

ANIMAL LAW

Peering over the gap or daring to close it?

BRIAN SHERMAN confronts the obstacles to greater justice for non-human animals.

When I first met Alice, she was 18 months old and had never been outdoors. She had never felt the sun on her face, never stood in grass or soil, nor played in the fresh air with her friends or family. Alice was separated from her mother and siblings shortly after birth. Her intellectual, physical and social needs were largely denied and she was forced to live her early days in prison-like surroundings.

The life that Alice had endured is difficult for many of us to imagine: forcibly impregnated, sleeping and living in a world of concrete and steel. It was an existence of abject misery.

By the time Alice was ready to give birth she was stressed and depressed.¹ However, that was not the reason her children were taken away. There were others in the same institution whose autonomy had also been impaired. Although some of them remained of saner mind, their offspring were also removed — destined for a life of pain, fear, frustration and intermittent hunger to be cut short only by premature death.

You might be asking yourself where in the world young Alice lived. What state could demonstrate such blatant disregard for widespread violations of the right to bodily integrity and liberty? What civil society would expressly sanction the ongoing conduct of such morally repugnant activities towards females and, more specifically, mothers?

The answer is — right here, in Australia. Alice experienced the life she did because Alice is a pig. Being a pig, or a non-human animal, reduces Alice's status in law to a mere chattel or a piece of property.

I was introduced to Alice when Voiceless, the organisation I co-established in 2004, decided to fund her new carers as part of its annual grants program, so that she could live out her life in a place where she could exercise her natural behaviour — outdoors, in a sanctuary.

Voiceless, so-named because animals have no voice and no standing at law, aims to promote respect and compassion for animals, raise awareness of the conditions in which they live, and take action to protect them from suffering. One of our primary aims in establishing Voiceless has been to 'lift the veil of secrecy' about what goes on inside Australia's factory farms. The life of Alice is a small insight into the treatment legally meted out each year to those of Australia's 540 million 'production' animals who live (for want of a better word) in factory farms.²

Alice and her kith and kin are intelligent beings. They have highly developed cognitive and problem-solving abilities. Pigs are also emotionally complex. They can feel fear, frustration, pain, hunger and thirst; however they are legally owned, bought, sold, treated and traded as if they are mere objects. Professor Gary Francione, who teaches an extensive animal law

program at Rutgers University in the United States, says that 'institutionalised animal exploitation is structurally similar to American slavery'.³

Since being liberated from a factory farm, Alice has shot to fame as a film star in the soon-to-be released production of *Charlotte's Web*. Sadly, however, for many non-human animals, the only escape is death. Steven Wise, who taught the first animal law course at Harvard, tells the story of a chimpanzee named Jerom who was imprisoned for life in a US primate research centre and repeatedly infected with HIV until the pain and suffering overcame him.⁴ In a February 2000 speech in Boston, the highly distinguished constitutional law professor, Lawrence Tribe, commenting on the chimpanzee's plight, pronounced that 'clearly Jerom was enslaved'.⁵

The fact is that millions, or more realistically billions, of enslaved animals are today suffering in ways that many of us find too horrible to imagine or confront. Children are generally aware; they have a kinship to animals but are socialised to believe as they grow older that it is acceptable to kill, eat, wear, exhibit and experiment on animals. Virtually everything we do to animals in society is regulated by law; however, for hundreds of years, lawyers have largely failed to advocate on their behalf. All lawyers were children once. Like everyone else they once knew intuitively that animals are sentient beings.

Although I am a layperson, not a lawyer, I do have certain expectations of what the law could and should be used for. In thinking about the law, it is usually in terms of ideals such as justice, fairness and equality. Although there are undoubtedly many factors that drive law reform today, I hope that the role of lawmakers and lawyers is to be, *inter alia*, a voice for the voiceless — for the weak, the marginalised and the oppressed — and to fight for, or at least debate and engage in, intellectual discourse about the basic rights and freedoms to which all beings should be entitled.

Ask yourself why you have always accepted that the recipients of these important rights should be limited to humans? A human being at death's door in a coma has more rights than an intelligent, sentient being of another species.⁶

The area of animal rights law is very new. In fact it is only just emerging.

Why is animal rights law potentially taboo or left of centre?

Is it the weight of history behind the classification of animals as property that makes their ongoing exploitation acceptable? Steven Wise points out that each of the following claims has been made:

Slaves live for the sake of their masters. The human races were placed on separate continents so that they would

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3. Gary L Francione, *Rain Without Thunder: The Ideology of the Animal Rights Movement* (1996) 179.
4. Steven M Wise, *Rattling the Cage: Towards Legal Rights for Animals* (2000) 15.
5. *Ibid.*
6. *Ibid.* 144-5.

not mix. Nature has marked Chinese as inferior to whites. Women are made for men. Blacks lie so far below whites on the scale of created beings that they have no rights that whites are bound to respect.⁷

These claims are so politically incorrect that even hearing them is enough to make many of us uncomfortable. Yet they were all accepted and given effect in law at various times throughout history.

Does the fact that a law exists make it right or place it in a realm beyond question? Martin Luther King Jr once cautioned us to, 'never forget that everything Hitler did in Germany was legal ... It was illegal to aid and comfort a Jew in Hitler's Germany.'⁸ Apartheid in South Africa was also enshrined in law and enforced for almost half a century by legal authorities. Once we stop questioning the law and its operation we may well have abandoned one of our own most hard-earned freedoms — the right to freedom of thought and expression.

Do animals need rights? The efforts of those who advocate on behalf of animals are sometimes challenged by those who claim that animals have no need for rights. This seems like a remarkable assertion considering the current situation in Australia, reflected in the following statistics:

- more than 215 000 female pigs like Alice are imprisoned inside sheds, pregnant and confined for part or most of their reproductive cycle⁹
- 62 per cent of female pigs, at some stage during their pregnancy, live in 'sow crates' in which they can barely take a step forward or back¹⁰
- the first time many pigs see the sunshine is on their way to the abattoir
- around 10 million 'battery' hens are held in barren wire cages in Australia¹¹
- each 'battery' hen has less than an A4 size piece of paper in which to live¹²
- 'battery' hens, which are seen as mere units of production, cannot flap their wings or dust bathe
- these 'battery' hens never feel the earth under their feet as they spend their lives standing on steel bars

- in the past five years, more than 260 000 sheep and 5800 cattle have died on board livestock vessels during their journey to the Middle East¹³
- over the last decade, 30 million kangaroos have been shot, with a further 3 million young-at-foot orphaned, left to starve or exposed to attack by predators — and that does not take into account their joeys.¹⁴

When one considers these statistics, it seems almost incomprehensible to suggest that animals should not have legal advocates.

Professor Francione has pointed out that the quest for animal rights is not a quest for the same rights that humans might have.¹⁵ Animal rights lawyers are not trying to enact rights for animals such as the right to vote. What is being sought in its most basic form is the right not to suffer.

The concept of human rights was not born overnight. The *Universal Declaration of Human Rights* was many years in the making and the existence, validity and content of many human rights is the subject of continuing debate in legal, philosophical and political circles. The immediate task for lawyers who wish to protect animals from suffering is simply to get the animal rights debate started. Once lawyers are willing to act as a voice for animals by engaging their hearts and minds in this emerging debate, Alice and billions of animals like her will have the opportunity to find shelter in the protection of the law as opposed to having it wielded as a weapon against them.

Future generations will look back at our current treatment of animals with disbelief and ask why it took us so long to speak up for animals; why their parents and grandparents who had a voice — who were highly articulate, educated and who were in positions of power and influence — did nothing.

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An emerging field

KATRINA SHARMAN argues current laws are failing animals because they stem from the fiction that animals are property.

John Stuart Mill once wrote that, 'every great movement must go through three stages; ridicule, discussion and adoption'. In the 2000 edition of America's first academic journal devoted to the emerging discipline of animal law, David Wolfson remarked that animal law has moved through the stage of 'ridicule' and is fast moving into the mainstream.¹ One year later, on the other side of the Pacific, in the High Court case of *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*, Kirby J acknowledged that issues such as animal welfare and the export of animals and animal products are clearly legitimate matters of public debate in Australia.²

I will return to the emergence of animal law; however, I want to start by examining the idea that animal law is not a serious legal topic. One might recall that this same opposition existed with respect to environmental law at the time that Professor Christopher Stone wrote his influential article, 'Should trees have standing?' Professor Stone argued that guardians should be appointed to speak for the 'voiceless' elements in nature, to ensure that they had legal standing. He pointed out that granting rights to those who have none is 'bound to sound odd or frightening or laughable ... because until the rightless thing receives its rights, we cannot see it as anything but a thing for the use of us'.³

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This raises the following questions: 'Are animals ours to use?' and 'Where did this line of thinking come from?' If one were to adopt a historical approach, it seems clear that although human beings clearly fall within the scientific classification of 'animals', we have consistently sought to separate ourselves from the broader animal kingdom. There has always been a range of arguments to sustain this 'us and them' mentality.

For those with religious leanings, the separation dates back to the Old Testament in which 'man' was granted 'dominion over all creatures'.⁴ There are many passages that one might quote from the Bible to reinforce the notion that human beings were never intended to be viewed within the same paradigm as animals. However, in recent years, traditional religious precepts have been challenged by the release of books by authors such as Matthew Scully.

In *Dominion: The Power of Man, the Suffering of Animals and the Call to Mercy*, Scully argues that even if God granted 'man' power over animals, this privilege is accompanied by a corresponding responsibility to respect life and to treat our fellow creatures with compassion and mercy.⁵

Of course, attempts to separate nonhuman from human animals have not been limited to the religious sphere. For thousands of years, those scientists opposed to creationism have also sought to distinguish the human species from other animals. For Cartesian thinkers, the answer was simple: animals were not conscious. According to Rene Descartes, they were 'unfeeling automatons, devoid of sentience and emotion'.⁶ That school of thought was challenged by Charles Darwin, who in *The Origin of Species* (1859) and *Descent of Man* (1871), argued that the difference between species was one of degree, not of kind.⁷

Even in post-Darwinian times, attempts are consistently being made to maintain the 'us and them' mentality. In the last 20 years, scientists have sought to identify a plethora of unique 'human' characteristics or capabilities ranging from brain size, language and tool use to intellect, awareness or consciousness. Yet, as our knowledge of the natural world has expanded, those arguments have slowly been laid to rest.

First, it was discovered that great apes and whales had complex communication abilities.⁸ Then it was revealed that humans were not the only animals that could use tools — chimpanzees and magpies could too.⁹ As our understanding of other species expands, it is becoming more difficult to invoke traditional arguments as a basis for preserving the 'us and them' mentality.

The notion of 'speciesism' — considering one's own species superior to others irrespective of their characteristics — coined by Richard Ryder in the 1970s and taken up by Peter Singer in his groundbreaking work *Animal Liberation*, is also being challenged. For example, in Professor Martha Nussbaum's latest book, *Frontiers of Justice: Disability, Nationality and Species Membership*, she says that:

We humans share a world and its scarce resources with other intelligent creatures. We have much in common with these creatures, although we also differ in many ways ... there seems to be no good reason why existing mechanisms of basic justice, entitlement and laws cannot be extended across the species barrier.¹⁰

The industrial establishment which benefits from the use and abuse of animals is so huge and so politically entrenched in our society that embarking on the road towards legal rights for animals may sometimes appear (to adopt Professor Stone's words) 'frightening or laughable'. Food producers and biomedical companies make billions of dollars from the ongoing use of animals as a resource. With the globalisation of factory farming and the explosion in genetic technologies, these obstacles appear to be increasing. However, the fact this exploitation is so enmeshed in our past and our present does not mean that we must accept it as part of our future. As Steven Wise points out, slavery in both Britain and America was once seen as integral to the functioning of those economies.¹¹ The exploitation of women, children and the environment also offers significant economic benefits; however at important moments in history, lawyers have been willing to challenge the industrial establishments that profit from those activities. I believe the institutionalised injustices and cruelty inflicted on animals present the next great challenge to lawyers.

I return to a central topic in animal law, the property status of animals. It is important to discuss this issue as many people contend that animals already have legal rights, as evidenced through anti-cruelty or animal welfare statutes. Without getting into the debate about what constitutes a 'right', I discuss four themes in current anti-cruelty/animal welfare laws which demonstrate that present laws are failing animals.

Theme 1: Animals are property

While animal welfare law has improved the lives of many animals, its potential to provide true protection is limited because it embraces the age old fiction that animals are property. It is true that our animal welfare laws convey certain protections on certain animals. However, under such law, animals are classified as 'stock' (livestock), 'specimens' (various species) and 'things' to be marketed, disposed of, bought and sold. This, in turn, affects everything we do to them, and when it comes to the most meaningful of legal protections (namely fundamental rights), they are virtually voiceless at law.

Theme 2: Animal welfare laws are intended to prevent cruelty

While the structure and provisions of each state's animal welfare laws vary, the objectives of the legislation, are broadly speaking, to prevent cruelty. A number of states also include additional 'management' or 'educational aims' in their list of objectives.¹²

The definition of 'cruelty' varies in each state. However, all states and territories prohibit the infliction of unnecessary pain or suffering on an animal, or the failure to take steps to alleviate pain being experienced by an animal, subject to specific exceptions. New South Wales, Western Australia, Queensland, Tasmania and Victoria use words such as 'beating, mutilating, kicking, wounding, terrifying, torturing, abusing and overworking an animal'.¹³ Some states, such as New South Wales, Victoria and Tasmania, have created offences for acts of aggravated cruelty, which are defined as 'acts resulting in the death, deformity or serious disablement of an animal'.¹⁴

4. Genesis 1:24–6.

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14. *Prevention of Cruelty to Animals Act 1979* (NSW) s 6; *Prevention of Cruelty to Animals Act 1986* (Vic) s 10; *Animal Welfare Act 1993* (Tas) s 9.

In addition to the general anti-cruelty provisions, some anti-cruelty statutes create specific offences of cruelty, including confining an animal or failing to provide adequate or appropriate exercise, exposing an animal to excessive heat or excessive cold, failing to provide adequate veterinary treatment, tethering an animal for an unreasonable length of time and failing to provide an animal with proper food, drink, or shelter.¹⁵ The Queensland and Tasmanian statutes go one step further and proactively impose a positive duty of care on people in charge of the animal.¹⁶

Theme 3: Not all animals are equal

Despite the apparent protection which the above statutes convey on animals, the benefits of all our animal welfare laws are tempered by the notion that some animals are more equal than others. For example, in NSW, certain protective provisions are modified when applied to stock animals, such as cattle, sheep, goats, swine, poultry, deer and horses.¹⁷ These modifications, which take the form of 'exemptions to the cruelty provisions' or defences to acts of cruelty, sanction the confinement of certain animals without exercise and the carrying out of mutilations such as mulesing, castration and tail docking in certain contexts, without pain relief.¹⁸ These same acts would constitute offences if they were carried out on our companion animals.

In addition to the exemptions and defences that sanction differential treatment of stock animals, all animal welfare laws in Australia are underpinned by model codes of practice. Whilst these codes arguably act as a guide to minimum animal welfare standards, their ability to provide meaningful protection is limited by the fact that their legal status and effectiveness varies in each state and territory. They also clearly legitimise many farming methods, which would constitute acts of cruelty if they were carried out on other than stock animals.

Of course, stock animals are not the only animals that fare poorly under animal welfare legislation. Most animal welfare laws also contain defences for those who wish to hunt, shoot and trap animals provided that no 'unnecessary pain' is caused during the process. These kinds of laws present considerable problems when it comes to law enforcement.

Theme 4: Cruelty is only cruelty when we say it is

I would like to turn now to the definition of 'unnecessary pain', to demonstrate what Steven Wise has identified as 'the problem with being a thing'.¹⁹ As I pointed out above, a requirement, which exculpates many people who would be conducting acts of cruelty in the circumstances I have just discussed, is that the animal did not experience any 'unnecessary pain'. This raises the question of what pain is necessary.

Is it necessary to castrate a stock animal without anaesthetic? Is it necessary to use a pack of dogs to chase a rabbit down its warren before the warren is crushed by a bulldozer? Is it necessary to raise billions of animals in unnatural, arguably painful conditions to achieve economies of scale?

Of course, from the perspective of the animal, none of the above acts are necessary. However, since animals in law are property, they have no say in

how these questions are answered. The meaning of 'unnecessary pain' is inherently malleable and almost always defined by human interests.²⁰ It is based on the notion that animals may legitimately be used as means to human ends. Although it is meant to be the product of a balancing exercise, the question of whether the infliction of pain on an animal is necessary will ultimately depend on society's perceptions of the extent to which animals can and should be used.²¹

The good news (for animals) is that lawyers are at last waking up to this emerging movement. In the US, there are now more than 60 law schools teaching animal law courses. There are casebooks, conferences and collections of essays compiled and commented by renowned legal scholars including Alan Dershowitz, Cass Sunstein and Martha Nussbaum.²² International, national and regional conferences are being convened to debate and discuss the barriers to justice that confront animals. Animal law chapters are mushrooming in Bar Associations and in law schools across the country.

In the Asia Pacific, the animal law movement is not yet fully fledged; however, it has legs and it is fast emerging. The University of New South Wales taught animal law for the second time in 2006. New Zealand is teaching animal law. Academics are talking. Last year, Voiceless co-hosted Australia's first national animal law workshop to bring together legal advocates for animals.

And when one steps back, with a truly open mind, why shouldn't the number of animal lawyers be increasing? After all, most people are compassionate and, given the opportunity, will speak out against cruelty to animals once they become aware how pervasive it is. As Wayne Pacelle (head of the Humane Society of the United States) said at a 2004 animal law conference at Yale Law School, 'human charity and kindness are not finite commodities ... Animal charities, like every other unselfish human enterprise, express the best in the human heart' (paraphrased).²³

Animal rights lawyers represent part of a call for justice for billions of living beings. They may not look like us and they may not talk like us, but they can and do suffer like us. This is an opportunity to change lives — to speak up for those who have no voice, those who are lawfully starved, terrorised, beaten, confined, abused and violated. It is our profession that has taken the 'life' out of animals by classifying them as legal objects and it is equally our profession that holds the keys to reduce their suffering through advocacy and law reform. Like many other animal lawyers, I believe that this generation is standing on the verge of one of the last great and pressing social justice movements. I hope that we will have the compassion and courage to open our hearts and minds to this important cause.

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17. *Prevention of Cruelty to Animals Act 1979* (NSW) s 4.

18. See, eg. *Prevention of Cruelty to Animals Act 1979* (NSW) ss 9 and 24.

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