2001);* South Australian Government Department of Premier and Cabinet, *PC012—Information Privacy Principles Instruction (1992).*
4. *Freedom of Information Act 1992 (WA); State Records Act 2000 (WA).* The Information Privacy Bill 2007—which aims to regulate the handling of personal information by the state public sector and the handling of health information by the public and private sectors—was introduced into the Western Australian Legislative Assembly in March 2007.
5. *Health Records and Information Privacy Act 2002* (NSW)*; Health Records Act 2001* (Vic)*; Health Records (Privacy and Access) Act 1997* (ACT).
6. See, eg, Queensland Government, *Information Standard 42A—Information Privacy for the Queensland Department of Health* (2001)*;* South Australian Government Department of Health, *Code of Fair Information Practice* (2004)*;* Northern Territory Government Department of Health, *Information Privacy Code of Conduct* (1997).
7. This finding is consistent with other recent inquiries into privacy laws: Parliament of Australia—Senate Legal and Constitutional References Committee, *The Real Big Brother: Inquiry into the Privacy Act 1988 (2005), rec 3;* Office of the Privacy Commissioner, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988* (2005), recs 2–7.

Rebuttable presumption: the way forward for Legal Professional Privilege?

By Tom Smyth and Christian Strauch

Tom Smyth and Christian Strauch were winners of the Australian Law Reform Commission's 2007 Kirby Cup Competition.

This submission concerns the reference placed before the Australian Law Reform Commission ('ALRC') by the Attorney-General on 29 November 2006. It is therefore not a broad-brush consideration of the nature, purpose or merits of the common law principle of legal professional privilege. This submission, like the referral to which it is directed, is concerned only with the desirability of further statutory modification or abrogation of legal professional privilege in the context of Commonwealth agencies' use of their coercive or investigatory powers.

The key aspects of this submission are, firstly, a description of the problem which has been referred to the ALRC for consideration — namely the occasional abuse of a broad and inflexible common law immunity. There, we consider legal professional privilege in the context of current Commonwealth agencies' investigatory functions and use of their coercive powers. Secondly, we critique the law of legal professional privilege as it currently stands. Thirdly, we lay out our proposal for reform of the law of legal professional privilege and provide a set of draft provisions that we say represent one solution to the problems we identify. Finally, we discuss strategies for the implementation of our proposal, looking specifically at jurisdictional issues, as well as more practical considerations. At the outset, however, it is instructive to consider the nature of the principle of legal professional privilege.

Legal professional privilege traditionally justifies its extension of absolute confidentiality by two streams of reasoning: firstly, privacy; secondly, the public interest. The privilege is absolute, and 'if a balancing exercise was ever required…it was performed once and for all in the sixteenth century, and since then has applied across the board in every case, irrespective of the client's individual merits'. [1] So as to maintain the underlying principles of legal professional privilege in a context of its occasional misuse, tactical use, or, abuse, this submission proposes a statutory framework and a judicial process, each of which is designed to curb the possibility of abuse.

At the heart of our proposal is an attempt to resolve the conflict between two aspects of the public interest: on one hand, the public interest in full disclosure; on the other, the public interest in the integrity and strength of the legal system and its ability to uphold established common law doctrines. We say that the correct way to incorporate common law legal professional privilege into the modern statutory environment is by enactment of a rebuttable presumption of privilege, removable only by judicial process.

Problem Description

A. The misuse and abuse of claims of legal professional privilege

The high-minded ideals we may glean from the common law should not distract from the fact that claims of legal professional privilege can be used for lower purposes. The resolution of a question over the legal professional privilege status of communications will necessarily involve recourse to a court. No doubt, the spectre of protracted litigation[2] may delay or frustrate investigations. In the *Kennedy* litigation, for example, claims of privilege delayed the execution of an Australian Securities and Investments Commission warrant by more than a year. Claims of privilege may also create a large volume of work for courts. *Hart v Commissioner, Australian Federal Police*, [3] for example, was a situation in which privilege was claimed over the equivalent of

200,000 documents. No doubt lawyers' ability to make such claims and the attendant time and expense of litigation leaves the law of privilege open to abuse by strategic moves in litigation.

B. The Cole Royal Commission

The scope for abuse of legal professional privilege, substantively, and as a tool of legal strategy, was lain bare most recently during the Cole Royal Commission. Relevantly, the Australian Wheat Board (AWB) challenged the Commission's examination of a document it had supplied, allegedly by mistake, on the basis of legal professional privilege. In *AWB Ltd v Cole*, [4] the Federal Court rejected the contention that the document was privileged, and held that the Commissioner did not have a power to determine claims for legal professional privilege. [5]

Parliamentary reaction was swift. The Royal *Commissions Amendment Act 2006* (Cth), an Act to amend *Royal Commissions Act 1902* (Cth), was the result. That Act provided the Commissioner with a power to require the production of a document for the purpose of making a finding about whether it is properly characterised as privileged.

In its report, the Cole Royal Commission said that, on legal professional privilege, '[t]he issue for consideration is whether the public interest in discovering the truth should prevail over the private interest of companies or individuals in maintaining claims of legal professional privilege'.

The AWB raised approximately 40 claims of client legal privilege during the Inquiry, involving up to 1,400 documents. Ultimately the AWB did not pursue its claims of legal professional privilege over a substantial majority of claims in actions in the Federal Court. Presumably, this situation provided some impetus for consideration of the current referral. [6]

In considering reform, it is imperative to bear the historical and jurisprudential roots of the relevant law constantly in mind. This submission would therefore be weak indeed if it did not take account of the development of legal professional privilege — a principle that has been described as a 'a practical guarantee of fundamental, constitutional or human rights', [7] 'essential for the orderly and dignified conduct of individual affairs', [8] and 'of great importance to the protection and preservation of the rights, dignity and freedom of the ordinary citizen under law'. [9] It is to that analysis we move now.

Legal professional privilege: history and purpose

Initially, legal professional privilege arose from a duty of confidence, and so attached to practitioners, not clients. [10] Judicial repudiation of that rule led to its reformulation, and fostered a theory that 'looked to the necessity of providing subjectively for the client's freedom of apprehension in consulting his legal advisor'. [11] Recognition that the privilege was one of the 'client and the public' [12] led, from the beginning of the 19th century, to the development of the currently prevailing body of jurisprudence.

In general, common law legal professional privilege arises — in protecting the interests of the client and the interests of the public — to protect the integrity of legal processes. Litigation, in Sir George Jessel MR's reasoning in *Anderson v Bank of British Columbia*,[13] can only be conducted by professionals; therefore, persons having recourse to those professionals should 'be able to place unrestricted and unbounded confidence in the professional agent'.[14] However, confidentiality cannot be the only reason for the privilege.[15] The other reason for the principle is the common law's recognition that 'the involvement of representatives skilled in the law who had been fully instructed was indispensable to the proper functioning of the legal system',[16] or, alternatively, 'the perfect administration of justice'. [17]

Clearly, the common law rules discussed above arose and found their application in adversarial proceedings. This referral is concerned with altogether different processes. As statements of principle, [18] however, their force is not dulled by a transfer from an adversarial to an inquisitorial or investigatory field of operation. The privilege serves the public interest by protecting the administration of justice [19] — and, as Wilson J pointed out in *Baker v Campbell*, the perfect administration of justice is not 'confined to legal proceedings'.[20]

Commonwealth agencies' use of coercive or investigatory powers no doubt affect legal rights, obligations and legitimate expectations at least as great a degree as litigious processes did in an earlier period. The common law principles [21] discussed above, as we said earlier, must therefore be borne in mind as further statutory abrogations or modifications — by their nature, stronger tools than common law development — are

contemplated.

In summary, the purpose of legal professional privilege is to instil confidence in persons seeking or receiving legal advice that the content of communications between their legal advisors and themselves will remain confidential, so as to protect individual interests, maintain the fairness and integrity of the legal system, and instil public confidence in that system. As has been noted, 'its efficacy as a bulwark against tyranny and oppression depends upon the confidence of the community that it will in fact be enforced'.[22]

Legal professional privilege has been termed a 'common law immunity'. [23] That being so, courts will not construct a statutory intention to abrogate its operation in the absence of clear words to that effect. [24] Whether it will engage to protect purportedly privileged communications will therefore be a question of statutory clarity: it may be ousted by clear provision,[25] but not by implication. [26]

The question confronted in the remainder of this submission, therefore, is to what extent the public interest claims of Commonwealth agencies' use of coercive or investigatory powers will justify the abrogation of any of those immunities.

The existing law

Presently, legal professional privilege is said to arise in three separate situations. [27] Firstly, advice privilege, which will operate to protect communications between lawyer and client.[28] Secondly, litigation privilege, which will operate to protect documents, the dominant purpose of which is for use in litigation. [29] Finally, third party privilege, which will protect disclosure of otherwise confidential information passing between a lawyer and third parties,[30] even in the absence of pending litigation. [31]

Most often, the constitutive statutes of the agencies this referral concerns are silent about the operation of legal professional privilege upon whatever coercive or investigatory powers are conferred upon them.[32] This has led to a situation in which common law legal professional privilege applies unless and until an amending statute (usually fact-specific and usually related to a perception of the public interest) is enacted. Clearly this is an unsatisfactory situation. It creates uncertainty in the relationship between client and lawyer; the nature of the enactments to which we refer make them arbitrary and exclude the prospect of judicial review; broadly, enactments such as the *Royal Commissions Amendment Act 2006* (Cth) may be termed retrospective legislation.

Evidently, there is a need for clarity and a need to eliminate the uncertainty inherent in the parliament's legal professional privilege enactments up to now. At the same time, however, there is a need to maintain privacy to as great an extent as possible, and to maintain the public interest by the means that seem most appropriate to the factual situation in which a legal professional privilege dispute arises.

Critique of the existing law

Currently, common law legal professional privilege is abrogated in different ways. It may be modified by statute, [33] or by a rule of court.[34] Heydon notes that 'enactments having such an effect [as to abrogate legal professional privilege] are rare'. [35] Legal professional privilege is essential to the legal process; even more, it is essential to public confidence in the legal process. The fact that, as was pointed out in *Maurice*, its ability to accomplish its purpose depends upon community confidence that it will be enforced[36] means that public confidence in the law and in the system that interprets and applies it is necessarily undermined by every short-term and fact-specific statutory abrogation [37] the privilege suffers.

We say that one option is that statute withdraw from the field altogether. In the normal course, the common law is a more subtle and more nimble means of legal development than is statute. However, the inflexibility to which we adverted above [38] speaks against the common law methodology allowing for exceptions, exclusions, or the refashioning of the privilege we advocate. In an age in which statute dominates the legal landscape, our proposal does not cut against the grain.

We say that any attraction the statutory withdrawal proposal has is connected to its key feature, judicial involvement. A uniform statutory provision which contains a rebuttable presumption of legal professional privilege over documents and communications—and which institutes a truncated judicial process for determination when the presumption is in dispute—we propose that this is therefore the correct path for the law to take.

Proposal for law reform

Our proposal is therefore not one of

△ The scope for abuse of legal professional privilege, substantively and as a tool of legal strategy, was lain bare most recently during the Cole Royal Commission.△

substantive reform. It is designed to maintain the basic purposes of legal professional privilege while attempting to minimise its openness to abuse. Commonly, broad abrogations of legal professional privilege are legislated as they become necessary in the midst of public enquiries, such as the Longford Royal Commission [39] or the Cole Inquiry.[40]

As is noted in the Administrative Review Council Report (ARC) Report, 'legal professional privilege is a contentious and evolving area'.[41] We say that acceptance of that fact, as well as a consideration of the underlying principles we discussed above—and of the limitations of statute—lead inevitably to a preference for statutory minimalism in this area.

The proposed uniform division

As is noted in the ARC Report, agencies' constitutive statutes are most often silent in relation to legal professional privilege.[42] This leads to a situation in which the common law privilege presumptively applies, of its own force, unless abrogated as the legislature's conception of the public interest demands.

We say that an entirely more satisfactory, and more certain, approach would be to enact a guideline provision in the terms of the one lain out below.

1.Privileged Documents and Communications

Where a document or other communication is undertaken or reduced to writing in order to:

a) record a legal practitioner's legal advice to the practitioner's client; or

b) record a legal practitioner's preparations or drafts of legal advice to be provided to a client; or

c) record the contents of meetings, consultations or other discussions between a legal practitioner an the practitioner's client; or

d) record a legal practitioner's meetings, consultations, or other discussions, oral or written, with other legal practitioners or other persons reasonably consulted by the practitioner in the course of advising a clientthe document or other communication will be assumed to be subject to legal professional privilege, and, subject to s 2 of this Act, [the agency] must not require production of it.

2.Application in Furtherance of Public Interest

Where [the agency]; reasonably concludes that, in furtherance of the public interest, a document of a type mentioned in s 1 should be produced, it may apply to the Federal Court for a Production Order.

3. Application to Federal Court for Production Order

On the application of [the agency], the Federal Court must entertain submissions from:

a) [the agency]; and

b) the legal practitioner's client

about whether the public interest will justify an order to produce the disputed document.

4.Federal Court Determination of Production Order Application

(1) In determining an application made under s 3, the Court must have regard to:

a) whether the public interest, in the circumstances of the application, warrants production of the document; and

b) whether [the agency's] investigation or enquiry is likely to be materially assisted by the document; and

c) the common law principles that led to the construction of legal professional privilege.

(2) In determining an application made under s 3, the Court:

a) may require access, without prejudice to the respondent's interests, to the documents in dispute;

b) may determine the application on the basis of written submissions alone;

c) must determine the application within ten (10) working days of lodgement of [the agency's] application.

(3) For the purposes of s 4(1)(a), to determine whether public interest warrants production of the document, the Court may consider:

a) the nature of the advice sought;

b) the respondent's purpose in seeking the advice;

c) the alleged conduct which is the subject of inquiry by [the agency];

d) the nature of any adverse finding based on the document;

e) the nature of the activities undertaken by [the agency];

f) the benefit to the community of full disclosure of the circumstances of the alleged conduct; and

g) any other consideration the Court considers relevant.

We say that this set of provisions strikes a balance between statutory certainty (the enumerated considerations in s 4(1)) and judicial involvement (especially s 4(1)(c)). It preserves the balance between the public interest and privacy, which legal professional privilege has traditionally demanded, and, by involving the judiciary in the determination of the relevance and public interest value of the documents, eliminates the need for last-minute legislative interference in the field in aid of the public interest. It also eliminates the tactical advantage of a claim of legal professional privilege (s 4(2)(c)).

Within guidelines, the proposed provisions also transfer the burden of the development of the law of legal professional privilege back to the courts, and allow development of a body of principle within the bounds of the common law (s 4(1)(c)). They are also deliberately not field-covering — for example, they will not necessarily bring into their s 1 scope documents or communications produced for an improper or illegal purpose, thus preserving the *Kearney* [43] ratio. As well, the s 1 categories may need to be expanded, s 1 broadly reflects the 2003 amendments to s 155(7)(B) of the *Trade Practices Act 1974* (Cth), so as not to require the production of documents to which privilege attaches.[44]

Our proposed provision also has the notable strength that, in contrast to measures such as the *Royal Commission Amendment Act 2006* (Cth), decisions made under it are necessarily the subject of a judicial process. Any decision therefore becomes reviewable on appeal from the Federal Court, or, alternatively, by s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), as the decision is clearly one 'under an enactment' for ss 3(1) of that Act. We say that explicit and substantive judicial involvement of this type and degree will be sufficient to dispel community concerns about the limited encroachment into the common law privilege the proposed provisions contemplate.

The provisions allow for a judicial development of the law of legal professional privilege, in a clear framework which imposes clear limitations. They would clarify the legal position of all parties to a dispute in relation to privilege, and eliminate the need for fact-driven statutory encroachments into the field. In essence, they guarantee the continuance of a principled body of jurisprudence on legal professional privilege.

B. Strategies for implementation

Were our proposed provisions accepted in substance, we say that the implementation process would be simple. Firstly, the categories would need, after a process of consultation and consolidation, to be expanded or contracted to reflect the agency's area of operation. Secondly, the revised provisions would need to be incorporated into the agency's constitutive statute.

As we have suggested incorporation into agencies' constitutive statute, we envisage that the limitations and process contained in the proposed provisions would apply across all of an agency's operations — and so there would be no need to reach further into their statutory frameworks to ensure compliance. The complexities of the *Evidence Act 1995* (Cth) may present theoretical obstacles to our proposal. [45] The final form of the provisions would be determinative of the nature and extent of those problems, however, so it is not productive to comment upon them here.

The outstanding issue, therefore, is the extent to which our proposal can be effective if it applies only to Commonwealth agencies. The proposed provisions would represent a substantial shift in the substantive body of the law, and a shift in the procedural tactics available to lawyers during litigation or during investigative processes. Such a change could no doubt take place in respect of Commonwealth agencies only, but we say that the regime would benefit inestimably from parallel enactments in respect of the state and territory agencies exercising analogous state and territory based powers. Such parallel enactments therefore form part of our proposal.

Conclusion

In the space which remains to us, we wish only to restate the substance of the problem we have sought to address and the substance of the solution we propose. Analysis of the cases revealed the two strands of principle underlying legal professional privilege: privacy, and the public interest. As we said at the outset, the public interest is an amorphous concept, especially where, as here, it can be invoked on either side of the argument. The problem that this paper has sought to address is that

the absolute, unbalanced confidentiality that legal professional privilege imposes is open to abuse. We have therefore sought to formulate a proposal that maintains the underlying principles of legal professional privilege while minimising the privilege's openness to abuse of the kinds which have occasionally been observed.

Our proposed provisions confine more narrowly than the common law the types of documents and communications to which privilege will attach. Those documents, in our proposal, are then subject to a rebuttable presumption of a privileged status; it is open to an agency to challenge this status in a curial process, on the basis of public interest only. The substantive content and operation of privilege is thereby, we say, maintained.

Our proposal contemplates measured deliberation (as opposed to ad hoc legislation) and a very great degree of judicial (as opposed to political) involvement. It also allows for judicial review or appeal of a statutorily confined decision, and in general is designed to inspire public confidence in what would amount to a very slight substantive change to the relevant law. We say that, slight as it is, our proposal interferes little with the public confidence aspect of the privilege, and not at all with the privacy aspect.

Endnotes

1. *R v Derby Magistrates' Court*; *Ex parte B* [1996] AC 487, 508 (Lord Taylor of Gosforth CJ).
2. *Kennedy v Wallace* (2004) 208 ALR 424;3.
3. (2002) 124 FCR 384.
4. (2006) 152 FCR 382.
5. Commonwealth of Australia, *Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme* (2006) vol 1, 190.
6. See Nickless & Priest, 'Call to Limit Legal Professional Privilege', *Australian Financial Review* (Sydney), 23 Apr 2007, 7; Drummond, 'Client Privilege a Hot Potato for Law Reform Body', *Australian Financial Review* (Sydney), 27 Apr 2007, 51.
7. *A M & S Europe v Commission of the European Communities* [1983] QB 878, 941.
8. *Baker v Campbell* (1983) 153 CLR 52, 89 (Murphy J).
9. *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, 490 (Deane J).
10. *Taylor v Blacklow* (1836) 132 ER 401; see also Wigmore, *Evidence in Trials at Common Law*: *Wigmore on Evidence* (McNaughton revised 4th ed, 1961) [2290]; J Heydon, *Cross on Evidence* (7th ed, 2004) [25210] et seq.
11. J Wigmore, Evidence in Trials at Common Law: Wigmore on Evidence (J McNaughton revised 4th ed, 1961, [2290].
12. *Wright v Mayer* (1801) 31 ER 1051 (Eldon LC); ibid.
13. (1876) 2 Ch D 644.
14. Ibid 649 (Jessel MR).
15. *Baker v Campbell* (1983) 153 CLR 52, 93 (Wilson J); *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, 237, 239 (Lord Simon of Glaisdale).
16. *Baker v Campbell* (1983) 153 CLR 52, 94 (Wilson J).
17. *Bullivant v Attorney-General* (Vic) [1901] AC 196, 200–1(Earl of Halsbury LC).
18. See *Minet v Morgan* (1873) LR 8 Ch App 361, 366.
19. *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 64 (Gleeson CJ, Gaudron & Gummow JJ); see also *Grant v Downs* (1976) 135 CLR 674, 685 (Stephen, Mason & Murphy JJ).
20. (1983) 153 CLR 52, 94.
21. See *Grant v Downs* (1976) 135 CLR 674.
22. *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, 490 (Deane J).
23. *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 553 (Gleeson CJ, Gaudron, Gummow & Hayne JJ).
24. *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J); see, generally, *Coco v The Queen* (1994) 179 CLR 427.
25. *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319.
26. *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543
27. Desiatnik, *Legal Professional Privilege in Australia* (2nd ed, 2005), 23–4.
28. *Interchase Corporation Ltd* (in liq) v *Grosvenor Hill (Qld) Pty Ltd* (1999) 1 Qd R 141.
29. *Grant v Downs* (1976) 135 CLR 674, 683 (Stephen, Mason & Murphy JJ).
30. See, eg, *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* (2002) 4 VR 332.
31. *Pratt Holdings v Commissioner of Taxation* (2004) 136 FCR 357.
32. See Administrative Review Council, *Government Agency Coercive Information-Gathering Powers [Draft Report]* (2007).

Continued on page 85

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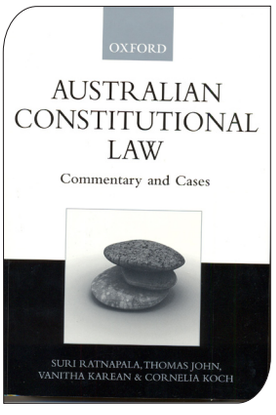
Reviews



Australian Constitutional Law: Commentary and Cases

By Suri Ratnapala, Thomas John, Vanitha Karean & Cornelia Koch, Oxford University Press, 2nd Edition, 2007

$85.00

Australian Constitutional Law: Commentary and Cases

The authors of this text set out to 'combine the virtues of treatises and of source books' to create a reference text on the Australian Constitution. At its core, this is mainly a 'cases and materials' text and the authors have done a good job of selecting important passages from key cases.

In keeping with their goals, the authors focus especially on the orthodox views of constitutional doctrine, though they often provide references to alternative views. The text is pitched at undergraduate law students and does not assume detailed knowledge of constitutional law or theory. With this in mind, the authors provide relatively brief, helpful summaries and explanations of the relevant facts and law. On the whole, the authors explain complex constitutional principles clearly, without resorting to over-simplification. It is, however, a relatively short text—for example, it is approximately half the length of *Australian Constitutional Law & Theory* by Professors Blackshield and Williams. As a result, each constitutional principle is addressed quite succinctly.

The authors provide some, generally brief, critical analysis of important decisions and principles. This is useful in contextualising the issues raised in the major constitutional cases and in elucidating important themes. However, some caution should be exercised in reading such critique because it is quite limited in its length and scope. I would hasten to add that this seems entirely consistent with the authors' aim—that is, they do not attempt to provide a comprehensive analysis of those issues, and such an attempt would be impossible in the space available. Instead, they provide a starting point for constitutional scholars wishing to conduct further research on these issues.

While all of the authors share responsibility for the book as a whole, the Preface discloses which chapters were written by which individuals. There are, therefore, some small differences in style and focus. For example, the first five chapters—dealing with fundamental principles such as the separation of powers—are written by Professor Ratnapala and are particularly well explained. Nevertheless, it is clear that some effort has been made to 'sew' together the various components to make the text homogenous.

This also raises a minor matter of style: the authors' minimalist use of punctuation may be a little unsettling for followers of HW Fowler and other traditionalists. Commas are relatively rare. I do not remember seeing a semicolon. Such pedantry aside, the writing is clear and concise. Constitutional law is notoriously complicated. Much of the writing in this area discourages students from engaging with this subject because it is equally complicated and often riddled with barely penetrable Legalese. In expressing themselves clearly and (where possible) simply, the authors are able to open up federal constitutional law to a broader readership.

△ Edward Santow

Pillars of Power: Australia's Institutions

Pillars of Power is a concise and very readable survey of the major institutions that provide the framework for Australian society.

David Solomon—journalist, lawyer and author of a number of other books on Australian politics and law—examines the obvious contenders, including government and parliament; federalism and the states; the courts and the media; some slightly less obvious contenders including Australia's economic regulators; the unions and universities; and one rank outsider, sport. The book is based on a series of articles that were published in the Brisbane Courier Mail in 2005.

Solomon does not consider these institutions in a static way—but examines how they have changed over time and the impact of this change. He notes, for example, significant power shifts between the Prime Minister, Cabinet and the Parliament, as well as between the Commonwealth and the States. He concludes that Parliament's power to question and restrain ministers has been reduced, and that Prime Ministers have become increasingly presidential in the way they conduct themselves.

Of particular interest—given the recent federal election—is Solomon's discussion of changes to Australia's electoral system and public funding of election campaigns and advertising over the last twenty years. He quotes the results of a number of academic studies that show how such funding favours incumbent members of parliament, and particularly incumbent governments.

Much of the book is based on interviews with individuals closely involved with the institutions of power. Two Prime Ministers, Bob Hawke and Malcolm Fraser, and a number of departmental heads, past and present, comment on the changing nature of the federal public service. The weight of opinion seems to be that the public sector has become more responsive to the needs of the government of the day, but that such responsiveness has come at the cost of absolute frank and fearless advice. One significant change has been to remove permanency for departmental heads, making them more vulnerable to removal and therefore, the argument runs, less likely to advise government frankly.

Dr Peter Shergold, Secretary of the Department of the Prime Minister and Cabinet, expresses the view, however, that the public service continues to provide robust policy advice to government in the public interest. In his view, "the most effective quality of advice is not that it is 'fearless' but that it is convincing".

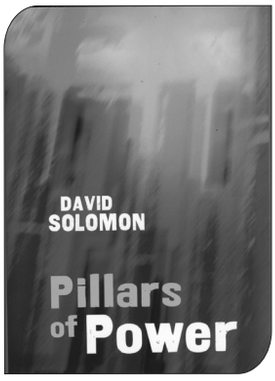
As might be expected, Solomon's discussion of the media is of great interest. He marks the rise of participatory media—based on broadband access to the internet and mobile digital technology—and the shifting fortunes of free-to-air television and the newspapers. He discusses the concentration of media ownership in Australia and the Federal Government's involvement in regulating the media and in driving defamation law reform. He reflects on the changing nature and role of journalism and emerging restrictions on the right of the public to be informed.

Whether or not sport can be considered a 'pillar of power' in Australia, the range of sports considered in detail is a bit disappointing from my personal, and a gender, perspective. Australian Rules football; rugby league; rugby union; soccer; cricket; golf; athletics; and racing all warrant detailed analysis. However, netball and tennis—despite falling within the top 10 sports in terms of participation in Australia—while mentioned in the text—are not considered in detail. Netball, in particular, has developed exponentially in Australia over the last twenty years and—given the success of the Australian national team and the extremely high participation rate of Australian women—would have made an interesting case study.

Solomon tracks the development of sporting professionalism in Australia, driven by increased involvement of the media in promoting and funding sport and the establishment of government sports institutes and academies, such as the Australian Institute of Sport. In this chapter, as in the rest of the book, we are given a fascinating bird's eye view of the sporting landscape and how that landscape has been shaped by the modern world.

A great deal of careful research stands behind each chapter of Pillars of Power. The book includes comprehensive notes, bibliography and index. Solomon assimilates his background research with material from interviews with key players, to provide a convincing basis for his conclusions. He is ideally placed to provide an overview of the changes in, and shifts of power among, Australia's institutions based on over forty years of observation and commentary. That experience and expertise is certainly reflected in the pages of Pillars of Power.

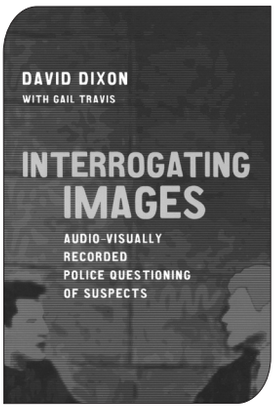
△ Carolyn Adams



Pillars of Power: Australia's Institutions

By David Solomon, The Federation Press, 2007: pp 255

$39.95



Interrogating Images: Audio-Visually Recorded Police Questioning of Suspects

By David Dixon with Gail Travis,Sydney Institute of Criminology, 2007, pp292

$45.00

Interrogating images: Audio Visually Recorded Police Questioning of Suspects

The title of this book is mystifying. 'Interrogating images' conjures up all sorts of strange ideas, but this reviewer still can't fathom what it is supposed to mean or convey in the context of the subject matter. That said, on to more important issues—the content.

This book focuses on the results of empirical studies of police interrogation of suspects and analyses the benefits and pitfalls of different methods of recording the proceedings. It also looks at police interviewing styles with a critical eye. The authors compare recording methods in Australia, the US and the UK, but concentrate largely on NSW—which has been a world leader in the introduction of electronic recording of interviews with suspects.

It begins with the bad old days of 'verballing' (police fabrication of confessions) and induced confessions under duress. Numerous inquiries over the years in Australia, including the Australian Law Reform *Commission's Criminal Investigations* (1979), made the existence of these practices undeniable, and eventually unacceptable. Various New South Wales governments delayed the introduction of legislation until the reform of the *Evidence Act* in 1995, well after the electronic recording of suspects was already widely in use. In spite of such delays, however, NSW and other states are today way ahead of police procedures in Britain and the United States in this area. The authors analyse a series of empirical studies of audiovisual-recorded interviews, and within them, compare those interviews, which also utilised a new style of interview training based on the English PEACE program (PEACE = Preparation and planning; Engage and explain; Account, clarification and challenge; Closure; Evaluation).

The conclusions of the studies are clear—electronic recording of interviews has largely put paid to verballing, and most professionals in criminal justice—particularly police, judges and prosecutors, greatly appreciate the benefits of recorded interviews over the old type-written police notes. Defence counsel still have some misgivings when it comes to filming disadvantaged suspects, such as those of a non-English speaking background or the mentally ill, who may appear to understand questions when sometimes they don't. There is also the problem of the suspect whose demeanour 'looks guilty', and so is more likely to be judged on appearance when a jury watches the interview. However, the defence counsel agreed that in most cases the recordings are more fair and honest than the old methods. Other innovations in interviewing practices are less clearly beneficial. The PEACE program as adopted, does not appear to be an improvement in getting to the truth in interviews. There still appears to be a lot to learn in police interviewing methods, a fact made more publicly obvious in recent years with interrogations of terrorism suspects.

This work would be of interest to those working in the criminal justice system. For the layperson however, there are problems in comprehension that could easily have been avoided. For example, one is apparently expected to just know what ERISP stands for—as that acronym recurs throughout the book—and serves the entire basis for the book. The answer doe not lay in the (unsatisfying) index, but in one lone footnote—Electronically Recorded Interviews with Suspected Persons. The acronym PEACE suffers from a similar treatment. Students of criminology and academics, may well feel frustrated by lapses such as these. On a brighter note, there is a good reading list at the end, for those who are interested in further research of police interviewing and recording methods in various countries.

△ Carolyn Kearney

Cyberspace Law: Commentaries and Materials

Cyberspace Law: Commentaries and Materials is a comprehensive introduction to laws relevant to cyberspace. It provides an overview of legal areas as diverse as copyright, patents, electronic contracting, data protection, encryption, content regulation and taxation.

A valuable teaching tool, the book incorporates several extracts of relevant legislation, case law and academic commentary accompanied by extensive explanatory notes and questions for consideration and further research. Extracted materials are primarily Australian but several sections refer to comparative examples from jurisdictions such as Singapore and the United States. Fittingly, international developments and the role of international institutions are noted in the discussion of most topics.

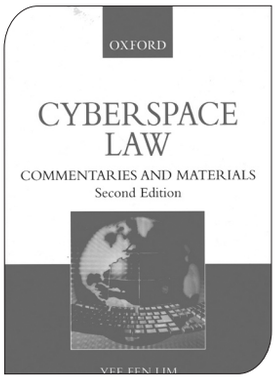
There are at least two ways to approach the law of the internet—by attempting to apply existing laws and processes to cyberspace—or by endeavouring to create a new field of 'internet law' based on international negotiations and institutions. Lim prefers the latter approach and the second edition of her book goes further than the first in demonstrating the difficulties of accommodating regulation of online behaviour within traditional legal structures. The new, nuanced chapter dealing with *Online Role-Playing Games* brings together an examination of trade mark protection, design registration and virtual property rights, and both spam and spyware are examined in the new chapter dealing with *Uninvited Material*.

As the title suggests, this is a book that provides an introduction to cyberspace law. Its intention is not to suggest detailed models of internet regulation. However, the short introductory and concluding chapters draw together some important themes that could usefully underpin such an examination—the inevitable delay between technical development and legal response; the need to consider both law and technical controls in a regulatory framework; the changing nature of the connection between the territory of a nation state and jurisdiction; the increasing importance of international cooperation and development of international institutions; and the domination of such international structures by representatives of highly developed regions such as Europe and North America.

For an edition published in 2007, one notable oversight is the absence of significant discussion about the dramatic increase in user-generated content on the internet. In recent years, developments in computer programming have facilitated new information sharing and information organising practices to such an extent that the term 'Web 2.0' was coined in 2004 to reflect the evolution of cyberspace. This is a phenomenon that has been observed since the publication of the first edition of this book in 2002. References to 'listeners' and 'speakers' in chat rooms such as 'ICQ' are perhaps out-of-date for a society with a mounting addiction to social and business networking sites and, increasingly, 'RSS' feeds, tagging and social bookmarking.

Despite this, Lim's thesis is ultimately supported. The impact of user-generated internet content on legal areas such as copyright and privacy further challenges the relevance of applying existing legal structures to cyberspace. Indeed, Lim's book successfully sketches an introductory landscape for scholars new to the area, and provides an excellent starting point for further consideration of methods of internet regulation.

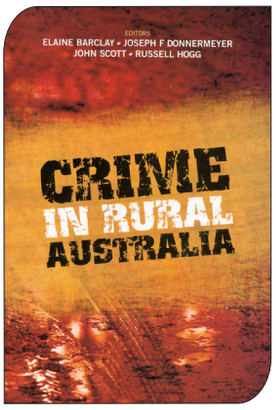
△ Erin Mackay



Cyberspace Law

By Yee Fen Lim,Oxford University Press, 2002, 2007

$120.00



Crime in Rural Australia

Edited by Elaine Barclay, Joseph F Donnermeyer, John Scott and Russell Hogg

Federation Press, 2007

$49.95

Crime in Rural Australia

Until recently, empirical and critical research has focused primarily on urban crime. Myths that rural communities are homogenous and places of social cohesion—together with the idea of the city as a dangerous place—help to reinforce this city-centred focus. The authors endeavour to dispel these myths and make a strong case for the separate analysis of rural crime.

Rural crime has been a much neglected area in criminology. Crime in Rural Australia makes the point that, although many of the current criminological theories and methodologies can be applied to rural crime, there are significant differences between urban and rural crime that warrants deeper examination of crime challenges faced by rural populations.

Research on rural crime shows that rural and remote communities in Australia are not crime-free places. Although the incidence of rural crime is diverse, it might be surprising for the reader to learn, for example, that the rates of violence are higher in many rural and regional locations than in metropolitan centres. In addition, the rates for violent offences and property crimes have been increasing more rapidly in regional Australia than in urban areas. Less surprisingly, given their physical isolation and the use of informal social controls, there are issues concerning the under-reporting of crime in rural communities, such as domestic violence.

The book is divided into three parts. Part One applies criminological theories—which traditionally focussed on urban crime—to the study of rural crime. It was argued that there has been too much emphasis on place-based theories to explain rural crime, when other criminological theories also could be utilised to explain crime in rural and remote areas. This Part also reviews the existing research and examines the social construction of rural crime.

In Part Two, a number of core criminological issues are considered, including the rural-specific issue of farm crime (eg, theft of livestock and other property offences, and environmental crime), as well as contemporary issues that are typical in the study of urban crime, such as youth crime, alcohol and drug problems, and the fear of crime.

Finally, Part Three examines rural crime from the perspectives of policing, crime prevention and criminal justice, including issues concerning indigenous Australians. Here, differences between urban and rural crimes are also apparent. For example, the police are more often expected to be part of a rural community and therefore may find themselves playing competing roles as a law enforcer and a resident. People living in rural areas have restricted access to support services due to their physical isolation, inadequate access to transport and dispersed population—issues that do not affect urban areas to any great extent. In addition, the effectiveness of crime prevention strategies in rural Australia tended to be undermined by the narrow focus on property crime and crime in public spaces, as well as assumptions about crime, space and rural relations.

The book is written in scholarly prose that is nonetheless accessible to the lay reader. It also includes interesting vignettes from the NSW police concerning rural policing and the 'stock squad' (Rural Crime Investigators), as well as contributions from a youth worker on the key to successful youth programs and a magistrate on the lack of sentencing options in rural areas.

Written and edited by leading scholars, the book is an important resource for students, criminologists, policy makers and those involved in the criminal justice system. It helps to bring the focus onto rural crime and takes a great step towards filling the void in criminological literature.

△ Huette Lam

Water Politics in the Murray Darling

The Murray Darling Basin, Australia's major waterway, covers four states and is home to two million people. It includes 30,000 wetlands and generates approximately 40 percent of Australia's agriculture and pastoral production.

It is not unusual, acknowledges Daniel Connell, to hear accounts of serious degradation of river systems, but the crisis in the Murray Darling Basin seems bleak indeed. The system is plagued by serious salinity problems. It experienced the world's largest recorded toxic algal bloom in 1991-1992. It has been seriously stressed by diversions which have tripled in the last 50 years, to the extent that the Basin cannot now be maintained as a healthy ecological system. It is now severely modified and bears little resemblance to the river system first found by Europeans. Further, the long time lag in ecological impacts means that the full extent of the degradation caused by current extractions and human activity is not yet known.

Published in February, Connell's book "Water Politics in the Murray Darling Basin" seeks to explain how a crisis looming so large for so long progressed inexorably despite all warnings. In part, Connell, an environmental historian, attributes this to the "boredom" associated with water management planning, which veils the fact that planning involves the exercise of real power. Principally, though, Connell points to the failures of the institutions historically responsible for managing the Basin and sets out to identify what is needed of institutional arrangements now, with particular reference to the Commonwealth Government's plan to take over management of the Basin.

Connell illustrates with force the limited capacity if the Australian political system to address the biophysical realities of environmental problems. Managing environmental issues requires the will to implement radical policy changes where necessary rather than simply pursuing incremental and politically acceptable change.

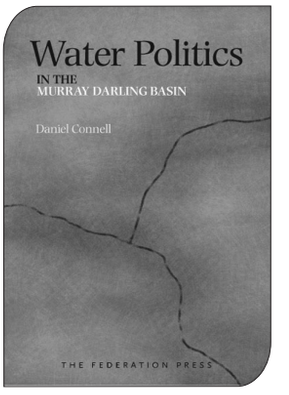
Connell laments that, while the language of environmental sustainability has been used by managers in the Basin for some decades, this has not been backed up by effective action. Most recently, the National Water Initiative agreed upon at the June 2004 CoAG meeting, embodied the 'radical' approach that the environmental needs of rivers must be met before water is allocated for irrigation. This, Connell argues, not been implemented in a meaningful way. This failure reflects the priorities of politicians who Connell accuses of "talking environment" but "dreaming production". It is manifested in a research agenda driven by a definition of sustainability "built only around the relationship of a farmers and a bank manager". "Almost no one", Connell points out, "puts forward an explicit in-principle defence of unsustainable management but so many take this approach in practice."

Connell explores the management of the Basin as a classic case study of federalism, with untidy compromises resulting from the necessity of central policy development on the one hand and the need to preserve state autonomy on the other. Tracing back to the 1870s, Connell charts the tensions between New South Wales, Victoria and South Australia over rights of irrigation and navigation. He also sets out the genesis of section 100 of the Constitution, which protects States' rights to the reasonable use of river water for conservation or irrigation.

Connell explains that a century of reluctant co-operation between jurisdictions has had disastrous consequences. Until the 1980s the MDB was still being managed as three largely autonomous state regions, preventing integrated catchment management of the system as a whole. And the requirement for unanimous decisions in the Basin Ministerial Council has meant that little could be achieved other than simple tasks requiring minimum co-operation between States.

In designing institutional arrangements, Connell stresses the need to start from first principles, including the biophysical realities and basic questions such as: how can we preserve the Basin as a working hydrological system? How modified should we allow our river systems to become? What is the proper role of agriculture in Australia? If the answers to these questions require radical change, says Connell, so be it.

Connell argues that a full Commonwealth takeover is inappropriate since detailed supervision and local knowledge are required for effective natural resource management. He argues that it is necessary to draw on the EU principle of "subsidiarity", devolving policy making so that States must retain an important role in any new institutional arrangement.



Water Politics in the Murray Darling Basin

By Daniel Connell, The Federation Press, 2007; 241 pages

$49.95

Published in February, Connell's book unfortunately predates the Commonwealth Water Act 2007 which received assent in early September. The Act, relying on Constitutional powers in the absence of Victoria's agreement to refer its powers, gives effect to the Government's $10 billion water plan. It establishes a five-member Authority, provides for the development of a Basin-Wide Plan and the enforcement of a new sustainable cap on extractions. A role will be retained for States through State Water Resource plans, accredited by the Commonwealth Authority. The Authority is nominally "independent" but would remain subject to directions from the Commonwealth Minister in most circumstances. This is a far cry from Connell's suggestion that the governing body should be a public corporation with the same degree of independence as the Reserve Bank.

The capacity of the new arrangements to respond to the urgency, and the scientific realities, of the problems in the Basin remains to be seen. What is clear is that the nature of institutional arrangements is crucial and they must not be "forged amidst our inattention", as Connell points out.

△ Elizabeth Passmore

Reform roundup

Articles in Reform Roundup are contributed by the law reform agencies concerned.

Entries to Reform roundup are welcome.

Please contact the Editor at: reform@alrc.gov.au

Contents

Administrative Review Council (the Council)

Draft Report on Government Agency Coercive-Information Gathering Powers

The Council is in the process of finalising a report on the exercise of coercive information-gathering powers by government agencies. This project is focusing on the powers of agencies to compel the provision of information, generally through production of documents or attendance at an interview. The project's principal objective is to determine whether greater consistency in these powers across government is either desirable or achievable. It will also consider the accountability mechanisms associated with the exercise of coercive investigative powers and the protections available to individuals. The Council received 37 submissions to the release of a draft report in December 2006.

The Council intends to report to the Attorney-General on this project in early 2008.

Report on Administrative Decisions in areas of Complex and Specific Business Regulation

The Council is currently responding to terms of reference from the Attorney General seeking the Council's views, in the context of decisions in areas of complex business regulation, on the most effective and efficient administrative accountability mechanisms. This project involves consideration of possible adaptations to merits review processes, the expansion or adaptation of other accountability mechanisms that might be appropriate to complex business regulation, and the possible development of a framework of guideline principles in the area.

The terms of reference for the project are available on the Council's website at www.ag.gov.au/arc.

Special 30th anniversary edition of Admin Review on the 'Future of Administrative Law and the Challenges that Lie Ahead'

In May 2007, the Administrative Review Council (the Council), published a special issue of its annual administrative law bulletin, *Admin Review,* marking the occasion of the Council's 30th anniversary.

The bulletin includes presentations which were made at a special 30th anniversary seminar in September 2006 at Parliament House by the former Chief Justice of the High Court, Sir Anthony Mason AC KBE; the Secretary of the Attorney-General's Department, Robert Cornall AO; the Chief Executive of the Business Council of Australia, Ms Katie Lahey; CEO of the Australian Consumers' Association, Mr Peter Kell, and the Chairman of the UK Council on Tribunals, Lord Newton of Braintree OBE DL.

The bulletin also includes articles from several other contributors on the theme of future challenges, including Dr Peter Shergold, Secretary of the Department of the Prime Minister and Cabinet on '*Future Challenges for Administrative Review'*; an article on '*Judicial Review in Western Australia*' by the Hon Wayne Martin, Chief Justice of the Supreme Court of Western Australia; and a brief history of the origins of the Council by its Executive-Director.

Please contact the Council Secretariat on (02) 6250 5800 or e-mail arc.can@ag.gov.au if you would like a copy of the anniversary edition of Admin Review.

Best Practice Guides

On 10 August 2007 the Council launched a series of best practice publications for administrative decision makers. The subject matter of each publication in the series reflects a key stage in the decision making process. The 'Guides' are intended to provide practical guidance to government decision makers on lawful and procedurally fair decision making, statements of reasons, accountability and fact finding and have been designed as a general training resource and reference for Commonwealth agencies. In this regard, they will be able to be supplemented by material for the policies, practices and legislative frameworks of departments and agencies. The Department of Immigration and Citizenship has now completed annotating the five Guides specific to that Department's requirements.

The Office of the Commonwealth Ombudsman is also considering producing an annotated version of the Guides.

The Council encourages other Departments to consult with the Council for the purpose of annotating the Guides to include agency-specific information. The Guides are available on the Council's website at www.ag.gov/arc. For further details, contact the Council Secretariat on (02) 6250 5800 or e-mail arc.can@ag.gov.au.

Automated Assistance in Administrative Decision Making Better Practice Guide

The Council recently participated in working group, led by AGIMO, to produce a 'hands on' Better Practice Guide for departments and agencies currently using, or in the process of developing, computer-based decision making systems. The working group was formed on the basis of one of the recommendations in the Council's most recent report on Automated Assistance in Administrative Decision Making (AAADM). That report identified 27 best practice principles designed to ensure that decisions made using expert systems are consistent with existing administrative law values.

A number of the Council's reports, including the AAADM report, can be downloaded from the Council's website.

British Colombia Law Institute

The British Columbia Law Institute has been very active in its project work. Following is a selection of some of our current projects:

Canadian Conference on Elder Law

The 2007 Canadian Conference on Elder Law was held in Vancouver on 8–10 November 2007. Experts and advocates of elder law came to share knowledge and explore best practices.The Conference attracted more than 220 attendees and presenters from around the world. It was a great success.

The theme of the 2007 Conference was 'Moving Forward, Moving Beyond.' Among the highlights of the ers presented were:

- the Keynote Address, entitled 'Elder Law:

An Emerging Practice,' delivered by the Right Honourable Chief Justice of Canada Beverley McLachlin, P.C.;

- the Welcome Address, delivered by the Honourable Robert Nicholson, P.C., Q.C., Minister of Justice and Attorney General of Canada, which highlighted the action and commitments of the Government of Canada to tackling crime, identity theft, and elder abuse;
- the Dinner Address, by Mr. Michael Valpy, an award-winning Canadian journalist and author; and
- the Distinguished Lecture, given by Prof. Rebecca Morgan, Director of Stetson University's Center for Excellence in Elder Law and the holder of the Boston Asset Management Faculty Chair in Elder Law.

The 2007 Conference was also held in conjunction with the first ever Federal/ Provincial/ Territorial Working Group on Seniors' Issues Forum, which focussed on elder abuse issues.

The British Columbia Law Institute and the Canadian Centre for Elder Law Studies would like to invite everyone to the 2008 Canadian Conference on Elder Law, which will be held in Vancouver, 13–15 November 2008. The theme of the 2008 Conference will be guardianship. The Canadian Centre for Elder Law Studies is planning to host next year's exciting conference jointly held with the International Guardianship Network.

The Canadian Center for Elder Law Studies is committed to international co-operation and knowledge mobilization. Watch for the call for abstracts for the 2008 Conference in early Spring 2008 at www.ccels.ca.

Real Property Review—Phase One

British Columbia has been using a variation of the Torrens system for land titles purposes for many years. As is the case in other jurisdictions, the system employed in British Columbia has some unique features. With continuing changes in economic activity and social needs, the time is ripe to consider a thorough review of the principles underlying real property interests and the operating systems and processes which relate to them.

In June 2007, the BCLI commenced work on the first phase of a law reform project that may mature into this comprehensive review. The goals of phase one of the real property review project include:

- meetings with key stakeholders in British Columbia's land title system; and
- preparation of a project plan for the broader, comprehensive project.

The project plan is scheduled for completion in December 2007. It will include recommendations on whether or not the broader, comprehensive real property review is feasible.

Phase one of the real property review project is being carried out with the assistance of an advisory committee

Family Caregiving Leave

There is a significant need in British Columbia to clarify the laws surrounding leave from employment and other forms of accommodation for the care of family members, which may include disabled adult children, and older adults. To date, little legal research has been assembled in this area, despite a significantly increasing prevalence of family caregiving in this province.

Given the growing obligations of family caregiving in British Columbia, employers are facing heightened demands to provide special leave provisions, flexible employment arrangements, and other workplace assistance. But the legal rights and responsibilities of the parties concerned are confusing and unclear in nature. Comprehensive legal research and writing in this area would help inform this development, as well as foster a greater understanding of the myriad issues facing short- and long-term caregivers.

In September 2007, the BCLI commenced a two-year legal research project to study these issues related to family caregiving leave. The goals of the project include:

- consolidating the conflicting and often confusing existing legal rules on the topic family caregiving leave;
- providing a basis for continuing legal education; and
- publishing a final report, with the potential to information future legislative change, which will create a much-needed resource for British Columbians.

This project is being carried out with the assistance of an advisory committee, composed of leading lawyers and other

professionals in the employment, human rights fields, and family care fields.

Personnel Changes

There were some changes made to the composition of the BCLI's executive committee at the BCLI's annual general meeting in September 2007. The BCLI's officers are:

Ann McLean	Chair
D. Peter Ramsay, Q.C.	Vice-chair
Gregory K. Steele, Q.C.	Secretary
Kathleen Cunningham	Treasurer

The BCLI also welcomed Kathleen Cunningham, Kevin Woodall, and Prof. Margaret Hall as new members and directors.

On 1 August 2007, the BCLI welcomed Krista James to its full-time staff. Ms. James joins the BCLI as a staff lawyer.

Manitoba Law Reform Commission

Franchise Law

In May 2007, the Manitoba Law Reform Commission released its *Consultation Paper on Franchise Law*. The Commission noted that franchising is a growing and relatively unregulated field of business activity. There has been occasional media attention focusing on the inequality between franchisors and franchisees and recently, on alleged franchising frauds in Manitoba. In recent years, four Canadian provinces have enacted new or replacement franchise legislation.

The Consultation Paper considered whether the regulation of franchises would be desirable in Manitoba. It provided an introduction to the history and various models of franchising, an overview of existing franchise regulation in Canada and other countries and a comparison of the elements of Canadian legislative regimes. Finally, it asked whether franchise legislation is needed in Manitoba, and if so, what elements should be included in the legislation. The Commission is currently considering the comments received in response to the Consultation Paper and preparing its final report.

The Consultation Paper is available on our website at: http://www.gov.mb.ca/justice/mlrc.

Defamation

The Manitoba Law Reform Commission has noted that a review of possible reform in the law of defamation respecting journalism deserves consideration. In recent years, the common law in other jurisdictions has extended a qualified privilege to the communications media, in some circumstances, for publications regarding matters of general public interest, including political and governmental matters.

There has been some concern that the current law in Manitoba does not adequately defend and encourage critical journalism, and that the notion of 'libel chill' hampers the reporting of issues of public concern and interest. Accordingly, the Manitoba Law Reform Commission has agreed to undertake this project.

Limitation of Actions

The law of limitations has traditionally been rife with complexities and ambiguities, leading to all manner of unfairness, but it is a subject that rarely captures the attention of legislatures. Manitoba's *Limitations Act* was amended in 1967, 1980, and 2002, but in essence it is still very much the same legislation that was enacted in 1931, and based on the same principles as the original English limitations legislation, much of which dates back to the 17th century. In recent years several Canadian jurisdictions have enacted, and the Uniform Law Conference has proposed, legislation that simplifies and rationalizes the law of limitations. The Manitoba Law Reform Commission is now studying the implications of recent reform initiatives for Manitoba, and will be making recommendations as to whether and how Manitoba should 'modernize' its legislation.

Waivers and Personal Liability

The waiver of liability is a contractual document designed to free a person from his common law duty of care to another. It is an aspect of the defence of voluntary assumption of responsibility. The waiver provides an immunity from tort liability with the consequence that a person who is severely injured as a consequence of negligent or reckless behaviour has no recourse. The Commission is conducting research in this area, recognizing that frequently, members of the public may not understand such waivers, or are required to sign them to secure entry to a wide range of recreational and sporting activities. Legislative reform in the UK, for example, declares such waivers to be void when relied on by commercial service providers. The project touches on negligence law, occupiers' liability,

contract and insurance matters.

Divorced Spouses Surviors' Pension Benefits

The Commission is currently carrying out research with respect to a possible gap in the law in Manitoba relating to the division of pension benefits between divorced spouses. Where one spouse has contributed to a pension plan, the benefits of the plan, usually a future pension income, generally must be divided between the spouses. Usually one half of the part of the pension that is attributable to the contributions made during marriage is transferred. However, this covers only the pension payable during the contributing spouse's lifetime; it does not cover any survivor's benefits. A divorced spouse, who would have had an expectation of security in later years from his or her spouse's pension or from a surviving spouse's pension, has no entitlement to a survivor's benefit. Arguably, this economic disadvantage should be taken into account along with the other circumstances of the parties.

The National Conference of Commissioners on Uniform State Laws

Current Developments and Projects in International Law

Since our last column for the *Reform* journal, a number of significant developments have occurred with respect to the National Conference of Commissioners on Uniform State Laws (NCCUSL). We held our Annual Conference in July 2007 and adopted four new uniform acts to recommend to the states for adoption: the *Uniform Interstate Depositions and Discovery Act, the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act*, the *Uniform Limited Cooperative Association Act*, and the *Uniform Rules Relating to the Discovery of Electronically Stored Information*. Our 2007 legislative year also was very successful, with 105 uniform acts having been adopted in the various states. In their first year after adoption by the Conference, the new *Uniform Anatomical Gift Act* has been adopted in 20 states and the new Uniform Prudent Management of Institutional Funds Act has been enacted in 13 states.

Our Annual Conference also adopted a shorter alternative name for our organization: the Uniform Law Commission (ULC). This name and logo will be prominently used from now on in our publications, on our website, and in our new offices. Effective December 26, 2007, the ULC will be housed in new, more spacious and much more convenient offices just east of the Chicago loop, overseeing Millennium Park and Lake Michigan: 111 North Wabash Avenue Suite 1010 Chicago, IL 60602 We will have new telephone and fax numbers, but our web and e-mail addresses will not change.

The ULC has a number of current projects dealing with international law. First, we are engaged in four projects with our North American counterparts in an effort to harmonize the laws of the United States, Canada, and Mexico. The ULC, along with the Uniform Law Conference of Canada and the Mexican Center for Uniform Laws, is working on a joint project to create a Harmonized Legal Framework for Unincorporated Nonprofit Associations in North America. This project should result in three 'national drafts'— one each for the U.S., Canada, and Mexico—that will contain a common set of basic principles that each country can incorporate into their statutory frameworks concerning unincorporated nonprofit associations. This joint committee has made significant progress and we expect that it will conclude by the summer of 2008.

A Joint Drafting Committee for Implementation of the U.N. Convention on Independent Guarantees and Standby Letters of Credit, with members from the ULC, the American Law Institute, Canada, and Mexico, has been established to work on implementation of the U.N. Convention, and to assist Canada and Mexico in developing letter of credit law consistent with Uniform Commercial Code Article 5. That committee will have its first meeting in November 2007.

At the request of the U.S. State Department, the ULC has established a Drafting Committee to revise the Uniform Interstate Family Support Act in light of the anticipated final adoption this fall of the Hague Convention on Family Maintenance, which contains significant new provisions concerning the international recovery of child support and other forms of family maintenance. Our colleagues from Canada and Mexico are also collaborating in this effort.

Finally, in the summer of 2007 we concluded the work of the ULC's first joint project with Canada and Mexico, the Joint Committee to Harmonize North American Law on the

Assignment of Receivables in International Trade. This committee worked closely with the U.S. State Department in preparation for the Department's seeking to obtain U. S. Senate advice and consent to the United Nations Convention on the Assignment of Receivables in International Trade. The Convention, which was adopted by the United Nations General Assembly in 2001, seeks to eliminate the prevailing uncertainties in the legal effectiveness of international receivables financing transactions through the establishment of a set of uniform rules. The Joint Committee also worked toward harmonizing the laws of the three countries in this area and to assure that the national laws were consistent with the Convention.

The ULC recently formed a new Joint Editorial Board (JEB) for International Law. The new JEB will consist of members appointed from the ULC and from the American Bar Association Section on International Law. The primary purpose of the JEB is to facilitate the promulgation of uniform state laws consistent with U.S. laws and international obligations dealing with international and transnational legal matters. One of the first acts of the JEB was to recommend last summer that the ULC work closely with the U.S. State Department to examine the new Hague Convention on Choice of Court Agreements. As a result of that recommendation, the ULC has appointed a Study Committee to make recommendations as to whether the United States should sign this Convention and, if so, how the Convention might best be implemented in ways that are as consistent as possible with state law in the United States. That Committee is expected to make its report early in 2008.

During the meeting of the Uniform Law Conference of Canada, in beautiful Prince Edward Island in early September, we (ULC's president, Justice Martha Walters of the Oregon Supreme Court, our immediate past president Howard Swibel, and I) had the great pleasure of meeting Laurie Glanfield, Secretary of the Standing Committee of Attorneys General, and Ian Govey, Deputy Secretary of the Australian Attorney-General's Department. This was an excellent opportunity for us to discuss ways in which we might exchange information and projects on which we might collaborate in the future. We are very much looking forward to further developing these important relationships in the near future.

Queensland Legal, Constitutional and Administrative Review Committee

The Legal, Constitutional and Administrative Review Committee is a multi-party committee of the 52nd Queensland Legislative Assembly with responsibilities regarding administrative review reform, constitutional reform, electoral reform, and legal reform. The legislation establishing the committee requires Ministerial responses to committee recommendations.

Interim evaluation of Hands on Parliament recommendations

The committee of the 52nd Parliament tabled its report and findings on an interim evaluation into the implementation of the *Hands on Parliament* recommendations on 14 November 2007.

In September 2003 the committee of the 50th Parliament tabled its *Hands on Parliament* report which examined barriers to Aboriginal and Torres Strait Islander peoples' participation in Queensland's democratic processes and identified strategies to overcome those barriers and enhance participation.

The Government's response to the *Hands on Parliament* report indicated support for, and a willingness to implement, most of the committee's recommendations. The Government requested the committee undertake an interim evaluation of the implementation and effectiveness of the recommended strategies after the first full electoral cycle.

In 2006 the committee of the 52nd Parliament decided to conduct an interim evaluation and consider whether the strategies adopted were:

- practical, workable and directed towards meeting the *Hands on Parliament* recommendations; and
- achieving, or likely to achieve, meaningful engagement of Aboriginal peoples and Torres Strait Islanders in democratic processes.

The evaluation process included consideration of:

- information received from the Speaker of the Legislative Assembly, Ministers, statutory office holders and registered political parties regarding strategies adopted to implement

the Hands on Parliament recommendations;

- 23 public submissions received in response to a consultation paper issued in April 2007; and
- views and information provided to the committee at workshops held during April and May 2007 in Rockhampton, Palm Island, Abergowrie, Yarrabah, Mareeba, Badu Island, Thursday Island, Mount Isa and Brisbane.

The Accessibility of Administrative Justice

The committee is finalising an inquiry into the accessibility of freedom of information (FOI) and judicial review mechanisms in Queensland. The inquiry began in 2005 when the committee of the 51st Parliament released a discussion paper seeking submissions on the following key issues:

- FOI fees and charges;
- costs associated with proceedings under the *Judicial Review Act 1991* (Qld), and concerns relating to self-represented litigants;
- access to available information about government decisions and actions;
- whether a diversity of people can access administrative justice; and
- resolution of genuine grievances about government decisions in an effective and timely way.

The committee received 37 submissions, 36 of which were tabled during 2006.

In April 2006, the committee convened a conference at which participants, who included members of the public, government decision-makers, lawyers, and representatives of community organisations and government-owned corporations, took part in one of three parallel discussions.

The committee of the 51st Parliament was dissolved before it could report on the inquiry. The present committee resolved to report to Parliament on the matters considered by the previous committee and has invited submission on four supplementary issues, namely:

- possible reform regarding administrative appeals;
- possible initiatives regarding the availability of information about administrative justice;
- the scope, if any, for reforms to provide for proportional dispute resolution in Queensland; and
- the publication of details regarding contracts entered into by public sector agencies.

Submissions on the supplementary issues closed on 28 September 2007 and the committee will report in 2008.

Meetings with the Ombudsman and Information Commissioner

The committee has responsibilities under the *Ombudsman Act 2001* (Qld) and the *Freedom of Information Act 1992* (Qld) that include monitoring, reviewing and reporting on the performance of the functions of the Queensland Ombudsman and the Queensland Information Commissioner.

To fulfil these responsibilities, the committee meets biannually with the Ombudsman and Information Commissioner, usually in May and November of each year. The previous biannual meetings were conducted in May 2007. Report no 58, *Meeting with the Queensland Ombudsman* on 22 May 2007, and report no 59, *Meeting with the Queensland Information Commissioner* on 22 May 2007, were tabled in June 2007.

Information on committee inquiries and reports is available at <www.parliament.qld.gov.au/LCARC> or by contacting the committee's secretariat on (07) 3406 7307 or at lcarc@parliament.qld.gov.au.

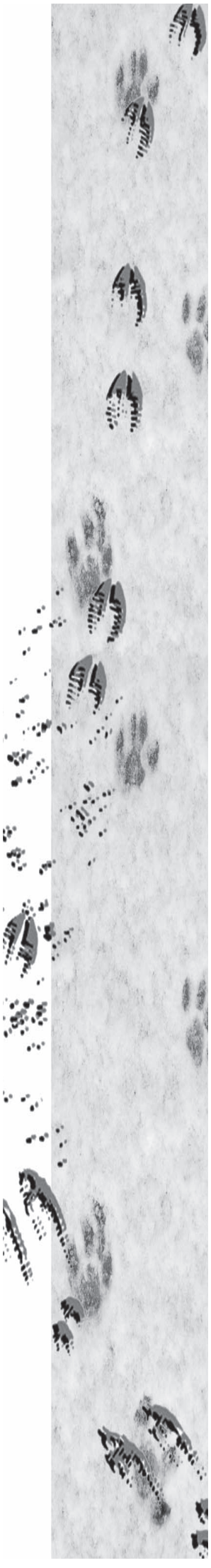
Queensland Law Reform Commission

The Guardianship Review

In October 2005, the Commission received a reference to review aspects of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld). These Acts regulate substitute decision-making for adults with impaired decision-making capacity.

The Commission's terms of reference require it to conduct this review in two stages. Stage one, which is now complete, involved an examination of the confidentiality provisions of the guardianship legislation. Those provisions:

- allow the Guardianship and Administration Tribunal (the Tribunal) to make 'confidentiality orders' in relation to Tribunal hearings, information and documents received by the Tribunal, and the Tribunal's decisions and reasons;
- prohibit the publication of information about Tribunal proceedings and the disclosure



of the identity of persons involved in those proceedings; and

- impose a duty of confidentiality on people who gain certain personal information through their involvement in the administration of the legislation.

In stage two, the Commission is to review the guardianship legislation more generally.

In July 2006, the Commission published a Discussion Paper, *Confidentiality in the Guardianship System: Public Justice, Private Lives*. To facilitate the consultation process, the Commission also produced a range of documents in more accessible formats:

- a shorter and independent guide to the Discussion Paper – Public Justice, Private Lives: A Companion Paper;
- two pamphlets setting out the key issues – one prepared specifically for people who may need help with decision-making, and a second prepared for families, friends and advocates; and
- an interactive CD-ROM that incorporated a transcript, as well as a full audio of all images and text.

The Commission held a series of public forums across Queensland, as well as a number of focus group sessions with people interested in, or affected by, the guardianship legislation. Four of these sessions were held with groups of adults who need, or may need, assistance with decision-making. Throughout the review, the Commission also sought feedback from the key stakeholders represented on its Reference Group.

The consultation process for this review was recognised during Disability Action Week 2007, with the Commission receiving the inaugural Human Rights and Justice Award for its inclusive community engagement.

In June 2007, the Commission completed its final report for stage one of the review. The Commission also produced a second volume to that report containing draft legislation that gives effect to its recommendations.

Again, the Commission produced a range of accessible documents to accompany the final report —a shorter, independent guide to the *Report, Public Justice, Private Lives: A Companion to the Confidentiality Report*, as well as two pamphlets setting out its key findings: one for people who may need help with decision-making, and a second for families, friends and advocates.

The central theme of the Commission's recommendations is that there should be greater openness in the guardianship system. This will promote accountability and transparency in decision-making, and safeguard the rights and interests of adults with impaired decision-making capacity. This is to be achieved by:

- replacing the current regime of 'confidentiality orders' with four new types of orders (collectively called 'limitation orders') that better reflect the nature of the decision being made by the Tribunal — namely, adult evidence orders, closure orders, non-publication orders, and confidentiality orders;
- establishing a legislative presumption in favour of openness and requiring serious harm or injustice to be demonstrated before the Tribunal may make a limitation order;
- generally permitting publication of information about Tribunal proceedings, provided the publication does not lead to identification of the adult; and
- retaining the current duty to keep information received when acting under the legislation confidential, but reconceptualising it as a duty to use information appropriately (rather than as a blanket prohibition on disclosure, subject to certain limited exceptions).

The Commission's report was formally launched on 1 November 2007. When speaking at the launch, the Attorney-General, the Hon Kerry Shine MP, stated that the Government's intention is to review the Commission's recommendations and introduce any amendments that might be required in 2008.

Other developments

The Commission's review of the Peace and *Good Behaviour Act 1982* (Qld) is nearing completion. The Commission expects to release its final report, which will include draft legislation, in early 2008.

The final stage of the Uniform Succession Laws Project, which is coordinated by the Commission, is also nearing completion. The final report of the National Committee on the administration of estates is expected to be completed in the first quarter of 2008.

That report will include model administration legislation for the States and Territories.

Victorian Law Reform Commission

Abortion

The Victorian Government has given the VLRC just six months to report on legislative options for the decriminalisation of abortion.

The government has asked the commission to:

1. Clarify the existing operation of the law in relation to terminations of pregnancy.

2. Remove from the *Crimes Act 1958* offences relating to terminations of pregnancy where performed by a qualified medical practitioner(s).

With regard to:

A. Existing practices in Victoria concerning termination of pregnancy by medical practitioners.

B. Existing legal principles that govern termination practices in Victoria.

C. The Victorian Government's commitment to modernise and clarify the law, and reflect current community standards, without altering current clinical practice.

D. Legislative and regulatory arrangements in other Australian jurisdictions.

The short reporting timeline meant the VLRC had to hit the ground running; it released a brief Information Paper on current law in Victoria and other states as soon as the terms of reference were received.

About 30 consultations were carried out in October and submissions were accepted until 9 November. The commission must report back to the government by 28 March 2007.

Civil Justice

Headed by full-time commissioner, Dr Peter Cashman, the civil justice review is currently working on its final report to government, which is due by 4 March 2008.

The review received a six-month extension on its original September deadline, to allow the VLRC enough time to refine its proposals for reform in consultation with key stakeholders.

Two sets of draft proposals were released for comment in July and September, and the commission received about 30 submissions to the first set and 20 to the second. This was on top of the more than 60 submissions received to the Consultation Paper at the end of 2006.

The VLRC report will concentrate on standards of conduct, disclosure of information, getting to the truth before trial, alternative dispute resolution, expert evidence,class actions, access to justice, self-represented litigantscostscase management, on-going civil justice reform and miscellaneous technical reforms

ART and Adoption

The VLRC made more than 130 recommendations in its *Assisted Reproductive Technology and Adoption Final Report*, to ensure the best interests of children are upheld by state law.

The recommendations were part of a comprehensive review of the laws governing access to fertility treatment clinics, recognition of parental status, sperm and egg donations, access to information about donors, access to adoption, surrogacy, and posthumous use of gametes.

Legislated principles would guide all decision making, including: putting the interests of the child first; protecting the health and wellbeing of all people involved; a right to information about genetic parents; and no discrimination on grounds of marital status, sexuality, race or religion.

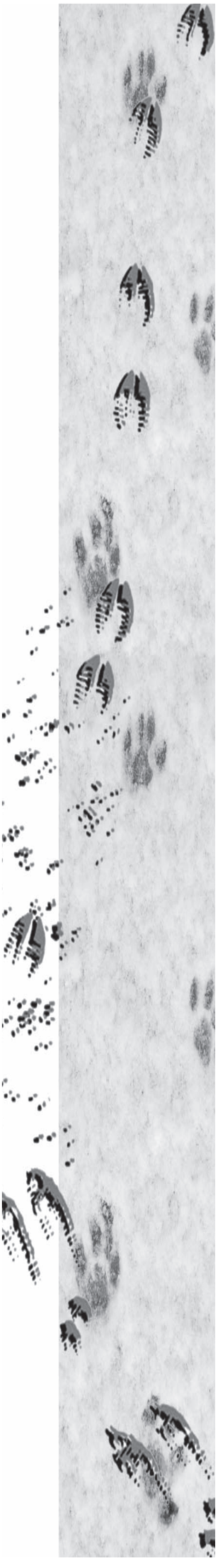
Children born through altruistic surrogacy arrangements and to same-sex couples would have their parents legally recognised under the recommendations.

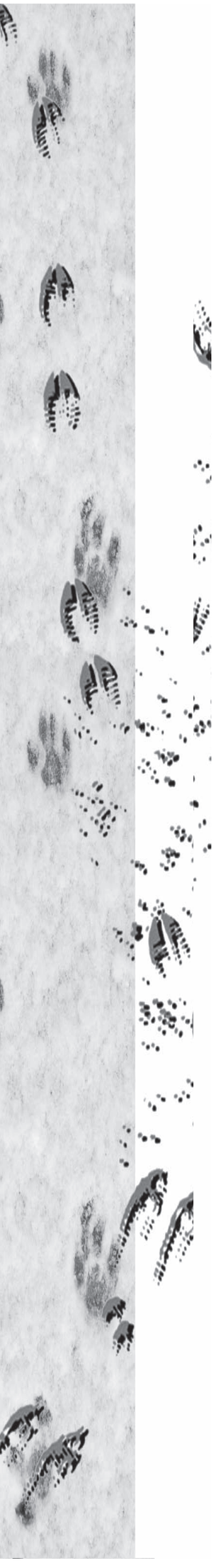
Instead of barring access to treatment on the grounds of marital status, which was found to be invalid in a Federal Court decision in 2000, the VLRC recommended a presumption against treatment for people with convictions for sexual offences and serious violent offences, as well as people who have had children taken from their care in the past.

The government has announced it will respond to the report, released on 7 June 2007, before the end of 2007.

Bail

The *Review of the Bail Act Final Report* was





tabled in parliament on 10 October 2007, making 157 recommendations for reform.

The major changes involved a plain English rewrite of the Act and the removal of the presumption against bail for certain 'reverse onus' offences.

Reverse onus tests apply to a small number of offences that, although serious, comprise a minority of the overall number of cases before the courts. They include: murder and treason; arson causing death; serious drug offences; aggravated burglary; and indictable offences when a weapon is used.

Throughout our review we heard that the arguments put forward to overcome the unacceptable risk test are also used to address the show cause and exceptional circumstances tests for reverse onus offences.

Decision makers told us that the ultimate issue for them is whether the accused poses an unacceptable risk.

Other recommendations involve: police processes; bail conditions; better consideration for the needs of victims of crime; bail justices; support for marginalised groups; children and young people.

Surveillance in Public Places

Close to 30 roundtables with users and subjects of surveillance were held in 2006 and 2007. These discussions have helped the VLRC tease out people's definitions of key terms in the project, such as 'surveillance' and 'public places', as well as understand the reasons behind surveillance being used and current regulation of different practices.

Roundtable participants were broadly grouped into the categories of state government and statutory bodies, police, local government, private corporations and community representatives.

The VLRC has also sought briefing papers from experts in two areas—the consideration of cyberspace as a public place and the impact of anti-terrorism legislation on the control of surveillance.

A Consultation Paper is planned for release in the first half of 2008.

VLRC personnel changes

The commission has a new full-time Chairperson in Professor Neil Rees, who took up his position on 1 June 2007.

Before joining the commission, he was a Professor and Foundation Dean of the Faculty of Law at the University of Newcastle. He has been involved in the establishment of three community legal centres and clinical legal education programs: Springvale (Monash University); Kingsford (University of New South Wales); and Newcastle (University of Newcastle)

Professor Rees has been a member of the New South Wales Administrative Decisions Tribunal, the Mental Health Review Board and the Psychosurgery Review Board and was previously a part-time commissioner of the New South Wales Law Reform Commission.

Full-time commissioner Dr Peter Cashman's appointment finished on 4 December 2007.

Law Reform Commission of Western Australia

Review of the Law of Homicide

The Law Reform Commission of Western Australia released the Final Report on the Review of the Law of Homicide in Western Australia on 2 November 2007.

The Final Report contains 45 recommendations for reform spanning homicide offences, defences and sentencing. The Commission's major recommendations include:

- that the offence of infanticide be repealed;
- that the partial defence of provocation be abolished;
- that mandatory life imprisonment be abolished to provide greater flexibility in sentencing for murder;
- that the partial defence of diminished responsibility not be introduced in Western Australia;
- significant reforms to self-defence and the introduction of a partial defence of excessive self-defence

The Commission's review is perhaps the most comprehensive reference on this area, aiming to ensure that the laws of homicide in Western Australia are principled, clear, consistent and modern. Because of the way the recommendations necessarily interact and interrelate, the Report emphasises the need to view them as a package, which provides a coherent framework for reform of Western

Australia's homicide laws.

To assist in the development of a consistent framework for reform the Commission determined the following seven guiding principles:

Principle One: Intentional killings – Intentional killing should be distinguished from unintentional killing.

Principle Two: Lawful Purpose – The only lawful purpose for intentional killing is self-preservation or the protection of others.

Principle Three: Mental Incapacity – The only other excuses for intentional killing are mental impairment and immature age.

Principle Four: Culpability and Sentencing – There should be sufficient flexibility in sentencing to reflect the different circumstances of offences and the relative culpability of offenders.

Principle Five: Simplifying the Law – The law of homicide should be as simple and clear as possible.

Principle Six: Contemporary Conditions – Reforms to the law of homicide should adequately reflect contemporary circumstances.

Principle Seven: Removing Bias – There should be no offences or defences that apply only to specific groups of people on the basis of gender or race.

The Commission acknowledges that the implementation of the recommendations as set out in the Report will substantially change the law of Homicide in Westerns Australia. As a result the Commission has emphasised the need for the government to carry out a review of the practical operation of the laws of homicide after any of the recommendations in the Report have been implemented for five years.

The Final Report on the Review of the Law of Homicide is available on the Commission's website at www.lrc.justice.wa.gov.au

Compensation for Injurious Affection

The Commission's Compensation for Injurious Affection reference requires the Commission to inquire into and report upon whether the principles, practices and procedures pertaining to the issues of compensation for injurious affection to land in Western Australia require reform. The Commission is in the process of compiling a detailed Discussion Paper on the area which is expected for release shortly. The Discussion Paper's release will be followed by a three-month submissions period and a Final Report. Those readers who have an interest in this specialised subject area are encouraged to email the Commission on lrcwa@justice.wa.gov.au to be included on our Discussion Paper distribution list. Submissions from jurisdictions other than Western Australia are welcomed.

Problem-Oriented Courts and Judicial Case Management

The Commission has encountered challenges on its Problem-Oriented Courts reference, not least of which has been the rapid expansion and development of this area of law. This has resulted in the Commission reassessing its project methodology and undertaking a more thorough investigative process across jurisdictions. A background paper outlining the theory that underpins this area of the law has been developed and will be published in the near future. Work on a detailed Discussion Paper has also commenced and will continue into 2008.

Selection, Eligibility and Exemption of Jurors

In September the Commission received a reference to examine and report upon the operation and effectiveness of the system of jury selection. The matter was referred to the Commission as a result of concerns raised about the growing number of people who apply for and are granted exemptions from jury service, or who are disqualified or ineligible to participate on a jury. The consequent effect of these exemptions and disqualifications from jury service is that juries become less representative of the community. In addition to this those who remain eligible for jury service then carry a greater burden to fulfil this important civic duty. The Commission anticipates that following on from a detailed Discussion Paper, a Final Report outlining its recommendations will be published at the end of 2008.

A Review of Coronial Practice in Western Australia

In November the Commission was asked to carry out a Review of Coronial Practice in Western Australia. The Commission has put together a panel of experts to provide advice through out the life of the reference and has engaged specialised skills of Dr Ian Freckelton and Dr Tatum Hands to undertake the project. The Terms of Reference are very

board and cover such areas as improvements to the Act; changes to jurisdiction, practices and procedures of the Coroner and the office; improvements to be made in the provision of support for families, friends and others; the provision of investigative, forensic and other services in support of the coronial function; and any other related matter. It is envisaged the project will take several years to complete with detailed consultations to commence in early 2008.

E-news

The Commission's new and improved website features an e-news subscription service which will inform subscribers when reports and papers are released as well as keeping subscribers up-to-date with the Commission's activities. The Commission invites reform readers to subscribe to this service. Subscription is free and you can unsubscribe at any time—just follow the prompts on the website: www.lrc.justice.wa.gov.au

Scottish Law Commission

Criminal law

During consultation on the Scottish Law Commission's Seventh Programme of Law Reform, which runs from 2005 to the end of 2009, it was suggested that the law on sexual offences was in need of review. Following public, academic and professional concern about two widely-reported rape cases in Scotland in 2004, the Commission was asked by Scottish Ministers to review the law relating to rape and other sexual offences. The Commission's Discussion Paper on *Rape and Other Sexual Offences* was published in January 2006, and was followed by a period of public consultation which ended in May 2006. The issues covered in the paper included the need to define consent; the redefinition of 'rape' to cover a wider range of sexual acts and to ensure protection for male and female victims; and enhancing the protection of persons vulnerable to sexual exploitation.

'Rape' is currently defined in Scotland as a man having sexual intercourse with a woman without her consent. However, 'consent' is not defined and juries are expected to apply what they consider to be the ordinary meaning of that word. The discussion paper proposed that the meaning of consent should be defined in statute and that a list of factual situations should be provided to indicate where consent is not present. The list, which would not be exhaustive, would include situations where the victim was subject to violence, including violence against a third party; and where the victim was unconscious or asleep or lacked capacity to consent as a result of drink or drugs.

The discussion paper proposed a redefinition of the physical act constituting the crime of rape to include non-consensual penetration with a penis not only of the vagina but also the anus or mouth of the victim. Other offences proposed included sexual assault by penetration, sexual assault by touching and a new offence of compelling another person to engage in sexual activity.

The Commission also proposed altering the current statutory provisions and common law principles to ensure that protection is given to those who cannot consent to sexual activity (such as young children) and to people with a limited capacity to consent. Such persons include older children, people with a mental disorder and people over whom others hold a position of trust or authority.

The discussion paper emphasised the need for gender equality and proposed that common law and statutory homosexual offences should be replaced by offences which are neutral as to gender and sexual orientation. It also considered arguments for and against the requirement that all the essential facts be proved by corroborated evidence.

The Commission has received a large number of helpful responses to the discussion paper. These have now been analysed and policy is being developed in light of them. We expect to submit a final report, including draft legislation, to Scottish Ministers before the end of 2007.

Insurance law

The Commission is working with the Law Commission for England and Wales on this project.

Insurance law in the United Kingdom has been criticised as outdated and unduly harsh to policyholders.

A joint scoping paper was published in January 2006 to seek views on areas of insurance contract law which should be included within the scope of this project. As a result of the helpful comments submitted in response to that paper, the project will include topics

such as misrepresentation, non-disclosure, warranties, insurable interest and unjustifiable delay.

We intend to publish two joint consultation papers, the first of which was published in July 2007. It deals with Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured. The aim is to publish the second paper before the end of 2008.

Limitation in personal injury actions and extinct claims

At the request of Scottish Ministers, the Commission has been undertaking a review of the provisions of the *Prescription and Limitation (Scotland) Act 1973* concerning limitation in personal injury actions. In particular, the Commission has been looking at the so-called 'knowledge test' and the judicial discretion to override the limitation period. The project arose because of concern about the way the test operates, particularly in cases involving industrial diseases and the question was raised whether the 1973 Act should be amended to specify factors to which the court may take into account in exercising its discretion.

Scottish Ministers also asked the Commission to review the position of claims for damages in respect of personal injury which had expired as a result of the law of prescription prior to September 1984, when a number of amendments to the 1973 Act came into force. One of those amendments removed personal injury actions from the scope of prescription. This change in the law did not affect claims which had already been extinguished by prescription. The Commission was asked to review the position of such claims following concerns about the position of people, particularly those who claim to have suffered childhood abuse many years ago in various institutions in Scotland, whose claims were extinguished under the previous rules of prescription.

A Discussion Paper (no 132) was published in February 2006, inviting comments by 31 May 2006. We expect to publish our report in December 2007. The Report will include a draft Bill to give effect to the Report's recommendations.

Damages for wrongful death

We received a reference from Scottish Ministers at the end of September 2006 inviting us to review the provisions of the *Damages (Scotland) Act 1976* relating to damages recoverable in respect of deaths caused by personal injury and the damages recoverable by relatives of an injured person.

Our Discussion Paper on *Damages for Wrongful Death* (DP no 135) was published on 1 August 2007 inviting comments by the end of November. The next stage in the project will be to analyse the responses and prepare a report and draft Bill, which we aim to complete in 2008.

Property

The Commission's Report (No 204) on *Conversion of Long Leases* was published in December 2006. It recommends that tenants of ultra-long leases should be entitled to have their rights converted into ownership. An ultra long lease is a lease which is granted for more than 175 years and which still has more than 100 years to run. The draft Bill included in the report sets out a scheme for the automatic conversion of such leases into ownership.

The Commission is working on a review of the *Land Registration (Scotland) Act 1979*. This project looks at the difficulties that have arisen in practice with the 1979 Act and considers the need for a conceptual framework to underpin its provisions. A Discussion Paper (No 125) on void and voidable titles, dealing with the policy objectives of a system of registration of title, was published in February 2004. A second Discussion Paper, (No 128) was published in August 2005. This paper looks at the three core issues of registration, rectification and indemnity against the background of the conceptual framework set out in the first paper. A third Discussion Paper (No 130) was published in December 2005. It considers various miscellaneous issues such as servitudes, overriding interests and the powers of the Keeper of the Register. The Commission is now working on the report.

The Commission is also engaged on a project concerning protection of purchasers buying property from insolvent sellers. A discussion paper (No 114) on *Sharp v Thomson* (1997 SC (HL) 66), which is the leading case in this area, was published in July 2001. One of the main proposals has largely been superseded by *Burnett's Trustees v Grainger* 2004 SC (HL) 19 where the House of Lords declined to apply *Sharp v Thomson* to ordinary personal insolvency. Section 17 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 has now implemented another of our proposals

designed to increase the protection given to *bona fide* purchasers. Following these developments the Commission hopes to publish its report in December 2007.

Succession

A new project has started on the law of succession. The Commission last reviewed this area 15 years ago although its recommendations have not been implemented. In its view the law does not reflect current social attitudes nor does it cater adequately for the range of family relationships that are common today. A public attitude survey was commissioned and a report of the results 'Attitudes Towards Succession Law: Finding of a Scottish Omnibus Survey' was published by the Scottish Executive in July 2005. The Commission's Discussion Paper on *Succession* (No 136) was published on 16 August 2007. It contained many proposals for reform on: intestacy where there was a surviving spouse or civil partner, stepchildren's rights on intestacy, and whether and if so how spouses and civil partners, cohabitants, children (including stepchildren) and others should be protected from disinheritance.

Trusts and judicial factors

The Commission is undertaking a wide-ranging review of the law of trusts. The project is being tackled in two phases. The first concentrates on trustees and their powers and duties. Two discussion papers were published in September 2003 as part of this phase—one on *Breach of Trust* (No 123) and one on apportionment of trust receipts and outgoings (No 124). A third paper dealing with the assumption, resignation and removal of trustees, their powers to administer the trust estate and the role of the courts (No 126) was published in December 2004. The final Phase 1 Discussion Paper, *The Nature and the Constitution of Trusts* (No 133), was published in October 2006. It considered the dual patrimony theory, the possibility of conferring legal personality on trusts and what juridical acts are required to constitute a trust as between the truster and the trustees/ beneficiaries and as between the truster and third parties. It dealt also with latent trusts of heritable property.

The second phase of the project will cover the variation and termination of trusts, the restraints on accumulation of income, and long-term private trusts. It will also look at trustees' liability to third parties and enforcement of beneficiaries' rights. The Commission published a Report on *Variation and Termination of Trusts* (no.129) in March 2007 following a Discussion Paper in December 2005. The Report makes several recommendations for removing current obstacles to variations of private trusts and for providing a uniform process for reorganising public trusts.

The Commission's recommendations regarding the investment powers of trustees contained in the Report on *Trustees' Powers and Duties* (1999, jointly with the Law Commission for England and Wales) have been implemented by the Charities and *Trustee Investment (Scotland) Act 2005*. Trustees can now invest in any kind of property and also buy land for any purpose.

The Commission is also working on a project concerning the law relating to judicial factors. A judicial factor is an officer appointed by the court to collect, hold and administer property in certain circumstances; for example, there may be a dispute regarding the property, there may be no one else to administer it or there may be alleged maladministration of it. The Commission believes that a radical overhaul of this area of law is necessary because judicial factory is a cumbersome procedure involving disproportionate expense. We have carried out empirical research into the current use of judicial factory and have consulted practitioners experienced in this field. The project has been delayed due to the need to give priority to other work but we hope to be able to publish a discussion paper by the summer of 2008.

Further information about the Scottish Law Commission's work and its publications may be found on its website at www.scotlawcom.gov.uk.

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Continued from page 53: 'The emergence of animal law in Australian universitites'

For a detailed account of the evolution of animal law as a scholarly discipline in the United States see David Favre, 'The Gathering Momentum' (2005) 1 Journal of Animal Law 1.

1. P Sankoff , 'Charting the Growth of Animal Law in Education' (2008) 4 Journal of Animal Law (forthcoming)

2.Animal Law (published by the National Center for Animal Law, Lewis & Clark Law School), Journal of Animal Law (published by Michigan State University College of Law) and Journal of Animal Law and Ethics (published by University of Pennsylvania).

3.Journal of Animal Law and Policy (to be published online from 2008, <http://sjalp.stanford.edu/index.html>).

4.See, eg, Sonia S Waisman et al, Animal Law: Cases and Materials (3rd ed, 2006).

5.See, eg, Cass R Sunstein and Martha C Nussbaum (eds), Animal Rights: Current Debates and New Directions (2004).

Continued from page 62: ' Rebuttable Presumption: The Way Forward for Legal Professional Privilege?'

33.See, eg, Australian Investments and Securities Commission Act 2001 (Cth) s 192; Corporations and Securities Panel v Bristile Investments Pty Ltd (1999) 152 FLR 469

34.See, eg, Uniform Civil Procedure Rules 1999 (Qld) ch 14, pt 2; Parr v Bavarian Steak House Pty Ltd [2001] 2 Qd R 196, 199 (Pincus JA), 199–200 (McPherson JA), 201 (Thomas JA).

35.Heydon, above n 10, [25285].

36.Attorney-General (NT) v Maurice (1986) 161 CLR 475, 490 (Deane J).

37.See, eg, James Hardie (Investigations and Proceedings) Act 2004 (Cth); Royal Commission Amendment Act 2006 (Cth); Special Commission of Inquiry (James Hardie) Records Act 2004 (NSW).

38.See R v Derby Magistrates' Court; Ex parte B [1996] AC 487, 508 (Lord Taylor of Gosforth CJ); see also A A S Zuckerman, 'Legal Professional Privilege — The Cost of Absolutism' (1996) 112 LQR 535.

39.Victoria, Royal Commission into the Esso Longford Gas Plant Accident, Final Report (1999).

40.Commonwealth of Australia, above n 5.

41.Administrative Review Council, above n 32, 54.

42. Ibid 57.

43.Attorney-General (NT) v Kearney (1958) 158 CLR 500.

44.See Trade Practices Act Review Committee, Review of the Competition Provisions of the Trade Practices Act (2003) Recommendation [13.5].

45.See S B McNicol, 'Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted' (1999) 18 ABR 189.

Continued from page 38: 'Ethical perspectives in animal biotechnology'

9. M Gjerris, A Olsson and P Sandøe, 'Animal Biotechnology and Animal Welfare' in *Ethical Eye—Animal Welfare* (2006) Council of Europe, 89.

10. B Rollin, Bad Ethics, Good Ethics and the Genetic Engineering of Animals in Agriculture' (1996) 74 *Journal of Animal Science* 535.

11. M Gerris and P Sandøe, 'Farm Animal Cloning: The Role of the Concept of Animal Integrity in Debating and Regulating the Technology' in M Kaiser and M Lien (eds), *Ethics and the Politics of Food: Preprints of the 6. Congress of the European Society for Agricultural and Food Ethics* (2006), 320.

12. Ibid.

Continued from page 35: ' The challenge posed by feral animals'

9. CSIRO Division of Wildlife and Ecology and Cooperative Research Centre for Vertebrate Biological Control of Vertebrate Pest Populations, *Rabbits—Prospects for Long Term Control: Mortality and Fertility Control* (1996), 7.

10. Ibid, 10.

11. Section 109 provides that where a State law is inconsistent with a Commonwealth law, the Commonwealth law shall prevail and the State law 'shall to the extent of the inconsistency, be invalid'.

12. See also the *Quarantine Act 1908* (Cth) which has obvious relevance to the import of animals at Australia's borders.

13. *Regulatory Impact Assessment—Consultation Draft 2007—August 2007*: National Codes of Practice for the Humane Control of Vertebrate Pest Animals (2007) Invasive Animals Cooperative Research Centre <www.invasiveanimals.com/index.php?id=164>, 3.

14.See also the Convention on Biological Diversity Conference of the Parties, COP 6 *Decision VI/23: Alien Species that Threaten Ecosystems, Habitats or Species*, 7–19 April 2002, < www.cbd.int/decisions/?m=cop-06>.

15. Primary Industries Ministerial Council and National Resource Management Ministerial Council, *About the NRM Ministerial Council*, <www.mincos.gov.au/about_nrmmc>. The NRMCC comprises the ministers from the Commonwealth, state, territories and New Zealand responsible for primary industries, natural resources, environment and water policy.

16. The Vertebrate Pests Committee comprises one member from: each Australian state and territory; New Zealand; the CSIOR; Bureau of Rural Sciences; the Australian Government Department of Environment, Water, Heritage and the Arts; and Biosecurity Australia. It monitors research, but is not funded to conduct research.

17. The Standing Committee comprises the departments heads or chief executive officers of the relevant

Commonwealth, state, territory and New Zealand government agencies responsible for natural resource policy issues.

18. 'Killing or removal (eg, baiting, shooting, trapping or mustering); exclusion (eg, fencing or netting); biological or fertility control; habitat manipulation (eg, removal of surface refuges); and changes in land use including agricultural practice (eg, timing of lambing or Cont:

planting different crops)': Vertebrate Pests Committee, *Australian Pest Animal Strategy: A National Strategy for the Management of Vertebrate Pest Animals in Australia* (2007), [1.3].

19.Parliament of Australia—Senate Environment, Communications, Information Technology and the Arts References Committee, *Turning Back the Tide—The Invasive Species Challenge* (2004); Parliament of Australia—House of Representatives Standing Committee on Agriculture, Fisheries and Forestry, *Taking Control: A National Approach to Pest Animals* (2005).

20. Parliament of Australia—Senate Environment, Communications, Information Technology and the Arts References Committee, *Turning Back the Tide—The Invasive Species Challenge* (2004), [5.119].

21. Ibid, [8.57].

'Lifting the veil of secrecy on animal-derived food products' Cont - page 41

business/4338308.stm; Compassion in World Farming, The Good Egg Awards <http://www.ciwf.org.uk/thegoodeggawards/pages/award-winners.asp>.

13 Wayne Pacelle, Testimony Before the Committee on Agriculture Subcommittee on Livestock, Dairy and Poultry on the Subject of the Welfare of Animals in Agriculture, 8 May 2007, p4.

14 The free-range egg market was estimated to be 5.5.% in June 2000; SCARM Working Group, Synopsis Report on the Review of Layer Hen Housing and Labelling of Eggs in Australia, June 2000 <http://www.affa.gov.au/corporate_docs/publications/pdf/animalplanthealth/layerhenhousing/synopsis.pdf>.

15 Australian Egg Corporation, Egg Industry Overview (2006) <http://www.aecl.org/Images/2006%20egg%20industry%20statistics%20(2).pdf>.

16 David McKinna, Australian Government Rural Industries Research and Development Corporation, Export Potential for Organics: Opportunities and Barriers, June 2006, 3; Andre Leu, Organic Federation of Australia Ltd, Organic Industry Booming, 23 June 2006 <http://www.ofa.org.au/Media/organic_industry_booming.doc>.

17 Fair Trading Act 1992 (ACT) s 12; Consumer Affairs and Fair Trading Act 1990 (NT) s 42; Fair Trading Act 1987 (NSW) s 42; Fair Trading Act 1989 (Qld) s 38; Fair Trading Act 1987 (SA) s 56; Fair Trading Act 1990 (Tas) ss 14, 16, 20; Fair Trading Act 1985 (Vic) s 10; Fair Trading Act 1987 (WA) ss 10, 12; Food Act 2001 (ACT) s 15, 18 ,24; Food Act 2004 (NT) s 14, 17, 21; Food Act 2003 (NSW) s 15, 18, 21 42; Food Act 2006 (Qld) ss 34, 37, 40; Food Act 2001 (SA) ss 15, 18, 22; Food Act 2003 (Tas) ; ss 15, 18, 22; Food Act 1984 (Vic) ss 10, 10A, 13, 17A; Food Bill 2005 (WA) ss 16, 19, 23.

18 Egg (Labelling and Sale) Act 2001 (ACT) s 5; Egg Industry Act 2002 (Tas) ss 8, 19..

19 Council Regulation 2001/05/EC of 19 December 2000 amending Regulation 1907/90/EEC on certain marketing standards on eggs [1999] OJ L 2/1.

20 Commission of the European Communities, Commission Working Document on a Community Action Plan on the Protection and Welfare of Animals 2006-2010, 3.2 < http://ec.europa.eu/food/animal/welfare/work_doc_strategic_basis230106_en.pdf >.

21 Council Directive 91/630/EC of 19 November 1991 laying down minimum standards for the protection of pigs. Official Journal L316, 11.12.1991, amended by Commission Directive 2001/93/EC of 9 November 2001 amending Directive 91/630/EC laying down minimum standards for the protection of pigs. Official Journal L316, 1.12.2001; The Welfare of Livestock Regulations 1994, The Welfare of Farmed Animals (England) Regulations 2000 and The Welfare of Farmed Animals (England) Regulations 2003 (Statutory Instrument 2003/299; Swiss Animal Protection Ordinance 1981, Article 22.

22 Council Directive 1999/74/EC of 19 July 1999 Laying Down Minimum Standards for the Protection of Laying Hens, Official Journal L203/53, article 5(2).

23 ibid.

24 Australia New Zealand Food Standards Code, Standard 1.5.2, (commenced December 2001).

25 Australia New Zealand Food Standards Code, Standard 1.2.11; Trade Practices Amendment (Country of Origin Representations) Act 1998 (Cth). Country of Origin standards

Clearing house

Recent law reform publications and areas of law under review

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Recent law reform publications and areas of law under review

Clearing house is compiled by the Australian Law Reform Commission. Entries can be made by emailing details of law under review to reform@alrc.gov.au. A list of abbreviations is available at the end of this document.

This edition of Clearing house covers ongoing inquiries and publications released from May 2007 to November 2007.

Abortion

VLRC

The Law of Abortion: Information Paper, September 2007.

Administrative Law

ARC

Government agency coercive information-gathering powers—final report expected early 2008.

Administrative review mechanisms in areas of complex and specific business regulation—WIH on inquiry.

COmb

Report into Referred Immigration Cases: Notification Issues, June 2007 (R).

Report into Referred Immigration Cases: Other Legal Issues, June 2007 (R).

MoJ(UK)

Adjudicator to HM Land Registry Statutory Instruments, August 2007 (CP 15/07).

NCCUSL

Revised Model State Administrative Procedure Act—new draft July 2007.

Administrative procedures for interstate compact entities—WIH by study committee.

QLCARC

Accessibility of administrative justice—report expected 2008.

Treasury

Review of Discretions in the Income Taxation Laws, June 2007 (DP).

Adoption

VLRC

Assisted Reproductive Technology and Adoption: Final Report, March 2007 [released June 2007] (R).

Agriculture

ACIP

Enforcement of plant breeder's rights—final report expected early 2008.

Associations

BCLI

Proposals for a New Society Act, August 2007 (CP).

BCLI; NCCUSL

Creation of a harmonised legal framework for unincorporated nonprofit associations in North America—new draft August 2007.

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A list of abbreviations starts on page 102.

This edition of Clearing house covers ongoing inquiries and publications released from May 2007 to November 2007.

HKLRC

Charities—WIH on new inquiry.

NCCUSL

Regulation of charities—WIH by drafting committee.

Omnibus Business Organizations Code—new draft July 2007.

Amendments to the Model Entity Transactions Act—approved August 2007.

Uniform Cooperative Association Act—approved August 2007.

Banking

HMT(UK)

Consultation on Better Regulation Measures for the Asset Management Sector, May 2007 (CP).

Review of the GB [Great Britain] Cooperative and Credit Union Legislation, June 2007 (CP).

Proposals for a UK Recognised Covered Bonds Legislative Framework, July 2007 (CP).

Banking Reform: Protecting Depositors, October 2007 (CP).

Regulation of Modified Credit Agreements, November 2007 (CP).

NCCUSL

Payment systems—WIH by study committee.

Bank deposits—WIH by study committee.

Implementation of the UN Convention on Independent Guarantees and Stand-alone Letters of Credit—WIH by drafting committee.

Bankruptcy & Insolvency

CAMAC

Long-Tail Liabilities: The Treatment of Future Unascertained Personal Injury Claims, June 2007 (DP).

Shareholder Claims against Insolvent Companies: Implications of the Sons of Gwalia Decision, September 2007 (DP).

Insolvency law reform—WIH on new inquiry.

Scot Law Reform Commission

Protection of purchasers buying from insolvent sellers—report expected December 2007.

Carriage of Goods

NCCUSL

Harmonized North American Law with Regard to the Assignment of Receivables in International Trade Convention, August 2007 (Report for discussion).

Censorship

AGD

Material that Advocates Terrorist Acts, May 2007 (DP).

Senate LCC

Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007, July 2007 (R).

Child Abuse

NCCUSL

Amendments to Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act—approved August 2007.

NT Govt

Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred': Report of the NT Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, June 2007 (R).

Children and Young People

ALRC

Review of Australian Privacy Law, September 2007 (DP 72). Report to be completed March 2008.

FLC

Improving family law processes for dealing with post-parenting order conflict—report complete but not yet released.

HKLRC

Causing or allowing the death of a child—WIH on inquiry.

NCCUSL

Relocation of Children Act—WIH by drafting committee.

Hague Convention on the Protection of

Children—WIH by study committee.

Amendments to Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act—approved August 2007.

NIDSO

Contact with children—WIH on inquiry.

Nova Scotia LRC

Grandparent-Grandchild: Access, May 2007 (R).

NSW Omb

Care Proceedings in the Children's Court, January 2006 [released November 2007] (DP).

NSWLRC

Young Offenders, December 2005 [released November 2007] (R 104).

Minors' consent to medical treatment—report expected early 2008.

Senate LCC

Crimes Legislation Amendment (Child Sex Tourism Offences and Related Measures) Bill 2007, October 2007 (R).

VLRC

Assisted Reproductive Technology and Adoption: Final Report, March 2007 [released June 2007] (R).

Citizenship

Senate LCC

Australian Citizenship Amendment (Ctizenship Testing) Bill 2007, July 2007 (R).

Commercial Law

HMT(UK)

Davies Review of Issuer Liability, June 2007 (R).

Man LRC

Consultation Paper on Franchise Law, May 2007 (CP).

NCCUSL

Record Owners of Business Act—WIH by drafting committee.

Sing LRRD

Contracts for the International Sale of Goods: Review of Article 95 Reservation, June 2007 (CP).

Commissions of Inquiry

ALRC

Client Legal Privilege and Federal Investigatory Bodies, September 2007 (DP 73). Report to be completed December 2007.

NZLC

Public Inquiries, November 2007 (Draft Report).

Compensation

Law Com

Remedies against public bodies—consultation paper expected late 2007.

LRCWA

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COmb

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HKLRC

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Man LRC

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ACIP

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HMT(UK)

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FLC

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FLC

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HKLRC

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NCCUSL

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Elder Law

HKLRC

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NCCUSL

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Man LRC

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HKLRC

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Judicial factors—discussion paper expected mid-2008.

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NSWLRC

Young Offenders, December 2005 [released November 2007] (R 104).

Abbreviations

ACIP Australia. Advisory Committee on Intellectual Property

AGD Australia. Attorney-General's Department

AGD(NSW) New South Wales. Attorney-General's Department

ALRC Australian Law Reform Commission

ALRI Alberta Law Reform Institute

ARC Australia. Administrative Review Council

BCLI British Columbia Law Institute

Cal LRC California Law Revision Commission

CAMAC Australia. Corporations and Markets Advisory Committee

COmb Australia. Commonwealth Ombudsman

CP Consultation Paper

DP Discussion Paper

FLC Australia. Family Law Council

FLRC Fiji Law Reform Commission

HKLRC Law Reform Commission of Hong Kong

HMCS United Kingdom. Her Majesty's Court Service

HMT(UK) United Kingdom. Her Majesty's Treasury

HO(UK) United Kingdom. Home Office

HoRLCA Australia. House of Representatives Standing Committee on Legal and Constitutional Affairs

HREOC Australia. Human Rights and Equal Opportunity Commission

ILRC Ireland. Law Reform Commission

IP Issues Paper

JCS(ACT) Australian Capital Territory. Department of Justice and Community Safety

Law Com England and Wales. Law Commission

LRCWA Law Reform Commission of Western Australia

Man LRC Manitoba Law Reform Commission

MCLOC Australia. Model Criminal Law Officers' Committee

MoJ(UK) United Kingdom. Ministry of Justice

NCCUSL United States. National Conference of Commissioners on Uniform State Laws

NIDSO Northern Ireland. Civil Law Reform Division, Departmental Solicitors Office

Nova Scotia LRC Nova Scotia Law Reform Commission

NSW Omb New South Wales Ombudsman

NSWLRC New South Wales Law Reform Commission

NT Govt Northern Territory Government

NZLC New Zealand Law Commission

NZMJ New Zealand Ministry of Justice

PC Australia. Productivity Commission

PJCCFS Australia. Parliamentary Joint Committee on Corporations and Financial Services

QLCARC Queensland. Parliament. Legal, Constitutional and Administrative Review Committee

QLRC Queensland Law Reform Commission

R Report

SALRC South African Law Reform Commission

Sask LRC Saskatchewan Law Reform Commission

Scot Law Com Scottish Law Commission

Senate FPAC Australia. Senate Finance and Public Administration Standing Committee

Senate LCC Australia. Senate Legal and Constitutional Standing Committee

Sing Acad Law Singapore Academy of Law

Sing MTI Singapore. Ministry of Trade and Industry

Sing LRRD Singapore. Law Reform and Revision Division

TLRI Tasmania Law Reform Institute

Treasury Australia. The Treasury

VLRC Victorian Law Reform Commission

VPLRC Victoria. Parliament. Law Reform Committee

VSAC Victoria. Sentencing Advisory Council

WACDJC Western Australia. Legislative Assembly Community Development and Justice Committee

WALC Western Australia. Legislative Council Legislation Committee

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Next issue...

In November 1997, the Australian Law Reform Commission (ALRC) report *Seen and Heard*: Priority for *Children in the Legal Process* was tabled in Parliament. The culmination of a two-year joint inquiry by the ALRC and the Human Rights and Equal Opportunity Commission, *Seen and Heard* is still unique in the breadth and depth of its treatment of the ways in which children and young people come into contact with the law, and the impacts—positive and negative—of this contact.

In the wake of the tenth anniversary of this historic report, the next issue of Reform will examine how Australia's treatment of children and young people has changed. Have major reforms to child protection legislation in most jurisdictions improved the wellbeing of children? Does Australia still need a national children's commissioner, and is such a role likely to be created? Has the experience of children in the juvenile justice system changed? Have opportunities for Indigenous children improved? Has the emphasis on youth participation in civic life had any impact on the experiences of children and young people? How do young Muslim people experience growing up in Australia?

This edition will also carry in-depth articles on the work of law reform agencies around Australia and overseas, as well as the regular 'Reform roundup' and Clearing house' features

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