

## ANIMAL LAW

### PHILOSOPHICAL AND SCIENTIFIC PERSPECTIVES

#### What is an Animal

Property, chattel of those who owns them or in their possession

Oxford Dictionary:

- living organism which feeds on organic matter, typically having specialized sense organs and nervous system and able to respond to stimuli
- distinguished from plants by being unable to synthesise organic molecules from inorganic ones so feeds on plants or other animals
- able to move about, but sometimes restricted to particular stage in life cycle
- includes vertebrates (with backbone: such as mammals, birds, reptiles, amphibians, and fishes) and invertebrates (lacking backbone: such as insects, spiders, mollusc)

Law:

- In POCTAA:
  - o S 3(3) "animal"
  - o S 25 "animal"
  - o S 3(1) "farm animal"
  - o S 25 "specified animal"
- In *Livestock Management Act 2010*: s 3 "livestock"
- In *Animal Welfare Act 1966* (US): s 2132 "animal"
- In *Domestic Animal Act 1994*: s 3 "domestic animal business"

#### Animal Law

Covers range of different contexts and issues where animals and the law intersect:

- Anti-cruelty
- Welfare
- Conservation

#### Animal Ethics

*Moral Philosophy or Ethics* → branch of philosophy that involves systematizing, defending and recommending concepts of right and wrong conduct

- Concerned with how we should live our lives and how we should regard and treat others

*Animal Ethics* → deals with relationship between human and non-human animals, how we should regard and treat them and our beliefs about their moral status

*Moral Anthropocentrism* → holds that human interests are located at centre of moral universe to exclusion of other beings

- Animals do not have moral standing either on basis that they lack sentience (Descartes) or rationality (Aristotle and Kant)

#### Rene Descartes

Mechanistic view of animal behaviour

Human animal can:

- properly respond (using human language) rather than merely react to sound
- learn to communicate (nonhuman animals merely emit sounds)

“... shows not only that animals have less reason than men, but that they have none at all ... it proves that they do not have a mind, and it is nature that acts in them according to disposition of organs”

### Immanuel Kant

We have duties to each other morally

Human animal ascendancy and sovereignty sealed through man's 'dignity':

“...fact that man is aware of ego-concept raises him infinitely above all other creatures living on earth. Because of this, he is a person and by virtue of oneness of consciousness ... is a being who, by reason of preeminence and dignity, is wholly different from things, such as irrational animals whom he can master and rule at will”

### Epicurus

Links between society, justice and law arose because society and justice require compass not to harm others, and without which, pleasure would not be attainable

Law:

- provides motivation to live justly, by not harming others
- delivers fear of punishment and mere detection which, through psychological effects, curbs behaviour toward what is deemed just
- exist as contract we have with others
- ensure our interests and enjoyment of certain rights

### Utilitarianism

Rightness or wrongness of an action evaluated by utility, its capacity to maximise happiness and minimise suffering

Teleological ethic → ethics of actions are judged by its outcome and ends are more important/meaningful than the means

### Jeremy Bentham

Utilitarianism is predicated upon the capacity of animals to suffer and equal consideration of interest

Law has a role in controlling pleasure and pain

Focused on sentience as the morally relevant distinction and link to law influenced early 18<sup>th</sup> century animal welfare movement that led to animal cruelty law and formed basis of current provisions

### Peter Singer

Humans should include and consider interests of animals when evaluating course of action because animals have quality of sentience (capacity to feel pain or joy and to experience suffering or happiness)

Our law, moral and ethics are built around the fact that we can suffer

We must treat like cases alike except when morally relevant differences support treating them differently

- As sentience is the morally relevant quality, we must consider equally the interests of all sentient beings in avoiding pain and suffering when making decisions that affect those interests, regardless of whether they are human
- To do otherwise is to resort to morally indefensible speciesism (idea that it is justifiable to give preference to beings simply on grounds that they are members of species Homo Sapien)
- Denunciation of speciesism does not imply nonhuman animals or human animals at all times, would be granted equivalent rights, or possess equivalent non-legal interests

Preference Utilitarianism → actions should be judged by extent to which they accord with preferences of any being affected by action and consequences, in particular preferences to avoid pain and maximise happiness

### Criticisms

1. Problem of quantification such as
  - a. how do we measure content of preferences and interests in pain and pleasure
  - b. can we calculate aggregation of all interests affected by given action for purpose of a precise evaluation
2. Justifies harmful practices as pain of sentient beings is put against the pleasure of humans
3. Anthropocentrism as this approach favour human interests.

### Animal Rights

Some animals have inherent value and should not be treated as a means to an end, for the same reasons that humans should not

Deontological ethics → action is morally good because of some characteristic of action itself, not because product of action is good

### Immanuel Kant

Proposition of beings as ends in themselves that should not be used as a means to an end

Animals have moral rights to be treated humanely or with more respect

### Tom Regan

Differentiating moral agents and moral patients:

- Moral agent → person who has sophisticated abilities, able to distinguish actions between right and wrong, bring impartial moral principles to bear on decision making
- Moral patients → people/entities who may not have capacity to judge right from wrong in way moral agents can, but are subjects-of-a-life
  - o This quality gives them inherent value in the same way as moral agents
  - o Subjects of a life → “involves more than merely being alive being conscious ... individuals are subjects-of-a-life if have beliefs and desires; perception, memory, a sense of the future, emotional life, together with feelings of pleasure and pain; preference- and welfare-interests; ability to initiate action in pursuit of desires and goals; psychophysical identity over time; and individual welfare in the sense that their experiential life fares well or ill for them, logically independent of utility for others and being object of others’ interests”

### Criticisms

1. Too abstract and formalistic as do not resolve questions of what to do when rights conflict
2. Social and political changes more important as precursors to abstract rights talk
3. Little bearing in practice, given institutionalised nature of use of animals and inability to assert rights on own behalves

### Legal Reform

CL: animals designated as property subject to human use and care

Welfarism → incremental reform of obligations of care and against cruelty without challenging foundational legal status

Abolitionism → abolish legal property status and replace it with something else

### Other Approaches

- Theory of reasons for action → seek to avoid doing harm by our actions
- Capabilities approach
- Wild law → any hierarchy of organism is inherently anthropocentric
- Animal citizenship → animals as members of shared society by virtue of social condition

### Animal Welfare Science

Encompasses biological, neurology, behavioural, ecology, evolutionary studies, neurosciences, cognitive sciences, genetics

Animal welfare → assessing individual animal's state in its attempts to cope with its environment

- WHO: refers to how an animal is coping with conditions in which it lives
  - o Animal is in good state of welfare if it is healthy, comfortable, well nourished, safe, able to express innate behaviour, and not suffering from pain, fear, and distress
  - o Good animal welfare requires disease prevention and veterinary treatment, appropriate shelter, management, nutrition, humane handling and humane slaughter/killing

Biological functioning → objective measures of how body of animal is responding to environment

- Ex, stress hormones

Affective states → indicators of subjective experience

- Ex, brain, calling out, stereotypical behaviours (hen picking at own feathers, cannibalising itself, elephants swaying left and right, lions pacing, giraffes looking)

Natural living → how closely is environment that animal is experiencing modelling or mirroring the wild

#### Five Freedoms – John Webster

1. Freedom from hunger and thirst (malnutrition) → ready access to fresh water and diet to allow full health and vigor
2. Freedom from discomfort → providing suitable environment including shelter to rest
3. Freedom from pain, injury or disease → by prevention and diagnosis
4. Freedom to express normal behaviour → adequate space and facilities for animal
5. Freedom from fear and distress → conditions avoid mental suffering

#### *Critiques:*

- Outcome measures manipulated through animal husbandry (aim to change genetics/biology of animals to make them more amenable) strategies to promote outcome stated
- 'Freedom from' does not adequately represent positive welfare state
- Can be inconsistency between these goals

#### Animal Sentience

Ability to have perceptions and sensations, to experience emotions associated with pleasure and suffering, to be aware of surroundings and of what happens to it, and to be motivated to promote its evolutionary fitness

Evidence of Animal Sentience:

- from animal cognition: high intellectual achievement might imply consciousness and sentience
- from animal emotion: biological and physical responses of animals indicate that they have emotional responses to environmental stresses

#### Animal Consciousness

State of being conscious; immediate awareness of one's own existence, sensations, thoughts, surroundings

#### Human v non-human animals

Genetics → modern molecular genetics suggests orangutans, gorillas, chimpanzees and humans should be grouped in the same genus, homo, in light of genetic code similarities

Behavioural and Cognitive Studies → evidence of animals learning language, using tools, and possessing problem solving abilities

Cultural and Social Life → observations of animals with complex family and social relationships, and emotional ties

Moral character or ethics → some claim that ethics derive from biology and in particular emotion, leading them to suggest it is not limited to human beings

Science plays a critical role in development of law related to animals:

- Legal recognition of sentience
- Range of animals covered by anti-cruelty law
  - o Agreed most vertebrates are sentient beings
- Development of industry based codes of practice
- Used to support habeas corpus claims and legal claims predicated upon the cognitive or other capacities of animals

## **HISTORICAL CONTEXT**

### **Ancient Societies**

#### Egypt

Animal veneration → gods often took animal form

#### Rome

Animal suffering as entertainment, to demonstrate militaristic qualities and reach of Roman Empire

#### Greece

Natural will v human will

Thinkers promoting vegetarianism, included Pythagoras (on basis of belief in transmigration of the soul → one could be reborn into various diff types of entities) and Plutarch, more contemporary (on basis of universal benevolence → sentients implies a mind)

Aristotle: The Scala Naturae or Great Chain of Being: simple taxonomy (categorisation) or implying exploitation of lower beings by higher ones (humans)

#### India

Number of thinkers influence contemporary thought, most significant is Buddha, who advocated vegetarianism for reasons similar to Pythagoras

### **Animal Trials**

#### Ecclesiastical Courts

(of the church) Dealt with cases of public nuisance and damage by untamed groups of animals – such as swarms of insects or a group of rats or moles

Process:

1. Complaint lodged by victim plaintiffs
2. Tried in absentia
3. Given representation
4. Often negotiated compromises were offered
5. Outcome of repeat offending would be anathema: animal excommunication

#### Secular Criminal Courts

Dealt with cases where animal caused physical injury or death to a human being or participated in a criminal act

Involve individual domesticated animals – such as pigs, cows, dogs

Process:

1. Charged with offence
2. Tried in person: animal arrested and taken into custody
3. Animal sometimes represented, witness examination and evidence as per human defendant
4. Decision rendered according to common law precedents
5. Outcome was usually corporeal punishment, not supernatural (mimic human punishment)

#### Possible Reasons FOR

- Reflects pre-enlightenment understanding that they have minds and spirits in some sense and are a legal and moral person
- Legal community as an extension of the faith community: note exclusion of Jews and Muslims (possibly also women) from same legal rights
- Biblical Literalism
- Cultural Positivism: primitivism and superstition
- Rehabilitation: little to suggest believed animals had rationality to change
- Economic grounds: unlikely, given costs incurred
- For crime to be forgotten: unlikely, given so visible
- Incapacitation: to remove animals that are demonstrably dangerous
- Deterrence: of other animals, or humans, or both
- Intimidate animal guardians: reiterating need for control
- To re-assert order and control: bring otherwise disorderly world within cognitive control, via legal system
- Retribution: to revenge the harm

#### THE LEGAL STATUS OF ANIMALS

*Legal Property* → legal recognition of person's dominion over an object/thing including rights belonging to the owner that is attached to the object/thing

*Domestic Animals* → owned by individuals or corporations who has unconstrained right

*Wild Animals* → qualified property in which no one has ownership

- State does not own wild animals in legal sense but has power to preserve and regulate the exploitation of an important resource (*Yanner v Eaton* (1999))

*Legal Person* → subject in which rights and duties are vested or capable of being vested including the ability to sue, be sued, own property and enter into contracts

#### Ngairé Naffine's Taxonomy

Three kinds of legal person:

1. Legalist → law's person is an artificial device with no necessary relationship to particular beings in the world (ex, personhood of corporations, rivers, states)
2. Humanist → law's person is a human being at whatever point of development
3. Rationalist → law's person is a human being with certain intellectual and rational choice capacities

"...a better means of evaluating appropriateness of legal characterisation of person is not how well it captures reality or how well it satisfies scientific or philosophical understandings of person but rather, how well it serves a just legal purpose"

*Legal Standing* → right to commence legal proceeding or right to have a court adjudicate on a complaint or issue

\*It is possible to have standing but not be a legal person\*

#### Do Animals have Legal Standing

Animals are objects under the law and their individual interests never directly recognised thus have no power to bring about a claim or action to protect their interests

### *Civil Law*

Standing depends on the claim of action but animals cannot bring a claim as they are property

### *Administrative Law*

Standing needs a special interest in the subject matter

Mere ideological interest or emotional investment is insufficient (*Australian Conservation Foundation v Commonwealth* (1980); *Animal Liberation Ltd v Department of Environment and Conservation* (2007); *Animals' Angels v Secretary Department of Agriculture* (2014))

### *Welfare Law*

Although animal interests are protected, it does so indirectly through responsibilities and limits and does not elevate animals to any new status in law

### **Recent Cases**

Decision to destroy a dangerous dog (*Dudas v Monash City Council; Tarawa-Shearer v Darebin City Council* [2012] VSC 578)

- The dog is both the plaintiff's property and pet thus should not be deprived of the opportunity to argue
- Legislative provisions are designed to protect community from breeds of dogs that Parliament considers would pose a danger to public safety and in doing so, it is material to take into account that the effect of legislation may be to deprive citizen of his/her property and domestic pet

### *Tommy the Chimpanzee*

2014 judgement: Tommy is not a 'person' for the purposes of rights and protections afforded by habeas corpus because, unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities, or be held legally accountable for their actions

2015 Judge Jaffe: capacity to bear duties and responsibilities is not a prerequisite to legal personhood

2017 NYSC Appellate Division: reaffirms 2014 judgement

2018 Judge Fahey: for the court to treat the chimpanzee as if he/she had no right to liberty protected by habeas corpus is to regard it as entirely lacking independent worth, as mere resource for human use, a thing the value of which consists exclusively in its usefulness to others

- We should consider whether chimpanzee is an individual with inherent value who has right to be treated with respect and while it may be arguable that a chimpanzee is not a 'person', there is no doubt that it is not merely a thing

### *AFADA on behalf of Cecilia (Chimpanzee)*

Cecilia granted habeas corpus and rules that it was a living being with rights and instructed defendants to immediately free her and relocate to sanctuary in Brazil

- Created the category of non-human legal persons entitled to certain fundamental rights protections

### **Alternative Models**

#### *A Strengthening protections within existing frameworks (Posner, Sunstein, Lovvorn)*

Usually not in owner's economic interests to inflict gratuitous cruelty to damage body of their non-human animal for no reason

Propose expansion and improvement on welfare acts to focus on enforcement and extend standing rules without actually changing the status of animals

#### *B Guardianship and Living Property Models (David Favre)*

Animals to retain equitable title while humans have legal title with duties determined according to 'best interests' principles

### C Companion Animal Property (Susan Hankin)

To recognise the sentience of animals, reflect how society views companion animals and address problems faced by judges when awarding damages

## **ANIMAL WELFARE REGULATION AND PREVENTION OF CRUELTY TO ANIMALS**

Anti-cruelty is a subset of animal welfare

Deterrence oriented: anti-cruelty is protected against through criminal law (*Prevention of Cruelty to Animals Act 1986*)

Compliance oriented: animal welfare is achieved through Codes of Conduct, Licensing, Meta-Regulation

### **Commonwealth**

No express head of power under s 51 of the Constitution in respect of animals

Incidental heads of power include: external affairs, fisheries, trade and commerce, corporations, and quarantine powers

Commonwealth laws: live export trade, processed at export registered slaughter establishments, wildlife protection, quarantine and health

Commonwealth agencies have responsibility for: welfare of kangaroos killed for commercial purposes, introduced animal management, wild animal management and animal research on Cth land, international negotiations

### **Statutory**

Anti-cruelty Legislation: *Prevention of Cruelty to Animals Act 1986* (Vic) and *Livestock Management Act 2010* (Vic)

Anti-cruelty Regulations: Subordinate legislation at a State or Territory level: *Prevention of Cruelty to Animals Regulations 2019* (Vic) and *Prevention of Cruelty to Animals (Domestic Fowl) Regulation 2016* (Vic)

Codes and Standards of Practice: State and Territory Codes of Practice based on 'Model Codes of Practice' developed by the Primary Industries Ministerial Council (PIMC)

- Non-binding but some Standards in Victoria are mandatory

Australian Animal Welfare Strategy: Commonwealth non-binding policies and strategies aiming for greater national harmonization

- Established in 2005, within the Commonwealth Department of Agriculture, Fisheries and Forestry (DAFF) as a result of inconsistency and different standards
- Aim: to harmonise state and territory animal welfare laws and move from Model Codes of Practice to "Standards and Guidelines"
  - o Contain: mandatory 'standards', less directive 'recommendations' and supporting 'guidelines'
- How: consultative process under auspices of an Advisory Committee and involving all major stakeholders
- Disbanded in 2014 due to budgetary constraints and labelled by animal welfare groups as significant backward step because it marked loss of forum for diverse range of stakeholders to deliver long-term improvements in animal welfare
- To date, only the Standards and Guidelines for Land Transport of Farm Animals is ready for implementation. Others were in development.

### **Criticisms**

Outdated → some Codes are over 20 years old and unlikely to reflect current best practice



Insufficiently critical of existing approach

Conflict of interests → overseen by Department of Agriculture which has inherent conflict of interest in promoting both interests of farm industry clients and interests of farm animals

Merely aspirational → given absence of Cth power, remains to be seen if States and Territories will enact laws reflecting agreed Standards

Domestic Animals Act and Local Council Regulations: concerning management of certain companion animals, particularly dogs and cats.

### **Animal Welfare Regulation**

Manner in which uses and treatment of animals is controlled in Australia illustrates a complex regulatory regime:

- Decentralised → standards are created in multiple sites: internationally, Commonwealth, State and Territories, governmental agencies, local councils, industry bodies, animal advocacy groups, private stakeholders, and consumers
- Hard and soft law → norms, binding law, model standards, codes of practice, industry self-monitoring, advocacy group labels, consumer control
- Multiple sites of accountability → enforcement and punishment of laws, advice and assistance, licencing schemes, regulatory oversight, market loss, shaming
- State-economy interactions → involves interaction between political and economic actors, regulation through agencies with dual tasks (primary industries and animal protection) lead to concern of regulatory capture

*Regulation* → process or set of processes by which norms are established, behaviour of subjects to norms monitored or fed back into regime, and mechanisms for holding behaviour of regulated actors within acceptable limits of the regime (by enforcement or other mechanism)

- Ex: persuasion, warning letter, civil and criminal penalty, licence suspension and revocation
- Can be both:
  - o Deterrence oriented: legal process approach of command and control
  - o Compliance oriented: social process approach of cooperative regulator-industry problem solving

*Meta-regulation or co-regulation* → deferring substantive regulatory responsibility to regulatees industries, sporting bodies, scientific community) and engaging in detached high-level oversight of the regulatees' performance regulating itself

\*As per Goodfellow: regulation of domestic animals is primarily deterrence oriented while regulation of non-domestic animals is primarily compliance oriented

### **Non-Domestic Animals & Compliance Model**

*In Favour*

- Enables right balance of various interests including animals, economy, environment
- Regulators committed to regulatory compliance and animal welfare
- More efficient and effective
- Lack of resources

*Against*

- Vulnerability of beneficiaries
- Incentive for harm
- Presumes concern for animal welfare among regulates

### **PREVENTION OF CRUELTY TO ANIMALS ACT 1986 (VIC)**

#### **Purpose**