From: 
Sent: Friday, 28 September 2012 9:05 a.m. 
To: Animal Welfare Submissions 
Subject: Animal Welfare Strategy 

Dear Sir/Ms.,

I have attached my submission regarding the proposed animal welfare strategy.

Please also find attached three legal articles I have published on these points.

For your information the citation information on the published versions of the articles is as follows:


Regards,

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Professor
University of Alberta
Faculty of Law
Edmonton, Alberta
T6H 2G5

follow me on Twitter:

8/11/2012
SUBMISSION FORM

ANIMAL WELFARE MATTERS:
Proposals for a New Zealand Animal Welfare Strategy and
Amendments to the Animal Welfare Act 1999

Please send your submission to the Ministry for Primary Industries by 5.00pm Friday 28 September 2012. Submissions can be emailed to aws_submission@mpi.govt.nz or posted to:

Animal Welfare Strategy and Legislation Review
Ministry for Primary Industries
PO Box 2526
WELLINGTON 6140

The questions in this form should be treated as a guide only — you can choose to answer any or all of the questions, or provide any other comments.


Submissions and a summary of submissions will be published on the Ministry's website. If you or your organisation do not want information in your submission to be published, please make this clear in your submission and explain why. The Ministry will take this into account when deciding whether to publish the submission or release it under the Official Information Act 1982.

Personal Information

Your name:

Your organisation/sector/interest group (if applicable):

Professor, University of Alberta, Faculty of Law

For ten years, from 2001-2010, I was a Lecturer/Senior Lecturer at the Faculty of Law at the University of Auckland. I have written and published extensively on animal law in the New Zealand and international context. My book, Animal Law in Australasia, is highly regarded in the field.

Because of the demands of my new job at the University of Alberta, I have had to write this submission on very short notice. As such, I am not addressing all of the points raised below. I am choosing to restrict myself to points of interest I can deal with in the short span of time available.

I am available to discuss any of the points in more detail, should you desire,
**Issue 1: New Zealand animal welfare strategy**

Q1. Do you have any overall comments or feedback about the proposed strategy and its approach?

Q2. What are the risks and benefits of adopting this strategy? Can you think of any missed opportunities or unintended consequences?

Q3. Do the values reflect New Zealanders' views about animal welfare? Would you suggest something else and why?

Q4. Do you have any comments on the proposed approaches, leadership roles, or Government priorities?

**Answers and comments**

Q3. I could speak at length about the description of the three values in 3.2 of the Animal Welfare strategy, but owing to my own time restrictions, I will keep this brief. I am troubled by the use of the word “humane” and the way in which this use is undermined immediately by “reasonable and necessary”. I believe this is one of the core difficulties with the animal welfare construct, and I have attached my chapter of the book from Animal Law in Australasia to explain why I think use of these terms – as they are presented in this strategy is deceptive. It seems clear that the strategy wishes to advance the uses of animals where it is necessary to humans. In my view, it is deceptive to refer to this as "humane" for the reasons outlined in the accompanying Chapter.

Q4. I am surprised that nothing in section 3.4 includes as a clear guideline the need to reduce animal suffering wherever possible. It seems to me that any question focused on “how best to improve animal welfare” must make the welfare of animals a clear priority. It is not merely about better planning, measuring performance, and improving skills. While all of these are important, I’d like to see a clear commitment to the reduction of harm in legislating particular practices as a primary objective.

In addition, I have attached an article on Codes of Welfare and Societal Discourse that I believe feeds into 3.5 of the Strategy. In my view, you ignore the fact that all New Zealanders have a vital role to play in continuing to discuss the evolving needs of animals and animal uses over time. It is not merely for them to "understand" the needs of animals. It is up to all New Zealanders to contribute to the vital discourse surrounding animal use that will assist government in setting and maintaining standards.

**Issue 2: Standards for care and conduct towards animals**

Q5. Do you agree with the proposal to replace codes of welfare with a mix of directly enforceable standards and guidelines?

Q6. What are the risks and benefits of this proposal? Can you think of any missed opportunities or unintended consequences?

Q7. What impact will the proposed changes have on you and/or your organisation or sector?

**Answers and comments**

I only wish I had more time to address this particular issue. Unfortunately, I only became aware of this at a very late stage. Let me say, however, that while I am sympathetic to some
of the issues raised, I do not believe that the primary benefit from Codes comes from whether they are directly enforceable, as I believe there will always be competing interests that make it difficult to make these standards as useful for animals as they should be. That said, I understand the desire to have greater clarity in the role of Codes. Personally, I don't think the status is nearly as uncertain as the strategy suggests, and I am surprised to hear that "not all minimum standards should be translated into regulations".

My gut feeling is that the Government's preferred option will inevitably lead to fewer applicable regulations. The whole idea of drafting regulations ties into Issue 3, and I have grave concern about reducing the impact of NAWAC in this area. I cannot help but feel that having the Government take over primary responsibility for regulations, which seems inevitable in this context, will lead to less protection for animals in the long run.

I have no idea exactly why "the process for developing regulations should be more efficient than the process for developing codes of welfare". My guess is that there are fewer opportunities for public involvement in the regulatory process, but, on the whole, for the reasons developed in my article, I believe it is a mistake to believe that efficiency in this area is good for New Zealand as a whole.

**Issue 3: Criteria for developing standards**

Q8. Would the proposals to add "practicality" and "economic impact" to the set of criteria improve the decision-making process, or would you suggest something else?
Q9. Do you agree that having "transitions" and "exemptions" is a better way to handle the situations that currently fall under 'exceptional circumstances'?
Q10. What are the risks and benefits of these proposals? Can you think of any missed opportunities or unintended consequences?
Q11. What impact would the proposed changes have on you and/or your organisation or sector?

**Answers and comments**

Q8 is very hard to address. I believe these criteria are already included in the decision making process and do a great deal to undermine the current protection afforded to animals. On one hand, adding these values would bring more transparency to the process. On the other hand, I think they would have an incredibly detrimental impact to animals and make it harder to impose meaningful regulations that promote the possibility of long-term beneficial change. Practicality and economic impact are two human values that inevitably work to the detriment of animals. The historical and comparative experience suggest that the inclusion of these factors in an express sense will slow down New Zealand's role as a leader in the area of animal welfare.

Q9. I have no real position on this, as it depends upon your approach to Q8. If you add practicality and economic impact as primary criteria to consider, it's difficult to imagine that many more exceptional circumstances are needed. Your example on religion seems to be one of the few, and, to be honest, that seems to be something already capable of being considered within the existing mix.

Q10. As I indicated, I think discourse on animal issues in New Zealand – perhaps the greatest benefit of the Code process – will suffer dramatically.
Issue 4: Role of the National Animal Welfare Advisory Group

Q12. Do you agree there is still a role for an independent committee on animal welfare?
Q13. Do you agree that the committee should be able to publish its advice at its discretion?
Q14. Do you agree that the current membership of the committee is appropriate or does it need to be changed?

Answers and comments

Q12. Absolutely. Despite the many flaws I believe are inherent in the current construction of the committee, I believe it is preferable to leaving matters in the hands of the Ministry of Primary Industries. I share the view of some of the private organizations who have spoken publicly on this matter who believe that the Ministry’s primary objective will always be to protect New Zealand’s agricultural industry. Having an independent committee at least provides a forum for alternative views.

Q14. I think change is required here. I believe that having lawyers on the committee would be useful, and ideally a better mix of animal advocates and industry would be desirable as well.

Issue 5: Live animal exports

Q15. Do you agree with the proposal to create directly enforceable standards for the export of live animals?
Q16. Do you agree with broadening the purpose of the exports part of the Act so that New Zealand’s reputation can be considered when making rules or deciding on applications?
Q17. What are the risks and benefits of these proposals? Can you think of any missed opportunities or unintended consequences?
Q18. What impacts will the proposal have on you and/or your organisation or sector?

Answers and comments

I am unable, because of the demands of time, to address this issue.

Issue 6: Significant surgical procedures

Q19. Do you agree with the proposals to change who can perform significant surgical procedures under veterinary supervision?
Q20. Do you agree that the Act should allow for mandatory conditions to be placed on controlled surgical procedures?
Q21. What are the risks and benefits of these proposals? Can you think of any missed opportunities or unintended consequences?
Q22. Are there any other ways the system should be improved?
Q23. What impact would the proposed changes have on you and/or your organisation or sector?

If you have a view on any of the procedures described in section 4.7.5 of the consultation document, please indicate how you think they should be classified:
• Not significant: can be carried out by anyone.
• Significant: may only be carried out by a veterinarian or a person who is acting under the direct supervision of a veterinarian and who is being taught veterinary science at undergraduate level.
• Restricted: as for significant surgical procedures plus may only be carried out if the procedure is in the animal's interests and using appropriate pain relief.
• Controlled: as for significant surgical procedures plus may also be carried out by the owner of an animal, or their employee with written veterinary approval.
• Prohibited: no one may carry out the procedure.

**Answers and comments**

I am unable, because of the demands of time, to address this issue.

**Issue 7: Reporting of animals killed for research, testing or teaching**

Q24. Do you agree that the number of animals killed humanely for research, testing and teaching should be included in official statistics?

Q25. What impact, including costs, would the requirement to report animals killed for use in research, teaching, and testing have on you or your organisation?

Q26. Can you think of any other changes that would improve the system for regulating animals used in research, testing and teaching?

**Answers and comments**

I am unable, because of the demands of time, to address this issue.

**Issue 8: Enforcement tools**

Q27. Do you agree with the proposals to attach instant fines to some minor offences and give some animal welfare inspectors the ability to issue compliance orders?

Q28. What are the risks and benefits of this proposal? Can you think of any missed opportunities or unintended consequences?

Q29. What impact would the proposal have on you and/or your organisation or sector?

**Answers and comments**

Q27. I believe this would be a hugely positive development. The criminal structure is too cumbersome to deal with most breaches of the Act. I would like to see penalties drafted in a way that reflected the repeat nature of the offending, and the quantum of animals harmed, but I believe overall the change would be a positive one.

**Issue 9: Other proposed offences**
Q30. Do you agree with the proposal to make drowning a land animal an offence?
Q31. Do you agree with the proposal to clarify that wilful and reckless ill-treatment offences apply to animals in a wild state?
Q32. What are the risks and benefits of these proposals? Can you think of any missed opportunities or unintended consequences?

**Answers and comments**

I have attached an article on hunting that supports the proposal in Q31.
Issue 10: Technical amendments

Q33. Do you have any comments on any of the technical amendments proposed in Table 1?

Answers and comments

Any other comments

Q34. Do you have any other comments or feedback not covered by these questions?

Answers and comments

by

Tucked into the very back of the Animal Welfare Act 1999 is section 175, a clause that effectively exempts wildlife from the scope of New Zealand animal protection law. Ostensibly enacted to permit legitimate forms of hunting, fishing and pest control to remain immune from scrutiny, the clause has morphed into a comprehensive exemption. As a result, acts of ill-treatment that would clearly be punishable had the victims been domestic or farmed animals can be committed with impunity against wild animals. This article will consider how section 175 has been applied and examine its impact on wildlife. After proposing a more limited interpretation of the clause that would provide a modicum of protection for wild animals, the article proposes a number of reform options that would better balance the needs of wildlife and persons involved in the activities that cause them harm.

In late 2007, John van Vliet detonated explosives on a portion of his apple orchard in the Wairarapa. His objective was neither mining riches nor demolition. Instead, van Vliet was pursuing a smaller target: a flock of starlings that was eating and otherwise damaging the apples from his orchard. Although starlings are regarded by many farmers as useful in reducing the presence of damaging insects, they can cause damage to some fruit crops. Van Vliet decided against other means of repelling the birds or reducing the damage they caused, and instead chose to blow up the nests altogether, killing the starlings in the process.

The results were predictable. Upon detonation, a massive fireball engulfed the starling roosts. Birds shot off in every direction. Many died instantly, but others were caught by the flames and crashed to the ground, writhing in pain. Neighbours claimed that thousands of birds were left wounded and helpless, suffering from singed feathers and broken limbs. The local inspector of the Wairarapa branch of the Society for the Prevention of Cruelty to Animals (SPCA) commented days after the incident that “there are still birds dying all around the place. It’s horrific and the most inhumane thing that could happen to innocent birds - simply soul-destroying”. Hundreds of local residents

* Faculty of Law, University of Western Ontario. This article was written largely while the author was employed by the Faculty of Law at the University of Auckland. The author wishes to thank Vernon Tava for his research assistance, the funding for which was graciously provided by the University of Auckland’s Faculty Research Development Fund. Thanks are also owed to Rebekah Thompson who provided additional assistance and to Celeste Black, Deidre Bourke, Anjja Dale, Dominique Thiriet and Steven White for their helpful comments on an earlier draft of this article.
2 Van Vliet has since turned to other means, constructing a net that protects his crops from starling damage. In 2009, he won the Gallagher Innovation category of the Ballance Farm Environment Awards for this initiative: Gerald Ford “Orchardist Nets Innovation Award” Wairarapa Times-Age (New Zealand, 22 April 2009).
3 Nathan Crombie “SPCA Looks into Firebombing of Starlings” Wairarapa Times-Age (New Zealand, 22 August 2001).
4 Ibid.
registered their disgust by calling the SPCA to complain, with many of them demanding that legal action be taken against Mr. van Vliet.

The outrage was certainly understandable. For over a century, New Zealand has forbidden wanton cruelty against animals, and the country prides itself as a nation that cares about the welfare of other sentient beings. Today, the limits of the type and degree of animal suffering that may be legitimately imposed by humans is addressed by the Animal Welfare Act 1999 (AWA), legislation that makes it an offence to cause an animal to suffer pain or distress that is unreasonable or unnecessary, punishing transgressions with up to five years’ imprisonment. While it is impossible to assert with certainty, it is difficult to imagine van Vliet’s acts being categorized as “reasonable” or “necessary”, especially considering the magnitude of suffering that resulted, and the other options to disperse the starlings that were available.

Despite considerable public indignation and suggestions that the SPCA was investigating the matter, no prosecution ever ensued. Notwithstanding overwhelming evidence that the explosion took place, that van Vliet arranged it, that animals suffered considerably as a result, and that the suffering was intentionally caused, the case file was shut quickly after it opened. To understand why, it is necessary to look to the very back of the AWA, where section 175 provides an unusual exception for otherwise cruel actions taken against animals, stating that “nothing in this Act makes it unlawful to hunt or kill...any animal in a wild state”.

According to the Ministry of Agriculture and Forestry (MAF), the government agency responsible for administering the legislation, s 175 rendered it impossible to pursue van Vliet in the courts. In a speech delivered shortly after the events in the

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6 AWA, s 28. Details of the various offences will be discussed in greater depth later in the article.
7 A determination of what it means to ‘ill-treat’ an animal requires a court to balance the need to impose the suffering in the circumstances against the suffering endured, ideally to punish acts of cruelty that have no broader social benefit: see Peter Sankoff “The Welfare Paradigm: Making the World a Better Place for Animals?” Peter Sankoff and Steven White (eds) Animal Law in Australasia (Federation Press, Sydney, 2009) at 18-25. While unlikely, it is conceivable that van Vliet could have defended his actions as being “necessary” for the protection of his crop relying on the fact that the orchard was suffering $250 000 a year in losses due to damage by the roosting Starlings. Still, it is difficult to imagine, given the immense suffering involved, that a court would accept the chosen means as being “reasonable”.
8 Gerald Ford “Orchardist Nets Innovation Award” Wairarapa Times-Age (New Zealand, 22 April 2009).
9 Van Vliet later contended that he did not expect so many of the birds to survive with injuries from the blast: Gerald Ford “Orchardist Nets Innovation Award” Wairarapa Times-Age (New Zealand, 22 April 2009). Nonetheless, van Vliet’s ignorance of the extent of the suffering he would cause would not affect his culpability under the AWA. Even if a charge of “willful ill-treatment” could not be sustained – and there is good reason to believe that Van Vliet was at least willfully blind to the fact that some of the birds would not have been instantly killed and would suffer – s 29(a) allows prosecution for simple “ill-treatment”, which does not require proof of any intention to cause suffering. It is, in effect, a strict liability offence: AWA, s 30.
Wairarapa, Jim Anderton – then the Minister of Agriculture and Forestry – made reference to the unfortunate incident, and stated that nothing could be done about it:

The problem is, because [the starlings] were wild animals, there is no liability for cruel treatment... The problem exists because, when the animal welfare bill was passed, it excluded wild animals. There was sensible thinking behind this – no-one has direct responsibility for caring for a wild animal. They are, by definition, not owned. So making someone responsible in a particular case can lead to impractical legal liability. While none of us likes to think about animals suffering, you can't have the law requiring drivers to swerve off the road to avoid a possum.  

In effect, Anderton concluded that s 175 made it impossible to prosecute van Vliet for his actions. Notwithstanding the fact that the explosion intentionally caused lengthy suffering for thousands of birds, the AWA had no application whatsoever, simply because the victims of the conduct were wild animals, as opposed to ones kept under human care.

This article will explore the correctness of this claim and consider some of the other difficulties raised by both the van Vliet case and the hunting and wildlife “exception” more generally. In Part I, s 175 will be examined for the purpose of defining its rationale and scope. The author rejects the notion that s 175 operates as a comprehensive exemption, and suggests instead that Parliament intended only to protect acts that fall within a reasonable definition of “hunt or kill”: conduct undertaken with the intent of killing or attempting to kill a wild animal or take it captive. Acts designed merely to cause pain to, torture, or molest the animal are not included. Building on this analysis, Part II discusses a second major limitation of s 175 and contends that the exemption applies only to acts of hunting or killing and no further. In the author’s view, section 175 provides no immunity for unnecessary consequential suffering caused by hunting, and as a result, a person whose original act may well have been exempt from prosecution can nonetheless be held liable for subsequent acts and possibly even omissions where such conduct, or a related failure to act, causes a wild animal to suffer.

Part III of the article will attempt to explain why s 175 of the AWA is often treated in a manner broader than the interpretation suggested in Parts I and II, and examine the impact of this treatment. As the Anderton excerpt implies, many investigators and prosecuting agencies seem to believe -- rightly or wrongly -- that wild animals are completely excluded from the AWA’s protection. The evidence to date shows that the section fails to provide investigating agencies with clear guidelines about when charges involving cruelty against wild animals can be brought, or whether they can even be brought at all, leading to paralysis. The result is the granting of an unbridled licence to commit whatever acts of cruelty one chooses upon wild animals in New Zealand.

Finally, in Part IV, the article will provide a few suggestions for future reform. While the proposed interpretation in Parts I and II, if accepted, would reduce the existing ambiguity and provide limits upon what can be done to wild animals, it is not a

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10 Jim Anderton, Minister of Agriculture “Judge the Heart of a Man by his Treatment of Animals” (Speech to open Wilmers Road SPCA Animal Shelter, Christchurch, 6 October 2007).
comprehensive answer. Reform of the AWA is urgently required to address a gaping hole in the legislation, as, regardless of one’s view on hunting, fishing and pest control, s 175 needlessly immunizes from prosecution acts against wild animals that should not be permitted. The author’s proposal is a moderate one that accords with the general theme of the AWA. After examining legislation in other jurisdictions, along with the underlying purposes of the AWA, two primary suggestions are made. First, acts undertaken against wild animals in an unreasonable manner should be treated in the same way as if they were committed against domestic animals. Second, in order to permit a proper assessment of the purposes for which particular conduct is undertaken, the definitions of hunting and killing should be decoupled, allowing for separate measurements of actions under these headings and an appropriate balancing of the purported benefits and harms that arise from the activities.

Part I – The Hunt or Kill Exemption in s 175: Interpretation

(a) Section 175 Within the Broader AWA Framework

To appreciate the manner in which s 175 operates, it is first necessary to understand the basic framework of the AWA. Although the legislation has nine distinct parts, only two concentrate specifically on offences for imposing animal suffering. Part I sets out standards for the care of domestic and farm animals, and is mostly irrelevant where wild animals are concerned. Its focus is exclusively on animals in captivity, and the obligations imposed upon owners and persons in charge of such animals. It has no application to acts intended to harm animals in the wild.

Part 2 is not restricted in this manner. Under the heading of “Conduct Towards Animals”, this part of the AWA focuses upon individual acts of ill-treatment. In addition to a number of specific forms of conduct that are prohibited or controlled – including matters like animal fighting, the use of traps, branding, etc. – the Act provides for three “general” offences: (1) ill-treatment simpliciter, punishable by a maximum of twelve months imprisonment or a fine not exceeding $50 000 or both; (2) reckless ill-treatment of an animal leading to permanent disability, serious harm or death, with a maximum penalty of three years and a fine not exceeding $75 000 or both; and, finally (3) wilful ill-treatment causing serious harm, permanent disability or death, the most

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11 The remaining parts of the AWA focus on animal exports, the establishment of advisory committees, codes of welfare, the use of animals in research, procedural provisions, infringement offences, and miscellaneous provisions. With the exception of Part 9, discussed below, none of these are relevant to this article.
12 Most modern animal welfare legislation is crafted in this manner, creating a clear separation between obligations owed to domestic animals and cruel treatment generally. For a review of similar Australian legislation, see Steven White “Animals in the Wild, Animal Welfare and the Law” in Peter Sankoff and Steven White (eds) Animal Law in Australasia (Federation Press, Sydney, 2009) at 239.
13 The only exception arises where a wild animal is brought into captivity, as Part I clearly imposes obligations in this scenario: s 177.
14 Section 31.
15 Sections 32-36.
16 Section 29(a). The penalty is set out in section 37 of the AWA.
17 Section 28A is the newest provision in the AWA, enacted through by the Animal Welfare Amendment Act 2010, s 5 (7 July 2010).
serious offence in the AWA, punishable by a maximum of five years imprisonment, and, in the case of an individual, to a fine of $100,000.18

At first glance, all three of the ill-treatment offences would seem to extend to acts involving domestic animals or wildlife equally. The sections apply to any improper conduct committed against an “animal”, defined in s 2 of the Act to include “any live member of the animal kingdom” that is a mammal, bird, reptile, amphibian, fish or crustacean. The offence of ill-treatment contains no exclusion for wildlife, and is committed any time an animal is forced to suffer “by any act or omission, pain or distress, that in its kind or degree, or in its object, or in the circumstances in which it is inflicted, is unreasonable or unnecessary”.19

The key to the special treatment of wild animals is found not in Part 2 but in Part 9 of the AWA, in a section of the legislation entitled “Miscellaneous Provisions”. There, settled amongst clauses addressing agricultural compounds, the ability to recover costs, and various transitional provisions, ss 175-178 provide the following:

Hunting or killing
175 - Subject to sections 176 to 178 and Part 6, nothing in this Act makes it unlawful to hunt or kill—
(a) any animal in a wild state; or
(b) any wild animal or pest in accordance with the provisions of—
(i) the Wildlife Act 1953; or
(ii) the Wild Animal Control Act 1977; or
(iii) the Conservation Act 1987; or
(iv) the Biosecurity Act 1993; or
(v) any other Act; or
(c) any wild animal or pest; or
(d) any fish caught from a constructed pond.

Hunting in safari parks
176 (1) Subject to section 178 and Part 6, nothing in this Act makes it unlawful to hunt a wild animal that is available for hunting in a safari park.

(2) Notwithstanding subsection (1) and section 175, where a person has hunted and captured a wild animal in a safari park (not being an animal that has been captured for the purpose of facilitating its imminent destruction), this Act applies in relation to that person as the person in charge of that animal.

Captured animals
177 (1) Notwithstanding section 175, but subject to subsection (2),—
(a) where a person has in captivity an animal captured in a wild state (not being an animal that has been captured for the purpose of facilitating its imminent destruction), this Act applies in relation to that person as the person in charge of that animal; and

18 Section 28, AWA.
(b) where a person has in captivity an animal captured in a wild state (not being an animal caught by fishing) for the purpose of facilitating its imminent destruction, section 12(c) applies in relation to the killing of that animal.

(2) Nothing in subsection (1) applies in relation to a wild animal that is hunted and captured in a safari park.

(3) Nothing in section 175 limits the application of any of the provisions of this Act in relation to—

(a) deer kept in captivity for the purposes of farming (not being deer available for hunting on a safari park); or

(b) mustelids kept in captivity as pets.

178 - Certain provisions relating to traps and devices not excluded
Sections 175 and 176 do not restrict the application of sections 34 and 36.

In combination, these sections carve out a sphere of conduct and make it immune from the regular application of the AWA. Section 175 is the primary clause, stating that “nothing in this Act makes it unlawful to hunt or kill” the animals listed in the various subparagraphs. Section 176(1) provides similar protection for the hunting of animals in safari parks.

The exemption for hunting and killing is not unlimited, as sections 177 & 178 make clear. Where a person captures an animal, but does not kill it, the AWA applies to the person who comes to be “in charge” of that animal. Section 177(1) provides that where a person captures an animal that would otherwise be in a wild state the obligations imposed in Part 1 of the AWA apply unless the animal has been captured for the purpose of facilitating its imminent destruction. Where a person captures an animal for this purpose, they must do so in a way that complies with s 12(c) of the AWA, killing the animal so as to ensure that no unnecessary pain or distress is endured. Finally, the

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[29] It is an unusual section, as the list seems to include a number of redundant clauses. For example, subparagraph (b) makes it clear that it is not unlawful to hunt or kill wild animals or pests in accordance with the provisions of various statutes, but subparagraph (c) repeats that it is not unlawful to hunt or kill any wild animal or pest. Surely (c) renders (b) unnecessary. The term “wild animal” is specifically defined by s 2 of the Wild Animal Control Act 1977, and restricted to particular species of non-native animals. At first glance, the exemption does not apply to fish, except those caught from a constructed pond (subparagraph (d)). Still, fish are defined as “animals” in s 2 of the AWA, and those living in a wild state are undoubtedly captured by subparagraph (a).

[30] The offence sections in Part I are only applicable where an animal is harmed by the person who owns the animal, or by a person who “has the animal in that person’s possession or custody, or under that person’s care, control or supervision”: ss 2, 10. Some definition has been added to the term “person in charge” by Kunitzch v RSPCA HC Whangarei CR1 2008-488-67, 13 October 2009, where Allan J held that the meaning of the term turns on the element of ‘practical control’ over the animals, ownership notwithstanding (at [47]).

[31] While it is beyond the scope of this paper, it is interesting to speculate whether hunters are generally aware of this “exception” to the hunting exemption. Some forms of pig hunting, to take just one example, may fall foul of this limitation. Pigs in New Zealand are commonly caught by dogs and occasionally killed with a knife rather than shot. Cutting the pig’s throat with a knife is regarded by some hunters as the “traditional” method of killing the animal, but it is unclear whether it is the quickest or most humane. It is, of course, quite likely that these animals – despite being pinned down and held by the hunter – would not be considered to be “captured” for the purposes of the AWA. See, for example, Rowley v Murphy [1964] 2 QB 43 (fox that was temporarily restrained with a view to being killed never passed into the state of
sections have no effect upon the use of traps and other devices, which are governed by ss 34 and 36 of the AWA.

(b) *The Meaning of Hunt or Kill in s 175*

(i) A Comprehensive Exemption?

Even with the limitations provided in ss 177 and 178, the “hunting” exception\(^{23}\) in section 175 of the AWA retains the potential to exempt a huge amount of what might otherwise be considered as “ill-treatment” from scrutiny. Some guidance is provided in s 2 of the AWA, which deems the term “hunt or kill” to include:

(a) hunting, fishing or searching for any animal and killing, taking, catching, trapping, capturing, tranquilising or immobilising any animal by any means;

(b) pursuing or disturbing any animal.

The definition certainly appears to have a broad scope. In addition to the acts of hunting, fishing and killing, which would seem to cover a broad gamut of activity on their own, the definition includes a host of other terms, some of which – most notably the terms pursuing or disturbing – could be applied to exculpate all sorts of behavior that causes harm to wild animals.

In an attempt to find meaning for this critical term, perhaps it is easiest to start by considering the contrary proposition discussed by Anderton in his speech about the van Vliet incident: that s 175 has no specific meaning, and simply constitutes a comprehensive “wildlife exemption”. Under this interpretation, the lengthy definition provided in s 2 is simply a convenient way of saying that any harm committed against a wild animal, aside from animals in captivity, is permitted.

There is some support for this interpretation. Though the commentary on this part was hardly uniform, many Parliamentarians during the process of enacting s 175 drew a distinction between animals “under the control of an individual”, and those in the wild.\(^{24}\) Without question, some of the problems discussed during the Parliamentary debates considered matters going beyond what might traditionally be defined as hunting or killing in captivity contemplated by animal welfare legislation). For criticism of this decision see Mike Radford *Animal Welfare in Britain: Regulation and Responsibility* (Oxford University Press, Oxford, 2001) at 212-214.

\(^{23}\) For the remainder of this paper, s 175 will be referred to as the hunting exception, simply for the purposes of simplicity. Section 176 duplicates the section with respect to hunting that goes on in a safari park.

\(^{24}\) See for example, Eric Roy, *New Zealand Parliamentary Debates*, 578 NZPD 17437 (16 June 1999)
so-called "pest" animals, a fact which provides support to the notion that s 175 constitutes a broad exemption.

Nonetheless, the legislative discussion on this point is hardly unanimous, which reduces its usefulness as an interpretative source. While the courts are certainly permitted to look at a statute's parliamentary history, there is a reluctance to use this material where it is as ambiguous as the legislation being considered. As Lord Browne-Wilkinson noted in Pepper v Hart, "references in court to parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words". There is no such clarity with regards to the purpose of s 175. For every comment referring generally to a "wild animal" exception one can locate another stressing that the exception was related to legitimate acts of hunting, fishing and pest control. Moreover, there is no evidence to suggest that this particular matter was ever considered in any meaningful way.

The limited jurisprudence regarding the meaning of the term is also equivocal. While section 175 has never been considered judicially, similar terminology in the Wildlife Act 1953 has been the subject of litigation. In Solid Energy New Zealand Limited v The Ministry of Energy, the High Court considered the meaning of s 63 of the Wildlife Act 1953, which prohibits the "hunting or killing" of any wildlife protected under the Act undertaken in the absence of lawful authority. As part of a plan to reduce harm to native fauna threatened by a mining project, Solid Energy intended to remove and relocate a collection of critically endangered Kauri Snails. The main issue in the litigation was whether Solid Energy needed to comply with the Wildlife Act 1953 in any situation where there was likely to be interference with wildlife by reason of its mining operations. It argued before the High Court that the "capture" being proposed did not engage the Wildlife Act 1953, as the purpose in moving the snails was beneficial, and the legislation was designed to apply only to harmful actions.

Mallon J disagreed with this approach, however. Despite recognizing that harm or the potential for such harm was a common element of the terms used in the definition, she adopted a broad view of the activities capable of causing such harm, noting that acts involving the hunting or killing of wildlife may be comprised of actions at "... the lesser end of the spectrum such as pursuing or disturbing wildlife where the harm may be only transitory [or] it may be harm at the more serious end such as taking the wildlife

25 This term is utilized because it is the word most commonly used for non-native species in New Zealand. While the word is repeated throughout the article, the author shares the view of Graeme McEwan "The Challenge Posed by Feral Animals" (2007/08) 91 Reform 30 at 31, that we should "drop the label of 'vermin' or 'pest' so that they are thereby removed from any serious notion of humane control".
26 That said, much of this may have been prompted by clause 19 of the original Animal Welfare Bill, which imposed a duty to rescue animals harmed by accident. The clause was the source of considerable consternation and was removed from the Government Bill that replaced Pete Hodgson's Private Member's Bill.
28 See the text accompanying note 49.
permanently from its habitat or killing the wildlife".\textsuperscript{30} More importantly for our purposes, she concluded that there was no point in delineating between different types of harm.\textsuperscript{31}

The section is intended to capture deliberate actions in relation to wildlife ... that interfere with the natural and ordinary activities of the wildlife that may harm the wildlife or carry with them that risk. The words in the "hunt or kill" definition should be interpreted in light of this intent.

As such, the Court in \textit{Solid Energy} concluded that term "hunt or kill" under the Wildlife Act 1953 has a nearly unlimited scope. Aside from accidental interferences with wildlife, which Mallon J seemed to exclude from scrutiny, any deliberate action taken against a wild animal constitutes the sort of hunting or killing with which the legislation is concerned. Extending this reasoning to s 175 of the AWA would effectively result in the section being treated as a comprehensive "wildlife exemption".

There are several reasons to be skeptical of \textit{Solid Energy}'s applicability in the AWA context, however. First, the very different purposes of the two pieces of legislation need to be taken into consideration. Section 63 of the Wildlife Act 1953 is intended to protect entire species of wildlife and ensure that any action with the potential to cause harm to wildlife is properly scrutinized by the Department of Conservation.\textsuperscript{32} In this setting, it makes sense for terms in the Act describing harmful conduct to be interpreted as broadly as possible. A narrow view of "hunt or kill" would have the effect of sanctioning activities that did not fall within an ordinary understanding of this term notwithstanding their harmful impact on wildlife.

In contrast, the AWA was enacted to protect individual animals from unnecessary suffering, and s 175 derogates from this purpose. At the very least, the rationale for creating a broad inclusionary definition in \textit{Solid Energy} – to comply with the purpose of the Wildlife Act 1953 – would appear to be missing in this context. More importantly, the approach taken in \textit{Solid Energy} needs to be assessed within the context of the overall regulatory scheme for the protection of wildlife created by s 63, and in particular, the fact that hunting or killing will be permitted under the Wildlife Act 1953 where it is undertaken pursuant to lawful authority. As Mallon J recognized:\textsuperscript{33}

A process of obtaining lawful authority is provided. That process does not purport to restrict the type of "hunting or killing" that might be approved. It appears to be available whether the hunting or killing is harmful to the wildlife or not. However, authorization applications would need to be assessed against the purpose of the Act. It is therefore difficult to envisage an authorization being given to catch alive or kill absolutely protected wildlife unless there is some greater good to wildlife served by the particular hunting or killing proposed. The authorization process, and the need to have "lawful authority", enables there to be prior scrutiny by the Minister responsible for the wildlife for the good of the wildlife.

\textsuperscript{30} ibid, at para [79].
\textsuperscript{31} ibid, at para [86].
\textsuperscript{32} ibid, at para [79].
\textsuperscript{33} ibid, at para [81].
This approach makes good sense. Under the Wildlife Act 1953, the Minister is tasked with weighing the complexities arising from any particular activity and granting approval where necessary in a manner that is most respectful of all competing interests. Taking a narrow view of "hunt or kill", and excluding certain actions from oversight as a consequence, would create a means of bypassing the scheme in a manner that would be detrimental to its overall functionality. In contrast, the AWA has no approval scheme for examining particular types of hunting or killing, and consequently, no secondary mechanism of determining which acts are "good", "bad" or respectful of the competing interests at stake exists. There is no need to create a broad inclusive definition in this context.

Doing so would also seem to conflict with the purpose and structure of the AWA. When one examines s 175, and its place with the broader legislation, two additional arguments can be raised to support the suggestion that it was not designed as an exception for all suffering imposed upon wild animals. The first argument simply recognizes that s 175 says nothing of the sort. On the contrary, it quite specifically refers to certain forms of activity. Applying the section as a comprehensive exemption conflicts with the principle that legislation should be interpreted in accordance with the wording utilized, and that contrary interpretations should not be adopted where Parliament avoided the use of language that could have easily accomplished the alternative approach being proposed.

A classic example of the latter type of reasoning occurred in the seminal Canadian decision of *Re B.C. Motor Vehicle Act*, where the Supreme Court of Canada first interpreted s 7 of the Charter of Rights and Freedoms, and, in particular, the meaning of the term "principles of fundamental justice". The case was a critically important one, as s 7 demands that governments avoid depriving a person of life, liberty and security of the person unless it is done in accord with the "principles of fundamental justice". Representatives of every legislature in Canada came before the Court and begged it to interpret the right as being procedural in scope only - a means of ensuring that legal deprivations of a person's life, liberty or security of the person accord with basic due process rights required as a matter of natural justice.

The Supreme Court swept these arguments aside, concluding that s 7 had substantive power that could be used by the courts to ensure that any deprivation of the sort referred to in the Charter complied with fundamental concepts inherent to a civilized legal system. There were many reasons for charting this path, but predominant in the judges' minds was the clear language that had been chosen by legislators. As Lamer J wrote for a majority:

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34 The meaning of an enactment must be ascertained from its text and in light of its purpose: Interpretation Act 1999, s 5(1).
35 [1985] 2 SCR 486. See also *R v Howard* [1987] 1 NZLR 347 at 352 (CA), where the phrase "charged with an offence" was not read as "subsequently charged with an offence" as requested by the defendant. According to the Court of Appeal, "if Parliament had intended the phrase to have this meaning, it might have been expected to say so in clear language".
36 For example, the Court held in its decision that it was contrary to the principles of fundamental justice to imprison someone for an offence of absolute liability.
It seems to me that to replace "fundamental justice" with the term "natural justice" misses the mark entirely. It was, after all, clearly open to the legislator to use the term natural justice, a known term of art, but such was not done. We must, as a general rule, be loath to exchange the terms actually used with terms so obviously avoided.\(^{37}\)

This reasoning is equally applicable to those who might contend that s 175 actually constitutes a comprehensive exemption. Had Parliament wished to create such an exemption for wild animals, there was an extremely easy way of doing so. Consider by comparison the Animal Welfare Act 2006, the legislation protecting animals in the United Kingdom.\(^{38}\) In section 2 of the Act, a clear distinction is drawn between certain types of animals. For the purposes of the Act, an animal is a “protected animal” where:

- (a) it is of a kind which is commonly domesticated in the British Islands,
- (b) it is under the control of man whether on a permanent or temporary basis, or
- (c) it is not living in a wild state.

Through its definition of “protected” animal, the Act distinguishes between wild and domesticated animals and, for the most part, creates protections only for the domestic animals who are under human care.\(^{39}\) There is no need to discuss hunting or any specific activity involving wildlife because conduct against wild animals is completely excluded from scrutiny unless the Act states otherwise. Subject to a few exceptional situations, an animal is only safe from ill-treatment under U.K. welfare legislation if it is a “protected” animal.

A second argument against a broad exemption is that the approach seems contrary to the structure and intention of ss 175-178. If Parliament truly intended to exclude wild animals from the protection of the AWA, why should it institute standards for trapping and the capture of animals? It is somewhat nonsensical to create standards relating to specific forms of conduct like trapping when equally or more heinous modes of torturing animals remain legitimate. In enacting the AWA, Parliamentarians spoke of the moral responsibility that New Zealanders have to all animals, noting that animals “should be treated with respect and dignity”.\(^{40}\) Distinctions were not drawn between certain animals, and while what can be considered “necessary” harm and suffering will certainly vary by animal and use, it was never contended that wild animals are not deserving of moral concern.

(ii) A Limited Exemption

\(^{37}\) *Re B.C. Motor Vehicle Act [1985]* 2 SCR 486 at 503 per Lamer J.

\(^{38}\) See similarly Prevention of Cruelty to Animals Act, RSBC 1996 c 372, s 2 (British Columbia, Canada), which states “This Act does not apply to wildlife... that is not in captivity”.

\(^{39}\) There are, of course, exceptions. Wild animals brought into captivity are treated in a manner akin to domestic ones: s 4(2). Animal fighting is also prohibited, regardless of the type of animal: s 8.

\(^{40}\) John Banks, New Zealand Parliamentary Debates, 578 NZPD 17450 (16 June 1999). See also Jill Pettis, New Zealand Parliamentary Debates, 578 NZPD 17445-17446 (16 June 1999) ("whether [a victim] is an animal or a fellow human, the milk of human kindness should extend to all"); Eric Roy, New Zealand Parliamentary Debates, 578 NZPD 17438 (16 June 1999) ("as a civilised society it is proper that we treat our animals in a humane, sensible, and proper way").
What then was Parliament trying to accomplish? While it is impossible to ascertain the legislators’ intent with any certainty, and the speeches of parliamentarians on this subject were inconsistent, there is reason to believe that s 175 had two primary rationales: (1) to create a limited exemption applicable to a sphere of conduct that remains popular and important to a large number of New Zealanders; and (2) to recognize that there are various methods of hunting and killing wildlife and the need for certainty and fairness in application is best served by exculpating all legitimate acts without making distinctions between the means used.

The first rationale for s 175 stems from a concern that applying the standard “ill-treatment” test to common forms of hunting, fishing, and pest control might cause difficulty in application. Although popular with a large segment of the public, the love for these activities is hardly universal, and many believe that the justifications for at least some types of hunting and fishing are not strong enough to rationalize the degree of suffering imposed. Since the standard test for ill-treatment requires a balancing of the strength of the justification for imposing suffering against the harm imposed, Parliament was quite likely worried about many popular types of hunting and fishing suddenly being regarded as illegal – or at least being subject to greater scrutiny – a fact with the potential to undermine support for the new legislation. Given the common view of “pests” in New Zealand, and the stated importance of eradicating them, there was likely a similar concern about limiting the manner in which ordinary New Zealanders deal with the many invasive species that are regarded as a scourge. To avoid some of the popular unrest tighter scrutiny of these activities would have caused, it made sense to exempt these activities from the scope of the AWA.

The second rationale, premised on the need for certainty, arises from the nature of “wildlife” and the fact that human interactions in this area are not nearly as predictable as those involving domestic or farmed animals. The sheer volume of animal types encompassed by the legislation and the manner in which humans deal with them is enormous. Parliament undoubtedly did not wish for the judiciary to be drawn into disputes over mousetraps, pest control, and the legitimacy of 1080 poison drops.

What remains unclear is whether these objectives require a comprehensive wildlife exemption in the face of wording to the contrary in s 175. An alternative approach would be to assume that Parliament intended a more limited exception intended

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42 Sankoff, supra note 7, at 28.
43 As the Department of Conservation website makes clear, “control programmes to manage and remove animal pests are essential for the survival of New Zealand’s special native plants and animals”: Department of Conservation Website, http://doc.govt.nz/conservation/threats-and-impacts/animal-pests/need-for-pest-control/.
44 These poison drops are extremely controversial, as they pose risks to wildlife and the wider environment. Moreover, they cause great suffering to the animals before death. These concerns notwithstanding, the Department of Conservation believes the use of 1080 is a vital tool in ensuring the survival of native species, and that “the benefits of the use of 1080 for mammalian pest control far outweigh the risks to native wildlife”: Department of Conservation Website: http://www.doc.govt.nz/conservation/threats-and-impacts/animal-pests/methods-of-control/1080-pest-control/1080-questions-and-answers/.
to reflect four facts: (1) that much hunting, fishing and killing causes pain and suffering; (2) that New Zealanders by and large enjoy these activities, or, in the case of pest animals, believe them to be essential; (3) that hunting and killing are undertaken in a myriad of ways, some of which are less pleasant than others; and (4) that many of the activities impose suffering that might not be considered reasonable or necessary if they were subjected to a judicial balancing under the test for "ill-treatment". On this view, section 175 protects what most New Zealanders regard as legitimate conduct from being brought before the courts, and provides a "zone of protection" where activities of this sort are undertaken in a borderline manner, in order to allow people to proceed without risk of sudden prosecution. This broader protection is justified owing to a lack of consensus regarding the legitimacy of certain activities on the margins of acceptable conduct.

A complete exemption for acts committed against wild animals would go well beyond accomplishing the objectives. Consider the following two scenarios. In the first, a man decides for the purposes of his own enjoyment to throw rocks at a flock of wild ducks and causes them harm in the process. In the second, youths corner a wild animal for the purpose of torturing it, and proceed to inflict a slow and painful death upon the animal. A comprehensive exemption would inure the offenders in both scenarios from prosecution, even though neither scenario engages the acts of "hunting" or "killing" in a manner that Parliament probably regarded as having value. Indeed, it is hard to imagine the average hunter or fisherman as having any affinity for the offenders in these scenarios either.

Treating s 175 as a "wildlife" exemption conflicts with both the plain wording of the statute and, very likely, Parliament's intent in enacting it. Nonetheless, it still fails to consider whether the definition of "hunt or kill" can be interpreted in a more limited manner, a task that is more difficult than one might first imagine because of the terminology that is used. Take the word "kill" that is repeated in the wider definition set out in s 2. It is well established that the act of killing is not punishable under animal protection legislation, as "ill-treatment" applies only to pain and suffering imposed while animals are alive. Thousands of animals are killed in New Zealand every day, and so long as this process takes place without the commission of unnecessary pain or suffering, the AWA is unconcerned. Thus, the term "kill", in its ordinary meaning, adds nothing.

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45 This scenario actually happened. See Anna Price "Duck's Death Ordeal", Christchurch Mail, 29 September 2007, p.3. The article recounts how three men stoned a duck to death. No prosecution ever ensued and there is reason to believe the "victim's" status as a wild animal, or the uncertain limits of s 175, was at least partially responsible.
46 For a particularly horrendous example, see State of Wisconsin v Kuenzi, 2011 Wisc. App. Lexis 150 (CA), where two individuals deliberately rammed deer with their snowmobiles and then proceed to drive their snowmobiles over the down deer, causing the deer's abdomen to rupture. The findings in this case are discussed in note 53.
47 This has always been true of animal protection legislation. As Radford, supra note 22, at 244 has written, the purpose of such legislation "is to protect... animals from necessary suffering, which includes the manner in which they die, but does not extend to safeguarding their lives. The morality of killing animals may be the subject of continuing controversy, but at present the law is clear: it is permissible to kill an animal (excepting those particular species which benefit from statutory protection), provided it is not accompanied by unnecessary suffering."
48 Proof of pain or suffering is an element of ill-treatment that must be established to impose a conviction: Merkofer v Police, CRI 2005-463-000025, 8 July 2005, (HC, Rotorua)(defendant acquitted after
of value to s 175, and one can certainly argue that the word should be given a broader interpretation as a result. Under this approach, all acts leading to the death of a wild animal would be included in the definition with the result being that the torturers in the example discussed above would be exculpated on the ground that their acts constituted a “killing” of the animal.

Use of the term “hunt” in a separate manner is equally puzzling. What is hunting, if not the act of “taking”, “catching”, “pursuing”, etc., an animal “by any means” as provided in s 2? One can imagine that the terms were included to ensure that the appropriate activities were all protected, but the breadth of the wording makes resolving the interpretation of the clause a difficult task.

If one accepts that some limitations on s 175 are desirable, the only sensible way to read the list of terms used is to accept that the majority of words are simply different ways to describe what is, in actuality, the act of hunting as understood in common parlance: conduct that involves an attempt to kill or take an animal by pursuit, capture, immobilization or other related means. Use of the term “kill”, which is otherwise redundant, should be understood within the context of New Zealand’s view of invasive species like possums, ferrets, stoats and weasels, and consistently with other legislation on the subject. Since it is set out so separately from the words that otherwise fall within a common definition of hunting, one can surmise that it refers to the killing of wild animals that is not part of an organized pursuit for the purposes of sport, but rather, for situations where wild animals are legitimately killed. Since the Wildlife Act 1953 and Wild Animal Control Act 1977 govern the manner in which wild animals can be killed without prior approval, it is not a huge stretch to guess that the AWA term refers to the killing of pest animals that is so encouraged in New Zealand, and is deemed to be legal by these pieces of legislation.

It remains true however, that some of the terms – like “disturbing” – have the potential to be regarded more broadly. In the examples proposed above, one could argue that throwing rocks at the duck or torturing the deer simply “disturbed” both animals. Interpretations of this sort need not be automatically accepted, however. There is nothing to prevent judges from restricting all of the terms in the hunting and killing definition to their core meaning. Where a more controversial application of a term is proposed – for example, the torturers contending to have “killed” the animal – a judge should be able to examine the activity undertaken by the individual and consider whether it falls within a reasonable understanding of the term utilized in the statute, keeping in mind the purpose of the AWA, and Parliament’s choice not to create a complete exemption for wildlife.


49 See for example the comments of Gavin Herlihy, New Zealand Parliamentary Debates, 578 NZPD 17477 (16 June 1999) on this very subject, noting that in his view, the Select Committee – of which he was a member – who proposed s 175 did so on the basis that “hunting, fishing and pest control should continue to be excluded”.

50 In a nutshell, the Wildlife Act 1953 protects certain wildlife from harm, but does not apply to a raft of “pest” species. The Wildlife Animal Control Act 1977 actually regulates the destruction of pest species.
This type of approach is supported by the writing of William Reppy, who has undertaken a study of exemptions in cruelty statutes in the United States.\textsuperscript{31} In his view, exemptions are designed to provide clarity for those involved in certain practices and ensure that the standards by which a practice is undertaken cannot be scrutinized by the courts for "reasonableness". For example, in certain states veterinarians and those in the food industry are rendered exempt from prosecution. But even where such exemptions exist, Reppy makes the argument that they are not comprehensive:

A common-sense approach would indicate some boundaries. Thus, a veterinary hospital employee who inflicts pain on an animal at the clinic for boarding and not medical care may likely be prosecuted, even though a large majority of veterinary hospitals also provide boarding services for pets. Similarly, under the "activities conducted for... providing food" exemption, a restaurant chef probably cannot be prosecuted for cruelly killing a duck he or she is about to cook in the kitchen but can be prosecuted for brutally kicking a cat that has strayed into the restaurant's dining area, since the cat has no direct relationship to the cook's preparing a meal.\textsuperscript{32}

The same logic should apply in regards to s 175. Certain acts must have the capability to stray beyond what can be considered "hunting or killing" and judges should be permitted to decide whether an act comes within a reasonable understanding of those terms.\textsuperscript{33} Without question, part of this analysis will require assessment of the accused's intent, a focus that is consistent with the small number of cases that have considered what constitutes hunting or killing in the context of wildlife legislation. In \textit{New Zealand Forest Service v Todd},\textsuperscript{34} for example, the Court held that a hunter who had observed a stag in the bush and gotten out of his vehicle to follow it – while carrying his rifle - was acting for the purpose of watching the stag rather than "pursuing" it as part of the act of hunting, even though his actions undoubtedly constituted a pursuit in the ordinary sense of the word. In terms of the Wildlife Act 1953, the Court held that: '[W]hat it is aiming at in this part of the definition is people who follow wild animals with the intend [sic] to kill or capture them ... In my view it comes to a question of 'intent'.' \textsuperscript{35}

This is a reasonable approach. A judge tasked with defining whether a particular act is "hunting" within the scope of s 175 should consider all available facts – including the defendant's intention, as derived from those facts -- and attempt to clarify what the defendant was doing when the suffering was inflicted. If the action in question was


\textsuperscript{32} Ibid, at 260-261.

\textsuperscript{33} This approach was rejected in \textit{State of Wisconsin v Kuenzi} supra note 46, where the Court accepted that running a snowmobile over a deer was not "hunting" in ordinary parlance, but held "that the term "hunting"... is so broadly defined that it includes taking wild animals by any means", and thus the act should be considered hunting for the purpose of the statute. The Court nonetheless held that the defendants could be prosecuted, concluding that the wording of the Wisconsin legislation – which provided that the cruelty legislation could not "controvert" any law on hunting, did not preclude a conviction for hunting in a cruel manner, as the two statutes could operate in concert. This solution is not available in relation to the AWA, as the wording of s 175 removes "hunting" from scrutiny altogether.

\textsuperscript{34} \textit{New Zealand Forest Service v Todd} (1986) 3 DCR 509.

\textsuperscript{35} Ibid, at 512.
intended not to “pursue” or “disturb” or “capture”, but was really intended to harass or to torture, section 175 simply should not apply.

Further support for this approach can be found by again comparing the AWA to the Wildlife Act 1953. This legislation, referred to earlier, defines ‘hunt or kill’ as:  

[T]he hunting, killing, taking, trapping, or capturing of any wildlife by any means; and also includes pursuing, disturbing or molesting any wildlife, taking or using a firearm, dog, or like method to hunt or kill wildlife, whether this results in killing or capturing or not; and also includes every attempt to hunt or kill wildlife and every act of assistance of any other person to hunt or kill wildlife.

Perhaps the most interesting distinction between the definition of hunt or kill in the Wildlife Act 1953 and that used in the AWA is the fact that the former’s definition includes “molesting”, a term that is notably absent from the AWA. The inclusion of this word in the Wildlife Act 1953 makes perfect sense. As discussed earlier, this legislation is designed to ensure the protection of wildlife and control the manner in which it can be taken. For this reason, an extremely broad definition is required. It would be troublesome if a person were allowed to throw rocks at a protected animal like a kiwi bird, to take one example, on the grounds that such conduct did not fall within an ordinary understanding of hunting, but was merely intended to harass or molest the animal.

Conversely, one can make a case that “molesting” was deliberately omitted from the AWA on the grounds that it was not the sort of conduct Parliament sought to exculpate. In its ordinary meaning, to molest means “annoy or pester in a hostile or injurious way”, and there is certainly room to distinguish this sort of conduct from other types of pursuing or disturbing. One can assume that certain acts done in preparation of hunting would “disturb” a wild animal – but the act of “molesting” an animal has a far different, more ominous, connotation.

For certain, even under this approach, difficult cases are likely to emerge. Take for example the practice of ‘internet hunting’, a practice that first emerged in the United States in 2005. This is a method that uses a remote-controlled firearm – aimed and fired with a computer mouse – to shoot an animal enticed into position by a baited feeding station. The first internet hunting website, Live-Shot.com, was created as a way of providing an “authentic” hunting experience for disabled persons. This idea caused outrage across the spectrum of animal welfare advocates, pro-gun and pro-hunting lobbies. Alliances were formed between such unlikely parties as the SPCA and the National Rifle Association to ban the practice. Many hunting groups claimed that ‘this is not hunting’, and a case of this nature would certainly test the limits of s 175, as a judge

56 Wildlife Act 1953, s 2(1). See also Wild Animal Control Act 1977.
58 There is no evidence that this practice occurs in New Zealand.
60 Ibid.
would have to determine whether the activity falls within a reasonable definition of “hunting” as that term is commonly understood.

Where a practice is deemed to fall within the scope of a protected activity, it remains to consider whether it is possible to impose a “reasonableness” criterion, and punish those who act in an unreasonable fashion. Consider a particularly odious example: the heli-hunting of Himalayan Tahr that currently takes place in New Zealand’s South Island. In a 2010 feature in the Sunday Star-Times, this practice was described as follows.\(^1\)

To a soundtrack of country music and a deafening roar of rotor blades, the video shows a Himalayan bull tahr being herded from the air, shot and wounded, and eventually taking refuge in a small cave in the South Island’s mountain wilderness. The American hunter provides a breathless narrative to what he describes as “organised chaos” and “ultimate fun”.

Filmed from the chopper, the video – posted on YouTube by heli-hunting opponents – shows the American being set down near the cave mouth, pointing his rifle into the darkened entrance and firing. “It’s so dark in here, I pretty much pointed where I thought he was gonna be,” says the hunter as he tentatively enters the cave, urged on by his New Zealand guide. He finds the dead tahr and says, “I tell you what, I’ve never seen something quite like that before.”

The guide, Mike Wilks of Kaikoura-based South Pacific Safaris, is holding the camera and can be heard saying: “It’s not generally how we do it but he’s got exceptional horns this bull, so we took him.” He adds: “It would be near impossible to hunt these tahr without the use of a helicopter.”

As a practice, heli-hunting attracts considerable criticism from animal advocates for the risks it poses, including the difficulty of getting a clean shot at the animal from a moving elevated platform. But many hunting associations decry the activity as well, stating that it is not true hunting, and amounts to cruel treatment. As one hunting association has suggested scornfully, animals are “driven to exhaustion by the helicopter and guides have been known to use shotguns to “sting” animals and drive them towards waiting clients”\(^2\).

Nonetheless, given the nature of the activity, and the fact that it involves pursuing a wild animal for the purpose of killing it, notwithstanding the use of “non-traditional” technology that many “real” hunters avoid, this conduct would seem to be immune from scrutiny under the AWA. The reasonableness of the activity, the fact that there exist other ways of hunting the animal with a lower potential for suffering, and even the seemingly cruel practices do not seem to be matters for a court to consider. If they were, there would be no need for s 175. The reasonableness of the activity is exactly what would be measured under the standard application of “ill-treatment”, and it is difficult to imagine what purpose the exemption would serve if “unreasonable” activities could be prosecuted under ss 28-29.

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1 Tony Wall “Death from Above” Sunday Star Times (New Zealand, 31 January 2010).
2 Ibid. The activity nonetheless remains legal, although the Department of Conservation is reviewing the guidelines under which it can be conducted: Department of Conservation “Heli-hunting Update”, 14 December 2010, accessible online: http://www.doc.govt.nz/about-doc/news/issues/heli-hunting/. Enthusiasts estimate the practices brings at least $50 million in foreign tourist revenues to the economy: Wall, ibid.
Taken together, these guiding principles help to inform a workable preliminary understanding of s 175. In summary, the author proposes that:

1) Actions taken against wildlife should be measured against the purposes of the AWA and a recognition that hunting, fishing and the extermination of pest species are regarded as having value that goes beyond the ill-treatment suffered by the animals, even when the means utilized are questionable;

2) Where an activity is not rationally related to these valuable activities, it should not be considered hunting or killing for the purposes of s 175. The courts should be able to assess whether the act in question falls within a reasonable understanding of what is ordinarily hunting or killing, and in doing so, should have regard to the accused’s intent, as ascertained from all available evidence;

3) Molesting or harassing an animal for purposes unrelated to hunting or killing should not fall within the scope of s 175; and

4) So long as the activity falls within a reasonable understanding of the terms set out in s 175, the court should not assess whether the particular type of hunting or killing is reasonable.

(c) Unintentional Acts

For the sake of completeness, it is worth briefly addressing the manner in which s 175 and the AWA in general address unintentional acts that cause wildlife to suffer. In his remarks about s 175 in the context of the van Vliet situation, Minister of Agriculture and Forestry Jim Anderton noted that “while none of us likes to think about animals suffering, you can’t have the law requiring drivers to swerve off the road to avoid a possum” 63 It seems to have been assumed, correctly or otherwise, that s 175 is required in order to deal with this problem.

There is no reason to believe this is actually the case, however. With regards to unintentional acts, or those undertaken in an emergency – for example, running over the possum to avoid swerving off the road – it is virtually impossible to imagine a prosecution for ill-treatment of an animal being sustained in these circumstances, even in the absence of s 175. To begin with, the act causing the harm was neither unreasonable nor unnecessary. Drivers are advised not to swerve around animals on the road where it is impossible to avoid them.64

Assuming that an animal is injured by a collision, it then falls to consider whether the driver is under an obligation to stop and provide assistance, and whether the failure to do so constitutes a punishable omission under the AWA. This would be highly unlikely.

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63 Jim Anderton, Minister of Agriculture “Judge the Heart of a Man by his Treatment of Animals” (Speech to open Wilmers Road SPCA Animal Shelter, Christchurch, 6 October 2007).
64 "While you should always try to avoid hitting an animal, you shouldn’t do anything dangerous, such as swerving into oncoming traffic. You have a better chance of surviving the impact from a small animal than you do a collision with another vehicle”: New Zealand Transport Agency, New Zealand Road Code for Motorcyclists, accessed online: http://www.nzta.govt.nz/resources/roadcode/motorcycle-road-code/about-riding/tips-for-handling-emergencies.html.
Parliament specifically considered and rejected such a clause when enacting the AWA.\textsuperscript{65} While this is not conclusive, it would be extremely unusual for a court to impose a duty on the public that Parliament examined and then refused to enact.

The concerns expressed by Anderton on this point seem more apparent than real and do not give rise to a justification for an unlimited hunting exception. Even in the absence of s 175, it is difficult to imagine a person ever being successfully prosecuted for accidental harm caused to a possum on a New Zealand motorway.

**Part II: Omissions and Subsequent Actions**

Though the scope of the hunting exception set out in s 175 may well be a matter of contention, it seems indisputable that where an act does fall within the definition of hunting or killing, it will not be the subject of a prosecution under the AWA. Still, the duration of the exception remains a matter of concern. To put it another way, can a person be punished for harm imposed on a wild animal if the harm arises subsequent to the act of hunting or killing that is otherwise exempt from prosecution?

The question is one of some importance and can be illustrated by the following example, where a hunter shoots a deer, but fails to kill it. As the animal limps away, the hunter follows it and imposes various acts of torture. Without ever taking the deer into captivity, the hunter - purely out of sadistic pleasure - causes the animal to suffer tremendously.

In Part I, I suggested that acts of torture should not fall within the s 175 exemption. Nonetheless, the acts in this case cause more difficulty. The initial act of shooting undeniably constitutes hunting, and is exempt from prosecution. But what about the subsequent torture? Here, the question to consider is whether the act of hunting can ever be completed to the point that subsequent actions must be assessed on their own merits within the broader context of the AWA.

Intuitively, it stands to reason that the answer to this question must be in the affirmative. A person’s actions are never static or frozen in time, and logically, it must be possible to commit new actions that must be assessed on their own merits. Indeed, sections 175-177 of the AWA appear to function on this assumption. For example, a hunter who wounds an animal by hunting it poorly is not liable for any injury imposed during the process. However, if the hunter then takes the animal alive into captivity, the obligations of the AWA apply in accordance with s 177. From that moment forward, the initially exempt actions of hunting are separate from whatever occurs later in captivity. The exemption no longer applies, and the hunter would most likely even be under the obligation to treat injuries that resulted from the hunting.\textsuperscript{66}

\textsuperscript{65} Animal Welfare Bill, Clause 19.
\textsuperscript{66} As per s 4 of the AWA, which requires persons in charge of an animal to rapidly diagnose and treat significant injuries. Again, the AWA must work in this manner. Imagine that a zoo commissions a team of hunters to tranquilize a wild animal for capture and eventual display in the zoo. If the animal develops an infection from the tranquilizer, it would be nonsensical if the zoo could then ignore the injury on the basis that it occurred in the context of a protected activity. Once the animal is in captivity, the reasons for the
It follows from this that both the act of hunting and the protection provided by s 175 have a demarcated end point. If one accepts that certain acts committed against wildlife are not protected by the exemption,\(^6\) a court must be able to assess when legitimate acts of hunting, fishing or killing have terminated, and decide at what point scrutiny of subsequent ill-treatment can become culpable. Thus, the torturing hunter described above would be exempt from prosecution for the injuries suffered by an animal during the hunting process, but may well be liable for harms imposed afterward.

This does not seem particularly controversial. The matter is complicated, however, by the fact that ill-treatment is not concerned solely with acts of commission like those described above. On the contrary, ill-treatment means “causing the animal to suffer, by any act or omission, pain or distress that in its kind or degree, or in its object, or in the circumstances in which it is inflicted, is unreasonable or unnecessary”. It follows that omissions, like intentional acts, can also be the basis for imposing liability.

This is where difficulty may eventually arise, for in the hunting context, omissions that cause harm are more likely to occur than the scenario involving torture described above. Consider a duck hunter who goes out for a day of shooting with friends. He decides early on that he is only interested in shooting. On several occasions, he shoots a duck and watches as it falls to the ground. While several of the ducks are injured, they do not die from the blast or the fall. The hunter then watches as the ducks struggle in pain, and many take hours to die.

Utilizing the framework described above, it seems fairly certain that the original act of shooting, whatever the intent, cannot be scrutinized. The more interesting question is whether any subsequent refusal to take reasonable steps to terminate the ducks’ suffering could be treated as illegal conduct. The answer requires consideration of the criminal law’s general position regarding omissions, and an understanding of the limited circumstances in which the failure to act is punishable.

For the most part, the traditional focus of the criminal law has been to prevent people from committing harmful acts, and not to impose responsibilities to act in a certain way. As Simester and Brookbanks have noted:\(^6\)

We value living in a society where citizens are respected as individuals – where they are free to live their own lives to act or intervene. The prohibition of omissions is far more intrusive upon individual’s autonomy and freedom than is the prohibition of acts, which is why the systematic imposition of (criminal or civil) liability for failures to act is to be resisted.

In addition to general concerns about liberty, there is a worry that compelling individuals to do something might put their own well-being at risk, especially in the situation where the omission relates to, for example, a failure to rescue.

\(^{6}\) In other words, that the analysis provided in Part I has merit. If s 175 is a comprehensive exemption, the subsequent analysis cannot be correct, as no acts against wildlife are punishable.

\(^{6}\) Andrew Simester and Warren Brookbanks, Principles of Criminal Law, 3d. ed. (Wellington: Brookers, 2007) at 44.
The common law has enforced the notion that omissions should not be punishable for centuries. Nonetheless, there are exceptions to this principle. First, an omission will be culpable where the offender is under some sort of duty to act. Thus, parents cannot simply neglect to feed their sons and daughters, as omissions of this sort contravene the duty to provide the necessaries of life to children. The AWA contains duties of a similar nature. A farmer, to take one example, is under a duty to provide animals in his or her care with food, water, shelter and other necessaries, and the failure to comply constitutes a breach of duty that is punishable.

These examples notwithstanding, the starting point with omissions is that they are not culpable unless specifically rendered liable, either by the imposition of some sort of duty to act, or through the wording of a particular statutory provision. To be clear, the definition of ill-treatment—which refers specifically to omissions—does not in itself create a duty; it simply provides that culpable omissions can be prosecuted. In other words, the term “omission” in this context must be regarded as an “omission for which there exists a duty to act”.

In the hunting context, it does not take long to see that no such duties arise within the context of the AWA. In contrast with other activities for which an explicit duty of care is provided, the AWA offers no indication that those interacting with wildlife can be punished for omissions. This does not mean that no duty exists, however. It is also possible for a person to be prosecuted for a failure to comply with a duty owed under the common law, even though it does not occur very often.

The leading case on duties of this sort is the House of Lords decision of R v Miller, where the defendant, a vagrant, inadvertently set fire to a mattress upon which he was sleeping in a vacant house. Instead of taking any steps to extinguish the fire or summon assistance, he merely moved to another room and went to sleep. A blaze resulted and the house was burned. He was charged with arson, on the theory that he had caused damage to property by recklessness. The defendant cleverly argued that since the fire had started unintentionally, a mere omission to put the fire out could not give rise to criminal liability in the absence of a positive duty to act. The House of Lords rejected the contention, and affirmed the defendant’s conviction. Relying upon the common law, Lord Diplock famously stated:

I see no rational ground for excluding from conduct capable of giving rise to criminal liability conduct which consists of failing to take measures that lie within one’s own power to counteract a danger that one has oneself created, if at the time of such conduct one’s state of mind is such as constitutes a necessary ingredient of the offence.

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69 Andrew Ashworth “The Scope of Criminal Liability for Omissions” (1989) 105 LQR 424. As we shall see however, there are exceptions to this general rule, even at common law.
70 Crimes Act 1961, s 152.
71 AWA, ss 4, 12.
72 There are many examples of this type. Section 11 of the AWA, for example, provides that “the owner of an animal that is ill or injured, and every person in charge of such an animal, must, where practicable, ensure that the animal receives treatment that alleviates any unreasonable or unnecessary pain or distress being suffered by the animal”.
74 Ibid, at 176.
In effect, the decision creates a particular sort of common law duty. Where a person has, by accident, created a state of affairs that would be punishable as a crime, then he or she is under a duty to take reasonable measures to counteract dangers created by such an act. Obviously, the omission will only be punishable if it meets with the other requirements of the crime for which the defendant has been charged.

There are at least three difficulties with extending Miller to the duck hunting scenario provided above. First, there is no guarantee that the basic premise of a common law duty to rectify dangerous situations arising from one's own acts will be accepted in New Zealand, and no case appears to have expressly considered the matter. At the very least however, one could say that there is a strong argument to be made for applying Miller. It is a precedent from the highest court in the United Kingdom, and decisions of the House of Lords have always been treated as being highly influential.

Second, and more significantly, it is unclear whether a "danger" to animals is sufficient to warrant the imposition of a common law duty to act. Miller was quite obviously a situation where the defendant's deliberate failure to counteract the fire he had caused created a major risk to life and property that allowed the House of Lords to overcome the general reluctance to punish omissions. Whether a court would find that the failure to alleviate suffering endured by an animal amounts to a sufficient "danger" to impose a duty act is unclear. Undoubtedly, those charged in such a case would be able to argue that dangers to an animal are insufficient to warrant deviating from the general principle that the criminalization of omissions should be resisted.

Nonetheless, this is not an irrefutable argument. Some commentators interpret danger as "subsequent illegality", rather than "danger to human life", and with good reason. The principle in Miller is not geared to the nature of the potential harm, but rather reflects the notion that omissions are punishable where a person creates a situation for which a high likelihood of future mischief exists. In these situations, the person is deemed to have a special relationship to the harm, and, consequently, should have an obligation to make attempts to alleviate it.

Finally, one could argue that the wording of "ill-treatment" could not be applied in this scenario because the alleged omission was not what "caus[ed] the animal to suffer" as required by the legislation. The need to establish causation could derail the possibility of prosecuting an omission, as a defendant in the hunting context could argue that his or her omission was not what caused the suffering, as it was the legitimate act of

75 While the excerpt does not use the term "reasonable", the general consensus is that the duty created in Miller only requires a person to take "reasonable" measures, rather than all measures, in order to avoid liability: Eric Colvin and Sanjeev Anand, Principles of Criminal Law, 3d ed. (Toronto: Thomson, 2007) at 145.
76 See however Police v Palmer, CIV 2004-454-01, 3 August 2004, (HC, Palmerston North), which refers to Miller in some detail and appears to approve of the general principles. Simister and Brookbanks, supra note 68, at 44, believe the doctrine does apply in New Zealand. In Canada, the Ontario Court of Appeal has endorsed the general principle, though the Supreme Court has, for the moment, refrained from doing: R v Thornton (1991) 1 OR (3d) 480 (Ont CA) affirmed on other grounds [1993] 2 SCR 445.
78 Simister and Brookbanks, supra note 68, at 49 suggest that "the relevant sorts of "danger" are those which threaten an interest protected by the criminal law -- thus the duty arises where, "unless [the defendant] intervenes, his earlier (positive) act will bring about the actus reus"."
shooting the animal that was the proximate cause of harm. Of all the arguments suggested, this is probably the least convincing, however. The defendant in Miller undoubtedly argued that it was his dropping a cigarette, and not his failure to put out the fire, that was what caused damage to property. This contention clearly failed, as the House of Lords was quite prepared to find that his subsequent omission was at least a partial cause of the harm that followed,\textsuperscript{79} and enough to ground his conviction for arson.

Those objections aside, and it is recognized that the second objection in particular will prove somewhat difficult to overcome, the reasoning in Miller offers tantalizing possibilities in the hunting context. First, so long as one accepts that the act of hunting can “end”, as set out above, s 175 is no obstacle to prosecuting an omission, for the legal nature of the original act does not preclude the extension of liability in this setting. Without question, Miller’s initial act – smoking in bed – was legal, notwithstanding its being extremely ill-advised. This did not prevent the House of Lords from holding him liable for the subsequent omission to counteract the danger he had created. Similarly, the hunter who legally shoots an animal cannot be held liable for this act, but – assuming the court is willing to accept subsequent suffering by the animal as being a “danger” – such a hunter is under a duty, to use the very language set out in Miller, “to take measures that lie within one’s own power to counteract a danger that one has oneself created”.

This narrowly targeted duty addresses the concerns surrounding omissions generally. To begin with, the duty is only engaged by a defendant’s willful act. Thus, where one hunter shoots an animal, a fellow hunter cannot be punished for standing by and watching the animal slowly die – even if the suffering in such a case could be easily alleviated.\textsuperscript{80} The duty to act is restricted to the person who created the danger, and is not a general duty that falls upon all spectators. Moreover, the duty would simply require that the person take reasonable steps to alleviate the danger caused. Thus, where a person shoots an animal, it stands to reason that he or she is under an obligation to ensure that the animal dies without unnecessary suffering. As we shall see in Part IV, this is not an unreasonable proposition, and it is one that accords with the standards set out in most voluntary hunting codes.\textsuperscript{81}

While hardly a “sure thing”, any attempt to extend Miller to the hunting context in a situation along the lines of the example set out above would have at least a moderate prospect of success. It would be a welcome result, as it would at least impose obligations upon hunters to take reasonable measures to alleviate suffering caused by their hunting.

Part III: The Ambiguous Nature of s 175 of the Animal Welfare Act

In the first two parts of this paper, an interpretation of s 175 was offered that would limit its potentially comprehensive nature. Without disparaging the analysis

\textsuperscript{79} An act is culpable when it is at least a contributor to the harm that follows: \textit{R v Lewis} [1975] 1 NZLR 222 (CA).

\textsuperscript{80} The same is true in the arson example. Miller was punishable for his failure to act, but a bystander who did nothing to prevent the fire from spreading would not be criminally liable.

\textsuperscript{81} For example, the Gamebird Hunting Code of Practice at “2007 Hunting Guide” Fish and Game Council New Zealand (2007) http://www.fishandgame.org.nz/Site/HuntingNZ/Hunting2007Guide.aspx, which is neither binding nor enforceable but suggests an ‘ideal’ to which hunters may aspire, provides in Point 7 that the ‘ideal’ hunter “[h]as, and utilises the ability to promptly and humanely kill disabled game.”
provided therein, it is worth pointing out its speculative nature, and recognize the fact that no judicial interpretation of this provision has ever been attempted. Although it is unquestionable that a huge number of wild animals are forced to endure suffering initiated by New Zealanders on a daily basis — especially during hunting season — it would appear that no case involving a wild animal as “victim” has ever been prosecuted under the Animal Welfare Act 1999.

This fact alone provides some reason to believe that, leaving aside any hypothetical construction of the clause along the lines discussed above, s 175 currently acts more as a prophylactic than a limited exemption, providing comprehensive protection to anyone who commits an act that causes harm to a wild animal. Evidence of this proposition can also be found in the van Vliet case discussed earlier. As noted above, shortly after the occurrence the Minister of Agriculture and Forestry decried the conduct, but added that despite his being ultimately responsible for initiating prosecutions under the AWA, there was nothing he could do. As he put it, “the problem is, because these were wild animals, there is no liability for cruel treatment”. This response is extremely troubling. Even if the section was only designed to exempt certain acts, the agencies responsible for administering the AWA, and likely those causing the acts of “hunting and killing” themselves, seem to believe that the exemption applies to all conduct involving wild animals.

In large part, this belief is caused by the section’s inherent ambiguity and breadth. Although a careful interpretation of s 175 reveals some limitations, these are not immediately apparent. The terms included within the definition of hunt and kill are worded in a broad manner and on a plain reading seem to encompass virtually every action that could be directed at causing pain to a wild animal. This demonstrates what may well be s 175’s greatest deficiency: its failure to articulate a framework governing the types of ill-treatment that are permissible where wildlife is concerned. The exemption is simultaneously unfair to those committing harm against wild animals, those whose interests are notionally being protected, and those who believe that the current structure is inequitable.

(a) Fair Notice to Affected Individuals:

The importance of providing fair notice to individuals with the potential to be affected by law has been a theme of doctrinal criminal law scholarship for centuries. While it is not always thought of as such, the AWA is a penal statute with the potential to subject individuals to harsh penalties of up to five years’ imprisonment. As a consequence, it should provide fair warning to those who might engage in prohibited

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82 Examples to prove the proposition cited are difficult to find, because one is effectively looking for the “absence of a prosecution”. Nonetheless, in addition to the van Vliet example, see supra, note 45.
83 The Ministry of Agriculture and Forestry is a prosecution organization approved pursuant to s 124 of the AWA under which the Minister may appoint inspectors. For a discussion of the agency’s effectiveness in prosecuting, see Peter Sankoff “Five Years of the “New” Animal Welfare Regime: Lessons Learned from New Zealand’s Decision to Modernize its Animal Welfare Legislation” (2005) 11 Animal L Rev 7 at 26-28.
84 Anderton, supra note 10.
conduct as to when their actions will "cross the line". As Simester and Brookbanks have suggested:

    The criminal law is not there solely to tell police and judges what to do after someone offends, but also to tell citizens what not to do in advance... This requires both that the rule be stated in advance, and also that it be stated clearly. Clarity is essential if citizens are to have fair warning that by their prospective actions they are in danger of incurring a criminal sanction. If individuals understand the law, they will be able to properly decide what to do in light of the guidance that the law is meant to provide.\textsuperscript{85}

It can be argued that s 175 of the Animal Welfare Act 1999 fails to provide the guidance required to put those who harm wild animals on notice as to the limits of permissible conduct. While the MAF currently appears to treat the provision as a complete exemption, there is no guarantee this approach will prevail forever. It may well be that certain acts against wild animals do not constitute "hunting and killing", and will be prosecuted at some point. Still, in the absence of a more precise definition, it is difficult to argue that an individual committing these acts could be said to have received proper notice of the propriety of his or her conduct in advance.\textsuperscript{85}

\textit{(b) Failing to Protect the Vulnerable}

    Hunters are not the only "parties" with an interest in the proper interpretation of the AWA. The existing ambiguity is even more troublesome for the beings whose interests are supposed to be protected under the legislation: the animals themselves. If s 175 was indeed designed as a limited exemption to exculpate only legitimate acts of hunting, fishing and pest extermination, it must be regarded as a complete failure. Those tasked with policing and enforcing the AWA are unsurprisingly unsure of the types of conduct committed against wild animals that may go beyond these acts and be regarded as culpable.

    In addition to providing notice to those likely to commit criminal acts, the law must provide guidance to those who enforce it. Where those limits are elastic or unclear, it stands to reason that the state -- who bears the burden of proving that the exemption does not apply -- will be unwilling or unlikely to prosecute, even if the activity seems to be exactly what the legislation is designed to punish.\textsuperscript{86} The result is a failure to protect the vulnerable animals for which the legislation was originally enacted.

\textsuperscript{85} Simester and Brookbanks, supra note 68, at 26-27.
\textsuperscript{86} Given the comments of the former Minister of Agriculture and Forestry, it would not be surprising if a person who ever got charged with an offence against wildlife raised the defence of officially induced error, on the grounds that the defendant's belief "arises out of an error of an authorized representative of the state and the state then demands, through other officials, that the criminal law be applied strictly to punish the conduct": Simester and Brookbanks, ibid. at 449. This would be difficult to establish however, especially since the availability of the defence in New Zealand is so unclear: ibid. at 453.
\textsuperscript{87} In another context, see Stephen J. Schulhofer "Taking Sexual Autonomy Seriously: Rape Law and Beyond" (1992) 11 Law and Philosophy 35 at 67, who notes that vaguely worded sexual violation laws designed to protect woman "ris[k] multiple problems of comprehensibility and effective enforcement", as "the vagueness, coupled with its violence-oriented connotations... seem likely to discourage enforcement against nonviolent abuse, even in core cases of extortionate threats that the drafters wanted to reach".
The problem is magnified in an area like animal protection law, where “owing to limited resources and organizational priorities, [the] authorities tend to focus on prosecuting animal cruelty cases with high chances of success, as opposed to running costly test cases”. Considering how difficult it is to get even strong cases of ill-treatment prosecuted successfully, it is not surprising that no one has sought to test the limits of $s$ 175. This is just another reason why the section acts as a comprehensive exemption, even if it was not intended to operate in this manner.

(c) Impediment to Law Reform

Perhaps the most disappointing effect of the current situation is how the existence and wording of the exemption has completely forestalled high-level discussion and law reform regarding the humane treatment of wildlife. Either $s$ 175 actually is an exemption, or, through a de facto application of the factors discussed above, it operates as one. On either approach, wild animals are left completely unprotected by the AWA, and, in effect, the law sanctions any act of cruelty imaginable upon them.

Leaving aside the desirability of this position, the amorphous nature of $s$ 175 quite likely has the effect of impeding reform, as not everyone shares the same view of its application. One cannot argue that wild animals are completely unprotected by the Act, because this position is difficult to prove with any degree of certainty. The definition of animal includes wild animals, and certain actions, such as those involving trapping and the like, remain punishable. On occasion, in discussing the plight of wild animals, I have been chided by animal advocates who maintain that $s$175 is “not a complete exemption”, and that even unreasonable acts of hunting can be prosecuted. While I do not believe this to be the case, I recognize that arguments against this position are complex, and $s$ 175’s inherent ambiguity allows people to take different views of its effect.

This ongoing statemate undermines what may well be one of the AWA’s greatest strengths: the fact that it keeps animal welfare issues firmly fixed in the public arena. New Zealand may not have the best system of animal protection in the world, but the AWA is commendable in that it requires Codes of Welfare to be regularly updated, and discussions surrounding any amendments to these codes must be published and available for public scrutiny. Notwithstanding the weaknesses inherent in this form of regulatory framework, the process ensures that issues surrounding animal welfare are discussed in a public forum on a regular basis.

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88 Katrina Sharman “Farm Animals and Welfare Law: An Unhappy Union” in Peter Sankoff and Steven White (eds) Animal Law in Australasia (Federation Press, Sydney, 2009) 35 at 52. See similarly Sankoff, supra note 83, at 27 (MAF has shown a conservative disposition and has yet to bring a test case).
89 AWA, $s$ 71(3)(public must be notified of draft Code of Welfare), $s$ 78(1)(Codes of Welfare must be reviewed every ten years).
91 A good recent example involves the abolition of sow stalls in New Zealand, which occurred, at least in part, because of the need for the matter to be investigated by the National Animal Welfare Advisory Committee, and the public scrutiny that was caused by this event.
Whatever one’s view of the results that come from these discussions, the process itself has value, as it guarantees the ongoing discussion of animal welfare issues and requires New Zealanders to discuss the merits of various animal uses on a periodic basis. This contrasts dramatically with the treatment of wild animals, who are rarely the subject of debate insofar as welfare issues are concerned. As I have previously suggested, animals whose treatment lies outside of the public eye are in a catastrophic position, for “the greatest obstacle to the better legal treatment of animals is passivity and ongoing acceptance of the status quo; a status quo most effectively maintained through silence”.

Despite the expression of sporadic outrage from the public when acts like van Vliet’s come to light, and the hollow statements from parliamentarians at the time of enactment that more public debate on this issue was required, there has been little sustained discussion regarding the extent to which the AWA should apply to wildlife since the legislation was enacted. Moreover, the ambiguous nature of this exemption renders plausible statements made by those who wish to defer reform by relying on the fact that egregious acts against wildlife can already be punished under the AWA. So long as the focus remains upon the scope of s 175, it cannot turn to the real matter of concern: whether s 175 deserves to remain in place at all.

(d) Summary

For the reasons outlined above, I believe that however it might be interpreted in a courtroom, s 175 should be regarded as a poorly conceived law that is desperately in need of clarification. In its current form, it fails to provide those who hunt and kill animals with any indication of the legality of their conduct, inhibits prosecutors from bringing charges even in egregious cases of ill-treatment, and simultaneously obscures the true position of Parliament toward wild animals. If wild animals are completely exempt from the protection of the AWA, subject to the limited situations set out in s 177 & 178, this should be made clear in order to permit public discussion on the propriety of this situation. The current state of ambiguity— in which wild animals “may” or “may not” be protected— is a thoroughly unsatisfactory state of affairs.

Part IV – The Cause for Reform

In 1999, Pete Hodgson, the Member of Parliament whose Private Member’s Bill provided the impetus for the eventual passage of the AWA, made the following statements on third reading of the new legislation:

I want to put on the record of the House my view that within 10 years someone will note that there are issues concerning hunting and fishing that ought to have been addressed by codes of conduct but have not been addressed by them. It will be seen to have been, I think, a mistake not to allow codes of conduct through into legislation—probably the biggest gap in this legislation."

92 Peter Sankoff and Steven White “Introduction” in Peter Sankoff and Steven White (eds) Animal Law in Australasia (Federation Press, Sydney, 2009) 1 at 4
It has now been more than ten years since those words were spoken in the House, and as this article has attempted to demonstrate, Hodgson’s words were remarkably prescient. The refusal to address concerns about animal protection and its relationship to wildlife is, arguably, one of the biggest weaknesses of the AWA.

Concerns about the reasonableness of the hunting exemption have been raised at least a few times since the AWA was enacted. For example, in 2003, the New Zealand SPCA investigated the killing of an Asian Water Buffalo that took place in a safari park in the Reporoa district. A guest from the United States paid to hunt down a water buffalo with a bow and arrow. The witness statement provided to the SPCA described the events from the initial shot as follows:

The arrow entered the shoulder and was obviously too high and too far forward of [the ideal kill area]. The animal walked forward and with some obvious discomfort broke the arrow off and tentatively continued to graze. The next shot disappeared into the animal high again and too far back... He was followed and every available moment he was shot... with an arrow in the endeavor to hit the right spot.

[The hunter] eventually ran out of arrows which I believe totaled 8, all of which were hits over various parts of the animal’s body. Then, in the absence of any more arrows, [he] fired 3 bullets from a 7mm Remington Magnum to finally have the animal run, and eventually jump into a lake and drown.

In all my years of hunting and farming I have never witnessed... such a disgusting manner in the hunting and destroying of an animal in the pursuit of fame. It was obvious the gentleman was inexperienced and was using a weapon that was obviously unsuitable for the humanly [sic] purpose of killing this type of animal.

The events in question were enough to disgust a seasoned hunter, but not enough to attract prosecution. While the SPCA pursued the matter, it was eventually informed by the MAF that no action could be taken against the hunter or the safari park. Sections 175 and 176 of the AWA provided both parties with complete immunity from prosecution.

This is hardly an isolated example, and it raises numerous questions about the status quo. While Parts I and II provided a means of interpreting s 175 so as to narrow

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55 See also “Wild animal protection needed”, Law Talk 698, 29 October 2007, which quotes former Minister of Agriculture Jim Anderton noting that “we can’t have senseless laws that make life in the outdoors a legal minefield, but there must be some way to react against moronic acts of cruelty”. 56 Witness Statement of Informant X, provided to Peter Blomkamp, Chief Executive, RNZSPCA, 14 May 2003 [on file with Author]. 57 Letter from Peter Blomkamp to Peter Sankoff, 12 November 2013 [on file with Author]. 58 In addition to the van Vliet example provided earlier, see also SPBA v Cooksey, CR1 2009-092-000708, 9 March 2009 (DC), a highly publicized case involving the shooting of a cat with a crossbow. While the defendant pleaded guilty, the judge at sentencing expressed considerable concern about the propriety of the prosecution, noting that the SPCA had not established that the cat was a domestic, as opposed to a feral cat. Despite the court finding that the actions had not been reasonable, “as there are ways of trapping cats and dealing with them other than to shoot them with a crossbow”, it is questionable whether a trial of the accused would have ended with a conviction. He could reasonably have relied upon s 175 to escape liability unless the SPCA could have proved that the cat was not feral. See also Murdoch v Police, AP-38-
the clause’s potentially unlimited scope, this approach would not address many of the
problematic situations that arise where wildlife is concerned. Neither Mr. van Vliet nor
the hunter in the safari park example would have any reason to fear the interpretation set
out in this article.99 In both cases, a judge would almost inevitably conclude that the
activities in question constituted the act of hunting, in the case of the safari park, or
killing a pest species, in the case of the explosives. Unless the AWA is amended to
provide a “reasonableness” criterion, or an enforceable “Code of Conduct for Hunting
and Killing” is enacted to set limits on techniques and approaches, this lacuna in the
legislation will continue to exist, and wild animals will continue to suffer accordingly.

It is difficult to understand the reasons for resistance in this area. While New
Zealand is certainly a nation populated by hunters and fishermen, it is also a nation of
farmers. While hunters have received a “free pass” from the AWA thus far, the farming
community has been exposed to considerable scrutiny, and those with an economic
interest in the production of animals have been forced to make many changes to their way
of doing business, all for the purpose of improving the lot of the animals in their care. In
addition to farmers, people who care for animals in zoos, rodeos, circuses, research
facilities and other settings have all had to take stock of their treatment of animals and, to
some extent, revise their practices. While no one can validly claim that the suffering of
animals has ceased, improvements in treatment have occurred.

Only the hunting community and those involved with the killing of pest animals
have avoided scrutiny altogether. It is a perplexing development. Though this approach
is hardly unprecedented in foreign jurisdictions, it does render New Zealand’s claim to be
a “world leader” in animal welfare somewhat of an overstatement,100 at least where wild
animals are concerned. One could easily make the case that New Zealand’s standards in
this area, which amount to almost no standard whatsoever, are amongst the very worst in
the Western world.

In contrast, consider the legislation currently in place in New South Wales. There,
any game hunting licencee must adhere to the NSW Code of Practice for Licensed
Game Hunters,101 and it is an offense if these conditions are contravened.102 The Code
includes the following mandatory provisions:103

795, 11 February 2002, HC, Invercargill (defendant convicted of killing cats by poison; conviction
premised on death of two domestic cats only).

99 There is at least a remote possibility that in both cases, a failure to ameliorate or reduce the harm caused
could constitute a punishable omission.

100 David Carter, Minister of Agriculture “Animal welfare is important to our welfare” (Speech to open
Royal New Zealand Society for the Prevention of Cruelty to Animals’ National Conference 2009,
Christchurch, 2 May 2009): “When it comes to animal welfare, New Zealand is held in high regard
internationally. We have a reputation as a country that takes the welfare of our animals very seriously”.

101 Game and Feral Control Act 2002 (NSW), s 24. However, this must only be followed by licence
holding hunters. Much of the hunting in NSW is covered by s 17 of the Act which exempts from the
licensing requirements ‘persons hunting pigs, dogs (other than dingoes), cats, goats, rabbits, hares and
foxes living in the wild on private land; people hunting on their own land, on land owned or occupied by a
member of their household, or on land owned by the person’s employer’ [this is not a direct quote but
rather paraphrases the section]. See also Nature Conservation (Wildlife Management) Regulation 2006
5 **Obligation to avoid suffering**
An animal being hunted must not be inflicted with unnecessary pain. To achieve the aim of delivering a humane death to the hunted animal:

(a) it must be targeted so that a humane kill is likely, and
(b) it must be shot within the reasonably accepted killing range of the firearm and ammunition or bow being used, and
(c) the firearm and ammunition, bow and arrow, or other thing used must be such as can reasonably be expected to humanely kill an animal of the target species.

6 **Lactating females with dependent young**
If a lactating female is killed, every reasonable effort must be made to locate and humanely kill any dependent young.

7 **Wounded animals**
If an animal is wounded, the hunter must take all reasonable steps to locate it, so that it can be killed quickly and humanely.

Although the provisions in the New South Wales legislation are the most detailed, most Australian cruelty laws also attempt to provide at least a modicum of protection to wildlife. Australian animal welfare legislation does not apply universally to wild animals, especially where they are designated to be a ‘pest’ or ‘feral’, but there is at least a requirement that no unnecessary suffering be imposed on the animal and that any killing be done in a ‘reasonable’ manner. The Australian provisions are not perfect, and one could level many criticisms at the exemptions, the lack of enforcement, and what is considered a “reasonable” manner of killing, but they are a far cry better than what exists in New Zealand, and at least send a signal that animal welfare is of some importance in the hunting context.

More than ten years have now passed since the AWA was enacted, and one must ask why hunting and killing is still entirely exempt from scrutiny, and no movement is on the horizon to change matters. If the reasoning expressed earlier in this piece is correct, and legislators were concerned that hunting as an activity would be deemed unnecessary or illegitimate altogether, there is an easy solution. The standard measurement of ill-treatment considers the extent of animal suffering balanced against the legitimacy of the purpose for imposing such suffering, and the means utilized to do so. Still, there is no reason why hunting and killing must be assessed by using this test. It is, of course, possible for the legislature to create intermediate positions. It is not – as Parliament seems to have believed in enacting the provision – an “all or nothing” proposition.

The easiest way of addressing the worry that hunting in its totality will be targeted for prosecution is by removing any consideration of purpose from the equation. In other
words, the AWA could be drafted to reflect that hunting, fishing and the killing of pest animals are legitimate activities, but insist that those activities be carried out reasonably. Instead of utilizing the broad test for ill-treatment, which requires a court to consider whether suffering was “in its kind or degree, or in its object, or in the circumstances in which it is inflicted” to be unreasonable or unnecessary, a more limited test could be adopted. For example, s 175 of the AWA could be amended to read as follows:

175 - Subject to sections 176 to 178 and Part 6, nothing in this Act makes it unlawful to hunt or kill—
(a) any animal in a wild state; or
(b) any wild animal or pest in accordance with the provisions of—
   (i) the Wildlife Act 1953; or
   (ii) the Wild Animal Control Act 1977; or
   (iii) the Conservation Act 1987; or
   (iv) the Biosecurity Act 1993; or
   (v) any other Act; or
(c) any wild animal or pest; or
(d) any fish caught from a constructed pond;

so long as the hunting or killing was undertaken in a reasonable manner, taking into account the method utilised to hunt or kill the animal and the steps taken to reduce any unnecessary pain or suffering.

Obviously, other wording might achieve this purpose as well, but is this not a considerable improvement on the existing situation? Instead of leaving wild animals completely unprotected and at the whim of the incompetent, the uncaring and even the sadistic, it imposes a limited requirement to consider the means used and assess their appropriateness. Given the stated purpose of the AWA, a requirement of this sort seems to be the very least that could be imposed.106

Another possibility worth considering is to distinguish between hunting for recreation and the killing of pest animals for conservation purposes. While it is beyond the scope of this article to analyze this point in detail,107 there is an argument to be made that the latter activity has a more justifiable purpose and is one for which scrutiny over the humane standards of killing is less desirable.108 Although there are many who contest this notion, it is often suggested that the killing of pest animals must be accomplished in certain ways in order to be effective,109 even if this imposes considerable pain and suffering upon the victims. Further consideration of the validity of these points will ultimately be required, but it is hardly heretical to suggest that killing animals for conservation purposes is different, and potentially more laudable, than hunting for

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106 Codes of Conduct, as proposed originally by Pete Hodgson, would of course be another possibility. While there are issues with the code process, they would allow for specific reforms to be implemented and updated over time.
107 See Thiriet, above note 105, who challenges the justification for recreational hunting.
108 This view has been challenged by many who believe that the killing of pest animals is not a viable strategy of encouraging proper conservation of native wildlife. See McEwan, supra note 25; Mitsuhiko Takahashi “Cats v Birds in Japan: How to Reconcile Wildlife Conservation and Animal Protection” (2004) 17 Georgetown Int Env L Rev 135.
109 One good example of this is the controversial use of 1080 poison discussed earlier, supra note 44.
recreation.

By de-coupling the two types of activities, Parliament could enact different standards of care. Hunting and fishing would need to be undertaken in a reasonable manner, as proposed above. The killing of pest species, on the other hand, could be regarded as legitimate unless the manner of extermination was demonstrably unreasonable and imposed extreme suffering. This is not to suggest that this approach should be adopted, as the matter is worthy of more detailed consideration, but it demonstrates that different and more finely nuanced solutions are indeed possible.

Conclusion

Nearly twelve years after the enactment of the AWA, the hunting exception remains unaltered, and its continued existence is symbolic of Parliament's unwillingness to grapple with the moral obligations humans owe towards wild animals. Without question, the relationship between humans and wildlife is more complex than that between humans and animals in our care, and the obligations set out in Parts 1 and 2 of the AWA cannot simply be adopted wholesale in respect of wildlife. Careful consideration is required to ensure that a proper balance is established.

That said, the status quo is intolerable. According to New Zealand animal protection law, it is currently reasonable to kill, maim and even torture a wild animal by any means. One can shoot a feral cat with a crossbow, blow up birds with explosives, and throw rocks at ducks for the purposes of amusement. Unless the victim happens to be the member of a species protected under conservation legislation like the Wildlife Act 1953, there will be no means of punishing the perpetrator.

A very recent example of the type of tragic event that occasionally unfolds in New Zealand highlights the downsides of the current approach. In March 2011, more than 100 shorebirds were senselessly shot on Kaipara Harbour. Many of the birds were injured and left to die in a horrible manner. As usual, there were expressions of anger and the matter received considerable attention in the New Zealand Herald. If caught, the offender will undoubtedly face prosecution. It turns out that some of the birds shot were dotterels, a protected species under the Wildlife Act 1953. The Act absolutely prohibits the imposition of any harm upon these rare birds, and for this reason alone, the slaughter will be investigated, and charges laid if possible. Amazingly, had the victims been of another species — say, a starling — nothing could have been done. Cruel or not, the callous shooting of birds and other unprotected animals for pleasure, even where the animals are left to die a slow and painful death, remains fair game in New Zealand.

In this article, I have suggested an interpretation of s 175 that attempts to narrow the exemption and provide some measure of protection for wildlife. It is difficult to imagine most hunters or others involved in the killing of wildlife disagreeing with restraints on torture and harassment, and an obligation to take reasonable steps to end the

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111 Subject, of course, to the analysis set out in Part II of this Paper.
suffering of animals they harm in the wild. This interpretation is not enough, however. For New Zealand to live up to its stated goal of being a nation that cares about its animals, steps need to be taken to provide some protection from ill-treatment for wildlife. Prohibiting the hunting and killing of animals undertaken in an unreasonable manner – or even a substantially unreasonable manner – would be a good first step. So long as s 175 operates to give carte blanche to the incompetent, the sadistic and the uncaring, wild animals are likely to continue to be prime targets of cruelty, and those involved in the conduct will have no legal reason to act otherwise.
THE ANIMAL RIGHTS DEBATE AND THE EXPANSION OF PUBLIC DISCOURSE: IS IT POSSIBLE FOR THE LAW PROTECTING ANIMALS TO SIMULTANEOUSLY FAIL AND SUCCEED?

By

This Article uses the theory of deliberative democracy, as developed by Jürgen Habermas and others, to suggest that public discourse is essential to encouraging democratic change in animal welfare law. The author examines the legal regimes of Canada and New Zealand to compare which country better facilitates a public dialogue about the treatment of animals. The Article concludes that, while Canada has a number of laws that ostensibly protect animals, New Zealand's regime is much better at creating the public discourse required to meaningfully advance animal protection. The author does not suggest that New Zealand's regime is perfect; rather, New Zealand's model is preferable to Canada's because it allows the public to meaningfully engage in laws affecting animals at regular intervals. In Canada, generating discussion on government about animal welfare is too often left to the whim of legislators. Due to New Zealand's model of encouraging and requiring public discourse, its protection laws have begun to surpass those of Canada, and there is reason to believe this will continue. Encouraging public discourse about our assumptions about animals fosters hope for meaningful progress in the lives of animals.

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* © 2012 Professor at the University of Alberta, Faculty of Law, who specializes in animal law, criminal law, and the law of evidence. He is the author or editor of five books, including Animal Law in Australasia: A New Dialogue, the first book ever published in the Southern Hemisphere to focus exclusively on animal law issues. Professor Sankoff lectures and publishes on a variety of animal law topics. He taught animal law at the University of Auckland from 2006–2010, and also as a Visiting Professor at Haifa University, the University of Melbourne, and the University of Western Ontario. Professor Sankoff has also taught an advanced animal law course entitled Comparative Concepts in Animal Protection Law at Lewis & Clark Law School.
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1. INTRODUCTION

[A synthesis of the desire for change and the sacredness of nature] requires the sanctification neither of the present nor of progress but of evolving processes of interaction and change—processes of action and choice that are valued for themselves, for the conceptions of being that they embody, at the same time that they are valued as a means to the progressive evolution of the conceptions, experiences and ends that characterize the human community in nature at any given point in its history.¹

Not long ago, I was fortunate to attend one of the growing number of conferences devoted to the topic of "animals and society," where speakers from diverse backgrounds talked about issues concerning the treatment of animals.² Seminars on subjects ranging from "the animal's current place in film" to "genetic modification of breeding sows" made for a very interesting weekend, but one particular moment from the conference remains fixed in my memory. It occurred during the presentation of a study designed to examine the extent to which workers on factory farms become emotionally attached to the animals, and whether these attachments differed from those that developed with animals kept in a "free-range" environment. At the end of the presentation, speakers responded to questions from the audience, many of which focused on the results of the study, its methodology and the like. Eventually, however, a member of the audience posed a question—or, more accurately, a series of questions—that I had heard many times before. It went something like this: "Why should we care at all about this study? Doesn't it simply entrench the governing ideology, and suggest that free-range is a desirable alternative when it really isn't? How does doing that further abolitionist goals?"³ The question came with a dismissive tone and left the speakers backpedaling. For the next twenty minutes, discussion in the room abandoned the study and its findings and transformed into a passionate debate among audience members and speakers alike regarding the merits of any initiative that fails to propound the objective of abolishing animal usage altogether.

What happened that day was no isolated incident.

³ The quote is paraphrased, although it accords with my personal recollection; see Bruce Wagman & Matthew Liebman, A Worldview of Animal Law I (Carolina Academic Press 2011) (defining "abolitionist" as a person "who seeks to do away with all nonconsensual human uses of animals").
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witnessed exchanges of this sort at conferences and seminars dealing with animal issues, and have personally had discussions of this sort with lawyers and students on a host of occasions. Intentionally or otherwise, the conversation about a specific aspect of the human-animal relationship transformed into an argument about one of the most divisive questions about animals possible: Is there good reason to enact laws protecting animals if those laws inherently recognize the continued exploitation of the subjects of the protection?

The framework of this debate is well known to just about anyone with even a basic familiarity of animal law. In a recent book entitled The Animal Rights Debate, Professors Gary Francione and Robert Garner address the question directly, describing its significance as follows:

One of us [Francione] argues in favor of the animal rights approach which ... maintains that we have no moral justification for using nonhumans at all, irrespective of the purpose and however "humanely" we treat them, and that we ought to abolish our use of nonhumans. Further, welfare regulation makes people think that animal exploitation has been made more "humane" and causes them to become more comfortable with animal exploitation, which perpetuates and may even increase the use of animals. The animal rights position that will be defended here focuses on ... [veganism] ... as the foundation of a political movement that will support measures consistent with the ultimate goal of abolition.

The other author [Garner] argues in favor of the protectionist approach, which maintains that although the traditional animal welfare approach has failed, this does not mean that it cannot be ... used more effectively in a practical sense. ... We should better regulate our treatment of animals consistent with the recognition that... [animals] have a morally significant interest. Further, even if we think that abolition is the desired long-term goal, we should pursue welfare regulation as a means to that end as part of a diverse approach to the problem.

As this excerpt makes clear, the debate is more about strategy than philosophy, and asks those interested in advancing the cause of law reform

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6 Indeed, many proponents of animal welfare concede quite readily that the propositions they put forth have aspects of moral inconsistency, in that they recognize a type of exploitation that conflicts with the primary rationale for imposing welfare laws in the first place. They accept this compromise on the ground that it is the only practical way of proceeding. See e.g. David Favre, Integrating Animal Interests into Our Legal System, 10 Animal L. 87, 94 (2004) (positing generally that building up the legal system "will not be obtained by revolution, but by the evolution of the status of animals"); Alexander Gillespie, Animals, Ethics and International Law, in Animal Law in Australasia 333, 333 (Peter Sasiloff & Steven White eds., Fedn. Press 2009) (stating that necessity
on behalf of animals to consider the best way of achieving that goal. On the
surface, the question seems highly relevant. Despite the existence of animal
protection laws in virtually every jurisdiction and a constant parade of
initiatives designed to reform them, humans continue to impose suffering and
death upon non-human animals in an ever-increasing spiral. The suggestion
that animals today are effectively protected from even extreme types of
"unnecessary" suffering—let alone death—is difficult to support in any
jurisdiction. Advocates working in this area are well aware of the loopholes and
exceptions that plague the law and the political forces that condemn
animals to continued exploitation. Questions about how we should proceed
seem both pertinent and desirable.

Nonetheless, many advocates seem tired of this discussion and
disinclined to address the animal rights debate at all. Indeed, they believe that
spending time pondering the best way forward is wasteful and counter-
productive. As Jonathan Lovvorn has written:

I do not doubt that it is far easier to spend one's time theorizing about a society
without animal exploitation—or commiserating about the abhorrent state of the
nation's animal laws—than doing the hard un-glamorous work of protecting
animals. But as we pine away for a court-imposed silver bullet for animals, or a
paradigm shift in a legal system that has classified animals as property for
centuries, billions of animals are enduring suffering that we have the power, and
the societal support, to prevent today.

The bottom line is that we need foot soldiers, not philosophers, and the handful
of scholars who are already devoted to exploring what a future world with
animal rights might look like are more than sufficient for that particular task. For
too many of the rest of us are trapped in their seductive web of animal rights
theory—unable, or perhaps unwilling, to roll up our sleeves and set to work

rather than philosophical purity should be the approach).

7 Katrina Scharman, Farm Animals and Welfare Law: An Unhappy Union in Animal Law in
Australia, supra n. 6, at 35-40 (outlining an increase in the number of animals farmed and a
growth in suffering resulting from industrial methods of farming); Marianna Sullivan & David J.
Wollson, What's Good for the Goose... The Israeli Supreme Court, Pole Grass and the Future of
Farmed Animals in the United States, 70 L & Contemp. Probs. 139, 139-60 (2007) (outlining
difficulties of reforming the modern industrial farming of animals).

8 See generally Leslie Bisgould, Animals and the Law 279-80 (Irwin Law 2011) (summarizing
Canada's anti-cruelty law as being unable to protect interests animals have in living their own
lives and in not being made to suffer for human purposes); Graeme McQueen, Animal Law:
7, 2012) (describing an animal welfare legal regime manipulated to advance producer self-
interests; animal suffering and cruelty on enormous scale permitted); Peter Sankoff, Five Years of
the "New" Animal Welfare Regime: Lessons Learned from New Zealand's Decision to Modernize its
legislative framework to protect animals).

9 See Wayne Pacelle, Law and Public Policy: Future Directions for the Animal Protection
Movement, 11 Animal L. 1, 1-3 (2005) (describing exploitation of animals such as puppy mills and
canned hunting ranches).
helping animals the hard way.\textsuperscript{10}

I certainly understand Lovvorn’s position, as well as his apparent frustration. As the example I provided illustrates, the debate can be divisive and polarizing, and it often impedes action on measures that may provide some benefit to animals. Nonetheless, as someone who has at least occasionally “rolled up his sleeves” and set to work on animal issues,\textsuperscript{11} I find it difficult to dismiss the question so easily.\textsuperscript{12} As desirable as it might be to focus exclusively on improvements to animal treatment that are immediately obtainable, I share Francione’s view that resources are limited\textsuperscript{13} and believe it is worth taking the time—at least occasionally—to think about the types of advances that will be the most beneficial strategically. I am often asked by those new to the movement about what actions they can take that would be the most useful and, aside from the obvious suggestion to change their own eating habits, I wish to be able to answer.

With this Article, I hope to contribute to the animal rights debate by considering whether its binary nature has overstated the extent to which one must accept one side or another to advance the interests of animals. As the title of this Article suggests, I believe that some laws designed to protect animals from unnecessary suffering—the legal framework that provides the governing paradigm for the regulation of the interests of animals in modern times—can simultaneously fail and succeed. Although abolitionists are correct to point out that most protection law fails to make a meaningful difference to the lives of animals today, they may be undervaluing the extent to which certain types of laws provide room for the public dialogue that makes more ambitious reform possible in the long-term. One key to advancing the interests of animals more quickly, as I see it, is to begin to understand what types of laws have this potential.

I proceed by first introducing certain theoretical constructs that promote the idea of facilitating social change through public dialogue, and the idea that discourse surrounding legal issues can have important long-term


\textsuperscript{11}From 2001 to 2005, while teaching at the University of Auckland, I was the Co-Director of the Animal Rights Legal Advocacy Network in New Zealand and, amongst other initiatives, worked directly on legislative reform involving battery hens, abused dogs, pigs, and research animals through the consultation process that I discuss in more detail later in this Article. In addition to helping directly with the training of prosecutors engaged in animal issues, and providing free advice on prosecuted cases, I also participated directly in two legal challenges. Since returning to Canada, I have worked on one abortive prosecution involving a factory farm.

\textsuperscript{12}I must of course acknowledge the fact that, as Steven Wise points out, I may simply be "[u]nqualified to devise the tactics and strategies necessary to implement a broad social and legal reform program over a period of decades." Wise, supra n. 4, at 54.

\textsuperscript{13}See Francione & Garner, supra n. 5, at 222 (noting that "resources allocated to welfare reform are resources that are not directed to abolitionist or vegan education… [and] pursuing both approaches comes at a cost").
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ramifications for such reform. I then build on this idea by considering what
types of animal protection laws are capable of creating public dialogue about
the way in which animals are treated. In part, I undertake this goal by
comparing the laws of the two jurisdictions with which I am most familiar:
Canada and New Zealand.\footnote{Though I am a Canadian citizen currently working and researching in Canada, I spent ten
years as a Professor at the University of Auckland, New Zealand.} This analysis will reveal that Canada’s legal
regime produces little in the way of sustained discourse around animal issues,
while New Zealand’s framework of laws, in contrast, creates a rich and
persistent discussion. While I believe neither country does enough to protect
the intrinsic interests of animals, I ultimately conclude that New Zealand is
much better suited to evolve in a positive direction, as the country’s existing
system of animal protection law is encouraging the public to engage in
meaningful discussion on questions relating to the “correct” treatment of
animals over the long term.

II. REFOCUSING THE DEBATE

For many people, the most frustrating aspects of the animal rights
debate are its indeterminate nature and the fact that the argument at its core
is virtually impossible to resolve with any conviction. Both sides are able to
point to the weaknesses of the other’s platform, and to do so with merit.
Francione is at his most convincing when he attacks the failures of
“welfarists,”\footnote{Rob Johnson, Defining a Movement,
“welfarist” as a person who believes that “we should be able to use other animals for our own
benefit as long as we treat them “humanely””).} noting that they have achieved little in the way of effecting
meaningful change for animals.\footnote{See Francione & Garner, supra n. 5, at 26-27 (arguing that “humane” torture is still torture).} He can justifiably point to the current
conditions in which animals are kept and show how most welfare initiatives
fail to account for animal needs.\footnote{Id. at 2, 5 (stating that animals are still being killed and eaten at an astounding rate and
that the welfarist position continues to treat animals as though they are morally inferior).} Moreover, Francione can make a good case
for the proposition that “we are using more [animals] in horrific ways than at
any time in human history.”\footnote{Id. at 49. The claim is certainly definable. Use of animals for food and related purposes is
increasing. See World Health Organisation [WHO], Global and Regional Consumption Patterns and
Apr. 7, 2012) (projecting that “annual meat production [will] increase from 218 million tonnes in
1997-1999 to 375 million tonnes by 2030,” with similar rises in milk and egg production). Moreover, much of this new production is occurring on factory farms, where suffering is greatest. See Worldwatch Institute, Global Meat Production and Consumption Continue to Rise,

But those demanding slow, progressive change and interaction with
governments and animal use industries also have a point to make, and it is
one based primarily on pragmatism. As Garner notes in the Animal Rights
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Debate:

I honestly do not think we have much of a choice but to accept the need to campaign for more effective animal welfare. I would regard as unlikely the assumption that "many people" will give up eating animals if they are made aware of the horrendous suffering they endure.\textsuperscript{19}

It is equally difficult to argue with Garner on this point, and my personal experience—as well as that of many animal advocates—squares with the reality Garner mentions.\textsuperscript{20} As much as we may wish for attitudes surrounding animal use to change, there is little indication significant headway is being made towards abolition.\textsuperscript{21} Nor is there historical evidence to support the idea that moral arguments alone are likely to prompt this sort of paradigm shift in the public consciousness.\textsuperscript{22} Globally, consumption of animal products is increasing\textsuperscript{23}—as if the current numbers are not staggering enough—and the amounts of money these industries generate make it difficult to believe that drastic change is coming any time soon.\textsuperscript{24} Although there has been a rise in vegetarian consumption in recent years,\textsuperscript{25} in absolute terms, the movement is progressing at a glacial pace.

It is fair to say that at present neither the "abolitionist" nor the "wellfarist" side can claim a decisive victory in this debate. Effectively, proponents of both viewpoints are most convincing in showing why the other's argument cannot lead to meaningful change for animals, and this stalemate may be responsible for the frustration many feel with the discussion. For those looking for the "best" way forward, interaction on the terms proposed above seems to lead mostly to paralysis and stagnation. Neither path seems to provide an unassailable answer regarding what we should do now.

\textsuperscript{19} Francione & Garner, supra n. 5, at 223–24.
\textsuperscript{21} Clearly, however, there is some progress. Recent surveys surrounding vegetarian and vegan preferences in North America suggest these lifestyles are increasing in popularity. Vegetarian Times, Vegetarianism in America, http://www.vegetariantimes.com/features/archive_of_editorial/667 (accessed Apr. 7, 2012) [hereinafter Vegetarian Times] (describing a 2008 study that shows 3.2% of Americans are vegetarian, while 0.9% are vegan). While I do not wish to demean this progress, it would be folly to suggest vegetarians—let alone vegans—are likely to constitute a majority of the population within the next decade (or even century, barring some drastic event).
\textsuperscript{23} See WHO, supra n. 18 (projecting that "annual meat production [will] increase from 210 million tonnes in 1997–1999 to 376 million tonnes by 2030," with similar rises in milk and egg production).
\textsuperscript{24} See Siobhan O'Sullivan, Animals, Equality and Democracy 55 (Palgrave MacMillan 2011) (discussing the power of the agricultural lobby); see also Eric Schlosser, Fast Food Nation 267 (Houghton Mifflin Co. 2001) (stating that lobbyists make it difficult to change food-based regulations).
\textsuperscript{25} Vegetarian Times, supra n. 21, at ¶ 7.
Perhaps one way of proceeding is to change the nature of the conversation and focus on something upon which both sides agree: that it will take time to achieve significant change in the way animals are treated. Switching focus to a longer frame of reference offers some promise, for it opens the door to different ways of assessing the success of particular endeavors. If everyone agrees that time is required to shift the public consciousness towards change, it may be productive to think about concrete ways in which animal welfare legislation can advance this long-term objective.

This sort of progress is beginning to occur. As the animal protection movement continues to evolve, greater attention is being paid to the way in which particular gains might be achieved, and to what role the law can play in creating the social conditions necessary for change to take place. In a recent article, Professor Jerry Anderson conducted this sort of analysis by comparing the animal welfare movement with the historical fight against child labor. Anderson’s conclusion was that “it is possible to achieve protection for powerless groups, even when such protection is detrimental to society’s economic self-interest,” even though this sort of change does not happen

16 Francione would undoubtedly reply by asserting, as he has on numerous occasions, that the animal welfare movement has already had between 160 and 200 years to establish its position and yet has failed to make any real headway. Gary Francione, Introduction to Animal Rights: Your Child or the Dog 181 (Temple U. Press 2000) (noting that although animal welfare laws have been popular for over 100 years, more animals are being treated cruelly than ever before); see Gary Francione, Animals—Property or Persons? in Animal Rights: Current Debates and New Directions 113, 116 (Case Sunstein & Martha Nussbaum eds., Oxford U. Press 2004) (stating that the fact that animal interests have become increasingly commodified despite 200 years of animal welfare law is proof of failure of such law); Francione & Garner, supra n. 5, at 221–22 (noting that despite 200 years of animal welfare, there has been no practical change to animal status). In my view, the 200-year figure is overstated. The early animal protection reforms of the 1800s were tepid and applied exclusively to malicious acts of cruelty against companion or working animals. Changes to a more “modern” system of animal law that recognizes the importance of safeguarding animal interests in the industrial context Francione correctly decryes has, at best, a fifty-year history. See Mike Radford, Animal Welfare Law in Britain: Regulation and Responsibility 262 (Oxford U. Press 2001) (noting that animal welfare did not emerge as a factor influencing public policy in the United Kingdom until the latter part of the 1960s). In most jurisdictions, a case can be made that acceptance of the idea that the welfare of animals must be protected and enhanced is of even more recent vintage. Sankoff, supra n. 8, at 13 (noting that New Zealand law changed philosophy in 2000 to a modern animal welfare approach); see Stephen K. Otto, State Animal Protection Laws—The Next Generation, 11 Animal L. 131, 132–33 (2005) (describing a tremendous surge in animal protection laws in the U.S. since 1993); Amanda Whitford, Advancing Animal Welfare Laws in Hong Kong, 2 Austl. Animal Protec. L. J. 65, 65–68 (2009) (documenting the need for change to a welfare-oriented approach in Hong Kong and the government’s willingness to institute reform in 2007).

In this, I mean something more than the abstract benefit that is often cited by welfare advocates: that every little gain for animals has the ability to promote long-term change through public exposure.

20 See generally Andrew Bartlett, Animal Welfare in a Federal System: A Federal Politician’s Perspective, in Animal Law in Australasia, supra n. 6, at 376 (addressing the political and legal landscape); Elizabeth Ellis, Collaborative Advocacy: Framing the Interests of Animals as a Social Justice Concern, in Animal Law in Australasia, supra, n. 6, at 354 (addressing the political and legal landscape).

21 Anderson, supra n. 22, at 1.
theorists, who has published over twenty-five books touching on, among other topics, political theory, communicative rationality, epistemology, and law. Habermas's work is highly complex, and a comprehensive explanation of his theories on law and democracy is impossible here, as his ideas on this topic span several books. As a result, my discussion of his work is, of necessity, going to be general. Thus, for the purposes of simplicity, I will draw more upon summaries of Habermas's theories than from the original texts, as the latter are fairly dense and make it difficult to extract general points concisely.

Central themes in Habermas's work include the importance of ensuring that individuals have a role in the governance of modern democratic society and a belief that "a stronger form of democracy is a genuine and achievable goal, even in complex and pluralist societies." According to Habermas, a key element in obtaining the "emancipation" of free individuals who might otherwise become victims of governance by institution is a vision of "deliberative democracy." Put another way, "the political system... must not become an independent system, operating solely according to its own criteria of efficiency and unresponsive to citizen's concerns."

Habermas applies the same approach to his ideal vision of the way in which law is enacted, concentrating on the procedures necessary to give law a form of moral authority. In his view, the law requires constant legitimacy gained through a complex set of discourses entrenched in the political arena.

36 His influence is undeniable. See e.g. Michel Rosenfeld, Book Review: Law as Discourse: Bridging the Gap between Democracy and Rights, 108 Harv. L. Rev. 1163, 1164 (1995) [referring to one of Habermas's major works as "a monumental achievement... that provides a systematic account of major issues in contemporary jurisprudence, constitutional theory, political and social philosophy, and the theory of democracy"].


38 Obviously, in an article of this nature, it is not possible to prove the truth or discuss the merits of Habermas's theories. However, plenty of such critique exists elsewhere. See e.g. Hugh Baxter, Habermas's Discourse Theory of Law and Democracy, 50 Buff. L. Rev. 205 (2002); Rosenfield, supra n. 34 Symposium, Exploring Habermas on Law and Democracy, 76 Den. U. L. Rev. 927 (1999).


40 See Habermas, Between Facts and Norms, supra n. 37, at 451 ("A moral dimension first appears in the autonomy that enfranchised citizens as co-legislators must exercise in common so that everyone can equally enjoy individual liberties."); see also Bo Carlsson, Jürgen Habermas and the Sociology of Law, in An Introduction to Law and Social Theory 77, 79 (Reza Banakier & Max Travers eds., Hart 2002) [stating that the cornerstone of Habermas's social theory is a struggle for emancipation from structural constraints].

41 William Rehg, Translator's Introduction, in Habermas, Between Facts and Norms, supra n. 37, at xxiii.

42 See Habermas, Between Facts and Norms, supra n. 37, at 104-09 (discussing the relation between law and morality).

43 See Rehg, supra n. 41, at xix (stating that "Habermas proposed a more complex set of discourses that underlie legitimate lawmaking").
According to Habermas, the process by which societies make laws is as important as any results achieved. As Carlson has written:

To cope with changing structures... and to deal with ordinary people's experience, it is necessary for Habermas's communicative ethics to set up a procedure which will enhance the mutual understanding and learning process. Law should install or correct the channels of communication in a self-regulated democratic process of decision-making. On the other hand, when law is employed not as a mechanism to enhance mutual understanding but as an instrumental steering, society suffers from systematically distorted communication and becomes colonized by system.

Thus, in today's society, the real evil is law that operates by rote and is no longer subject to review or dialogue through the democratic process. Laws of this sort amount to a "colonization by system," in which the individual becomes enslaved to a process beyond his or her control, without the possibility of contribution or reform. Ideally, laws should be enacted in a manner that conforms to an active conception of the democratic process, and while voting on every law would be impractical, the ordinary citizen should be guaranteed an ability to participate through a discursive process of legislative decision making. In Habermas's own words, for a true discourse in law making to exist:

The desired political rights must guarantee participation in all deliberative and decisional processes relevant to legislation and must do so in a way that provides each person with equal chances to exercise the communicative freedom to take a position on criticizable validity claims.

Vibrant communication surrounding the process of legislating is thus critical to an effective rule of law. Formally institutionalized deliberation and decision making must be open to input from informal public spheres. Consequently, Habermas's model places considerable normative responsibility for the democratic process on those public fora, informal associations, and social movements in which citizens can effectively voice concerns. For the public sphere to fulfill its democratic function, there must be: channels of communication that link the public sphere to a robust civil society in which citizens first perceive and identify social issues; a broad range of informal associations; and agenda-setting avenues that allow broader social concerns to receive formal consideration within the political system.

Discourse of this sort does more than ensure that lawmaking is reflective

44 See Habermas, Between Facts and Norms, supra n. 37, at 296-97 (describing the importance behind the discourse theory of ideal procedure for deliberation and decision making).
45 Carlson, supra n. 40, at 83-84.
46 Id at 48.
47 See Habermas, Between Facts and Norms, supra n. 37, at 437 (noting that "the discourse theory of law conceives of constitutional democracy as institutionalizing—by way of legitimate law... the procedures and communicative presuppositions for a discursive opinion... that in turn makes possible legitimate lawmaking").
48 Id at 127.
49 Reh. supra n. 41, at xxxi–xxxii.
of an appropriate standard of modern democracy. Increasingly, scholars are suggesting that Habermas's approach is also a useful way of ensuring that laws are both effective and well informed by policy.\textsuperscript{50} There are two main reasons for this suggestion. First, allowing the public to participate in an ongoing process of law making is conductive to the way in which social norms tend to evolve\textsuperscript{51} and ensures that the results have a higher degree of legitimacy.\textsuperscript{52} Strand, who likens the process of long-term law reform and the communication between governments and citizens to a type of ongoing "legal story," describes the circular nature of law-making as follows:

People's actual experiences provide the basis for the articulated legal stories that mold into the told legal story…. If the community accepts the legal story, people internalize its lessons and act accordingly; in this case, a social norm grows along with and reinforces the legal story. If, however, the community does not accept the legal story, adjustments occur to bring word and deed into alignment.\textsuperscript{53}

She goes on to note how important appropriate vehicles of discourse are to this type of legal growth:

All the individuals in the society are responsible for the content of law—through the collaborative emergence of frames and laws and through the eventual emergence of norms and roles…. Recognizing this leads to a heightened awareness of the importance of providing avenues of communication and enactment for everyone.\textsuperscript{54}

In effect, the concept of deliberative democracy draws upon the insight that legitimate laws reflect the general united will of the people but asserts that "laws can be understood as reflective of that will when those laws arise from a democratic process of public reasoning—that is, from deliberation."\textsuperscript{55}

\textsuperscript{50} See e.g. Alice Woolley, \textit{Legitimizing Public Policy}, 58 U. Toronto L. J. 153, 167–68 (2008) (discussing Habermas's deliberative democracy approach, noting that when such an approach is executed, the accepted laws are legitimate, and arguing that "[g]round and well informed public policy will arise only where policy decisions follow from a process of public deliberation"); Rehg, \textit{supra n. 41}, at ix-xi (discussing Habermas's deliberative democracy approach regarding the tension between "social reality" and a "claim of reason" in modern law).

\textsuperscript{51} That said, the government has a role to play in shaping the social meaning that forms the basis of the norm" and attempting to guide a growing consensus. Hope M. Babcock, \textit{Assuming Personal Responsibility for Improving the Environment: Moving Toward a New Environmental Norm}, 33 Harv. Envtl. L. Rev. 117, 155 (2009).

\textsuperscript{52} Woolley, \textit{supra n. 50}, at 167.

\textsuperscript{53} Strand, \textit{supra n. 35}, at 615; see John Morrison, \textit{How to Change Things with Rules}, in Law Society and Change 5, 6 (Stephen Livingstone & John Morrison eds., Dartmouth Publ. 1990) ("Law can tinker with the housekeeping of the legal system… but if the final point of impact of such change is within the legal system itself this does not count. Social change through law refers to change, originating from either outside the legal system or, more rarely, from within it, which moves through the legal system to make an impact outside it.").

\textsuperscript{54} Strand, \textit{supra n. 35}, at 627.

\textsuperscript{55} Jürgen Habermas, \textit{Popular Sovereignty as Procedure}, in \textit{Deliberative Democracy: Essays on Reason and Politics} 33, 48 (James Bohman & William Rehg eds., MIT Press 1997) ("[T]he affairs of society, a unity of aims is a necessity. The majority production of a unified will is compatible with the 'principle of the equal validity of the personal will of each....'"); Woolley,
As Woolley puts it:

Theoretical models of deliberative democracy assert the necessity for, and the importance of, determining the public will through a discussion in which participants identify a consensus view on legitimate reasons and on the state action that follows from those reasons. . . . Deliberation may be a source of democratic legitimacy. . . . But it is also, and perhaps primarily, the proper democratic process because it will, if designed to encourage critical thinking, reduce social pressure and enhance information sharing, and thus lead to better decisions.56

In short, these theorists suggest that public discourse is an essential aspect of encouraging democratic change in the law and equally important in letting the law develop in a way that reflects a deeper societal consensus. A static law permits little dialogue, whereas a vibrant legal system possesses the intrinsic ability to evolve over time and be accepted as part of the wider social ethic through public discussion and debate.

My personal experience with animal welfare law suggests that these theorists may well be correct. In a nutshell, my hypothesis is that animal welfare laws that encourage discourse surrounding animal use and contain opportunities for public consultation are more likely to provide long-term benefits than laws that create fragmented discourse or obscure it altogether. To illustrate what I mean, I propose to examine the animal welfare models of two legal regimes: Canada and New Zealand.

A. A Model for Silence and Fragmented Discourse: Canadian Animal Protection Legislation

Although Canada has a long-held reputation for being progressive on social issues, especially when compared to its neighbor to the south,57 the country is no haven for animals. In fact, judging from the criticism the country receives for both its approach to animal welfare generally58 and to specific issues of concern,59 one could argue that Canada’s animal protection

supra n. 50, at 166–67 (summarizing Jürgen Habermas’s ideas).

56 Woolley, supra n. 50, at 167, 169.


58 See Bisgould, supra n. 8, at 67–87 (criticizing Canada’s cruelty provisions); Elaine L. Hughes & Christiane Meyer, Animal Welfare Law in Canada and Europe, 6 Animal L. 23, 73 (2000) (noting a strong need to reform Canada’s laws); John Sorensen, About Canada: Animal Rights 40–58 (Fernwood Publ. 2010) (detailing Canada’s animal welfare laws and concluding that in the agricultural context the law disregards the animal’s interest almost entirely).

59 Perhaps the best known of these issues is the seal hunt. Canada has the world’s largest commercial sealing industry and is consistently under scrutiny for, among other things, the manner in which the seals are slaughtered. Some jurisdictions, including the European Union, have banned the import of seal products on grounds of the cruelty imposed. Canada has responded by threatening litigation through the World Trade Organization. See Sorensen, supra n. 58, at 85–88 (explaining how Canadian seal hunting is actually detrimental to the economy of
legislation is among the worst in the Western world. In Canada, the protection of animals falls largely to the federal government. Indeed, where farm animals are concerned, it is—with minor exceptions—only federal legislation that matters. For the purposes of this Article, given the extent to which it dominates the field in this area, I focus exclusively on the federal legislation.

It does not take very long to peruse Canada's federal animal protection laws. The provisions designed to prevent cruelty to animals can be found in the Criminal Code, the country's primary source of penal legislation. After a number of unsuccessful attempts at reform, it remains true that this legislation has not been thoroughly reviewed since the advent of modern animal rights philosophies, and, to put it charitably, the clauses are "horribly antiquated." In Part XI of the Code, which addresses forbidden acts against property, sections 445.1(a) and 446(1)(b) set out the primary protections for animals in captivity.

445.1(a) — Every one commits an offence who willfully causes or, being the owner, willfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird; ... 446(1)(b) — Every one commits an offence who being the owner or the person

Canada because of international opposition); Wagman & Lieberman, supra n. 3, at 96–97 (describing the manner in which seals are slaughtered, the banning of seal products, and the threat of Canadian litigation through the WTO).

Canada's federal system allocates responsibility for lawmaking between the federal and provincial or territorial governments. Most of Canada's provinces and territories have enacted their own pieces of animal welfare legislation which, on balance, are more animal-friendly than the federal legislation. See e.g. Wagman & Lieberman, supra n. 3, at 158–59 (noting that Ontario reforms provide "stiffer penalties," expanded coverage, and better sentencing options for judges). That said, as discussed below, these laws are directed almost exclusively towards companion animals.

Most provincial legislation avoids regulating agriculture through one of two mechanisms. Some provinces expressly restrict the application of the legislation to companion animals. See e.g. Companion Protection Act, R.S.P.E.I. 1988, c. C-14.1, ss. 1(2)–(4). The more common approach is to exclude scrutiny of agricultural practices altogether. See e.g. The Animal Care Act, C.C.S.M. 2010, c. A-84, ss. 2–3 [containing such a generalized exclusion], or in any situation where the practice is "reasonable and generally accepted." See e.g. Animal Protection Act, R.S.A. 2000 c. A-41, s. 2(2) (containing this narrow exclusion); Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c. O.36, s. 11.1(2) [containing this narrow exclusion]; see also David J. Wolfson, Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production, 2 Animal L. 123, 135–39 (1996) (arguing that the effect of such an exemption is to allow treatment that would otherwise be illegal, thus allowing cruelty to proliferate on the farm).


See Bignoul, supra n. 8, at 87–96 (detailing Canada's unsuccessful attempts at reform in the late 1990s).

Hughes & Meyer, supra n. 58, at 40–41.


These offenses are punishable by a maximum prison term of five years. Sections 444 to 447 contain a number of additional, very specific prohibitions involving animals that are almost never used. They include offenses such as baiting animals with poison, conducting or attending a cockfight, or being involved in competitions involving the shooting of captive birds. R.S.C. 1985, c. C-14, ss. 445.1, 446.
having the custody or control of a domestic animal or a bird... fails to provide suitable and adequate food, water, shelter and care for it.67

Although the Code is the most significant source of animal protection law in Canada, and the only statute that applies to all animals, the federal government has also assumed responsibility over a few aspects of the handling, transport, and slaughter of animals in two pieces of legislation governing food safety. For example, regulations enacted under the authority of the Health of Animals Act68 make it an offense to transport injured animals or transport or load animals in a manner likely to cause undue suffering.69 Other regulations passed pursuant to the Meat Inspection Act70 control aspects of the slaughter process71 and prohibit certain practices such as the use of electric prods to the genital or facial region of an animal.72

These provisions create an additional layer of regulation over certain aspects of the industrial use of animals, but they are limited in application. To begin with, they apply exclusively to particular practices and do not extend to cover the entirety of an animal's care.73 Moreover, the standards are vague, and judicial interpretations of the terminology are extremely rare. As Bigould has concluded, "[v]ery few cases [under these pieces of legislation] concern animal welfare issues, and of those that do, fines are low, amounting to the cost of doing business."74

The shortcomings of Canada's federal framework for animal protection have been well documented. In a 2000 article, Hughes and Meyer conducted a detailed examination of Canadian legislation and noted its many flaws, concluding that it is "overly narrow in scope, unduly technical to prosecute, and overly reliant on the subjective state of mind of the offender."75 Bigould cites three major problems with the federal legislation,76 concluding that

68 S.C. 1990, c. 21, ss. 5-50. One should not be fooled by the statute's title into thinking that this law augments animal welfare. A careful study of the legislation, even by looking at its long title—An Act respecting diseases and toxic substances that may affect animals or that may be transmitted by animals to persons, and respecting the protection of animals—reveals its primary purpose: preventing disease in animals that might be passed to humans through the food chain. Bigould, supra n. 8, at 174-75.
69 Health of Animals Regulations, C.R.C., c. 506, ss. 139-144, 152-59. The regulations also provide specific rules for certain types of transport, such as for sea carriers carrying livestock. See Bigould, supra n. 8, at 174-79 (noting regulations about conduct such as overcrowding or beating an animal that is being loaded or unloaded).
71 See id. at 62(1) (providing that no animal shall be handled in a manner that subjects the animal to avoidable distress or pain).
73 See id. (prohibiting specific practices such as use of electric prods on the face).
74 Bigould, supra n. 8, at 180.
75 Hughes & Meyer, supra n. 58, at 63; see also Manning & Sankoff, supra n. 65, at 1068-78 (arguing that Canada's provisions do not function well and that wording of the Code has proven highly problematic in practice).
76 Bigould, supra n. 8, at 71-87 (These problems are: (1) the provisions are rarely applied in the industrial context; (2) the underlying assumption that the crimes are never serious; and (3) the courts' approach to sentencing leaves animals in a vulnerable position.).
"crimes against animal property are minimized throughout the justice system, resulting in the withdrawal of charges, high acquittal rates, or weak sentences."

Nonetheless, from the perspective of providing avenues for public discourse, the problems mentioned above are hardly the law's most egregious defects. After looking closely at the governing legislation, it comes as no surprise that sustained debate about animal welfare standards rarely seems to resonate across the Canadian landscape. Although it is difficult to measure a negative of this sort, it is remarkable how rarely animal welfare concerns manage to occupy the media or generate wide interest. Since an attempt at federal reform collapsed prior to 2000, I have not seen any serious discussion in the media about the need for wide-scale change regarding animal treatment. Instead, questions are entirely issue-specific and driven by whatever event grabs the media's interest. For example, one day it is the needless killing of sled dogs in British Columbia. Months later, it is the misdeeds of a companion animal shelter in Montreal. No issue seems capable of generating enough traction to provoke a sustained discussion of legal standards. Moreover, questions involving agricultural animals—the vast majority of captive animals to endure pain and suffering—are virtually never raised. In my view, this lack of discourse stems, at least in part, from the current state of Canadian animal protection law.

The problem originates as much from the law's framework as from any of the specific flaws listed above. Canadian anti-cruelty law operates on the basis of a simple binary equation that has not changed for over 100 years. On the surface, anti-cruelty law separates matters into strict categories of "right"

77 Id. at 97.
81 David J. Wolfson & Mariann Sullivan, Paxes in the Hen House, Animals, Agribusiness and the Law: A Modern American Fable, in Animal Rights: Current Debates and New Directions 205, 206 (Case R. Sunstein & Martha C. Nussbaum, eds., Oxford U. Press 2004) ("From a statistician's point of view, farmed animals represent 98% of all animals (even including companion animals and animals in zoos and circuses) with whom humans interact.")
and "wrong," with few gray areas. Animal suffering is either "necessary" or "unnecessary," but the law provides very few clues regarding what constitutes cruelty in the abstract. In sum, anti-cruelty legislation amounts to an inflexible prohibition whereby necessary suffering is legal, whilst unnecessary suffering is illegal. In terms of legal discourse, the Code’s long-standing approach suggests that the matter of animal protection has been resolved.82

Behind the scenes, of course, what constitutes cruelty against animals is anything but resolved. In operation, the law is not black and white, but rather almost entirely gray—albeit a shade of gray that is rarely discussed in public. The law imposes a standard that notionally governs the treatment of all animals, but does so through an approach so vague that it fails to provide any guidance for meaningful public debate. For example, are battery hen cages cruel under Canada’s laws? What about using horses to drag calesses around the cobblestone streets of old Montreal, a practice currently being scrutinized?83

The difficulty is that answering these questions first requires unpacking several assumptions upon which the term "necessary" is measured, and establishing some common parameters. Do economic concerns trump the interests of animals? Which animals should be protected? Do animals truly suffer? Without any statutory guidance, resolving these issues is both difficult and time-consuming, and by the time these questions have been fully aired, the public has usually lost interest in the original issue. In terms of guiding any surrounding social discourse, the law is simultaneously too certain—"cruelty is wrong"—and too uncertain to be helpful.

Canada’s statutes are not the whole problem, of course. As any lawyer knows, vague statutory phrasing can become vital and discursive through judicial decision making.84 Nonetheless, there is little reason to believe that the judicial decisions emanating from Canada’s anti-cruelty standards are adding substantially to the discourse. To begin with, for dialogue to emanate from court decisions, it is useful to actually have cases—ideally at the appellate level, where the law can actually be discussed in some detail—

84 In contrast, consider Canada’s provisions on sexual assault. Over the past thirty years, Canadian courts have been involved in a vibrant discussion about the way in which the criminal law should address sexual violence. Judicial decisions from the Supreme Court of Canada, coupled with legislative intervention, have crafted a public dialogue about these issues that continues to resonate. See Janine Benedet & Isabel Grant, Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity and Misunderstood, 52 McGill L.J. 243, 259–60 (2007) [explaining the review and revision the Canadian Criminal Code has gone through in relation to sexual assault and the effects these revisions had on victims with disabilities]; Joanne Wright, Consent and Sexual Violence in Canadian Public Discourse: Reflections on Ewanchuk, 16 Can. J. of L. & Soc. 173, 201 (2001) (discussing Canada’s revolutionary reforms of sexual assault law and the dialogue responding to those reforms).
reviewing the standards that animate the law in question. It is here that Canada’s prosecution deficit—a feature consistently remarked upon by critics of the legislation—comes into play. Given how many different agencies are involved in the investigation and prosecution of cruelty cases, it is difficult to obtain precise numbers, but even a search of the reported case law indicates that very few prosecutions go forward in a given year.

Second, where prosecutions do occur, they do not involve the types of cases that are likely to start a discussion about the standards in which animals—and especially farm animals—are commonly kept. A number of reasons exist for this lack of discussion. First, complex cases that require a court to look deeply into the heart of the industrial agricultural framework and ask questions about how society should balance competing values are not the types of cases judicial bodies are well suited to delve into. As Strand has suggested: "traditional judicial decision-making does not do a good job of accommodating [the idea of complex causation].... [Other bodies] are in a [better] position to consider a complex and specific historical, factual and political landscape." 87

Moreover, as a practical matter, prosecutors have little interest in taking controversial cases forward. Bound by a mandate to act in the public interest and take only cases with a reasonable prospect of conviction,88 prosecutors commit the meager ration of time allotted for animal cases to fact scenarios they can win: cruelty involving the most egregious type of violence against animals imaginable. These include cases like R. v. Connors, in which a man pleaded guilty to beating a puppy to death,89 and R. v. Monroe, in which the defendant tortured two dogs over a prolonged period with heat, electricity, and blunt force.90

Without question, the offenders in those cases needed to be punished, but it is difficult to see how such prosecutions do much for animals in the long-term. Even in the unlikely event that media coverage brings cruelty prosecutions to the wider public, the resulting dialogue is likely to be of the same discussion of right and wrong that the legislation itself promotes. Thus,

85 Bisgould, supra n. 8, at 86-87; Hughes & Meyer, supra n. 58, at 76-77.
86 A Westlaw Canada search conducted by the author in February 2012 concentrating on cases decided in 2011 located only three reported cases nationwide that dealt with charges involving cruelty against animals; all at the Provincial Court level, Canada’s lowest trial jurisdiction. Obviously, there must be unreported decisions as well, but it is difficult to contend that the courts were stimulating intense discourse on animal protection standards in 2011.
87 Strand, supra n. 35, at 646.
88 See generally Ontario, Report of the Attorney General’s Advisory Committee on Charge Screening, Disclosure and Resolution Discusssions 52-55 (Queen’s Printer 1993); see also Steven Penney et al., Criminal Procedure in Canada 449-53 (Lextis Nexis 2011) (discussing Canadian prosecutorial discretion).
90 R. v. Monroe, 2010 ONCJ 226 at par. 21 (CanLII). In terms of stimulating discourse surrounding animal standards, there have probably been less than ten meaningful cases in Canada decided during the last sixty years. In writing my book on criminal law in 2008 Manning & Sankoff, supra n. 65, I located only three cases of note decided by appellate courts. The most recent, and probably the most important, decision on animal cruelty ever decided in Canada was released in 1978. R. v. Menard [1978] 43 CCC (2d) 458 (Que. C.A.).
a member of the public reading about these cases is likely to sit back and tut-tut about how some "nuts" are sadistic towards animals while feeling good that some vague progress against animal cruelty is being made. But coverage of these cases may actually inhibit the process of systemic, long-term reform. Those who judge Canada’s animal protection law on the basis of the cases that actually make it to court would undoubtedly assume that sadistic animal abusers were the main proponents of animal suffering. In effect, the law perpetuates the myth that malicious offenders are the problem, when, in fact, these persons impose only a tiny fraction of the suffering that animals across Canada endure.91

Laws that focus exclusively on this sort of conduct are unlikely to stimulate much in the way of public discourse. If a high-profile case achieves a conviction, little is gained, because public discussion is almost unanimously condemnatory of the offender. If the defendant obtains an acquittal, there is the possibility of some discourse, but even in this instance, discussion is likely to focus upon flaws in the legislation and become subsumed in wider questioning of the way by which offenders can escape punishment by exploiting technicalities in the criminal law. In either case, anti-cruelty prosecutions of this sort seem ineffective at creating consequential dialogue. What is there to talk about when a deranged offender decides to torture his animals for sadistic pleasure? Leaving aside the sadists, who is likely to argue that this sort of conduct does not deserve condemnation?

In summary, the operation of Canadian law provides little impetus for sustained public discourse on animal issues. To be clear, I am not suggesting that discourse surrounding animal issues does not happen in Canada. The horrific killings of sled dogs in British Columbia highlighted earlier is a good example of a situation where an event was so shocking to the public consciousness that it prompted discussion and, eventually, legal reform.92 Nonetheless, the question engaged by this Article is what the law can do to increase and improve societal discourse surrounding the suffering endured by animals, and it is in this regard that Canadian law must be regarded with suspicion.

B. A Model for Greater Discourse: The New Zealand Legislation

The weaknesses of the Canadian model become more apparent when compared with a framework that actually promotes discourse around animal issues. In this regard, notwithstanding its many functional shortcomings, New Zealand animal welfare legislation feels like a breath of fresh air. The suggestion here is not that the New Zealand legislation currently results in

91 See generally Babcock, supra n. 51, at 126 (proposing that laws can facilitate certain types of myth that impede the development of more sophisticated norms for regulating a problem).
outcomes that are better for animals than in Canada—although that seems to be the case, at least in some situations. Rather, as indicated earlier, my focus is on whether the law encourages the public to become engaged on questions of animal treatment and provides opportunities for these questions to become part of a national discussion on animal care.

In contrast to Canada's fragmented legislation, New Zealand has centralized all of its provisions on animal treatment within one statute: the Animal Welfare Act of 1999 (AWA). Parts of the legislation are extremely detailed, and the AWA enumerates more than forty distinct offenses. In addition to the basic cruelty offenses that mirror the Canadian legislation, New Zealand has followed the modern approach to welfare pioneered in the European Union. Thus, New Zealand has significantly expanded the range of obligations owed by owners to their animals, requiring them at all times to provide proper food and water, proper handling, adequate shelter, protection from and treatment of injury and disease, and an opportunity to display normal patterns of behavior. Moreover, the AWA specifically bans a range of distasteful practices.

Even at first glance, New Zealand's law has benefits in comparison to the Canadian system. Among other rules, the AWA provides for duties of care that apply to every animal in a person's charge and removes the need to prove "ill-intent" where a person harms an animal unnecessarily. Codes of Welfare relating to particular types of animal treatment are designed to provide specificity about desirable practices and drafted to ensure that animals receive what they need in accordance with "good practice and scientific knowledge."

The codes of welfare play a critical function within the AWA framework. Compliance with a relevant code amounts to a complete defense against any charge of failing to fulfill a duty of care or causing ill treatment to an animal. Thus, in practical terms, the codes are more important than the substantive provisions of the AWA. As long as a person complies with the dictates of a

93 Infra pt. III(9)(3) (New Zealand has made progress on two of the more controversial processes in industrial farming where Canada remains stalled, imposing bans on the use of sow stalls and traditional battery hen cages.).
94 See Radford, supra n. 26, at 261–66 (discussing background of the welfare approach developed in Europe).
96 One good example relates to surgical procedures that farmers often performed themselves. Under the AWA, most procedures now require the assistance of a qualified veterinarian. See id. at §§ 15–19.
97 See id. at §§ 4, 10 (imposing obligations to provide animals with food, water, shelter, opportunity to display normal patterns of behavior, physical handling that minimizes suffering, and protection from and rapid diagnosis of disease).
98 See id. at §§ 29, 30 (rendering the ill treatment of animals—causing unnecessary suffering—a strict liability offense); see also id. at §§ 28, 28A (defining aggravated versions of this offense for reckless and willful ill treatment causing serious harm or death, which merit increased penalties).
99 See id. at § 10 (imposing obligation to ensure animal needs are met in a way that complies with good practice and scientific knowledge).
particular code, it makes no difference whether that person has technically
committed an offense under the AWA, because the code effectively overrides
every section of the legislation.

Although the New Zealand law is unquestionably more detailed and
sophisticated than its Canadian counterpart, there is little evidence to
suggest that the situation on the ground for animals—and especially for
farmed animals—is markedly better. The enactment process surrounding the
codes of welfare is part of the reason for this lack of progress. In particular,
there are several hidden loopholes in the legislation that permit industrial
users to maintain traditional standards of husbandry, with the most
significant being created directly by the purpose section of the AWA. As I
noted in an earlier article:

In a clever twist of legislative drafting, the Act does not demand that the...
codes... adhere to the [obligations owed by owners to their animals]. Instead,
the standards enunciated in these codes must be the “minimum necessary to
ensure that the purposes of this Act will be met.” The key purpose of the Animal
Welfare Act 1999 is “to reform the law relating to the welfare of animals and the
prevention of their ill-treatment.” In other words, it is to prevent the infliction of
‘unreasonable’ or ‘unnecessary’ suffering.102

Given this structural formulation, it is understandable that the code-enactment
process is regarded by the government as a way to balance human and animal
needs.103

This is not my only criticism of the codes process. I have argued in the
past that the government is exceptionally conservative with its approach to
codes104 and that the process is replete with features that make significant
reform difficult to obtain.105 Looking at these flaws, I can understand why I

101 The sophisticated nature of the New Zealand framework, while not a
conclusive point, is a
strong indicator of the system’s confidence with Habermas’s suggestion that law aims to produce
a “communicatively achieved understanding” rather than a “normatively ascribed agreement,”
because a system “becomes more rational as its complexity increases, that is, as its range of
adaptation to environmental changes is enhanced.” Stephen K. White, The Recent Work of
102 “That article first explained that the definition of ‘ill-treatment’ in New Zealand is suffering
imposed on an animal that is unreasonable or unnecessary, with those terms defined—as in all
cruelty statutes—by measuring the animal’s need to be protected from harm against the human’s
need to impose it. Peter Sanoff, The Welfare Paradigm: Making the World a Better Place for
Animals?, in Animal Law in Australasia, supra n. 6, at 31 (hereinafter Sanoff, The Welfare
Paradigm).
103 M.
104 As I noted in 2005, “the [code process] is simply a method of refining accepted means of
animal production to ensure that [the government] balance economic needs with some forms of
restraint.... The [code] process does not attempt to identify and eliminate ranges of practice that
are objectionable or even unnecessary. As its best, it is an attempt to refine and excuse certain of
the worst parts of existing practices.” Sanoff, supra n. 8, at 24.
105 Among the most serious obstacles is the fact that most codes are drafted by industry and
enacted by individuals with ties to agricultural concerns. In addition, the body responsible for
developing codes has created its own set of guidelines that seem likely to entrench the status quo
and inhibit aggressive reform. Arinza Dale, Animal Welfare Codes and Regulations—The Devil in
Disguise!, in Animal Law in Australasia, supra n. 6, at 181–96.
concluded in 2009 that the codes were more of a "minor upgrade than a revolutionary step forward" for animals.106

In retrospect, I believe I may have been too harsh on the code process, probably because my focus was on the law's effectiveness in improving standards for animals, a point on which the jury remains out. Nonetheless, I have started to see some previously unrecognized value from the New Zealand framework. Although that framework is currently failing as a means of providing suitable short-term outcomes for animals, the process of enacting codes is an invaluable mechanism for promoting societal discourse on issues relating to the proper treatment of animals, which are normally glossed over or ignored. A careful examination of the New Zealand legislation reveals at least four features that are useful in stimulating positive long-term dialogue on animal issues. I examine these features as a means of showing how societal discourse can be effectively augmented—perhaps even unintentionally—through certain types of legislative action.

1. Consistent and Predictable Review

Occasionally, people ask me to identify the "best" feature of the AWA, the one I believe should be a part of any well-designed animal welfare law. While my answer has varied over the years, my current response is steadfast. The most important clause in the AWA is buried deep in the middle of the statute and provides no protection that an animal advocate would immediately identify as being significant. Still, I have great admiration for section 78 of the AWA, which provides that "the National Animal Welfare Advisory Committee [NAWAC or the Committee]107... must at intervals of not more than [ten] years, review every code of welfare for the time being in force."

In terms of discourse, it would be difficult to draft a more useful legislative provision. The requirement creates at least four major benefits. First, section 78 puts discussion regarding the needs of animals on the legislative agenda in perpetuity. In contrast to the Canadian position, where Parliamentary discussion regarding standards for animal care is left to the whim of legislators, New Zealand's governing statute mandates a review of every code regulating the treatment of animals at least once each decade. The legislature may extend the time period, but not indefinitely, and only where justified.108 It means that so long as New Zealanders are farming sheep, pigs, and chickens, there will be a national discussion about how that farming should take place. We may not always like the results, but I find it hard to see

106 Sankoff, The Welfare Paradigm, supra n. 6, at 32.
107 Animal Welfare Act 1999, at § 78. The NAWAC is a quasi-independent body composed of experts on animal care who provide recommended codes of welfare to the Minister of Agriculture and Forestry, who has the legal power to enact them. In practice, the Minister almost always adopts the recommendations. Bale, supra n. 6, at 176–79.
108 Section 78(4) of the AWA, in conjunction with section 79A, permits the government—on the recommendation of the Minister of Agriculture—to extend the time available for review where necessary. This section was added in 2004, when it became apparent that reviewing Codes of Welfare was going to be a more complicated and lengthy process than originally anticipated. For further discussion this point, see Sankoff, supra n. 6, at 17–18.
how one could be unhappy about the fact that such discussion is going on. I would direct such a person towards Canada, where the silence on animal related issues is deafening, and simply getting a discussion started amongst government officials, who seem to think that there is “nothing to see here,” is a major endeavor.

The ongoing discussion leads to a second benefit. Ten years may seem like a long time between reviews, but not in the context of the number of animal practices being regulated by codes of welfare. There are currently fourteen codes of welfare in place,\(^\text{109}\) with plans for the enactment of at least six more over the next five to ten years.\(^\text{110}\) Effectively, this means that the NAWAC will be revising two codes a year, every year, indefinitely. Not only are animal standards going to be discussed perpetually, but the sheer quantity of codes being revamped means that animal law is \textit{always} on the agenda, and, in relative terms, the next chance to reform a practice is just around the corner.

What this means is that an opportunity to challenge a given practice or to end a particular type of suffering is never limited to one special occasion when legislators show a willingness to engage on an issue. In effect, the creation of a permanent system of review means that legislators have given up their ability to set the agenda and dictate when animal issues will be considered—a power delay strategy common in many jurisdictions—in favor of a mandatory reform process. Consider the example of keeping layer hens in battery cages, a farming technique New Zealand animal activists have been fighting for decades.\(^\text{111}\) In 2004, the NAWAC released its recommended code of welfare on battery cages, somehow reaching the conclusion that battery hen cages complied with the requirements of the AWA.\(^\text{112}\) The Committee used some rather tortured logic to get there:

\begin{quote}
NAWAC is unable to recommend replacement of current cage systems with alternatives systems until such time as it can be shown that, in comparison to
\end{quote}


\(^\text{109}\) Currently, these areas are governed by voluntary codes of “recommendations and minimum standards” that have no legal effect. The Ministry has indicated these will be replaced by formal codes of welfare over the next five to ten years.\(^\text{110}\)

\(^\text{111}\) Save Animals From Exploitation (SAFE) has been demanding an end to battery cages since 1987. SAFE, \textit{Battery Hens}, http://www.safe.org.nz/Campaigns/Battery-hens/ (accessed Apr. 7, 2012). SAFE is one of New Zealand’s largest and most effective animal advocacy groups. SAFE, \textit{About Safe}, http://safe.org.nz/About-Safe/ (accessed Apr. 7, 2012) (“With a history spanning more than seven decades of campaigning on behalf of animals, SAFE continues to be at the forefront of exposing animal abuse within New Zealand and around the globe... [and] has over 10,000 members and supporters.”).

current cage systems, alternative systems, in the context of supplying New Zealand's ongoing egg consumption needs, would consistently provide better welfare outcomes for birds and be economically viable.113

The reasoning was justly ridiculed, because it suggested that economic concerns are decisive of animal welfare questions.114 Nonetheless, it was at least a conclusion forced to come up with a reason for keeping existing cages, the NAWAC utilized logic that jeopardized the very credibility of the AWA. In the process, the NAWAC unintentionally augmented the national dialogue on battery cages,115 and it was not long, in relative terms, before battery cages were back up for review.

Today, as I describe in more detail below, the welfare of layer hens is once again being discussed. With the NAWAC's 2004 reasoning now publicly discredited, it seems inevitable that at least the use of traditional battery hen cages will be abolished.116 What the process demonstrates is that a temporary failure, unsettling as it is for campaigners and damaging as it is for the animals, can sometimes be successful in commencing a public dialogue about a practice that would otherwise be ignored. Moreover, the requirement that the government publicly state its position sets the stage for future challenges and precludes any attempt to shift justifications for keeping a troubling practice in place. At the very least, advocates of a more animal-friendly approach know what to target—whether it be custom, flawed science, or economic arguments—and can plan accordingly.

The consistency of the code process leads to an unintended third benefit: it allows for a focused dialogue. One of the greatest challenges for animal activists lies in the fact that so many different kinds of animals are being treated badly in so many different ways. At times, the challenge of explaining the myriad of improper practices to the public becomes overwhelming, leading to a form of information fatigue. Ironically, the code review process has proved to be a boon in organizing the animal advocacy movement and

113 Ministry of Agric. & Forestry, Layer Hens, supra n. 116, at 19; NAWAC, Layer Hens, supra n. 116, at 10.
114 See e.g. Dale, supra n. 6, at 189 (arguing that the NAWAC was taking an overly conservative approach in implementing beneficial welfare standards where economic productivity would be impacted); Michael Morris, The Ethics and Politics of the Caged Layer Hen Debate in New Zealand, 19 J. of Env. Ethics 495, 504 (2006) (arguing that threats by egg producers may have caused the NAWAC to ignore the law) (available at: http://www.springerlink.com/content/hb6681t15562214h/ (accessed Apr. 7, 2012)).
115 This dialogue was furthered by various challenges to NAWAC's practice. See infra pt. III(B)(2).
letting the public come to grips with animal issues in bite-sized pieces. Advocates can now plan campaigns around the codes. They can also target particular practices they wish to abolish, such as the use of sow stalls for pigs, a practice that is widespread in New Zealand. In 2009, an animal advocacy organization landed a media coup when Mike King, a former pig industry spokesperson and popular media personality, agreed to visit an intensive pig farming operation in the dead of night, unannounced. Not surprisingly, King was horrified by what he saw. The visit was recorded by one of New Zealand’s most popular news programs, and it generated publicity that persisted for several weeks.

The public pressure stemming from the broadcast eventually coalesced around the Animal Welfare (Pigs) Code of Welfare that sanctioned the horrifying conditions New Zealanders had watched with disgust on television. Indeed, just three days after the television program first aired, the focus of the story—which the pig industry and the Minister had tried, unsuccessfully, to turn towards the more conventional narrative of this having been the fault of one farmer “gone bad”—was steered to a legal process: a review of the pig code that was suddenly "the top priority" for the NAWAC.

Two months later, after an intense public discourse surrounding the

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121 The amount of media coverage generated from this event, by New Zealand standards, was staggering. For a list of stories published on this issue, see SAFE, Pigs in the Media, http://www.lovepigs.org.nz/latest-news/mike-king-story/media/ (accessed Apr. 7, 2012) (listing stories from May 18, 2009 through December 19, 2010).

122 The Ministry first took the unusual step of attacking the messenger, suggesting that SAFE “seems more intent on playing publicity games than assisting the animals on this farm.” NZ Herald Staff, Carter Slams SAFE as MAF Investigates Piggery, New Zealand Herald (May 19, 2009) (available at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&obj_id=10573191 (accessed Apr. 7, 2012)). The ploy backfired when government inspectors found that the piggery, despite how horrific it appeared on television, indeed complied with the existing code of welfare, and consequently, a prosecution was impossible. NZ Herald Staff, MAF Inspection Found Nothing Wrong with Pig Farm: Owner, New Zealand Herald (May 20, 2009) (available at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&obj_id=10573273 (accessed Apr. 7, 2012)). Shortly thereafter, focus turned to the code.

treatment of pigs, the Minister of Agriculture and Forestry effectively decided to give up trying to save sow stalls. In a speech directly to the pork industry, widely reported in the media, he made the following eye-opening comments:

I believe it is time for you to take a good, long, hard look at yourselves. ... You have a real opportunity here to ... take the high ground. Stop letting other people lecture you about your industry and demonstrate your ability to lead. ... As an industry you haven’t done well enough.

New Zealanders are demanding real restrictions on the use of dry sow crates, or the eventual elimination of them altogether. ... I have made it clear that I personally feel that the 2015 date [to review sow crates] needs to come forward significantly.

Your industry can treat these welfare issues as an opportunity or as a challenge. I suggest opportunity. Because one thing is for sure: this issue “ain’t going away any time soon.”

I have read that excerpt several times, and it is sometimes difficult to believe the comments are not coming directly from an animal welfare group. Frankly, I have never seen such strongly worded comments about an agricultural practice in any jurisdiction from a sitting member of a government executive. Without question, it was clever advocacy and good media work that pushed the Minister towards this position. But it was the code process that ultimately made the Minister conclude that the issue “ain’t going away any time soon.” It was not simply something that could be deflected by a pattern of stalling and investigations, while waiting for the media to move on to other interests. The Minister recognized that one way or another, pigs would eventually return to the agenda, and to his credit, he seized the initiative and forced the industry to shape up. Again, this sort of dialogue, from a government official responding to the deluge of concerns expressed by ordinary New Zealanders, is invaluable.

Finally, though it is merely a subjective perception, I believe the review process provides a subtle, yet critical fourth benefit: the creation of a public recognition that laws protecting the interests of animals are important. Every year, regardless of whatever other pressing issues might arise, animal welfare remains on the legislative agenda. New Zealand’s government, usually

125 Id.
through the Minister of Agriculture and Forestry, is involved and engaged in the process. Leaders of industry are called to account for their treatment of animals, and the media has responded by covering these events and publicizing most aspects of the code process. I cannot help but think that the unmistakable message is that New Zealanders should care about animal welfare.\textsuperscript{127} Even if the short-term results sometimes belie this conclusion, the message over the long-term must be that animal welfare is a matter of public importance, and one to be taken seriously.

2. Layers of Dialogue

Though I have described the schedule that determines the review of the codes of welfare, the process for updating these codes is also important, as it involves multiple stages and allows the public to have a real say in the outcome. As Timothy Caulfield has noted, albeit in a different context, regulatory approaches "have the flexibility necessary to respond to diverse and changing social attitudes [and provide a] forum for ongoing public dialogue."\textsuperscript{128} In contrast to legislative bans that stifle discussion through their permanent nature, the discourse surrounding regulatory decision-making can have benefits that go well beyond whatever law results from the process.

Enactment of a new code of welfare involves a six-stage process that can take up to two years to complete.\textsuperscript{129} First, the NAWAC annually identifies its code priorities for the coming year, which indicates to the public the practices and categories of animals that are next in the queue for review.\textsuperscript{130} The NAWAC's annual report makes this list publicly available.\textsuperscript{131} Second, the NAWAC creates an internal committee to decide how the code will be drafted.\textsuperscript{132} Normally, this process involves notifying the public and industry stakeholders that it intends to review a particular code, and then convening a writing group from these parties. This second step effectively commences a pre-consultation process in which welfare advocates and those most seriously affected by the code are able to raise issues with the NAWAC and, where appropriate, start a public discussion about controversial procedures that the code will address.\textsuperscript{133}

\textsuperscript{127} See Michael P. Vandenbergh, The Social Meaning of Environmental Command and Control, 20 Va. Envtl. L.J. 191, 200–01 (arguing that law is expressive in the sense that it can signal, reinforce, or change social meaning).

\textsuperscript{128} Caulfield, supra n. 83, at 457–58.


\textsuperscript{130} Much of this consultation is also mandated by the AWA directly, Animal Welfare Act, at §§ 70–72.


\textsuperscript{132} NAWAC, Process, supra n. 133, at 1.

\textsuperscript{133} Sirard believes that public consultation and discussion on legal issues plays a vital role in making long-term change. She notes that "[l]ocal institutions...are in the best position to instigate and sustain the kind of dialogic and creative processes that will engage people in
Eventually, a draft code of welfare is produced. The NAWAC next commences an internal process whereby it reviews the draft code and any submissions that have been received. Once the NAWAC is satisfied with the code, it is time for the fourth stage: a public submission process. While the draft code provides an indication of the NAWAC's preliminary conclusions, and has considerable weight, nothing is firmly settled when this draft is released. The public comment process usually results in thousands of public submissions from individuals and groups interested in commenting on the draft code. Submissions are normally written, but the NAWAC will occasionally hear oral testimony from witnesses, as well. The submissions themselves provide further opportunity for continued public dialogue, as they are often posted online. Many of the submissions are extremely detailed and contain an array of facts about the animals in question, going on to discuss policy, scientific points, and even legal concerns.

When the public consultation process is complete, the NAWAC takes time to consider whether to make changes to the draft code. After a lengthy period of internal revision, the NAWAC delivers its proposed version of the code of welfare, along with a detailed report explaining its reasoning, to the Minister of Agriculture and Forestry, who makes the final decision regarding whether to enact the code as a regulation. The Minister will normally adopt the code as recommended, although, as we shall see, this does not always occur. Approval of the code, normally accompanied by a Ministerial statement, represents the final stage. The reports, Ministerial statements, and the code

rethinking the shared reality… It is when individuals change their stories, their roles, and their interactions that the system-level pattern… that emerge[s] from these interactions will change."
Strand, supra n. 55, at 647.

134 NAWAC, Process, supra n. 133, at 1.
135 Id.
136 Id.


137 See e.g. SAFE, Join the Nocages Campaign, http://safe.org.nz/Campaigns/Battery-hens/ (accessed Apr. 7, 2012) (noting that the draft Layer Hens Code of Welfare received over 33,000 submissions, while not every Code attracts this level of attention).


140 NAWAC, Process, supra n. 133, at 1–2.
141 Id. at 1, 2, 5.
desktop publishing example

itself are then posted online for public viewing.\textsuperscript{144}

Remarkably, there is publicity at virtually every point in this process. It is now common for the NAWAC, industry stakeholders, and animal advocacy groups to engage in public discussion at several stages: at the pre-consultation stage; once a draft code has been released; after the NAWAC has sent its version to the Minister; and, of course, once the Minister has enacted the code.\textsuperscript{145}

Consider the example of layer hens, discussed earlier. Eight years after the NAWAC concluded that battery cages complied with the AWA, the matter is receiving renewed consideration.\textsuperscript{146} The public mindset toward cages has developed considerably in the interim, and, in contrast to the situation in 2004, the debate is no longer about whether to keep battery cages. It seems inevitable that these will be banned under the new code, and the sole question to consider is whether the Code will adopt the industry's desire for colony cages.\textsuperscript{147}

The public attention to the process has been remarkable. As a review of the code for layer hens approached, animal advocacy groups began a concerted campaign to drum up interest and promote the need for change. Throughout 2010 and 2011, there was consistent media attention and discussion of the merits and drawbacks of cages accompanying every stage of the review process.\textsuperscript{148} The media reported in some detail on even run-of-the-mill protests by animal activists that, in the past, would never get a sniff of public attention. In part, that new level of attention occurred because the protests were not random events scheduled on a whim. Instead, they were methodically planned to coincide with significant events in the legislative process, such as the close of public submissions on a particular code of welfare.\textsuperscript{149} The overall result was an astonishing amount of media coverage for a single animal welfare issue, much of it prompted by the fact that each


\textsuperscript{146} Ministry of Agric. & Forestry, Layer Hens, supra n. 116, at 2.

\textsuperscript{147} Id.

\textsuperscript{148} The media coverage, once again, has been extraordinary, with a consistent stream of news items and investigative reports on radio, television, and in newspapers. SAFE, Boycott Cage Eggs, http://www.safe.org.nz/Campaigns/Battery-hens/In-the-media/ (accessed Apr. 7, 2012).

new stage of the code process gave the media a fresh angle to report.

The end of the code process, which occurs when the NAWAC releases its recommended code to the Minister, where it is normally approved, is not really an end at all, because it simply sets the table for future discussion. Advocacy groups can assess the final product, highlight areas of scrutiny, decide whether to take further action, and plan for the next round of review. On rare occasions, however, this formal end process can explode into yet another round of public discourse.

Such an explosion occurred in 2010, when the Minister of Agriculture and Forestry shocked the country—and much of the world—as the event caused a minor international media sensation—by refusing to adopt the Animal Welfare (Commercial Slaughter) Code of Welfare as presented by the NAWAC, demanding instead that it be strengthened to protect animal welfare. In particular, the Minister objected to the process of slaughter without stunning and inserted a clause banning the practice, which had the effect of rendering traditional Jewish kosher slaughter in breach of the AWA.

A coalition of Jewish groups immediately went to the courts and obtained an interim injunction, preventing the commercial slaughter code from coming into force. They next challenged the Minister’s decision on judicial review. Six months later, the Minister relented, settling the case by

150 Infra pt. III (9)(4).

The foregoing demonstrates that the code review process is detailed, lengthy, designed to engage multiple parties, and structured to allow the story to unfold slowly for the media. The richness of different voices expressing their points of view in a public forum is edifying for all concerned. Moreover, by diversifying the way in which New Zealand reaches conclusions, the process takes the power to resolve issues away from a single branch of government and ensures deeper, richer decision-making. As Braithwaite has noted:

> Checking of power between branches of government is not enough. The republican should want a world where different branches of business, public and civil society are all checking each other .... The nuts and bolts of checks and balances, of independence and interdependence, require contextual deliberation for any given source of power.\footnote{John Braithwaite, On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Powers, 47 U. Toronto L.J. 305, 344 (1997).} Braithwaite also notes that “[s]eparations of powers both within and between the private and public sectors are important to controlling such abuses of power, as is countervailing power from institutions of civil society that muddy any simple public-private divide,” Id. at 344.

3. Applicable to all Animals

A third positive feature of New Zealand’s legislative regime stems from the fact that its design provides protection to every type of animal\footnote{The term “animal,” as defined in § 2 of the AWA, is exceptionally broad and extends to any} in
captive. This inclusiveness has two effects. First, increasing the overall number of codes in existence augments the quantity of animal-related discourse. The second and more significant impact, however, relates to a potential increase in the quality of discourse. It is possible—albeit speculative—that the enactment of comparable codes for companion animals, who lack commercial significance, may lead people to question the validity of codes governing the treatment of agricultural animals.

The point that concerns the welfare of domestic animals may lead to protections for farm animals is premised on a theory formulated by Professor Siobhan O’Sullivan of the University of Melbourne, who suggests that advancing the long-term interests of farm animals requires us to vary the use of the equal consideration principle commonly found in animal rights discourse. Instead of arguing that the interests of human and non-human animals should be similarly respected, O’Sullivan suggests that a more fruitful way forward—and one more palatable to the general public—is to focus upon equality between animals: “by applying the basic liberal democratic principle of equal consideration to the way we manage the lives of animals we would be able to improve the situation of many animals, especially those animals who are economically productive but rarely seen.”

New Zealand’s regulatory framework is ideal for exposing inequity between different animal species. Largely unencumbered by commercial...
interest and drafted by coalitions of animal friendly agencies. New Zealand's companion animal Codes stand in stark contrast to their agricultural counterparts. The Animal Welfare (Dogs) Code of Welfare, for example, is animal-focused throughout. With respect to shelter, the code sets the following legal standard:

- Dogs must be provided with sheltered and dry sleeping quarters.
- Measures must be taken to enable dogs to keep warm in cold weather.
- Sleeping quarters must be large enough to allow the dog to stand up, turn around and lie down comfortably.
- Dogs must be able to urinate and defecate away from the sleeping area.
- Ventilation and shade must be provided in situations where dogs are likely to experience heat distress.

The protections required by the code of welfare for dogs are a far cry from what is currently permitted for pigs, chickens, and cows. Over time, pointing out these distinctions could help provoke public discussion about why it is permissible to treat farm animals so poorly in contrast to companion animals, especially in situations where both, as a matter of science, demonstrate similar needs and desires. O'Sullivan, who supports an incremental approach to welfare standards, suggests that a key objective is to achieve:

[a] set of standards ... adhered to across the entire spectrum. It would mean that the state would be acting illegitimately if it required an animal exhibitor to provide an animal with x amount of space, while a farmer was required to provide the same species of animal with y amount of space .... It would mean that by popular agreement a decision would have to be made about what is socially acceptable .... This model would allow for the possibility of positive discrimination, or additional protection for animals most in need. But it would not allow for the removal of protection from some animals on the basis that the

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168 See generally, Animal Welfare (Dogs) Code of Welfare 2010 (describing in some detail the welfare conditions that must be provided for dogs.)

169 Id. at s 4.2, Minimum Standard No. 5.

170 Consider, to take just one comparison, what is provided for pigs kept in farrowing crates, which only have to be big enough to allow the animal to lie down, moreover, the pig can be kept there for four weeks without exercise, which would violate several aspects of the Dog Code. See NAWAC, Animal Welfare (Pigs) Code of Welfare 2010 at 19 (available at http://www.biosecurity.govt.nz/files/regs/animal-welfare/req/codes/pigs/pigs-code-of-welfare.pdf (Dec. 3, 2010) (accessed Apr. 7, 2012)) (explaining Minimum Standard No. 10).

171 See e.g. Grace Clement, "Pots or Meat?" Ethics and Domestic Animals, 1 at 1 of Animal Ethics 46, 46-48 (2011) (providing examples of the similarities between pigs and dogs).
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suffering occurs beyond the impartial community’s gaze.172

The development of codes for a wide variety of animals may assist in
getting the public to come to grips with these sorts of internal inconsistencies.
The public nature of the process, combined with the fact that codes are widely
available and publicized, is a useful way of showing how different species of
animals (as well as animals of the same species in different regulated settings)
can receive such different levels of protection from the law. In contrast to
other jurisdictions, where broadly worded standards appear to afford similar
treatment to different species, but actually discriminate wildly through a
manipulation of the necessary harm standard, New Zealand’s disparate
treatment is open for all to see. Hopefully, in time this visibility will provoke
the kind of societal discussion that O’Sullivan advocates.

4. New Channels of Dialogue

One of the aforementioned frustrations of working within the Canadian
framework is the paucity of avenues available for creating legal debate. Within
a binary, criminal-based structure, advocates wishing to push the envelope
are limited in the types of legal discussion they are able to create. Public
prosecutors have almost complete control over the types of litigation that
move forward;173 and more creative types of challenges face difficulties in
obtaining standing.174 Especially where the industrial usage of animals is
concerned, it is virtually impossible to contest the informal decision making
that results in the law becoming stagnant: the government’s refusal to
prosecute any common, but nonetheless questionable, agricultural practice.175

The beauty of a complex legislative framework like the one that exists in
New Zealand is that it provides avenues for challenging decisions made in
relation to animals. Thus, in addition to the dialogue created through the
regulatory process, further opportunities for discourse exist if one is able to
contest the outcomes generated. In other words, as Morison has noted, this
type of structure is useful because it “provide[s] a framework through which
individuals and interest groups . . . can pursue issues through the courts or

172 O’Sullivan, supra n. 24, at 167–68.
173 It may be possible in some circumstances to bring a “private prosecution,” however. See
174 See e.g. Reece v. Edmonton (City) 2011 ABCA 239 at ¶ 36–37 (describing how an attempt
to obtain a declaration that the city of Edmonton was in breach of animal protection law by
keeping lone African elephant in poor conditions was quashed on the grounds that the advocacy
group lacked standing to bring the challenge).
175 In Canada, the prosecutor’s discretion regarding which prosecutions to bring forward is
2012)) (holding that decisions of whether prosecution should be brought are reviewable only
where there has been flagrant impropriety, bad faith, or clear lack of objectivity).
other related mechanisms of arbitration or conciliation.\textsuperscript{176}

While New Zealand advocates have been slower to utilize mechanisms of this sort, a few external challenges have demonstrated the possibilities that exist to generate discourse by contesting the decisions made when a code is enacted. In 2005, the Animal Rights Legal Advocacy Network (ARLAN)\textsuperscript{177} brought a challenge to the\textit{Animal Welfare (Layer Hens) Code of Welfare} by utilizing a special procedure that permits any individual “aggrieved at the operation of a regulation” to contest such regulation before a panel of Members of Parliament.\textsuperscript{178} ARLAN contended that battery cage systems failed to comply with the requirements of the AWA and that the Minister had acted improperly in enacting regulations that conflicted with legislation passed by the House of Representatives.\textsuperscript{179}

Although it did not accept every aspect of the complaint, the Regulations Review Committee—composed of sitting members of four different political parties—agreed that the government had acted improperly.\textsuperscript{180} Just as importantly, it convened a day of hearings where it closely questioned members of the NAWAC.\textsuperscript{181} The public hearings were extremely useful in revealing the manner by which the NAWAC reached decisions and balanced competing priorities. Although the government ultimately refused to adopt the Committee’s recommendations,\textsuperscript{182} it had to issue an official response that clearly defined its position on battery cages.\textsuperscript{183} The official response stating that position has been incredibly useful to advocates in framing arguments during the revamped code process of the last two years.\textsuperscript{184}

While unsuccessful in changing the government’s position on battery

\textsuperscript{176} Morison, supra n. 53, at 10.

\textsuperscript{177} As a matter of disclosure, I was the Co-Executive Director of ARLAN between 2001 and 2005 and participated in this challenge.


\textsuperscript{179} Id. at 10.

\textsuperscript{180} The NAWAC concluded that the Minister’s failure lay in the failure to order a phase-out of battery cages. The committee felt that the code itself recognized that these cages were problematic, but simply deferred the decision of how to address them to a later date. The Committee concluded that this was not an option available to the Minister under the AWA. Id. at 4, 16-17.

\textsuperscript{181} Id. at 32-41 (providing the testimony of Dr. Peter O’Hara, the chairman of NAWAC in 2005).

\textsuperscript{182} The committee only has the power to “draw the attention of the House” to any problems with the regulation; it cannot compel the House or the Executive to act. See Ryan Malone & Tim Miller, Regulations Review Committee Digest 14 (3d ed., N.Z. Ctr. for Pub. L. 2009) [available at http://victoria.ac.nz/mgp/pnl/RegRev/Index.aspx (accessed Apr. 7, 2012)] (noting this limited power).


cages, the process of review provided yet another useful layer of dialogue, as
it resulted in oral testimony from government officials about the types of
choices they made and why they made them, and necessitated a detailed
response from the Minister of Agriculture and Forestry.\footnote{\textsuperscript{185}} Moreover, review
resulted in acknowledgement by a governmental committee that battery
cages do not comply with the AWA and should be abolished.\footnote{\textsuperscript{186}} For the first
time, New Zealanders had the opportunity to talk about something other than
the merits of a particular decision regarding animals. Rather, they could
discuss the legality of the route by which the decision was made. All of these
points have undoubtedly helped improve the discussion on battery cages
that has subsequently taken place.

Legal challenges may prove even more fruitful in the long run. Because of
New Zealand’s administrative law regime, it has never been entirely clear
whether an interested party or organization can challenge regulations in court
on the grounds that they do not comport with legislation.\footnote{\textsuperscript{187}} In 2010, however,
we received a partial answer when the Minister of Agriculture and Forestry
imposed a ban on kosher slaughter, as discussed earlier.\footnote{\textsuperscript{188}} A coalition of
Jewish groups immediately challenged the decision on judicial review,\footnote{\textsuperscript{189}}
arguing first that the Minister’s decision had been affected by a "mistake of
fact; second that there has been a failure properly to consult; and third that
regard has been had to irrelevant considerations and proper regard not had to
relevant considerations."\footnote{\textsuperscript{190}}

The arguments made by the coalition of Jewish groups are not much
different from what animal advocacy groups contend when a code falls short
of protecting the interests of animals. It would be interesting to see whether a
challenge can succeed when the argument rests on the fact that the code is
under-inclusive, as opposed to over-inclusive, as was the case in the kosher
slaughter case. Unfortunately, the kosher slaughter challenge did not fully
address the legitimacy of this sort of judicial review, because the parties
settled before trial.\footnote{\textsuperscript{191}} Still, it is worth noting that the court took the case

\textsuperscript{185} Anderson, supra n. 187, at 7-8; Regulations Review Committee (NZ), supra n. 182, at 13.

\textsuperscript{186} Regulations Review Committee (NZ), supra n. 182, at 4, 17.

\textsuperscript{187} [H] 923/01, Moosh v. Attorney General, [2005] 215, (English translation available at

\textsuperscript{188} A challenge in New Zealand would essentially proceed along the lines of this famous case
from Israel, which successfully contended that the Israeli government’s regulations on foie gras
production permitted cruelty, and were in conflict with the governing legislation. For a discussion
of this case, and the procedural route it followed, see Sullivan & Wolfson, supra n. 7, at 143–54.

\textsuperscript{189} See Auckland Hebrew Congregational Trust Board v. Minister of Agriculture [2010] NZHC
(accessed Apr. 7, 2012)) (providing an overview of the dispute and specifically addressing an
evidentiary matter related to the challenge).

\textsuperscript{190} Id.

\textsuperscript{191} Id. David Carter, the Minister of Agriculture, reconsidered his decision to ban the kosher
slaughter of chickens when he reached an agreement with the Jewish community about the ways
in which such slaughter could take place; the challenge to the code of welfare was immediately
dropped as a result. David Carter, Indication of a Further Minimum Standard in the Animal Welfare

seriously and did not dismiss it on the grounds that the party lacked standing or that challenges of this sort to a Ministerial decision were impossible. While there is reason to be wary of this case's applicability to attempts to challenge the Minister for failing to enact a regulation sufficient to protect animals, the outcome does show that judicial review of a decision regarding codes of welfare may be possible.

The examples above show how decisions made within a regulated framework can be exposed to judicial scrutiny in a much easier fashion than the decision to abstain from making decisions that is the primary problem with an offense-based system. As animal law advocates continue to increase in confidence and strength, it is likely that further challenges of these types will come. Obviously, challenges are useful in their own right, in that they may effect substantive change, but their secondary benefit should not be overlooked: they are yet another means of encouraging meaningful public dialogue around animal issues. In the long run, external challenges that bring in government bodies and the judiciary will help diversify the types of voices discussing the regulation of animal treatment. Continued questioning will help to expose inconsistencies, and hopefully prompt the public to think more deeply about the kinds of barriers that leave animals vulnerable to long-term suffering and abuse.

III. CONCLUSION

According to the discourse principle, just those norms deserve to be valid that could meet with the approval of those potentially affected, insofar as the latter participate in rational discourses. Hence the desired political rights must guarantee participation in all deliberative and decisional processes relevant to legislation and must do so in a way that provides each person with equal chances to exercise the communicative freedom to take a position on contestable validity claims. Equal opportunities for the political use of communicative freedoms require a legally structured deliberative praxis in which the discourse principle is applied.

When someone concerned about animals looks at the state in which so


"The difficulty is that the kosher slaughter decision would have affected a group of persons directly, by notionally infringing upon their freedom of religion. Animal advocacy organizations arguing that a particular code was under-inclusive would face challenges premised on standing, in that they would have no direct interest in the proceeding, and could not benefit from it. That said, New Zealand law takes a fairly generous approach to public interest standing, and there is no reason to believe a challenge of this type could not be brought. E.g. New Zealand Consumers Cooperative Society (Manawatu) Ltd v. Palmerston North City Council [1984] 1 NZLR 1, 15-16 (McMillan J) (holding that citizens should be able to challenge laws without being precluded from doing so by technical rules)."

Hubermann, Between Facts and Norms, supra n. 37, at 127.
many of these beings suffer today, it is undoubtedly difficult to accept that the
answer to the problem is simply more talk. Surely the facts are available for all
to see, and action, not discussion, is what is required. Unfortunately, as
Anderson has demonstrated, social movements with objectives as
substantial as this one need enriched dialogue as much as they need action.
Convincing the public of the necessity of adopting a new social norm and
obtaining the consensus to enact the changes required is going to be a long,
slow process.

What I hope this Article demonstrates is that animal welfare law has the
potential to make a real impact where its structure promotes vibrant and
ongoing discourse. Over the past few years, New Zealand has started moving
ahead of Canada in setting better standards for animals, and there is every
reason to believe that gap will widen substantially in the next decade. New
Zealanders today have embraced discussion of the way animals should be
treated as a subject that is serious and deserving of ongoing scrutiny. In New
Zealand, members of the public are now questioning some common
assumptions, noting inconsistencies in treatment, and—one hopes—changing
their attitudes towards animals as a result. This discourse may play a
significant role in transforming the country, turning New Zealand into a place
where one can legitimately point to welfare standards that have made
meaningful improvements in the lives of animals.

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196 See Anderson, supra n. 22, at 15, 23 ("Civic republicans would certainly emphasize the role
of such leaders, who can help lead dialogue 'to make the citizenry more virtuous by chang[ing]'
individual preferences.").
Deconstructing the Welfare Paradigm: What Has the Law Governing Humane Treatment Done to Make the World a Better Place for Animals?

In Australia and New Zealand, as in most of the common law world, the commission of an intentional act of cruelty by a person against an animal has long been regarded as a penal offence, punishable in the criminal courts.¹ For well over a century, both jurisdictions have accepted that the power and privilege of using animals to our own ends is not unrestrained,² and that humans owe certain duties towards animals living within our sphere of influence. Defined most commonly by the term "animal welfare",³ this concept prohibits humans from causing unnecessary pain, suffering or distress to the animals that we come into contact with or care for.

It has not always been this way. If time machines existed and it were possible to journey back to the 17th century, a traveler visiting that era would bear witness to a world founded on a mad form of "Descartian" logic; a world where animals were treated as "automatons",⁴ whose squeals, squeaks and cries in response to various stimuli were regarded as nothing more than the sounds of improperly functioning machines. In this world there was no functional concept of animal welfare.⁵ If an animal feels no pain, it is virtually impossible from a moral standpoint to distinguish any meaningful difference between such a thing and the rocks on the ground, the trees in the forest, or the air we breathe. A Descartian animal is one to whom humans can do with as they please, without fear of moral repercussion.

The end of this dark period for animals was prompted by a host of different factors,⁶ not the least of which was a better scientific understanding about the

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¹ The author wishes to thank Steven White for his helpful comments and David Tong for his research assistance. David's assistance for this article was graciously provided with support from the University of Auckland Faculty Research Development Fund.

² In New Zealand see the Animal Welfare Act 1999. Each Australian state and territory has similar legislation, for a representative example see Animal Welfare Act 2002 (WA).

³ In New Zealand see The Animals Protection Act 1880; in Australia see, for example, Prevention of Cruelty to Animals Act 1920 (WA).

⁴ I have chosen to use the terms "animal welfare" and "animal protection" more or less interchangeably, even though one could argue that there are slight differences between the two. For the purposes of this Chapter the differences are not significant, as both terms treat animals as objects and punish unnecessary harms in the manner discussed here. It is this prohibition of unnecessary or unreasonable harm against animals that I refer to as the animal welfare construct.

⁵ "The common law recognized no rights in... animals, and punished no cruelty to them, except in so far as it affected the rights of individuals to such property": Stephens v State (1888) 65 Miss 329 at 331-332.

⁶ Radford suggests that there were at least six separate factors that formed the basis of the modern welfare movement including the development of new scientific views toward the animal kingdom, emerging new philosophical theories about humankind's place in the
capacities of animals, and, in particular, their ability to feel pain. Over time, a greater concern for the well-being of these creatures gradually developed, framed upon the premise that humans had a responsibility to care for animals and be sensitive to their interests whenever possible. Propounded most famously by English lawyer and philosopher Jeremy Bentham, this new ethos built on the emerging concept of utilitarianism, which suggested that the goal of all morals and legislation was to promote pleasure and avoid pain for the greatest possible number. Bentham argued that animals should not be left out of this equation merely because they were not as sophisticated as human beings. As he famously suggested, “the question is not, Can they reason?, nor, Can they talk, but, Can they suffer?”

Aided by Bentham’s arguments and considerable lobbying, the idea that animal interests should be considered in assessing the rightfulness of their treatment eventually took hold and spread across the common law world. The laws that followed were premised on the disarmingly simple notion that humans should avoid imposing suffering upon animals unless the result of doing so created greater pleasure for society than the pain it imposed on the animals in question. Today, this notion of balancing animal pain against human need or pleasure is central to most legislative systems that regulate the treatment of animals. No longer viewed as radical and inconsequential, providing for animal welfare through legislation has become an accepted part of human discourse, settled neatly into the mainstream of Western society.

The emergence of the welfare concept was a significant development in the treatment of animals. At the very least, it permitted humans to proclaim that we had transcended our brutish nature and evolved into a compassionate society that minimizes the suffering inflicted upon animals whenever possible. We have formally abandoned the notion that these sentient beings are “just” animals and undeserving of moral concern. As one New Zealand parliamentarian noted during the passage of the Animal Welfare Act in 1999:

I can leave this Parliament with the knowledge that we, as members of this Parliament, are united on this legislation because most of us believe in our hearts that animals should be treated with respect and dignity as creatures of God. I judge people on the way they treat animals, and I judge countries on their provision for animal welfare...

This sentiment is hardly unique and in the abstract is likely shared by a large majority of people in Australia and New Zealand. Simply stated, we believe

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2 John Banks, New Zealand Parliamentary Debates, Animal Welfare Bills, 578 NZPD 17450 (June 18, 1999).
3 For example, in 2002, the RNZSPCA commissioned a Colmar-Brunton poll which found that 79% of New Zealanders supported the banning of battery cages, and would be willing to pay
that animals *matter*, and that their welfare is something worthy of being considered.

Although significant, acknowledging that animals "matter" does not tell us very much about how they should be treated. Indeed, the idea that animal suffering at the hands of humans should be minimized whenever possible is really only the beginning of the debate about how animals should be treated in modern society. While the development of the welfare construct was undoubtedly important as a way of leaving behind the 17th century model of animals as machines, it remains to discover whether legislation premised upon this concept has actually achieved its goal of allowing animals to be treated with the "respect and dignity" mentioned above.

Given how significantly we have invested in the welfare paradigm as a mechanism for preventing the suffering of animals, this sort of inquiry is vital, and one that is becoming more common in light of developing critique surrounding the shortcomings of modern animal welfare initiatives.10 Leaving aside the rhetoric of maintaining "respect and dignity" for animals, it remains necessary to consider what exactly we mean in saying that animal welfare is important. What are the core objectives of animal welfare legislation, and what are some of its limitations?

Sadly, despite the lofty rhetoric uttered by many of its proponents, the answers to these questions reveal some reason to be concerned about the effectiveness of laws founded on the animal welfare paradigm. While the lack of a concerned commitment to enforce welfare laws undoubtedly plays a role,11 the problem arguably runs deeper, to the very heart of the utilitarian calculus proposed by Bentham more than three centuries ago. In light of the sustained pain and suffering endured by animals living in Australia and New Zealand today, particularly in the agricultural context,12 we must ask whether the welfare paradigm is capable of regulating animal use and abuse in a way that allows it to provide animals with protection from the many threats they face, and if not, whether it can even be salvaged.

**The Basics: What is Animal Welfare?**

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11 For more on the difficulties concerning enforcement in this context, see Sankoff P., "Five Years of the 'New' Animal Welfare Regime: Lessons Learned from New Zealand's Decision to Modernize its Animal Welfare Legislation" (2005) 11 Animal Law 7 at 24-31.

12 See Chapter XXX (Sharman).
To properly assess the success of animal welfare as a means of protecting animals from harm, it is useful to briefly consider how the concept first emerged. Despite its entrenched status, animal protection law is of a relatively recent vintage, with the first laws dedicated entirely to the reduction of animal suffering emerging in the early 19th century. Prior to the passage of such laws, animals were regarded as property to be dealt with at the owner’s discretion, and the rights over these animals were “as absolute... as in any inanimate beings.” As John Lawrence wrote in summing up the legal position of the time, “no man is punishable for an act of the most extreme cruelty to a brute animal ...[and] the owner of a beast has the tacit allowance of the law to inflict upon it, if he shall so please, the most horrid barbarities.”

Although this represents an accurate account of the law, it is an overstatement to suggest that animals of this time were subjected to tremendous suffering as a matter of course, or that the law provided no protection for them at all. On the contrary, even in an era with no specific welfare controls there existed both legal and practical restraints that in combination provided some means of controlling the pain and suffering endured by animals.

The legal protection extended to animals, which still exists today, arose by virtue of an animal’s status as property, and the rights such status provides for the animal’s owner. Being treated as property may limit an animal – or anyone acting on the animal’s behalf – from asserting claims against the person that owns it, but this status does bestow powerful rights on the animal’s owner, allowing the owner to use the law to remedy any interference inflicted by another party. Thus, at least in an indirect sense, the common law “protected” animals from being harmed by third parties who might wish to abuse them. To the extent any such harm affected an animal’s value as a piece of property, it was capable of being remedied through the courts in the form of an order for damages in favour of the owner. In this limited way, it can be said that the laws governing property protected domestic animals from harm by deterring outsiders from gratuitously harming animals owned by another.

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15 The protection differed depending upon whether the animal was wild or domestic. As discussed below, domestic animals received stronger protections, but a number of early statutes “protected” certain wild animals from being hunted or poached, usually to preserve the rights of landowners (including the Crown) rather than the animals in question.  
16 In addition, many common law jurisdictions provide certain limited protections in their criminal legislation, usually for valuable stock animals. For example, s 221 of the *Crimes Act 1961* (NZ) makes it a crime punishable by a maximum of seven years’ imprisonment to “kill[] any animal that is the property of any other person with intent to steal the carcass, skin or plumage, or any other part, of the animal”. In Australia, s 468 of the *Criminal Code 1889* (Qld) provides that a person who “wilfully and unlawfully kills, maims, or wounds any [stock]
The practical restraint on harming animals relates to the role played by animals in pre-industrial society, and the assumption that one does not gratuitously harm their own property. During this time, people were heavily dependent upon the ownership of domestic animals for agricultural labour and transport, amongst other things. Most farm animals were raised not solely for food, but to play a vital role in the ongoing life of the enterprise. Since an unhealthy animal could not play its part in the operation of the farm, it was generally contrary to the interests of the owner to impose pain and suffering upon the animals. As a very general proposition, it remains accurate to suggest that people have little incentive to harm their own property. The owner of a champion racehorse, for example, has no need to be concerned about welfare restrictions, as he or she has every practical incentive to keep the horse healthy, regardless of what the law mandates.  

Still, these protections were and are limited in significant ways. In the first place, the animal’s property status provides no protection whatsoever from harms caused by the owner, which is unfortunately where most suffering tends to occur. Similarly, the practical benefits of keeping animals healthy extend only to animals that create value for the owner. Additionally, this motivation does not prevent owners from causing harms of a more transient, but still painful, nature that do not affect an animal’s worth.

The limitations of these protections can be assessed by looking at a common practice of the 19th century: bull-baiting, an activity that provoked the first legislative attempts to protect animals in England. This horrendous “sport”, extremely popular at the time, involved a form of animal fighting put on for public spectacle and an opportunity to gamble. A bull, or in some circumstances, a bear, would be tethered to a stake so that it could not advance past a certain point, although it retained full movement of its head. The bulldog, trained and bred for this purpose, would attempt to sneak in and grab the bull by the nose, its most sensitive point. Dogs would either be gored by the bull’s horns, or tossed in the air, often ripping off part of the bull’s nose in the process. Both animals tended to suffer immensely, and deaths or disfigurements caused by injuries were common.  

It is not difficult to discern why the “traditional” protections were of no help to the animals forced to take part in this activity. Since it was the animal’s owner

animal capable of being stolen’ commits an indictable offence punishable by a maximum of seven years imprisonment.

17 Still, even this example has limits. The incentive to keep the horse healthy depends upon it winning races and being a lucrative asset. Once its productivity disappears, so does its protection.

that was staging the fights, there was no way for anyone to obtain redress on
the animal's behalf, as the owner was legally entitled to do what he or she
wanted with their property. Similarly, the "practical" protection was of no
assistance either, as the animal's value derived from the sport itself, and thus
its participation was compelled even if injury resulted, since it was
economically profitable to use the animal in this way and replace it where
necessary.

Bull-baiting was one very public example of how the existing legal regime
failed to protect animals from harm. Eventually many of the more genteel
members of society came to be appalled by these uses of animals, which they
regarded as "disgraceful and beastly". What they were concerned with was
not the welfare of animals per se, but more about particular uses they found
distasteful. In other words, even as legislatures first came to consider the
legitimacy of this sort of activity, they were concerned not with "cruelty" in its
effect (the impact on the animal), but with the wrongful nature of the practice
and the fact that it inflicted harm that failed to promote some socially desirable
result.

Even at this early stage, legislators were aware of a potential problem with
crafting laws that provided protection for animals. Although it was clear that
many people wanted to reduce animal suffering of the sort described above, it
was impossible to ignore the fact that English society rested, at least in part,
on the death and suffering of animals, as their use was viewed as essential
for human progress and survival. The difficulty lay in fashioning a legal
compromise that could distinguish between acceptable and insalubrious
harms. What was needed was a system that permitted a person to whip an
animal in order to prompt it to work faster, while simultaneously prohibiting the
whipping of the very same animal for the sake of pure, sadistic pleasure.

The solution came from Bentham and his multifunctional utilitarian calculus,
which seemed an ideal means of resolving the problem. Rather than
punishing a person who merely caused harm to animals, which would
encompass both forms of whipping described above, the law would attempt to
deter unnecessary harms — those inflicted for reasons that brought no wider
social benefit.

18 Richard Sheridan, Parliamentary Debates of the United Kingdom, vol 35, col 213 (18 April
1800), cited in Radford, ibid at 34.
20 Thus, one of the primary reasons for the legislative initiative was that it "gave greater
emphasis to social vices... and gave rise to many disorderly and mischievous proceedings":
Radford, ibid. at 33.
21 As one MP noted during an attempt to pass animal protection legislation in 1809, if
Parliament was to pass legislation punishing some animal cruelty, while "we continued to
practice and to reserve in great measure to ourselves the sport of hunting, shooting and
fishing, we must exhibit ourselves as the most hardened and unblushing hypocrites that ever
shocked the feelings of mankind": William Windham, Parliamentary Debates of the United
Kingdom, vol 14, col 1040 (13 June 1809), cited in Radford, ibid at 37.
The nature of this approach can be seen even in modern legislation, which is structured on a similar paradigm. In New Zealand, the provision at the very core of the Animal Welfare Act 1999 is s 29(a), which makes it an offence to "ill-treat" an animal.\(^{22}\) The term is defined in s 2 of the Act to mean "causing the animal to suffer, by any act or omission, pain or distress that in its kind or degree, or in its object, or in the circumstances in which it is inflicted, is unreasonable or unnecessary".

The utilitarian balance is evident from the wording of the section. While causing the animal to suffer pain or distress is critical to a finding of ill-treatment, it is not just any pain or distress that will qualify. Instead, the suffering must be "unnecessary" or "unreasonable", both words that import a balancing test, in that they focus not solely on the harm inflicted, but on whether the action causing such harm is justifiable.

It follows that assessing the value of animal welfare legislation requires a deeper examination of the utilitarian balancing exercise that is at its very heart. When will treatment that causes pain, suffering or distress be "unreasonable" or "unnecessary"?

The Difficulty: What Does "Animal Welfare" Mean?

In the opening paragraph of this chapter, it was suggested that we have evolved to the point that we no longer regard animals as pure objects or things, able to be treated in any way humans choose. This is more than simply an aspirational statement. The official policy of New Zealand, the Commonwealth of Australia, and every Australian state and territory is that the "ill-treatment" of animals is illegal.\(^{23}\) While this is certainly an admirable statement of purpose, and valuable in its own right, it does not on its own guarantee animals any real freedom from harm. On the contrary, the strength of the protection depends heavily upon what is considered "ill-treatment."\(^{24}\)

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\(^{22}\) A more serious offence is created by s 28, which punishes the willful ill-treatment of an animal leading to death or permanent disability.

\(^{23}\) Different jurisdictions use different language, but nothing turns on this. For example, Queensland and the Northern Territory both use the term cruelty instead of ill-treatment, although their description of what constitutes cruelty is virtually identical to the New Zealand definition of ill-treatment: Animal Care and Protection Act 2001 (QLD), s18(2); Animal Welfare Act (NT), s6. Western Australia's Act refers to welfare in its title and purpose, but to cruelty in its general prohibition (Animal Welfare Act 2002 (WA), s 19), showing that the difference is merely semantic. All of these statutes use virtually the same formulation, regardless of what term is used to describe the conduct.

\(^{24}\) It also depends heavily upon what is considered an "animal". Where the being in question is not an "animal", any treatment of such being is dealt with in accordance with the default common law position: that a person is entitled to treat their own property in any way they choose. For example, in certain Australian states, the definition of "stock" excludes many animals from welfare protection: see Chapter 2 (Sharman). Obviously, this sort of definitional manipulation has serious repercussions for the animal in question, but I do not propose to examine this issue further here. My central objective is to explore the concept of welfare and its limitations, and this requires closer definition of the central balancing – the definition of
There are two core requirements for such a finding. Obviously, the animal must suffer in some manner, either by enduring pain or distress. While a significant part of the overall inquiry, this first condition is usually a matter to be resolved from the available facts, and while it can occasionally prove problematic from an evidentiary standpoint, it does not often determine whether a practice will fall afoul of the legislation. Instead, most cases tend to turn upon whether the suffering was unreasonable or unnecessary.

At a very basic level, it is difficult to quibble with these qualifying words. If a person is inflicting pain or distress for an unreasonable purpose, it follows that such an action should be prohibited. Similarly, the unnecessary imposition of pain can hardly be defended in a civilized society. In contrast, how can one possibly argue against "reasonable" or "necessary" actions? To understand where problems may arise, it is useful to begin by considering an actual prosecution. *Towers Hammon v Burnett*, a recent decision from Queensland, represents a fairly typical case involving cruelty against animals. One morning, for reasons known only to himself, Mr Burnett decided to use an iron bar to viciously beat five cats. All five eventually died from their injuries. Several witnesses testified about how the animals were howling throughout the process, and the veterinarian who had to euthanize one of the animals said it must have been in considerable pain, as it was virtually decapitated from the beating.

The accused pleaded guilty, accepting the prosecution's suggestion that in conflict with s 18 of the *Animal Care and Protection Act 2001* (Qld) "he had caused the animals to suffer pain that was, in the circumstances, unjustifiable, unnecessary or unreasonable." Because of the guilty plea, it was not necessary for the presiding magistrate to actually consider why the suffering was unnecessary, but it is not too difficult to perform this assessment here. Obviously, in being beaten in the manner described, the cats suffered tremendous pain. As for the benefit gained, the most that can be said is that the defendant might have received some sadistic pleasure from the activity. Clearly, this sort of "benefit" is not one that society values, and as such, any realistic application of the utilitarian calculus would have to result in the "benefit" being outweighed by the harm caused to the animals. Consequently, in this scenario, it is very easy to conclude that the suffering constituted ill-treatment.

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25 For an extreme example, see *R v McRae*, December 19, 2002, Doc No 02-683, Ontario Superior Court of Justice, where the defendant was acquitted after the presiding judge concluded that "suffering" had not been proven beyond a reasonable doubt despite the defendant having kicked and struck his dog, and thrown it against a tree. Several witnesses testified to having heard the dog whine and yelp, but the judge was unwilling to infer that this was representative of pain. The finding was upheld on appeal.


27 Ibid at para 11. Amazingly, the defendant was sentenced at first instance to pay a fine, but this was bumped up on appeal to a punishment of three months' imprisonment.
Most cases of animal cruelty prosecuted in the courts today follow this sort of scenario.\textsuperscript{28} Even though conduct of this nature is widely scorned by the public, the evidence indicates that a good number of cases involving intentional cruelty against animals are committed each year.\textsuperscript{29} On a positive note, leaving aside concerns related to enforcement and sentencing,\textsuperscript{30} the animal welfare model handles these instances easily and effectively. Where a person intentionally mistreats an animal by torture or the like for personal gratification or some other unsavoury motive, he or she can expect to be prosecuted. The balance in such cases always tilts decidedly in favour of the animal which is harmed.

While it is reassuring that our laws are equipped to deal with these horrific types of cases, it is premature to conclude from this example that our animal welfare system "works". Although instances like the \textit{Burnett} case tend to dominate media reports about animal abuse, they actually represent a very small part of the harm humans impose upon animals. To begin with, almost all cases of this sort involve companion animals like cats or dogs, which comprise a tiny proportion of the animals that we keep under our care.\textsuperscript{31} Moreover, despite the fact that they represent the majority of cases brought in the courts, instances of sadistic cruelty represent an extremely small percentage of the actions human perform that cause animals to suffer some type of pain or distress. While the animal protection scheme can deal with the "extreme" case, what about more common types of suffering? Let us briefly examine two examples of this sort in an attempt to uncover an answer.

First, consider one of the more contentious animal welfare issues in New Zealand:\textsuperscript{32} the cutting, or docking, of dog tails, a practice that has gone on for over a century. It involves the amputation of the puppy's tail either with scissors, a knife or with a rubber band.\textsuperscript{33} The procedure is usually performed

\textsuperscript{28} It is impossible to list all of the cases of this sort, but perusal of media reports in any Australian or New Zealand jurisdiction will show a large number of "intentional cruelty" cases. For summaries of some of the worst instances of this type, see Sharman K, "Sentencing under our anti-cruelty statutes: why our leniency will come back to bite us" (2002) 13 Journal of the Institute of Criminology 333, 334-335; Sankoff, above n 11 at 32-33.

\textsuperscript{29} Williams, V.M. et al, "Animal Abuse and family violence: Survey on the recognition of animal abuse by Veterinarians in New Zealand and their understanding of the correlation between animal abuse and human violence" (2008) 56 NZ Veterinary Journal 21. Williams et al show that 83% of veterinarians reported seeing cases of deliberate animal abuse within a five year period, while 9% reported seeing four cases or more a year.

\textsuperscript{30} On shortcomings in the sentencing process, see Chapter XXX (Markham).

\textsuperscript{31} In the United States of America, for example, 98% of animals "with whom humans interact" are farmed: Wolfson D and Sullivan M, "Foxes in the Henhouse" in Sunstein C and Nussbaum M, eds, \textit{Animal Rights: Current Debates and New Directions} (Oxford University Press, New York, 2004) at 206.

\textsuperscript{32} The docking of dog's tails, except for therapeutic purposes, has been prohibited in all Australian states and territories since 2004. For a summary of how the ban works, see: Department of Primary Industries and Fisheries, "A Guide to Queensland's Ban on Tail Docking Dogs" see \url{http://www2.dpi.qld.gov.au/animalwelfare/2071.html} at 9 June 2005.

\textsuperscript{33} P.C. Bennett and E Perini "Tail Docking in Dogs: A Review of the Issues" (April 2003) 81 \textit{Australian Veterinary Journal} 208 at 208-209.
without any anaesthetic at between three to five days of age.\(^{34}\) Although there is dispute regarding the extent to which dogs actually suffer, most of the scientific evidence shows that the procedure causes a great deal of pain, as the cut goes through many highly sensitive nerves in the tissues including skin, cartilage, and bone.\(^{35}\) The pain is not permanent, but it can persist for several days, and there is always a risk of infection.\(^{36}\)

Given that dogs suffer from the procedure, the utilitarian calculus demands that such suffering be reasonable or necessary, which requires an examination of the purpose for which tail docking is performed. There is considerable controversy about this. Some proponents of docking maintain that it is performed in the health interests of the dog, as a means of avoiding certain potential injuries common to the breed.\(^{37}\) Nonetheless, while this might be the rationale in some cases, for most breeders and dog owners it is questionable whether health ever enters into the equation, as the decision to dock is virtually automatic and based solely on aesthetic preference, in conformity with the "breed standard."\(^{38}\) Breeds subjected to docking have always had their tails cut in this manner, and thus the dog simply "looks odd" without it.

Is this a "reasonable" or "necessary" infliction of pain and distress? Essentially, the balance in this case is between what seems to be considerable short-term pain for the animal, and the aesthetic preferences of the owner, supplemented by human tradition. Although this might seem to be an easy determination in favour of the animal, dog-tail docking remains legal and widespread in New Zealand, despite being banned elsewhere. Two attempts to eliminate the practice through legislation have failed.\(^{39}\)

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\(^{34}\) Ibid at 209.

\(^{35}\) Ibid at 209-211.


\(^{37}\) See, eg, The New Zealand Council of Docked Breeds (http://www.nzcdb.co.nz/). The New Zealand Veterinary Association has rejected this suggestion, believing there are no health benefits to the practice that outweigh the harm to the animal: New Zealand Veterinary Association, *Tail Docking of Dogs Policy*, 18 November 2000, available at http://www.vets.org.nz/News/Press/TailDock/B1_3_2_1a%202000.pdf. This is the position of virtually every veterinary association that has considered the issue. The Australian Veterinary Association has long been against this practice: Australian Veterinary Association, "AVA calls for an end to cosmetic tail docking", Press Release, 10 April, 1995, available at: http://www.cdb.org/countries/ausvet.htm

\(^{38}\) Royal College of Veterinary Surgeons (UK), Guide to Professional Conduct (London, RCVS, 2000). The New Zealand Council of Docked Breeds, above n 37, set as its primary goal the notion of retaining "freedom of choice".

\(^{39}\) The issue of tail docking was heavily discussed during the enactment of the *Animal Welfare Act 1999*, and a majority decision was made not to ban the practice: See (2004) 621 New Zealand Parliamentary Debates 16369 (Dianne Yates) for a detailed summary of the 1999 debate). In 2004, Dianne Yates, a Labour MP, brought a private member's bill, the *Animal Welfare (Restriction of Docking of Dogs' Tails) Bill*, Bill No. 169-1, before Parliament. It was considered by the Government's Administration Committee, which recommended that the Bill not be passed. It was subsequently shelved. See *Animal Welfare (Restriction of Docking of
Consequently, it is impossible to charge anyone who engages in the practice, as it is not regarded as "ill-treatment" by prosecuting agencies or the courts.\footnote{This stems from the fact that Parliament specifically rejected imposing a ban on this practice on two occasions. Anyone actually charged with an offence for docking will have little difficulty showing that Parliament’s intent was not to ban the practice, and thus it constitutes a “reasonable” procedure.}

Even more problematic are welfare concerns arising from the commercial use of animals. Any number of examples could be utilized here, but one of the easiest to understand is the battery cage, used in the storage of layer hens. Despite the fact that chickens are social animals who enjoy moving around and interacting, current methods of egg production require most chickens to be kept in tiny battery cages for their entire lives. It is generally conceded that this method of storage results in serious health problems for the hen, as well as depriving them of any reasonable quality of life.\footnote{Each hen is allocated space equivalent to roughly an A4 piece of paper, and is confined with between 3-20 other birds. For considerable detail on battery cages, how they cause hens to suffer, and their legal status in Australia, see Sharman K, “Putting the chicken before the egg; layer housing laws in Australia” [2008] 1 Animal Protection Law Journal 46. For a New Zealand view, see Morris M, “The Ethics and politics of the caged layer hen debate in New Zealand” (2006) 19 Journal of Agricultural and Environmental Ethics 495.} Nonetheless, this practice does not constitute ill-treatment, and remains legal in every Australian and New Zealand jurisdiction.

Why is such a cruel method of keeping hens permitted to exist, notwithstanding the pain and distress it imposes on the animals? The suffering is said to be justified by a pressing human concern: the need for a sizeable amount of affordable eggs.\footnote{NAWAC, 'Animal Welfare (Layer Hens) Code of Welfare 2004 Report', 21 April 2004 <http://www.biosecurity.govt.nz/files/regs/animal-welfare/req/_CODES/layer-hens/lhc-report.pdf> ('Layer Hens Code (NZ) Report')} As New Zealand’s National Animal Welfare Advisory Committee (NAWAC) stated in concluding that the battery cage complied with the country’s welfare requirements:

> Welfare must be considered holistically. NAWAC is unable to recommend replacement of current cage systems with alternative systems until such time as it can be shown that, in comparison to current cage systems, alternative systems, in the context of supplying New Zealand’s ongoing egg consumption needs, would consistently provide better welfare outcomes for birds and be economically viable.\footnote{Ibid at 10.}

Both examples raise serious questions about the definition of “ill-treatment”, and how it protects – or fails to protect – animals from harm. To understand why dog tail docking and the battery cage remain legal methods of treating animals in spite of the suffering they inflict, it is necessary to look in more
detail at how the balancing exercise at the heart of the animal welfare construct actually operates.

"Unreasonable" or "Unnecessary" Suffering

While animal protection laws have existed for almost 200 years, there remain surprisingly few cases that actually set out, in detail, how the balancing test between necessity and animal harm should operate. There are a number of reasons for this. First, the enforcement of animal welfare statutes remains alarmingly inadequate. In New Zealand, for example, it would be unusual to see more than one hundred prosecutions taken in a calendar year. Second, very few cases result in defended hearings, and almost none are appealed, except perhaps in regards to the adequacy of the sentence imposed. Because prosecuting agencies tend to take their strongest cases forward, the result is a flurry of guilty pleas, with the consequence that very little case law is generated to assist in future interpretation of the statute. Finally, where defended hearings do occur, they are still mostly focused on cruel treatment of the type discussed above, where the balance of interests is so obviously tilted in favour of the animals that judges do not need to work very hard to resolve the details of how the balance operates. The issues tend more often to be factual rather than legal.

One exception to this trend is a very prominent Canadian case, *R v Menard*, which sets out the definition of inhumane treatment in that country, and represents one of the more elaborate attempts to define what kind of harm against animals is impermissible. It is a decision of the highest court in Quebec, one level below the Supreme Court of Canada, written by a judge who went on to become Chief Justice of the Supreme Court, giving the decision added precedential value. Since the language utilized in Canada’s provisions is virtually identical to that used in Australasia, the propositions it sets down should be equally applicable, or at least persuasive.

The *Menard* case concerned the prosecution of a private businessman who was catching and killing stray dogs and cats by poisoning them with carbon

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45 In 2005, for example, the RNZSPCA, who initiates the overwhelming majority of animal welfare prosecutions, laid 94 informations, and secured 48 convictions: RNZSPCA, "2006 National Statistics", *Animals' Advocate* (August 2006) at 4
46 As such, most contested cases will focus on matters such as whether the defendant was the cause of the suffering, or whether the animal suffered.
47 (1978) 43 CCC (2d) 458 (Que CA).
49 Canada’s Criminal Code, s 446(1)(a) provides that it is an offence to cause or permit to be caused "unnecessary pain, suffering or injury to an animal".
monoxide. The facts of the case and how it was resolved are not particularly relevant today.\textsuperscript{50} Nonetheless, in attempting to define a clear interpretive path for the term “unnecessary”\textsuperscript{51} that is at the core of most welfare schemes, the judgment makes four points that help explain why animal protection mechanisms of this sort often fail to protect animals from harm.

(1) \textit{Harm is not absolute, but relative}

The terms “unreasonable” and “unnecessary”, so important to our understanding of modern welfare legislation, are very familiar to lawyers. These words, or others like them, can be found sprinkled throughout statutes of every sort. Rather than setting out a defined set of proscriptions whereby only particular acts can be performed, qualifying terms of this type leave the question of legality to be resolved by judges and juries, who determine on a case-by-case basis, in consideration of the facts with which they are confronted, whether the act was proper.

Terminology of this sort has advantages and disadvantages. On the plus side, it provides a great deal of flexibility, and allows solutions to be tailored to individual cases through a balancing of relevant factors.\textsuperscript{52} At the same time, an oft-stated concern with legislative wording of this sort is that it provides little guidance. Until such terms are imbued with some form of structure by the judiciary, stating that “unreasonable” or “unnecessary” actions are forbidden provides little idea of what actually constitutes permissible conduct.

In \textit{Menard}, Lamer JA addresses this lack of guidance by importing a utilitarian approach, holding that the term “without necessity” creates a balancing test whereby an animal’s suffering must be measured against the gains to be had from imposing such suffering.\textsuperscript{53} Moreover, he reiterates that every case must be decided on its own merits, stating:

It is sometimes necessary to make an animal suffer for its own good or... to save a human life. Certain experiments, alas, inevitably very painful for the animal, prove necessary to discover or test remedies which will save a great number of human lives. [The legislation] does not prohibit these incidents, but at the same time, condemns the person who, for example, will leave a dog or a horse without water and without food for a few days, through carelessness or negligence or for reasons of profit or again in order to avoid the costs of a temporary board and lodging, notwithstanding that these

\textsuperscript{50} The accused was convicted on appeal, on the grounds that his preferred method of killing caused considerable harm to the animals involved, and that using a different, less painful system would not have been more expensive.

\textsuperscript{51} The Canadian legislation actually uses the term "without necessity", but it is difficult to see how anything could turn on this minor distinction.

\textsuperscript{52} See, eg, Radford above n6 at 258, who favours this approach.

\textsuperscript{53} \textit{Menard} was hardly the first animal welfare decision to draw this conclusion. In \textit{Ford v Wiley} (1869) 23 QBD 203, Lord Coleridge CJ famously noted that "the cruelty intended by the statute is the unnecessary abuse of the animal... and unnecessary means that it is inflicted without... adequate and reasonable object".
animals would suffer much less than certain animals used as guinea pigs. Everything is therefore according to the circumstances, the quantification of the suffering being only one of the factors in the appreciation of what is, in the final analysis, necessary.\textsuperscript{54}

The excerpt, straightforward in most respects, makes two points that are worth emphasizing. First, it recognizes that suffering imposed for unsupportable reasons will be punishable. Second, through the reference to experimentation, it recognizes that suffering of any kind can be justified if there is a strong enough reason to impose it, even where such suffering is “very painful”.

There is nothing inherently problematic about this approach, and it conforms with the way in which most proportionality tests are conducted, whereby everything is said to depend on the particular circumstances. As we shall see, however, the animal welfare balancing treats these circumstances in a way that compromises the overall exercise, and reduces its utility for animals.

(2) Human Demands Predominate

While the initial excerpt suggests that the balancing exercise is neutral, involving animal interests on one side and human needs on the other — the classic essence of a proportionality test — that notion is quickly dispelled once one reads further. In the very next paragraph, Lamer JA reveals that the scales are loaded on one side before “harm” and “need” are ever considered:

Within the hierarchy of our planet the animal occupies a place which, if it does not give rights to the animal, at least prompts us, being animals who claim to be rational beings, to impose on ourselves behaviour which will reflect in our relations with them those virtues we seek to promote in our relations among humans. On the other hand, the animal is inferior to man, and takes its place within a hierarchy which is the hierarchy of the animals... It will often be in the interests of man to kill and mutilate wild or domestic animals, to subjugate them and, to this end, to tame them with all the painful consequences this may entail for them... This is why, in setting standards for the behaviour of men towards animals, we have taken into account our privileged position in nature and have been obliged to take into account at the outset the purpose sought...\textsuperscript{55}

In many respects, there is nothing surprising here, and the statement is an accurate reflection of the world we live in. Human society does have a strong interest in subjugating animals, “with all the painful consequences this may entail”. Nonetheless, from a legal standpoint it is not difficult to see the concerns this statement poses for the animal welfare calculus. Instead of a neutral balance, whereby human need is balanced against animal suffering, we are presented with a balance tilted heavily from the outset in favour of justification of harm. In effect, human need weighs more than animal

\textsuperscript{54} Menard, above n 47 at 464.
\textsuperscript{55} Ibid.
suffering, in that it is valued in a much more significant way. We sit in a privileged position, and thus the starting point is not a presumption that harm is generally wrong, and must be justified, but that it is humanity’s privilege to inflict it.

One wonders why the actor inflicting the harm is not tasked with justifying it, especially since welfare legislation is designed to protect against, and not permit, harmful conduct. Nonetheless, this is not the interpretation taken here. Instead, “necessity” means something much closer to “reasonable desire”. Humans are allowed to inflict pain not because we must – in that we have no other option, certainly one interpretation of the term “necessity” – but because we choose to. As we shall see, this has grave implications for the effectiveness of the welfare calculus.

(3) Legitimacy of Purpose

While human privilege predominates, it does not mean that any action undertaken against an animal can be justified. Despite “our privileged position in nature”, there are limits that must be imposed to ensure that animals are not subject to every human whim. Lamer JA describes this as a “rule of civilization”, that allows us to utilize our superior position to put animals in our service, but inhibits us from harming them gratuitously:

Thus men, by the rule of [animal protection legislation], do not renounce the right given to them by their position as supreme creatures to put animals at their service to satisfy their needs, but impose on themselves a rule of civilization by which they renounce, condemn and repress all infliction of pain, suffering or injury on animals which, while taking place in the pursuit of a legitimate purpose, is not justified by the means employed. “Without necessity”... means that man in the pursuit of his purposes as a superior being... is obliged not to inflict on animals pain, suffering or injury which is not inevitable taking into account the purpose sought and the circumstances of the particular case.56

This is another revealing excerpt. It provides the “nuts and bolts” of the justificatory exercise, holding that whether a particular act that causes suffering can be sanctioned by human need should be resolved by two primary factors: the purpose of the conduct and the means employed to inflict the suffering. I shall explore the “purpose” concern here, and consider the question of “means” in the next section.

The purpose criterion appears, on the surface, to provide considerable protection for animals. Lamer JA specifically recognizes that some purposes for harming animals will not be accepted. One’s purpose must be “legitimate”, a requirement that permits courts to swiftly punish any harm imposed upon animals undertaken for horrific or dishonourable objectives.

56 Ibid at 465.
This deceptively simple language masks a critical shortcoming: it provides no definition of what constitutes a legitimate purpose. Despite the absence of a precise definition, a few clues are provided in the rest of the judgment. Throughout, Lamer JA makes reference to “human superiority” and our “privilege” to use animals to our own ends, which indicates that a very broad view of legitimacy is likely to be adopted. To begin with, the most significant uses of animals – for food, as generators of milk products, and to provide clothing – are clearly legitimate. As we saw from the layer hen example, it is also legitimate to choose a harmful method of production so long as this is economically effective. Even if one accepts that these are critical uses from a human perspective, they hardly represent the low end of the spectrum, in a world where circuses and rodeos abound, and inflicting pain for our entertainment remains permissible.

The truth is that our list of “legitimate” uses is virtually endless. The term encompasses core uses like those described above but extends even further, to harm caused for public enjoyment – through entertainment – and even to harm inflicted as a means of satisfying human aesthetic preferences, as shown by the example of dog tail docking. As Francione has suggested:

Courts generally hold that any treatment that facilitates our use of animals for an accepted purpose is considered necessary under the laws. We do not balance interests in order to determine the legality of the allegedly cruel act or the legality of the animal use to which the cruelty is a part. Rather, we look to whether the activity the defendant seeks to engage in is an accepted institutionalized use of animals. If it is, we then look to whether the allegedly cruel act is considered a normal part of that use by those involved in the institution, or is intended to enable that use. Such a framework will accept the standard of “necessity” defined by animal property owners, and explains why the anticruelty laws have not been able to touch certain activities, such as animal agriculture or hunting.

Since the purpose is not balanced by whether it is useful to the animal, but rather by whether it is an accepted part of human “privilege” that advances society’s interests, it will only be those purposes that do not conform to accepted human values that will run afoul of this test. An examination of the case law suggests that only three purposes seem to clearly fall outside the pale of legitimacy. The first was discussed above: cruelty engaged in for sadistic purposes, or no reason at all. This cannot be a legitimate purpose, for sadism is not a value that is regarded positively in human society. Aside from its inherent barbarism, conduct of this type demonstrates a lack of compassion and risks encouraging aggressive, and even dangerous, character traits.

57 As one 19th century judge put it, in language that remains relevant today, suffering is permissible “whenever the purpose for which the act is done is to make the animal more serviceable for the use of man”: Murphy v Manning (1887) 2 Ex. D. 307 at 314.
58 Francione, G, above n10 at 58-59.
59 As John Locke suggested centuries ago, “the custom of tormenting and killing beasts will, by degrees, harden their minds even towards men; and they who delight in the suffering and
Similarly, a waste of economic capital will not be considered legitimate. Thus, if a particular practice damages an animal’s worth without providing a corresponding gain, it cannot be accepted.\(^5\) If, for example, it could be demonstrated that layer hen cages did not produce any economic benefit, and it could equally be shown that providing the hens with more space to roam would be more productive, it could not be said that keeping the hens in a situation that caused them distress was for a legitimate purpose. Our society does not reward economically wasteful activity, and thus, such a purpose cannot be legitimate.

Finally, a third illegitimate purpose for inflicting harm upon animals, and one of the most common scenarios resulting in prosecution, is laziness or poor management exercised by animal owners. A good example of this arose in *RSPCA v Gilbertson*,\(^6\) where the defendant allowed 30 horses in her care to simply waste away. Her horse trekking business had fallen upon hard times, and rather than taking proper measures to deal with the animals, she allowed them to endure food shortages and neglected their medical care, resulting in horrific suffering.

Not surprisingly, the court was unwilling to recognize any of the suffering as legitimately imposed. It was the product of sloth, ignorance or poor management, values that a court will never be willing to endorse. As such, any harm suffered by animals under these circumstances, no matter how small, outweighs the purpose for which it was imposed, and constitutes ill-treatment.

Without question, these three illegitimate purposes will capture some forms of ill-treatment, and punishing them is better than having no protection for animals at all. Still, it is worth re-emphasizing that these types of actions represent only a tiny fraction of the harms that humans impose upon animals. Sadly, the purpose test is unlikely to encourage much restraint so long as we regard as “legitimate” matters that would not satisfy a more stringent interpretation of the term “necessary”.

(4) **Legitimacy of Means**

While we can now see that the legitimate purpose test suffers from certain shortcomings, Lamer JA acknowledged in *Menard* that necessity cannot be measured by purpose alone. One may have a perfectly legitimate purpose but exercise it in a completely inappropriate way. Consider, for example, a

\(^5\) This is, effectively, the basis upon which the defendant in *Menard* was convicted. The methods he used to kill his animals caused them pain, and a less painful method was available without any increase in cost.

\(^6\) [2002] DCR 618 (NZ).
common practice on modern farms: the castration of beef cattle, a procedure undertaken to maximize economic output and make animal handling easier.\textsuperscript{62} According to our earlier analysis, these constitute legitimate purposes, notwithstanding that castration is a painful procedure. Nonetheless, undertaking it by forcing the animal down and chopping off its testicles with a rusty axe would inevitably constitute inhumane treatment. Notwithstanding the legitimate purpose, the suffering imposed by utilizing such methods would not be "justified by the means employed", especially as a safer procedure is available at a comparable cost.

This second part of the "necessity" test does provide animals with some protection from harm. Even where suffering is required to advance legitimate purposes, the need to avoid ill-treatment demands that precautions be taken to reduce suffering. Still, the advantages provided by this aspect of the "unnecessary" test cannot be considered in the abstract, and need to be situated within the reality of everyday human society. Just as human purposes cannot be questioned in light of human privilege, our methods for achieving those purposes must take into account human priorities, which rank higher on the scale than those of animals. As Lamer JA noted in Menard:

\begin{quote}
[The expression "without necessity" takes into consideration all the circumstances of the particular case including first the purpose itself, the social priorities, the means available and their accessibility, etc. One does not kill a steer in the same way that one kills a pig. One cannot devote to the euthanasia of animals large sums of money without taking into account social priorities. Suffering which one may reasonably avoid for an animal is not necessary.\textsuperscript{63}
\end{quote}

On this view, leeway must once again be afforded to the humans tasked with taking care of animals. It is not that all suffering must be avoided, but only that "which one may reasonably avoid", a loophole of considerable proportion.\textsuperscript{64} Just as human privilege allows us to impose suffering even where it is not "necessary" in any objective sense, the same privilege allows us to prioritize human convenience above a requirement to use measures that may reduce the pain and distress endured by animals. Thus, even where it is clear that euthanizing animals in a more humane way is available, it is essential to keep the human costs in mind before doing so. Where, for example, a more humane practice will cost money to put in place, it is unlikely

\textsuperscript{62} Castration, the removal of the testicles of a bull by either surgical or non-surgical methods, is widely performed because of consumer preference, for economic considerations and to improve the temperament of cattle: see Jane Jr, C et al, "Castration of Beef Cattle", University of Tennessee at http://www.thebeefsite.com/articles/930/castration-of-beef-calves.

\textsuperscript{63} Menard, above n 47 at 466.

\textsuperscript{64} This accords with the older jurisprudence though different wording has occasionally been used. In Tucker v Hazelhurst (1906) 26 NZLR 263 at 265, Chapman J noted that "even in the use of legitimate processes connected with the treatment of... animals the infliction of excessive suffering is an offence".
to be required, as social priorities, including the maximization of wealth, demand otherwise.\textsuperscript{65}

The Real Meaning of the Welfare Construct

What does all this mean for animals? In summary, the test for ill-treatment begins by dividing all harms against animals into two broad categories. Actions undertaken for an illegitimate purpose automatically constitute ill-treatment, but unfortunately for animals, very few human purposes fall under this designation. Human privilege allows us to use animals for a wide variety of objectives that the animal welfare construct will not question. Illegitimate purposes are confined to those that have no value in society, including the infliction of harm owing to laziness or the satisfaction of a sadistic tendency.

The purpose test does not stand alone, however. To avoid being labeled ill-treatment, an action must also be necessary within the context of a particular purpose. In other words, the means taken must be appropriate considering the purpose in question. While this sounds much more useful, questioning the means taken is very difficult to do once the purpose for which the harm was inflicted is accepted as legitimate.

Perhaps the most significant concern is the consistent focus on economic efficiency, which tends to enshrine harmful practices and render them immune from scrutiny. In a farmed animal context, once we accept that producing food at an economic price is necessary, the whole question of animal welfare ends up being mostly redundant, as just about any profit maximizing initiative that imposes pain tends to be accepted. The onus lies on those seeking change to provide an alternative that is at the very least: (a) a welfare improvement for the animals, and (b) economically effective.

It is the combination of the purpose and means test that is most damaging to animals. Consider the fate of "broller" chickens, which represent over 95% of the more than 500 millions birds raised for meat in Australia and New Zealand alone each year.\textsuperscript{66} Welfare advocates have long complained about various procedures engaged in by the chicken meat industry, but perhaps the biggest welfare concern is the way in which the birds themselves are raised. The very breeding of these birds, it is suggested, is inherently cruel for they cannot be

\textsuperscript{65} This is a longstanding tenet of animal welfare law. As an Irish Court noted in \textit{Callaghan v Society for the Prevention of Cruelty to Animals} (1885) 16 L.R. Ir. 325 at 333, regarding dehorning: "the pain caused to the animal... cannot be said to be an unnecessary abuse of the animal... if the operation by which the pain is caused enables the owners to attain [the object of raising the animal] either more expeditiously or more cheaply".

grown in the manner required without significant health problems. In a 2008 report, the Humane Society of the United States described broilers as follows:

Broiler chickens have been selectively bred for rapid growth to market weight. In 1920, a chicken reached 1 kg (2.2 lb) in 16 weeks, but today’s broiler chicken strains may now reach 2.27 kg (5 lb) in only 7 weeks. Daily growth rates have increased from 25 g (0.88 oz) to 100 g (3.52 oz) in the past 50 years—an increase of more than 300%. Genetic selection is so intense that the age by which broiler chickens reach market weight and are slaughtered has decreased by as much as one day every year. Ongoing selection for rapid growth is a severe welfare problem as it has resulted in leg disorders, including deformities, lameness, tibial dyschondroplasia (TD), and ruptured tendons, and has been correlated with metabolic disorders such as ascites and sudden death syndrome. Broiler chickens selected for faster growth also suffer from weakened immune systems, making them more susceptible to a variety of additional diseases.67

Assuming these allegations are accurate, they raise significant questions for the animal welfare paradigm, as they challenge not a particular practice, but the very manner in which the industry currently runs its business. Nonetheless, the animal welfare construct is completely ill-equipped to address this type of complaint. The legitimacy of the purpose would be considered and immediately approved. Broiler chickens are bred in this way because it represents the most cost efficient way of raising them. The animals that die are more than compensated for by the quick growth of the others who can be shipped to market in a fraction of the time required for conventional birds. From there, the inquiry would move on to the means chosen, but here even animal advocates would have to accept that in terms of achieving the desired purpose the means taken are extremely reasonable, as they result in considerable cost savings. Thus, if one’s goal is to produce the most economically efficient chicken possible, it is difficult to argue with the broiler chicken.

Imposing welfare standards for broiler chickens would have to begin by radically altering the way in which these birds are raised. Unfortunately, the welfare construct is not designed to achieve this objective. So long as the means take are reasonably related to a legitimate purpose, they will not be questioned. It is not surprising that a growing number of critics believe that the animal welfare construct is designed not to reform but, in many cases, simply to legitimize current practice. As Hughes and Meyer have suggested, “the notion of protecting animals because they have inherent value and rights

to lead their natural lives is not even open for discussion. The morality of the list of current "uses" of animals will also not be questioned. 66

Together, these factors demonstrate why the definition of ill-treatment, as currently constituted, fails to provide any meaningful protection for the majority of animals subjected to harm. Of course, we are hardly bound to this approach. The biggest advantage of the common law is its flexibility and willingness to reassess formerly established propositions. Still, a radical revamp of the welfare paradigm is unlikely to occur in the near future. The problem is that we cannot impose a more stringent test, as it would be impossible to enforce. A vibrant justificatory regime would challenge practices that are enshrined and widespread. Even food use would have difficulty being defended, as many people live without animal products, and it cannot be said that their consumption is needed in any real sense. In the absence of any political or popular momentum to engage in this type of reform however, "necessary" will continue to mean "legitimate", a term understood through the prism of our privilege to dominate animals. Not surprisingly, a term interpreted in this manner stops very little suffering at all.

Alternative Approaches to Welfare

The foregoing analysis has concentrated on the weaknesses in animal welfare law involving the balancing between human and animal needs in considering what constitutes "ill-treatment". While early laws of this sort focused exclusively on this objective, modern legislative innovations have created a new breed of animal welfare laws to supplement — if not replace — the construct discussed above. These can be sorted into two categories: specific bans or prohibitions, and the imposition of duties or obligations upon animal owners. I wish to briefly address these types of laws to illustrate that they do not represent a significant departure from the welfare construct. Indeed, they are premised upon the same balancing test described above, though they manifest this balance in slightly different ways.

a) Bans and Prohibitions

Just about every animal welfare statute lists a number of procedures and activities that are absolutely prohibited. The practical effect of these "bans" is to remove any consideration of whether the conduct constitutes "ill-treatment". Contravention of a prohibition amounts to a breach of the statute, without any proportionality testing of the sort discussed above.

For example, just about every jurisdiction has specifically banned the holding of fights between animals. 69 In addition, New Zealand's Animal Welfare Act

69 See, for example, Animal Welfare Act 1999 (NZ), s29(e); Prevention of Cruelty to Animals Act 1979 (NSW), ss18 and 18A; and Animal Welfare Act 1985 (SA), s14. Tasmania does not
1999 makes it an offence for a person who is not a veterinarian to perform certain listed surgical procedures.\textsuperscript{70} In New South Wales, the tethering of sows in a piggery is absolutely prohibited.\textsuperscript{71} Victoria has banned the practice of driving on a highway with a truck or trailer where an unsecured dog is left in the back and at risk of harm.\textsuperscript{72} Every jurisdiction now provides at least a few bans of this type, making it clear to those who care for animals that such practices cannot be employed under any circumstances.

Prohibitions of this sort work well to eliminate a small number of discredited practices, particularly because they eschew the balancing exercise required by the more flexible "ill-treatment" test. There is no consideration of human "privilege" or any balance of competing priorities. On the other hand, this strictness explains why bans of this sort are relatively few and far between. The only practices that tend to be banned are those regarded as so odious that it is possible to prohibit them without any significant opposition. For these harms, there exists near absolute consensus that the suffering imposed on the animal outweighs the benefit with regard to the practice in question.

Despite the effectiveness of bans and prohibitions, they should not be understood as having progressed beyond the welfare calculus. Instead, they are simply a reflection of it. Thus, in New Zealand, people should not perform surgeries themselves because it is highly dangerous to the animal and potentially wasteful of valuable capital. In New South Wales, tethering is prohibited because it is an inefficient means of keeping sows that is easily replaced by cheaper, equally effective alternatives. Finally, in Victoria, keeping dogs unsecured in open trailers while driving is dangerous both to the dogs and to other drivers, and is practiced primarily by owners who are too lazy to properly secure their animals.

b) Imposing Obligations

Although the crime of imposing "ill-treatment" still stands at the core of most welfare regimes, enhancements over the past decade or so have been implemented to rectify certain deficiencies present in earlier legislative instruments. In addition to the small number of banned activities set out above, today's welfare legislation also includes another manner of regulating human behaviour: the imposition of duties or obligations towards animals. In New Zealand, for example, s 10 of the Animal Welfare Act 1999 requires that every person in charge of an animal must ensure that the needs of the animal are met in a manner that accords with good practice and scientific knowledge. These needs, set out in s4 of the Act, include providing the animal with:

(a) Proper and sufficient food and water;

appear to have an absolute prohibition to this effect, though it would likely be covered under the general definition of cruelty.

\textsuperscript{71} Prevention of Cruelty to Animals Act 1979, s10(3) (NSW).
\textsuperscript{72} Prevention of Cruelty to Animals Act 1986, s15A (Vic).
(b) Adequate shelter;
(c) Opportunity to display normal patterns of behaviour;
(d) Physical handling in a manner which minimizes the likelihood of unreasonable or unnecessary pain or distress;
(e) Protection from, and rapid diagnosis of, any significant injury or disease.

By just about any measure, this approach represents an improvement over older versions of animal welfare protection, which at all times required that the suffering inflicted be intentional.\(^3\) A failure to comply with the obligations imposed by s4 is punishable absent any proof of suffering or intention to neglect the animals. These were important changes, especially as so much of the improper conduct relating to animals arises from poor care and neglect, as opposed to willful actions.

In addition, these obligations – with the exception of s4(d), which is drafted in a manner identical to the definition of ill-treatment (with all the attendant consequences) – appear a great deal less flexible than the cruelty provisions examined above. There is no balancing or measurement of human need required here. A contravention of the statutory requirements is established as soon as the person in charge fails to provide the animal with the core requirements mandated by s 4.

Nonetheless, a closer look at the overall structure of the Act reveals that even these seemingly absolute requirements measure human need against the suffering imposed upon animals, as a number of exceptions have been inserted in the legislation to ensure that a failure to comply will only constitute an offence where there is no “reasonable” or “necessary” justification for the omission. For many of the reasons set out above, no jurisdiction is prepared to impose an absolute system of duties along these lines – especially an obligation to allow the animal to display “normal patterns of behaviour” – as doing so would have enormous repercussions for our system of agricultural production.

The means of mitigating the harsh consequences of s 4 is via three separate defences available to exculpate an accused who fails to comply with a required duty.\(^4\) (1) that he or she took all reasonable steps to comply; (2) that the failure took place in circumstances of emergency and was necessary for the preservation of human life; and (3) that there was in existence at the time of the offence a relevant code of welfare and that the minimum standards established by the code were in all respects equaled or exceeded.

\(^3\) The predecessor to the New Zealand Animal Welfare Act 1999, the Animal Protection Act 1960, did not specifically mention that cruelty had to be intentionally inflicted, but it was a well-accepted premise at common law: McFarlane v Robson [1916] NZLR 216; Hart v Police [1955] NZLR 666.

I propose to leave aside the first two defences, which are tightly circumscribed and accord generally with the principles of criminal law,\(^{75}\) and focus on the third – that the defendant complied with a relevant code of welfare. It is unnecessary to fully explore how these codes operate here, as their shortcomings are comprehensively addressed in a separate chapter.\(^{76}\) In a nutshell, these codes are drafted by a quasi-government body, the National Animal Welfare Advisory Committee (NAWAC), and enacted by the Minister of Agriculture and Fisheries. Codes set out acceptable practices with regard to individual types of animals and animal uses, including layer hens, pigs, animals in rodeos and many more. Since compliance with a code provides a comprehensive defence for those charged with failing to fulfill their obligations under s10 of the Act, it is no exaggeration to suggest that where such a code exists, it is more important than the Act itself. So long as a person complies with what the code requires, it makes no difference whether they have failed to provide the obligations set out in s4, as the code effectively overrules any duty imposed by the Act.

Not surprisingly, the codes provide a great deal more leeway than the legislation itself. In a clever twist of legislative drafting, the Act does not demand that the NAWAC create codes that adhere to the requirements of s4. Instead, the standards enunciated in these codes must be “the minimum necessary to ensure that the purposes of this Act will be met”.\(^{77}\) The key purpose of the Animal Welfare Act 1999 is “to reform the law relating to the welfare of animals and the prevention of their ill-treatment”. In other words, it is to prevent the infliction of “unreasonable” or “unnecessary” suffering.

Given this structural formulation, it is understandable that the code enactment process is regarded by the government as a way to balance human and animal needs. In language remarkably reminiscent of Menard, the NAWAC has described its role as follows:

> Its obligation is to work to improve animal welfare by rigorous evaluations of relevant science, practical experience and good practice first, with economics, international trends and public sentiment modulating those outcomes. Economics may constrain the speed of implementation of a change NAWAC desires, or it may prevent it.\(^{78}\)

\(^{75}\) The first defence allows an exception where the accused took reasonable steps to prevent the omission from occurring. It is unfair to punish such an accused, despite the fact that an act of cruelty occurred. The second defence is essentially the common law defence of “necessity”, where animal needs suffer but only because they are justified by an unavoidable human concern.

\(^{76}\) See Chapter XXX (Dale). The brief account in this chapter uses the New Zealand experience to illustrate how the use of codes constitutes a key part of the animal welfare construct. Codes operate in the same way, in substance if not in detail, in all the Australian jurisdictions.

\(^{77}\) Animal Welfare Act 1999, s73(1)(a) [Emphasis added].

Again, this means that human needs — and especially economic considerations, which are inevitable in the commercial farming context — will have a significant role to play in the code process. The result so far has been codes drafted along the lines of the layer hen and broiler chicken examples discussed above, whereby considerable harm to the animals is recognized, but the status quo is justified on the basis of human need and economic efficiency.

For the most part, the provisions of the Act that impose obligations tend to punish those who have no good reason for failing to take care of animals, with "good reasons" — such as keeping broiler chickens in close confinement to maximize economic efficiency\(^{79}\) — legitimized through codes. Cases prosecuted under these provisions tend to look like those involving ill-treatment, in that they are situations where a person starves their animals, fails to provide them with medical care, or keeps them in improper housing owing to laziness, ignorance, an unwillingness to spend money, or a combination of the three. Prosecutions under these provisions almost always involve worst-case scenarios, where animals are found near death, suffering from starvation, thirst or other serious medical ailments.\(^{80}\)

While these provisions are undoubtedly useful additions to the prosecutorial arsenal, and an improvement on what existed previously, they are no panacea for animals harmed through institutionally accepted practices. So long as animal welfare legislation provides for exceptions that permit the benefits of s 4 to be undermined through the code process, this type of provision will be more of a minor upgrade than revolutionary step forward.

**Conclusion**

The animal welfare paradigm has been the dominant model for animal treatment in the common law world for almost 200 years. When first proposed, it was a remarkable step forward for the law, and made the very public statement that the indiscriminate imposition of animal suffering would no longer be permitted. From that moment forward, owners of animals could be charged for undertaking acts intended to harm the animals under their care. It was a sensible way of proceeding initially, and arguably worked well under a framework in which most humans lived with their animals, and where there was no real justification for wasting commercial property, at a time when animals were relatively scarce and essential to a small farm's survival.

\(^{79}\) Animal Welfare (Broiler Chickens: Fully Housed) Code of Welfare 2003, which permits a stocking density of 38 kg per square meter, roughly 50% higher than recommended by studies conducted in the European Union, which suggested that a higher stocking density would lead to illness, injury and disorders for the birds. For greater detail, see Sankoff, above n 11 at 21-24.

\(^{80}\) See eg: *RSPCA v O'Loughlan* [2007] SASC 113 [accused convicted of improper treatment when animal found emaciated such its "skin appeared to be hanging off [its] bones"; *Mansbridge v Nichols* [2004] VSC 530 [accused convicted of improper treatment after numerous sheep found dead or dying because of a lack of food, water and medical attention]; *Joyce v Visser* [2001] TASSC 116 [dogs starving and living in shed full of garbage and feces].
What this chapter has attempted to demonstrate is that the benefits provided by this construct today are somewhat questionable, as the welfare model is inhibited by the realities of human society and the pursuit of economic productivity, which find their way into a balancing test that is not nearly as neutral or beneficial to animals as it initially appears. The law may prevent "cruelty", but it does so by stripping away the meaning of this word through its acceptance that human privilege to use animals to our ends takes priority over suffering, and that human needs like efficiency, higher economic productivity, more desirable aesthetics and even entertainment count as legitimate ends.

In the agricultural context, where the vast majority of animal suffering occurs, the result is that most modern uses of animals have been accepted, and are not considered to be ill-treatment. For a new welfare initiative to succeed, it has to both ameliorate the animal’s position and be at least as efficient as the existing practice. Perhaps over time a court might be willing to tilt the balance where animal suffering is reduced and only a minimal cost increase is required, but significant expense – which is likely for most meaningful welfare initiatives - is unlikely to be imposed.

None of this should be particularly surprising, as it is thoroughly unreasonable to expect the law to take a position that goes far beyond what the majority of people actually want. We have, in effect, the legal system we deserve. It allows us to condemn and look down on sadistic practices we abhor, while simultaneously permitting battery cages, sow stalls and other questionable, yet economically efficient, storage methods, to continue.

In time, new legal models to address the suffering of animals may well be developed, but our current construct may actually be impeding the quest for real change by cloaking dubious practices in a veneer of legality, and by using soothing and misleading words to describe the conduct in question. A perusal of legislation from across the region shows that it is now common to describe harms against animals in wording that connotes a strong imagery of concern. Our focus is on the “welfare” of animals, the “prevention of cruelty”, and the end of “inhumane” use. In contrast to earlier times, where most animal suffering was simply ignored, it is now exceptionally common for politicians of all stripes and those working in the primary animal industries to rely upon this terminology as a means of demonstrating how much they care about their animals, most likely as a way of assuaging public concern. For example, the New Zealand government strongly and repeatedly refutes “cruelty” in the treatment of animals.81 Australia deems itself a “world leader in animal

welfare". It takes a degree of inquiry well beyond the average citizen to uncover what this truly means, however.

Equally troubling is that the practices that wind up being permitted are deemed to be "humane", "not cruel", and "legal", in accord with our "tough" animal welfare standards. In effect, this clever manipulation of language allows the animal industries to engage in practices that might well shock the average observer if considered on their own merits, and at the same time state with confidence that they are complying in full with the legal standards required by the governing legislation.

Neither the politicians nor the animal owners are lying. As a society, we have rejected "cruelty" against animals, but on the argument presented here, this has been accomplished primarily by altering what this term means beyond all feasible recognition. So long as we premise our animal protection laws on the current interpretation of welfare, and define ill-treatment and cruelty in terms of the balancing exercise discussed, we will continue to mask harmful treatment of animals in a sophisticated web of legal terminology that consigns an ever growing numbers of animals to a lifetime of "necessary" and "reasonable" pain and distress.

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83 It is worth reiterating, for example, that almost 80% of respondents to separate opinion surveys in Australia and New Zealand voiced the opinion that battery cages for layer hens were "cruel", notwithstanding the fact that legislation in both jurisdictions concludes otherwise: see above n 9.

84 For example, the Poultry Industry Association of New Zealand responded to concern over battery cages by stating that "the industry has robust systems and processes in place and we have a long history of adhering to the highest standards of animal welfare. All processes are strictly regulated by and comply with the National Animal Welfare Advisory Committee (NAWAC), the SPCA and MAF."; Poultry industry Association of New Zealand, Jamie's Fowl Dinners - Q & A for Poultry Industry Association [http://www.pianz.org.nz/Documents/Jamies_Fowl_Dinners_Q_A_Meat.pdf](http://www.pianz.org.nz/Documents/Jamies_Fowl_Dinners_Q_A_Meat.pdf) at 31 October 2008. See also Meat and Livestock Australia, Animal Welfare, [http://www.mla.com.au/TopicHierarchy/InformationCentre/AnimalHealthandWelfare/Animalwelfare/default.htm](http://www.mla.com.au/TopicHierarchy/InformationCentre/AnimalHealthandWelfare/Animalwelfare/default.htm) at 31 October 2008, which discussed the organization's interest in developing and complying with national welfare standards.

Submission by the University of Auckland

The University of Auckland is very mindful of its statutory responsibilities in regard to animal welfare and to ethical considerations when animals are used for research, testing and teaching. We thank the Ministry for Primary Industries for the opportunity to make this submission on the “Animal Welfare Matters” consultation document.

Our submission addresses only those consultation questions which pertain to current University activities, namely those covered by Part 6 of the current Animal Welfare Act 1999 (these questions are found in Section 4.8 of the consultation document).

Q24. Do you agree that the number of animals killed humanely for research, testing and teaching should be included in official statistics?

Yes. The University of Auckland agrees that the number of animals killed humanely for research, testing and teaching should be included in official statistics.

Before the present legislation was passed, the University noted and discussed the fact that there was no provision for recording the numbers and species of animals killed humanely for research, testing and teaching purposes. Although there is currently no legal requirement to do so, the University already keeps records on the numbers of animals killed for research and teaching, and has an archive of such records going back to 1988. (The University does not perform any animal testing.)

Q25. What impact, including costs, would the requirement to report animals killed for use in research, teaching, and testing have on you or your organisation?

The change proposed would have little impact on this University. As required, we already report on the number of animals manipulated to the Ministry and, although it is not currently a requirement, the University also keeps records of the number of animals killed humanely for tissue collection (as mentioned above). Provided that the information to be reported is only the numbers and species of animals involved, and grades of manipulations, then reporting on those numbers would be a comparatively straightforward process for the University of Auckland and would attract minimal additional cost.
Before approving an application to undertake research or teaching using animals, the University's Animal Ethics Committee also already has to be satisfied that the application demonstrates benefits for society.

Q26. Can you think of any other changes that would improve the system for regulating animals used in research, testing and teaching?

We consider that Part 6 of the Act - as it currently stands - provides adequate and appropriate measures to protect the welfare of animals used in research, testing and teaching.

University or Auckland Distinguished Professor
Deputy Vice Chancellor (Research)
Submission for the Animal Welfare Strategy and Legislation Review

Department of Physiology, University of Otago

I am very strongly opposed to the National Animal Ethics Advisory Committee (NAEAC) proposal to ‘include animals killed as part of research, testing and teaching (RTT) in the definition of manipulation’ because this is not consistent with the purpose of the Act, or with the rationale for reviewing the Act outlined in the discussion paper.

Humane killing for RTT is excluded from the Act because the Act rightly focuses on the ‘prevention of ill-treatment of live animals rather than the exercise of moral judgement about using animals where the animal is killed humanely’. The discussion paper states that the purpose of the review is to ‘do more to avoid, prevent and deter unacceptable treatment of animals’ and that the Government is ‘not proposing radical change’ because the ‘values, outcomes and approaches are already implicit in the system’. In direct contradiction to the Act and the rationale for the review, the NAEAC proposal does not do more to prevent ill-treatment of live animals, exercises moral judgement about using humanly-killed animals and radically changes the purpose of the Act with respect to RTT.

By defining humane killing as a manipulation, the NAEAC proposal will require all researchers who use post mortem tissue for research to obtain approval from their local Animal Ethics Committee (AEC) prior to undertaking the research. This is a radical change of the focus of the Act because this will require a moral judgement about using animals where the animal is killed humanely and implies that the values, outcomes and approaches in the current system are not sufficient. If moral judgements are to be made about the use of tissue from humanly-killed animals, then all sectors of the New Zealand community who use tissue from humanly-killed animals should be held to the same moral and ethical standards as New Zealand researchers.

The requirement for researchers to obtain AEC approval for RTT on tissue from humanly-killed animals will almost certainly increase the numbers of animals used for RTT, in direct contradiction to the stated goals of ‘the 3Rs’ of reducing numbers, refining techniques and replacing animals. Researchers will be discouraged from using post mortem tissue from humanly-killed animals and might replace such experiments with manipulations of live animals, increasing the impact of the research on live animals. Furthermore, it will not be possible to investigate serendipitous observations by humanly killing animals and studying post mortem tissue. Rather, researchers will have to humanely kill the animals, discard the cadavers, seek ethical approval, breed replacement animals (which will generate many more animals that do not carry the trait of interest) humanely kill the replacement animals (and the animals not carrying the desired trait) and study the post mortem tissue of the new animals carrying the trait (and discard the cadavers of the other animals), increasing numbers of animals used for RTT.

The requirement for researchers to obtain AEC approval for RTT on tissue from humanly-killed animals will grossly increase the administrative burden on institutions and individual researchers because it will require AEC approval of all research on animals and animal tissue, rather than research for which animals were manipulated prior to humane killing. This will increase the numbers of researchers required to obtain AEC approval and will increase the numbers of AEC applications to be considered by each AEC.

Defining humane killing as a manipulation will require the reporting of animals humanly killed amongst the numbers that were manipulated prior to death. This will create a false impression of the impact of research on animals in New Zealand, providing opportunity for sensationalist reporting of animal use statistics, potentially harming New Zealand’s reputation.

The NAEAC proposal is justified by an unsupported statement that ‘Given the less certain outcomes of research, testing, and teaching it is reasonable to ask for justification rather than assuming an automatic benefit for using an animal for research, testing or teaching’. I know of no evidence to suggest that the outcomes of post mortem research are ‘less certain’ than outcomes from any other type of research. I do not believe that the outcomes of post mortem research are ‘less certain’ than outcomes from any other type of research. I know of no researcher who has ever stated that the outcomes of post mortem research are ‘less certain’ than outcomes from any other type of research. The discussion paper does not provide any information to support this ill-founded assertion; NAEAC should be forced to put their evidence for this assertion before the public prior to any change in legislation, if any such evidence exists.
My responses to some of the specific questions are below:-

Q19. Do you agree with the proposals to change who can perform significant surgical procedures under veterinary supervision? and Q21. What are the risks and benefits of these proposals? Can you think of any missed opportunities or unintended consequences?

I do not agree because an unintended consequence of the proposal to change who can perform significant surgical procedures will be to prevent researchers completing surgery without veterinary supervision. It should be explicitly stated that researchers working with AEC approval are exempt from this restriction. Most surgeries for RTT are not common veterinary procedures and the expert surgeons are the researchers themselves. Current legislation requires researchers complete basic surgical training before being allowed to manipulate animals, and to demonstrate proficiency in surgical techniques specific to their research, as well as post-operative care, to the local AEC before being allowed to continue using the surgical technique. Thus, active veterinary supervision of all surgery for RTT is not necessary.

Q23. What impact would the proposed changes have on you and/or your organisation or sector?

If researchers were prevented from performing surgery without veterinary supervision, many research programmes (including mine) would essentially be terminated until institutions employed many more veterinarians to complete this supervision. This would have a severe negative impact on the international competitiveness of New Zealand life sciences.

Q24. Do you agree that the number of animals killed humanely for research, testing and teaching should be included in official statistics?

This question does not address the actual change proposed by NAEAC, which is to classify humane killing as a manipulation. For the reasons outlined above, I am strongly opposed to the NAEAC proposal. If it is the intention of MPI to include the number of animals killed humanely for RTT in official statistics, the NAEAC proposal should be re-drafted to remove the reference to ‘manipulation’, which has a specific legislative meaning in RTT and will require AEC approval for such research.

I am not opposed to reporting numbers of animals used for RTT but I am strongly opposed to reporting non-manipulated humanely-killed animals as having been manipulated. To prevent misleading the public and reduce the opportunity for sensationalist reporting, there would need to be further essential divisions required in the reporting, at least: animals bred for RTT humanely-killed by researchers where post mortem tissue was used for RTT; animals bred for RTT humanely-killed by researchers where post mortem tissue was not used for RTT; animals bred for RTT humanely-killed by animal husbandry technicians where post mortem tissue was used for RTT; animals bred for RTT humanely-killed by animal husbandry technicians where post mortem tissue was not used for RTT.

Q25. What impact, including costs, would the requirement to report animals killed for use in research, teaching, and testing have on you or your organisation?

Simple reporting of animals used might not grossly increase the administrative burden on institutions and individual researchers. While I acknowledge that, contrary to the requirements of the Act, my local AEC already requires researchers to obtain ethical approval to harvest tissue for research from humanely-killed animals, this inappropriate requirement is currently being challenged in the preparation of the new Code of Ethical Conduct for the Use of Animals (CECUA). Defining humane killing as a manipulation, as proposed by NAEAC, will have a huge negative impact nationally and will likely grossly inflate the time cost and financial cost associated with this increased administrative burden.

Q26. Can you think of any other changes that would improve the system for regulating animals used in research, testing and teaching?

When Code Holders submit CECUAs to the MPI for approval, MPI should require the Code Holder to forward copies of all forms and guidelines used by their AEC to check these carefully for compliance with the Act. While the Act allows Code Holders to collect other information on AEC application forms, some institutions do not differentiate these types of information on their forms, effectively allowing AECs to rule on issues beyond their terms of reference, such as Health and Safety Compliance.
Animal Users Advisory Group  
Dept Microbiology and Immunology  
University of Otago  

17 September 2012  
Animal Welfare Strategy and Legislation Review  
MPI  
P O Box 2526  
Wellington  
email: awsubmission@mpi.govt.nz  

To whom it may concern,  

The Animal Users Advisory Group has prepared the following submission in response to the call for submissions for the amendment of the Animal Welfare Act 1999. We agree that the submission may be published but ask that neither the group nor any individuals in the group be named or identified in anyway on any publication. We request this in light of public perception of animals used in Research, Testing and Teaching (RTT) and the associated risk to the AUAG, its members and the University of Otago.  

The AUAG wishes to submit the following proposals and comments in relation to the amendment of the Animal Welfare Act 1999. We make specific reference to sections of the Animal Welfare Matters document below:  

1. Regarding Q5 and 6: We support the proposal to replace the codes of welfare with a mix of regulations and guidelines. We propose that species-specific guidelines and standards for laboratory animal care in New Zealand should be developed. The guidelines and standards should include acceptable practices for the management of animals that develop conditions resulting from adverse phenotypes and for euthanasia necessary for the management of breeding. Our view is that a risk of the proposal for standards of care and conduct is that it could incorporate reporting of animal numbers to MPI for animals that are euthanized as part of a breeding programme or for animal management. The AUAG does not support any requirement for reporting of laboratory animals that are euthanized for the management of breeding programmes. This would  

Department of Microbiology and Immunology  
PO Box 56, Dunedin, New Zealand.  
Tel 64 3 479 7734 - Fax 64 3 479 8540 - email microbiology@otago.ac.nz  
www.otago.ac.nz
present a misleading impression of numbers of animals used in RTT to the public.

2. Regarding Q24: The AUAG agrees with the proposal that euthanasia of experimental animals for subsequent retrieval of tissues should fall under the remit of NAEAC and that a 'limited' application to an AEC with sufficient information to demonstrate the 'benefits to society' should be required. The reporting of animal usage should be in a category clearly distinguished from that of manipulated animals, for the reasons outlined below.

3. Regarding Q25: Reporting numbers of euthanised, non-manipulated animals will greatly inflate the animal usage statistics available to the media. For this reason, the impact to our university (which already monitors animals euthanised for tissue collection at an institutional level but does not currently report the numbers to MPI) will be one of increased reputational cost. In our experience (e.g. Otago Daily Times, 5 March 2012), the media will not distinguish animals euthanised for tissue collection from those that are truly manipulated, so a misleading picture will be presented to the public.

4. Regarding Section 4.8.2: We support the exemption of circumstances where RTT is undertaken on a dead animal (and/or their tissue) procured from a 'commercial retail outlet', however we do not support the use of 'retail' within the definition as abattoirs, for example, may not always have an associated retail outlet. We propose that the terminology be changed to 'commercial source'.

Yours sincerely,

Chair, AUAG.
From: Friday, 28 September 2012 8:22 a.m.  
To: Animal Welfare Submissions  
Cc:  

Subject: Animal Welfare Strategy and legislation review submission  
Attachments: AW_Act submission UoO.DOC  
Animal Welfare Strategy and Legislation Review  
Ministry for Primary Industries  
PO Box 2526  
Wellington 6140  

Dear Sir or Madam,

Please find attached a submission from the University of Otago on the proposals for changes to the Animal Welfare Act 1999 and a strategy for animal welfare.

This submission has been prepared by our animal ethics committee, after consultation within the University, but please note that it does not constitute a consensus view from all members of the university on all of the matters discussed.

You are likely to receive other submissions from within our university community, some with different views, and we welcome further discussion, debate and engagement on these matters.

Yours sincerely,

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PROFESSOR  
DEPUTY VICE-CHANCELLOR (RESEARCH AND ENTERPRISE)  
UNIVERSITY OF OTAGO • CLOCKTOWER/REGISTRY BUILDING  
PO BOX 56, DUNEDIN 9054, NEW ZEALAND  
www.otago.ac.nz  

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7/11/2012
Dunedin Animal Ethics Committee, on behalf of the University of Otago
12 September 2012

Preamble

The Dunedin Animal Ethics Committee, University of Otago, currently oversees over 450 animal usage protocols covering a wide range of activities from wildlife conservation surveys to invasive neuroscience. As such we are very much aware of the breadth of activities associated with the use of animals in research, testing and teaching (RTT).

We believe that the current Act and approved Institutional Codes of Ethical Conduct for Use of Animals (CECUA) system works reasonably well, though there are some areas which we wish to highlight for possible amendment in the revised Act. Where possible we have aligned these comments to the MPI discussion paper (No.2012/07), Proposals for a New Zealand Animal Welfare Strategy and amendments to the Animal Welfare Act 1999.

MPI Discussion paper 2012/07 Section 4.7.4 Changes to who can perform surgical procedures.

Comment: While it appears that this change is not intended to have an impact on Part 6 of the Act, the use of significant surgical procedures is part of current RTT practice in New Zealand. Moves to require more direct veterinary involvement in these practices need to be carefully considered.

Questions on significant surgical procedures
Q19. Do you agree with the proposals to change who can perform significant surgical procedures under veterinary supervision?
Response: The Act needs to ensure that researchers are still able to perform surgical procedures as part of RTT. Changes to veterinary supervisory conditions should not be a barrier to RTT activities and we do not support the need for direct involvement by a veterinarian in all RTT applications.

Q20. Do you agree that the Act should allow for mandatory conditions to be placed on controlled surgical procedures?
Response: Yes, assuming that these conditions will be set following consultation with the research community to ensure that barriers to RTT are not unintentionally imposed. Mandatory conditions will ensure adherence to best practice and improve animal welfare.

Q21. What are the risks and benefits of these proposals? Can you think of any missed opportunities or unintended consequences?
Response: As noted above for Question 19, we are concerned that increased veterinary supervisory requirements may adversely impact on the capacity to perform RTT.
Q22. Are there any other ways the system should be improved?
Response: As long as these changes do not impact significantly on Part 6 (RTT use of animals) we have no comment.

Q23. What impact would the proposed changes have on you and/or your organisation or sector?
Response: The University of Otago presently employs three veterinarians to monitor animal health and welfare in our RTT programmes. Increasing the need for more direct veterinary involvement would have significant, and we believe unnecessary, cost implications for our organisation.

MPI Discussion paper 2012/07 Section 4.8 Reporting animals killed for Research, Testing and Teaching.
As indicated in the discussion paper the definition of ‘manipulation’ currently specifically excludes the killing of an animal in order to undertake RTT on a dead animal (and/or its tissue). In proposing to change this, the discussion paper states “The Government also needs to ensure that including killing as a ‘manipulation’ under the Act does not make research, testing, and teaching obligations within the Act unreasonable. The Government therefore proposes to:

- Exempt researchers who kill an animal for research, testing, and teaching purposes from needing to satisfy a ‘harm-benefit’ test. Animal ethics committees would only have to be satisfied that an application to undertake research, testing, or teaching using animals demonstrates benefits for society; and
- Exempt circumstances where research, testing, and teaching is undertaken on a dead animal (and/or their tissue) procured from a commercial retail outlet.”

The University of Otago’s institutional view of killing as a manipulation.
As the current Act stands, the humane killing of animals is not considered to be a manipulation. However, the University of Otago believes that the collection of animal tissues for RTT should require ethical consent. The Institution’s CECUA requires that the killing of animals to acquire tissues for RTT must have undergone ethical review by its Animal Ethics Committee (AEC). This review process focuses on ensuring best practice for humane euthanasia and requires a justification for the numbers to be used. We believe that this approach is consistent with the MPI discussion paper proposal. Our long-standing practice is that such usage is internally recorded under a separate ‘impact’ grade (ET, for euthanasia for tissue).

We do not require this process for animals culled for the purposes of maintaining a breeding colony, however such euthanasia is conducted under approved standard operating procedures overseen by the Institution’s Animal Welfare Office veterinary team.

The Institution also requires reporting of intention to collect tissue from dead animals from other (non-commercial) sources (for example, naturally deceased wild-life). Such reporting allows the University the opportunity to prospectively evaluate a range of potential institutional risks, including cultural sensitivities, health and safety requirements and potential requirements of other legislation.
Concern with regard to changing killing to a manipulation.
The University of Otago is concerned that changing killing to a reportable 'manipulation', even if graded separately from other manipulations, will significantly and misleadingly inflate animal usage statistics. Recent evidence suggests that the news media and other interest groups tend to report animal use as a single figure (Otago Daily Times front page headline “University Animal Death toll tops 25,000”, 5 March 2012).

In contrast to the National Animal Ethics Advisory Committee's pre-submission on the Animal Welfare Act (dated 15 May 2012), we do not believe that animals killed without manipulation for RTT, or culled as part of colony maintenance should be counted. Nor that such usage should be included in the statistical reporting process on the grounds that it will misleadingly inflate the public perception of manipulated animal use.

Recommendation:
That the Act be altered so that euthanasia for RTT is required to undergo AEC review and approval. However such usage should not be included in the statistical reporting process on the grounds that it will misleadingly inflate the animal usage statistics. We would therefore suggest that the first proposed exemption be altered to:

- Exempt the use of non-manipulated humanely euthanised animals (and/or their tissue) for research, testing, and teaching. Animal ethics committees must be satisfied that an application to undertake research, testing, or teaching using euthanised animals demonstrates best practice for euthanasia and provides an acceptable justification for the numbers euthanised.

In addition, we recommend that breeding and euthanasia for production purposes remain separate from the Act. We would therefore suggest that a third exemption be included:
- Exempt circumstances where animals are humanely euthanised as part of animal breeding practices for the supply of animals for research, testing, and teaching and permit research, teaching and testing to be undertaken on those animals (and/or their tissue) which are surplus to breeding production.

Questions on reporting of animals killed for research, testing or teaching
Q24. Do you agree that the number of animals killed humanely for research, testing and teaching should be included in official statistics?
Response: Inclusion of the number of animals humanely killed solely for procurement of dead animals or their tissues for RTT does not constitute an animal welfare risk and has the potential to mislead the public on the number of animal manipulations which are performed as part of RTT. We therefore do not support including these numbers in the official animal usage statistics, however, we believe that the public's interests would be best protected by requiring that such killing be approved by an AEC.

Q25. What impact, including costs, would the requirement to report animals killed for use in research, teaching, and testing have on you or your organisation?
Response: Requiring the reporting of animals killed for this type of RTT would be potentially misleading and thereby distort the animal usage statistics and
could have significant reputational cost risks for the New Zealand research sector, including tertiary institutions such as the University of Otago.

Q26. Can you think of any other changes that would improve the system for regulating animals used in research, testing and teaching?
Response: see response to question 24.

Q34. Other Comments or feedback
Adverse phenotypes within genetically modified (GM) and selectively bred animals.

As the Act is currently written, breeding is not a manipulation. Therefore the breeding and maintenance of selectively bred or genetically modified animals (in particular, but not exclusively, rodents) for RTT does not require ethical consent.

The University of Otago is concerned that this situation has the potential to result in the omission of appropriate monitoring of animal welfare relating to the development of debilitating animal physical characteristics (adverse phenotypes), for example spontaneous cancers and neurological conditions.

Recommendation:
That maintenance of all GM animal colonies, and selectively bred colonies, be required by the Act to be covered by a CECUA and undergo AEC evaluation to identify potential adverse phenotypes and, where necessary, develop an AEC approved colony maintenance and management plan, which minimises the impact of the adverse phenotype on the animal. The CECUA should stipulate that such plans must include humane endpoints. This would require amendment to section 88 of the current Act.
Amendments to the Animal Welfare Act

Submission from University of Otago

I am senior scientist that has lead Marsden, HRC and NERF-funded projects relating to whole animal biology. My specialities are unusual in New Zealand. I have designed rodent animal houses and currently manage two animal facilities: one relating specifically to my research and the other being a communal resource. I have a working knowledge of national and international regulations governing animal houses, and the scientific basis for the regulations.

Question 24.
I support the reporting of animal use, but strongly oppose the associated regulations. The rationale for my view is documented in answer to Question 25.

Question 25.

Research colonies of produce vast numbers of rodents that are not used for RTT

The number of animals bred and killed without use typically exceeds the number of animals used for experimental manipulation, often by a large margin.

This excess production is in part to minimize the ethical costs associated with animal manipulation: the number of animals used in experiments relates to the square of the variation between animals (ie, if the variation between animals doubles, then the number of animals used in an experiment increases by four). Experiments therefore use age-matched and sex-matched animals, leading to animals being culled as they are too old or the "wrong" sex.

With GM colonies only a proportion of the mice have the appropriate genetic mutation. Typically, 1 out every 2 mice in GM colonies are culled for this reason, with this rising to 6 out every 8 being culled with more complex mutations.

The University of Otago currently operates as NAEAC recommends. This results in many thousands of rodents being killed. The dead animals are disposed of rather than being used for RTT or to reduce harm done to live animals.

As an Animal Manager, I am permitted to kill animals without restriction and to dispose of the tissue. As a scientist, I am not permitted to use the tissues of the animals that my staff kill, without prior approval of the AEC. The application process by the AEC is inefficient and slow. On many occasions, dead animals have been discarded without study because the compliance costs have been too high.

Student researchers are inexperienced, and their inexperience is a significant factor in harm done to live animals in Universities. This could be minimised by providing the students with unrestricted access to freshly-killed animals, to practice their techniques. At Otago, this is not occurring as its AEC has placed significant barriers around post-mortem use of tissue, in order to minimise animal use.

There is a shortage of animal tissue to teach undergraduate students, even though there is a large stream of suitable tissue passing through the University waste disposal.
The AEC directly restricts access to tissue. The largest barrier, however, to accessing tissue is artificial costing of animals. The cost of breeding and killing an adult animal is independent of the subsequent use of the animal. Animals are expensive: Departments have limited funds for teaching and research groups have limited funds to provide animals to train their members. This prevents tissues being used for RTT. Animal facilities run at a loss because they cannot sell their excess animals. The University recoups the losses made by their animal facilities, through central charges on researchers and Departments. Departments and researchers are paying for animals that are discarded but cannot use them for RTT.

As an Animal Manager of a small breeding facility, I am not permitted to supply my excess animals to my colleagues to prevent competition with the University’s central facility.

In summary, NAEAC’s proposal is based on the presumption that there is a relationship between the amount of post-mortem research that is undertaken, and the number of animals that are bred and killed. This presumption is incorrect.

Recommendations

1. In my view, Universities should be required to:
   a) report the number of animals that they breed and kill, but do not directly use in RTT.
   b) justify the non-use of killed animals to an external agency on a three-yearly basis, with the staff of the Universities being able to make submissions to the agency regarding the non-use of killed animals.

2. I support the public reporting of animal use, provided:
   a) the study of post-mortem tissues from humanely killed animals is clearly separated from manipulations of live animals.
   b) the numbers of animals killed, but not used for RTT, is made public.

Composition of AEC

The composition of AECs, NAEAC and ANZCAART do not reflect Society, an in my experience the views of these organisations can be extreme relative to the general public, on some issues. The value placed on animal life is one example of this.

Consumers of research such as the Heart Foundation, Neurological Foundation and Cancer Society have similarly standing in New Zealand to the Veterinary Association and animal welfare societies. Their views on whether research should be restricted because of the humane loss of animal life are, however, not necessarily the same.

Live animal manipulation must have a counter balance and I strongly support the current composition of AEC, which have representation for the Veterinary Association and an animal welfare society, but do not have representation from the consumers of research.

The use of tissues from humanely-killed animals is accepted in New Zealand, even thought some parts of society oppose it. I strongly oppose the use of non-representative committees to regulate humane animal use.

Recommendation
1. University's should be required to ensure all killing is humane, as per the current law, but should not be permitted to restrict the purpose to which the animals are used.

2. If Parliament considers that post-mortem research should be regulated, then I request that the regulation is fully independent of AECs, as the ethics associated with deliberate manipulation of a live animals and the study of a dead animal have no overlap.

**Abuse of power by AECs and NAEAC**

The Act excludes humane killing as a manipulation, but the University of Otago's Code of Ethical Conduct defines killing as a manipulation.

NAEAC and others opposed the exclusion of killing as a manipulation when the Animal Welfare bill was debated. Parliament unanimously rejected NAEAC's view.

The AWA requires institutes to consider the views of its AEC when drafting its Code of Ethical Conduct (CEC). Institutes often use their AECs to screen the views of other members of the Institute.

I was a member of the University's AEC at the time the AWA was passed. Senior members of the University's AEC were actively involved in lobbying Parliament to define killing as a manipulation. This included University staff and lay members.

The members of the AEC that had unsuccessful lobbied Parliament to define killing as a manipulation used their statutory right of input to the CEC to successfully lobby the University to negate the statutory restriction placed on their powers. Two significant issues flow from this.

First, the AWA requires that researchers minimize harm, without reference to the lose of life. The University's CEC changes this requirement, altering the intent of the Act.

The Act, and biomedical ethics, requires that researchers place the life of animals at risk of humane death (e.g. anaesthetic overdose) if this reduces the probability of suffering.

Medical and veterinary practice aims to reduce suffering, but not to the extent that life is placed at risk.

The University's CEC has permitted its AEC to risk suffering in order to reduce humane loss of life. I submit that this is a significant breach of the Animal Welfare Act.

Second, the Education Act protects the right of ethical enquiry by academic researchers. This protection extends to individuals and University Departments.

Parliament is the highest authority. The AWA, in my lay view, constitutes a declaration by Parliament that post-mortem research should not be restricted, other than through a requirement to ensure that any killing is humane. The protection extended to researchers and teachers by Parliament has been over-ridden. This is preventing ethical teaching and research from occurring.

NAEAC enforces the regulation of research but does not enforce the protections provided to researcher, which they do not agree with.
Recommendations

Until Parliament alters the AWA, NAEAC and the AECs that it oversees should not be permitted to define killing as a manipulation. Institutes should not be able to circumvent this restriction by simply changing the wording of their CECs to avoid the use of the word “manipulation”.

Other issues

The house and breeding of rodents are governed by international conventions. These conventions are designed to:

1. Minimise animal use by decreasing variation between animals.
2. Prevent experiments being confounded by uncontrolled variation in the animals' environment.
3. Ensure that experiments done in different parts of the world can be compared.

The University's central animal facilities have been in breach of these conventions, as a matter of policy. These breeches are currently being addressed, but have persisted for decades.

The conventions protect animal welfare, but this is not their primary purpose. For example, mouse houses must be 21±2°C, even though mice thrive outside of this temperature range. The non-compliance in animal house has multiple causes, with a prime cause being the practice of institutional vets using their clinical judgement to over-ride convention. That is, breeches are accepted if the animals lack clinical symptoms. Science must have standards of housing that greatly exceed what is acceptable in the general community, or in normal veterinary practice.

In my view, the avoidable harm to live animals caused by this non-compliance exceeds that done by all researchers.

In my view, the integrity of a proportion of the data generated by the University has been compromised and the statistical power of many investigations diminished.

This harm has persisted because the University's AEC is unwilling to regulate its institutional veterinarian, or the University's management. The fact that Institutional veterinarians are permanent members of AEC is central to the persistent of serious breeches. Lay members and the non-specialist "independent" veterinarian defer to the institutional veterinarian. Institutional veterinarians are listed as "animal welfare officer", which masks their active participation in the process of animal manipulation.

Frequently, the AEC delegates the care of the animal houses to the institutionary veterinarian. This creates the following situation.

The institutional vet has control of animal houses, on behalf of the institute. He/she receives complaints from users about animal houses, on behalf of the University. He/she is a
dominating influence in the 6-monthly AEC audit of animal houses, and in some institutes is permitted to undertake these alone. She/he receives complaints about animal houses from researchers. I am aware of situations where the veterinarian has refused to stand-down from AEC investigation of his own actions and actions by a close relative.

The 5-yearly CEC audits are undertaken in secret, with the reports also being restricted. During the 1st two audits of the University, I was a manager of an animal facility using technologies new to New Zealand and novel even at international level. On both occasions, I had raised issues ahead of the site visits but were unable to speak to the auditors, or present a written submission. Some scientists were unable to speak to the auditors, during the current review.

The auditors and institutional veterinary officers are viewed as having a close association through the Veterinary association and ANZCCART etc.

There is a lack of confidence in the CEC audit process, with the long-term persistent of serious breeches of regulations in animal houses proof that this audit process needs to be improved.

The standards governing animal houses are set by ANZCCART. The ANZCCART regulations are incomplete and have not been updated in response to the emergence of new technologies (eg individually vented caging).

The generation of regulations for animal facilities also needs a committee with a breadth of expertise that is rarely achieved in Australia and New Zealand. Science is international, and I submit that national or regional regulations are not appropriate, and have not been so for many decades.

**Recommendations.**

1. The standards for animal houses in New Zealand should be linked to regulations in the EEC or the USA, with this role being removed from ANZCCART.

2. The inspection of animal facilities during the CEC audits should be undertaken by inspectors based outside of Australasia. My preference is to build a linkage with inspectors from the Home Office (UK).

The University of Otago is in the process of initiating audit through AAALAS. This is a valid alternative to linkage with the UK inspection. It is evidence that the current audit is failing and is a positive and commendable approach by the University to problems in its animal facilities.

3. Institutional veterinary officers should not be permitted to participate in the AEC of their institutes, either as a full member of the committee or as an ex-officio member in attendance.

4. The Act should be amended to ensure that the staff of institutes are able to participate in the review of their CEC and to ensure that staff are able to obtain a NAEAC approved version of the audit report.
Amendments to the Animal Welfare Act

Submission from the Department of Anatomy
University of Otago

This submission has been prepared by Professor [Name], on behalf of 83 members of Academic Staff in the Department of Anatomy. Animal research is a significant part of biomedical research completed in the Department, and we are highly supportive of the philosophy and intentions of Part 6 of the Animal Welfare Act, 1999, which regulates animal research.

**Key issue:** We strongly oppose the proposed amendment from NAEAC that unmanipulated animals killed as part of research, testing and teaching be included in the definition of manipulation.

The Act currently explicitly excludes killing as a manipulation, and this issue is extensively discussed and well justified in the guide to the act published in 1999. In our view, this is the correct position for Government to take, and thus, we support the current version of the Act. The rationale presented by NAEAC for changing the Act (to legally enforce the collection of statistics) is weak and poorly thought through, has been drafted in a way that will provide a significant administrative burden on researchers, creates a double standard where one group of society is governed by different rules than the rest of society, and most importantly, will paradoxically lead to greater harm to animals through regulating and minimising use of dead animals. We will detail our opposition to this proposed change below:

**Question 24. “Do you agree that the numbers of animals killed humanely for research, testing and teaching should be included in official statistics?”**

We do not support this proposal. The inclusion of humanely killed, non-manipulated animals in statistics that relate to manipulation of live animals risks creating a false impression that may undermine medical and agricultural research in New Zealand. The manipulation of live animals is an issue that some parts of society oppose, and therefore and must be regulated, and documented (as at present). The moral objection to animal manipulation does not logically translate to the use of tissue for research, particularly since a main purpose of post-mortem research is to avoid live animal testing. These statistics become public information, and it is unlikely that the media will distinguish between manipulated animals and animals humanely euthanised for tissue collection, fueling sensationalist reporting of animal research (see, for example: http://www.odt.co.nz/news/dunedin/200081/university-animal-death-toll-tops-25000). Inflating animal manipulation numbers with additional animals humanely killed for tissue collection will lead to a distorted picture being presented to the public, with negative outcomes in terms of institutional and government reputation.

**Question 25. “What impact, including costs, would the requirement to report animals killed for use in research, teaching and testing have on you and your organisation?”**
Reporting of numbers of humanely killed animals would be a relatively small cost, if this were all that the NAEAC/MP1 was requesting. However, the consequences of defining killing as a manipulation are far reaching and would have significant consequences (detailed below). We have already seen these consequences at the University, because despite the clear guidelines against it in the act, the University of Otago’s current Code of Ethical Conduct redefines killing as a manipulation (we have strongly opposed this apparent breach of the Animal Welfare Act in our submission on the 2012 review of the Code of Ethical Conduct of the University of Otago; we consider it highly inappropriate for a Code of Ethical Conduct to change the explicit intention of the Act). NAEAC’s proposal will provide statutory force to this failed policy.

1. Practical impacts:
Indirect increase in harm to animals, and waste of animal tissue: Post-mortem research can often replace research on live animals, and the use of dead animals can reduce the ethical costs of subsequent manipulations of live animals. The definition of killing as a manipulation at Otago has already led to significant pressures to minimise the use of dead animals (inconsistent with the philosophy of the Act). The majority of mice and rats bred are culled for husbandry purposes without being used for scientific research. This provides a large tissue resource that could be used, for example for anatomical studies or to teach students manipulation skills. Under NAEAC’s proposal, and the University’s current procedures, the killing of excess animals by the University’s animal facilities is not regulated or minimised. However, if a scientist seeks to access tissue from the culled animals, then the animal will be deemed to have been killed for research purposes. This will require an approval process, justification and minimisation. Fewer of these dead bodies will be used.

Consequent of the above, we have to limit the availability of tissue to our undergraduate programmes, while large numbers of bodies are thrown away. There is suboptimal tissue available to train inexperienced researchers to manipulate live animals. Dead animals that could be used to reduce harm are being cremated without use because of regulatory barriers. Because it will often be more convenient, researchers will be inclined to use additional groups of animals for this research and teaching, rather than make use of these dead bodies (the regulatory workload being the same).

A double standard introduced into the law: The discussion document states “Given the less certain outcomes of research ... it is reasonable to ask for justification rather than assuming automatic benefit for using an animal...”. Uncertainty is given as a reason for regulation. The death of a mouse poisoned by the public is uncertain. The death of a rabbit shot for the pleasure of the hunter, or the possible benefit of a farmer, is uncertain. It may linger, malmed, dying of starvation. In contrast, the humane death of mice and rabbits in research institutes is certain. The above statement assumes that some forms of post-mortem research are not of benefit, but gives no example of the types of research that will not be permitted. NAEAC and MPI have created an inference in the document that some forms of post-mortem research involve practices that the public would not approve of. As scientists, it is difficult to counter this inference when it is not illustrated. We know of no post-mortem research that is controversial, either in New Zealand or internationally. No law should be written in such a way that one element of Society (in this case, researchers using animals) are governed differently
from other elements of Society (e.g. Commercial facilities, Animal breeding facilities, Pest Controllers, Hunters).

2. Economic Impacts:
   Damage to research programmes: Successful innovative research programmes regularly reveal new avenues of research. These opportunities need to be explored by small preliminary experiments, whose sole aim is to identify issues for extensive exploration. The AEC process is slow: from conception to approval is rarely less than 2 months, often extending to 4 months or beyond. The AEC forms are complex, and the staff costs associated with approving exploratory experiments is large relative to the costs of the experiments. The current regulation of post-mortem research at Otago is preventing exploratory experiments from being undertaken (Appendix 1 provides an example). This limits the competitiveness of Otago research relative to the international market.

Response to other questions in the discussion paper:

Significant surgical procedures
Question 19/21

We request that any restriction on significant surgical procedures should not apply to surgery being undertaken by scientists under Part 6 of the Act. Biomedical scientists have a PhD, which involves 8+ years of University training (including prerequisite degrees). Typically, scientists have an additional 4 years post-PhD training before having an independent research programme or being able to independently train students. All biomedical surgery and teaching is approved by an AEC, ensuring that scientists act within their skill set. Surgery undertaken by biomedical scientists is often outside of the norms of veterinary practice, and the research training of scientists is essential to the success of scientific manipulations.

The Agricultural Compounds and Veterinary Medicines (ACVM) Act 1997 unintentionally restricted the use of drugs in biomedical experiments. This resulted in various experiments being technically illegal until the Code of Practice for the Use of Veterinary and Human Medicines in Research, Testing and Teaching Organisations was established in 2003. We now have cumbersome regulation over use of these drugs in research, where previously it was easily managed within normal research protocols. We wish to avoid similar unintended consequences of the present proposed amendments.
Appendix 1
A case study of the effect of defining killing as a manipulation

One of my GM mouse colonies breeds well, when the male carries the genetic modification. Unexpectedly, when the dam carries the mutation, the litter size is reduced from an average of 6, to less than one. This observation may indicate that we have accidentally identified a novel component of female fertility that could be relevant to human infertility or the breeding of livestock. We are not funded to undertake research in female fertility, and the colony is likely to be culled when our current funding ends in 24 months. If our chance observation is to be turned into scientific observation, then we need to obtain preliminary data identifying why the females do not breed.

At one stage we had three dams that could have been killed and examined. We wished to know, for instance, whether the dams only ever had 1 embryo, or whether they started with many embryos that died before birth. Injecting a freshly killed dam with a dye can identify early microscopic embryos, thus identifying whether the dams have reduced conception or atypically high loss of embryos.

However, despite what it states in the Animal Welfare Act, at Otago, prior approval is required to use a dead mouse. Hence, the mice were killed and discarded without examination, as un-required mice must be culled, and the opportunity to advance knowledge was lost. The University’s AEC considers that the non-use of killed animals is a superior option to permitting scientists to examined dead animals without their approval. This view is unlikely to be shared by the families in our community that have infertile members, or women who have suffered recurring spontaneous abortion.

If we seek ethical approval and then specifically generate mice to study, the following costs occur:
1. Only one in four mice in our colony are genetically modified females. To replace the three dams, we need to mate 3 pairs. In addition to the 3 required dams, on average we will have 15 other un-need mice (males, normal females) and 6 ex-breeder. That is, we will need to kill 21 mice to get the 3 replacement dams that were destroyed without use.
2. GM mouse colonies are small. Adult mice for use as breeders are often not immediately available. Once breeders are available, it will take a minimum of 70 days to produce adult mice capable of breeding. This is a significant proportion of the limited time available to us, and significant cost associated with animal housing.

The regulation of post-mortem research leads to the loss of research opportunities, it increase the dollar and ethical costs of research. In my view, it is unethical to restrict post-mortem use of research animals, given that colonies used to generate animals for manipulation invariable give to rise to large numbers of animals that are destined to die.
SUBMISSION FORM

ANIMAL WELFARE MATTERS:
Proposals for a New Zealand Animal Welfare Strategy and
Amendments to the Animal Welfare Act 1999

Please send your submission to the Ministry for Primary Industries by 5.00pm Friday 28
September 2012. Submissions can be emailed to awssubmission@mpi.govt.nz or posted to:

Animal Welfare Strategy and Legislation Review
Ministry for Primary Industries
PO Box 2526
WELLINGTON 6140

The questions in this form should be treated as a guide only – you can choose to answer any
or all of the questions, or provide any other comments.

The consultation document Animal Welfare Matters can be downloaded from the Ministry for

Submissions and a summary of submissions will be published on the Ministry’s website. If
you or your organisation do not want information in your submission to be published, please
make this clear in your submission and explain why. The Ministry will take this into account
when deciding whether to publish the submission or release it under the Official Information
Act 1982.

Personal Information

Your name: University of Waikato Animal Ethics Committee

Your organisation/sector/interest group (if applicable): University of Waikato
Issue 1: New Zealand animal welfare strategy

Q1. Do you have any overall comments or feedback about the proposed strategy and its approach?
Q2. What are the risks and benefits of adopting this strategy? Can you think of any missed opportunities or unintended consequences?
Q3. Do the values reflect New Zealanders' views about animal welfare? Would you suggest something else and why?
Q4. Do you have any comments on the proposed approaches, leadership roles, or Government priorities?

Answers and comments

Q1 We, as an organisation agree that a review of the Animal Welfare Act 1999 is needed to address any identified shortcomings of the original Act and to better reflect the changing concerns of our society about the treatment of animals in New Zealand. We agree that the key objectives of the Act should be to ensure that animals are treated humanely while acknowledging society's right to use animals for human benefit.

Q2 The benefits of this strategy are to provide animal welfare legislation that better reflects the common opinion of New Zealand society concerning the humane use and treatment of animals. Potential risks are to undertake this process with too much haste which may not fully consider all possible implications of the proposed changes for particular sectors of society who have a requirement for animal use. We have a concern around the loss of the independent role played by NAWAC.

Q3 We agree that individual opinions about the ethical use of animals are extremely widespread and that the proposal should reflect the middle ground of public opinion. We would argue that the middle ground view of New Zealanders currently accepts that humane animal use is justified for a wide variety of purposes: for hunting and fishing; use of animals for food; use of animals for companionship; working animals; use of animals for research, testing and teaching; use of wild animals for public display (e.g. zoos); use of animals for entertainment (e.g., horse and dog racing). We therefore agree that the major purpose of the legislation should therefore be directed to the issue of animal welfare and the humane treatment of animals rather than extending into the wider debate about the ethics of animal use and subjective and controversial topics such as an animal's right to life.

Q4 No comment.

Issue 2: Standards for care and conduct towards animals

Q5. Do you agree with the proposal to replace codes of welfare with a mix of directly enforceable standards and guidelines?
Q6. What are the risks and benefits of this proposal? Can you think of any missed opportunities or unintended consequences?
Q7. What impact will the proposed changes have on you and/or your organisation or sector?

Answers and comments

Q5 We agree with the proposal to replace codes of welfare with standards and guidelines. However, it is unclear how the proposal to abolish codes of animal welfare would apply to organisations operating under animal ethics committees.

Q6 Enforcing the standards will generate a cost to sectors and organisations.

Q7 No comment.
Issue 3: Criteria for developing standards

Q8. Would the proposals to add “practicality” and “economic impact” to the set of criteria improve the decision-making process, or would you suggest something else?

Q9. Do you agree that having “transitions” and “exemptions” is a better way to handle the situations that currently fall under ‘exceptional circumstances’?

Q10. What are the risks and benefits of these proposals? Can you think of any missed opportunities or unintended consequences?

Q11. What impact would the proposed changes have on you and/or your organisation or sector?

Answers and comments

Q8 Inclusion of “practicality” and “economic impact” as statutory criteria may undermine welfare if not carefully overseen. Criteria for how these are balanced against animal welfare need careful consideration.

Further, we feel that the terms “practicality” and “economic impact” are too subjective or ill-defined and potentially allow for abuse of the system. We feel that mandatory industry guidelines or best practice guides should be the standard and that the provision of exemptions on the basis of practicality or economic impact negate the value of mandatory guidelines and are inconsistent with the majority view of New Zealanders that important issues such as animal welfare should not be downplayed on the basis of implications arising from issues of practicality or economic impact.

Q9. We agree with transitions and exemptions as a way to deal with practices currently covered under exceptional circumstances. We query exempting animal welfare on the basis of religious practice (section 4.4.2). Does this meet with accepted standards in New Zealand?

Q10 Potential for reduction in national welfare standards if “practicality” and “economic impact” criteria are abused.

Q11 No comment.

Issue 4: Role of the National Animal Welfare Advisory Group

Q12. Do you agree there is still a role for an independent committee on animal welfare?

Q13. Do you agree that the committee should be able to publish its advice at its discretion?

Q14. Do you agree that the current membership of the committee is appropriate or does it need to be changed?

Answers and comments

Q12 While we agree that things could be streamlined we believe there is value in having a committee independent from the Government.

Q13 Yes to maintain independence.

Q14 Overall balance seems reasonable.
Issue 5: Live animal exports
Q15. Do you agree with the proposal to create directly enforceable standards for the export of live animals?  
Q16. Do you agree with broadening the purpose of the exports part of the Act so that New Zealand's reputation can be considered when making rules or deciding on applications?  
Q17. What are the risks and benefits of these proposals? Can you think of any missed opportunities or unintended consequences?  
Q18. What impacts will the proposal have on you and/or your organisation or sector?  

Answers and comments  
Q15 – Q18 No comments.  

Issue 6: Significant surgical procedures
Q19. Do you agree with the proposals to change who can perform significant surgical procedures under veterinary supervision?  
Q20. Do you agree that the Act should allow for mandatory conditions to be placed on controlled surgical procedures?  
Q21. What are the risks and benefits of these proposals? Can you think of any missed opportunities or unintended consequences?  
Q22. Are there any other ways the system should be improved?  
Q23. What impact would the proposed changes have on you and/or your organisation or sector?  

If you have a view on any of the procedures described in section 4.7.5 of the consultation document, please indicate how you think they should be classified:  
- Not significant: can be carried out by anyone.  
- Significant: may only be carried out by a veterinarian or a person who is acting under the direct supervision of a veterinarian and who is being taught veterinary science at undergraduate level.  
- Restricted: as for significant surgical procedures plus may only be carried out if the procedure is in the animal’s interests and using appropriate pain relief.  
- Controlled: as for significant surgical procedures plus may also be carried out by the owner of an animal, or their employee with written veterinary approval.  
- Prohibited: no one may carry out the procedure.  

Answers and comments  
Q19. Agree.  
Q20. Do not agree. Including mandatory conditions in the Act might mean it will be too restrictive for little advantage.  
Q21. Care will be needed to ensure that the definition of a Controlled Surgical Procedure does not restrict the ability of a researcher to undertake novel procedures not directly covered by regulations.  
Q22. Yes – see below.  
Q23. The proposed changes need to make specific provision for techniques and procedures normally expected to be undertaken within research institutions. Although a veterinarian may instruct, supervise and authorise the researcher to perform the procedure, it will generally not be appropriate for the veterinarian to ‘directly supervise’ on a continuing basis.
Issue 7: Reporting of animals killed for research, testing or teaching

Q24. Do you agree that the number of animals killed humanely for research, testing and teaching should be included in official statistics?

Q25. What impact, including costs, would the requirement to report animals killed for use in research, teaching, and testing have on you or your organisation?

Q26. Can you think of any other changes that would improve the system for regulating animals used in research, testing and teaching?

Answers and comments

Q24. We, as an organisation, do not agree with the proposal to include reporting of all animals killed for research, testing or teaching. This proposal represents a fundamental shift in emphasis of the Animal Welfare Act away from the primary goal of minimising pain, suffering and distress in animals to a more moral judgement about an animal's right to life. We feel strongly that the inclusion of statistics on numbers of animals killed will significantly elevate animal use statistics (probably by several-fold), causing unnecessary concern in the public mind about animal use for research, testing and teaching. It is quite clear from past campaigns in the public media from "concerned" interest groups such as political parties and organisations against the use of animals for research, testing and teaching that the overall number of animals used represents the most evocative statistic to support their campaigns, irrespective of the documented levels of suffering to which those animals were subjected. The fact that around 75% of all animals used in New Zealand for research, testing and teaching suffer little or no impact is almost never reported in these media campaigns.

Q25. The requirement to include all animals killed for research, testing and teaching would impose costs on our organisation and our ability to conduct research, particularly research on fish. Much of the research conducted by the University of Waikato that would involve the killing of animals for research involves research on fish.

For instance, the University currently has a very substantial programme of environmental research directed at improving freshwater quality by controlling or eradicating invasive exotic fish. Eradications of pest fish in lakes may involve the removal and killing of tonnes of fish. The requirement to enumerate every individual would substantially increase the costs and difficulties of this research. Moreover, including such animal "use" in official statistics would elevate the overall numbers of animals used. The requirement to kill all captured pest fish is not a moral judgement call but a legal requirement, given that common carp, mosquitofish, rudd and brown bullhead catfish are legally designated as either unwanted or noxious organisms under biosecurity legislation.

We can also foresee significant problems with the requirement to report on numbers of animals killed with respect to many other forms of fish research by Universities and other organisations. The requirement to humanely kill, identify and report on every single individual fish imposes a very much greater level of ethical compliance on research organisations compared to the general public who currently have no constraints imposed on them other than a legal requirement to abide by fisheries regulations imposed by MPI or Fish & Game New Zealand. The requirement to humanely kill a wild fish is not even required of the general public. Research organisations already have to apply for a special permit from MPI to capture any aquatic life for research and annual reports currently only require overall estimates of pest fish numbers rather than absolute totals. Research fishing by NIWA or MPI to evaluate commercial fish stocks would also fall under the umbrella of research and would require enumeration of every individual killed. Such activities could potentially lead to a gross elevation of Animal Use Statistics from the current level of around 300,000 animals per annum to values in excess of several million. Enumeration of fish even in controlled laboratory environments is also problematic. Maintaining cultures of fish, such as zebrafish, would require keeping statistics on every single individual. Such statistics are easily obtained
on mammals or birds whereby animals are housed singly or in small groups in cages, but almost impossible to obtain for fish where hundreds may be kept in each aquarium.

A recent example of how similar legislation can impose unnecessary constraints is that of a programme in the Australian Capital Territory to involve local schools in restoring waterways by removing exotic fish. If the schools were given the resources to remove and humanely euthanize the fish then they could proceed without any further constraint, given that these were pest species and not protected in any way. However, if they counted all the fish they caught in order to record the effectiveness of their fishing, that then was designated a research project with a requirement to obtain approval by an animal ethics committee and the submission of statistics on all fish caught. The proposed changes to the New Zealand Animal Welfare Act would impose exactly this sort of dilemma – if pest animals were killed as part of a pest management programme then no ethical or reporting requirements would be necessary but if the catch was recorded or formed part of a research programme then it would be subjected to the full requirement for ethical approval, demonstration of public good, and result in an unnecessary elevation in the animal use statistics.

An additional problem with this proposal is that of requiring an animal ethics committee to assess whether a proposal to kill animals satisfies the requirement of providing significant benefits to society, when it is impossible to provide details of the proposed number of animals that may be killed as a result of the research. In most cases it would be impossible to predict how many animals may be caught in fishing studies, or how many offspring may be produced in captive fish breeding. Depending on the species’ fecundity, this could be anywhere from dozens to millions of offspring per gravid female.

Q26: We ask that a wider range of animals be considered when making changes or improvements to the system.

We feel that the current legislation works well to regulate animal use for research, testing and teaching, given that it only relates to the manipulation of animals and requires consideration of the 3 Rs in this respect. The level of suffering of animals is carefully considered and reported on, thus minimising the degree of pain, distress and suffering of animals used for research, testing and teaching.

**Issue 8: Enforcement tools**

Q27. Do you agree with the proposals to attach instant fines to some minor offences and give some animal welfare inspectors the ability to issue compliance orders?

Q28. What are the risks and benefits of this proposal? Can you think of any missed opportunities or unintended consequences?

Q29. What impact would the proposal have on you and/or your organisation or sector?

**Answers and comments**

Q27 – Q29 No comment.

**Issue 9: Other proposed offences**

Q30. Do you agree with the proposal to make drowning a land animal an offence?

Q31. Do you agree with the proposal to clarify that wilful and reckless ill-treatment offences apply to animals in a wild state?
Q32. What are the risks and benefits of these proposals? Can you think of any missed opportunities or unintended consequences?

Answers and comments

Q30. We agree in principle to make drowning a land animal an offence but feel that this should be more specifically worded as “intentionally drowning” to exclude conditions whereby land animals may be drowned accidentally, for example by entanglement in fishing nets. We consider that “land animal” is an inadequate definition – is a sea bird or a marine mammal a “land animal”?

Q31 We agree in principle to make wilful and reckless ill treatment of animals apply to animals in the wild state, however, it would require some specified conditions governing what practices (for humane killing, for example) are appropriate. It is not clear from the proposed changes whether the new legislation would change the current situation whereby the requirement to kill animals humanely exempts animals caught by fishing to now including these. If so, then clear guidelines would be required to specify exactly what constitutes humane killing of fish and what does not.

Q32: No comment.

Issue 10: Technical amendments

Q33. Do you have any comments on any of the technical amendments proposed in Table 1?

Answers and comments

Any other comments

Q34. Do you have any other comments or feedback not covered by these questions?

Answers and comments

Issue 6: Significant surgical procedure

The Versatile Hunting Dog Test Assn (NZ) represents our membership of 60. Our breeds comprise the European hunt, point, retrieve breeds that have traditionally had their tails shortened since their development 100 and more years ago. These breeds often have naturally very long tails.

These breeds were selected for soundness and working ability, they have tails that have fine tips with little flesh cover or hair cover. These breeds wag their tails furiously whilst hunting, and so the tails are shortened by less than 50% to reduce damage. In NZ hunting conditions the dogs are predisposed to tail damage on the Manuka, gorse, broom and other scrub they generally hunt within. Even the Pointer and Setter breeds in NZ that were developed to hunt the open moors and so do not have their tail shortened are suffering tail damage in NZ conditions.

Once a tail tip is split open it is difficult to heal due to the dog wagging it against objects all the time, in severe cases the dog must undergo anaesthetic and have the tail amputated. This is reported to cause stress and pain in many such dogs. This is preventable if the tail is shortened, as allowed now, by banding the neonatal pup prior to 3 days of age.

Tail banding has been successful and is proven to have no adverse affects on the puppy. There have been no reports of any problems resulting from tail docking.

If it is said that tail shortening is for convenience, than this also applies to the majority of procedures on farm animals. Tail docking lambs and cows is only for the convenience of the farmer.

If it is said that tail banding might cause pain or discomfort and for this reason should be banned, then it must follow that procedures on farm animals causing any pain and discomfort must stop, in particular the removal of deer velvet which is for pecuniary gain only and is not once in a stags life but every year it lives. There cannot be a double standard!
NAWAC report 2009/10 published on the Ministry of Primary Industries website concluded that scientific evidence suggested connections in a very young puppies brain (prior to 72hr) which carry signals to let the puppy experience pain are not fully developed.
There is no new evidence to disprove this!

Three bodies have reviewed this topic 3 times in less than 15 years!
Tail docking has been reviewed by the Government on two occasions via the Animal Welfare Act and then via an amendment.
A Govt Select Committee ruled there was no reason to ban tail shortening in dogs.

Dog owners, dog clubs and the public were all canvassed for their views.

Does NAWAC consider its past committee and the Govt Select Committee findings were wrong?
Why does the NZ Veterinary Assn want to ban tail shortening when it is not concerned with velvet removal, aborting cows for milking purposes, desexing of young dogs for the convenience of the owner. It is understood the NZVA ruled against tail shortening without ever canvassing its own membership.

It is the viewpoint of the VHDTA that tail shortening by the current banding scheme is a humane and necessary procedure for our working gundogs in prevention of tail injuries that would occur with an unshortened tail whilst the dog is hunting. We feel there is absolutely no reason to discontinue the accredited banding scheme that is now in operation.

Question issue 4:
Q13. VHDTA do not agree the committee should publish its advice at its discretion. The reason being Q14.
Q14. VHDTA does not agree that the current membership is appropriate and it does need to be changed. There is not enough representation from groups that are involved in working dogs, too much representation from groups that are city people with city values which do not reflect the wider New Zealand. Also VHDTA feel that the membership obviously contains people associated to radical groups, made obvious by issue 6.

To summarise, the VHDTA strongly believe that the tail banding scheme now in use is working well, has shown no problems, is humane, and this whole issue has been promoted by certain groups so many times that it is now nothing but harassment. It needs to stop!

Thank you for your time in reading this submission.

Yours sincerely,
Veterinary Council of New Zealand (VCNZ) Submission to MPI on the Review of the Animal Welfare Act, 1999

Submitter Information
VCNZ Registrar on behalf of the Veterinary Council of New Zealand

Issue 1: New Zealand animal welfare strategy
Q1. Do you have any overall comments or feedback about the proposed strategy and its approach?

Answers and comments
VCNZ supports the proposed strategy and its approach. Our comments are restricted to the area of significant surgical procedures.

Issue 6: Significant surgical procedures
Q19. Do you agree with the proposals to change who can perform significant surgical procedures under veterinary supervision?
Q20. Do you agree that the Act should allow for mandatory conditions to be placed on controlled surgical procedures?
Q21. What are the risks and benefits of these proposals? Can you think of any missed opportunities or unintended consequences?
Q22. Are there any other ways the system should be improved?
Q23. What impact would the proposed changes have on you and/or your organisation or sector?

If you have a view on any of the procedures described in section 4.7.5 of the consultation document, please indicate how you think they should be classified:
- Not significant: can be carried out by anyone.
- Significant: may only be carried out by a veterinarian or a person who is acting under the direct supervision of a veterinarian and who is being taught veterinary science at undergraduate level.
- Restricted: as for significant surgical procedures plus may only be carried out if the procedure is in the animal's interests and using appropriate pain relief.
- Controlled: as for significant surgical procedures plus may also be carried out by the owner of an animal, or their employee with written veterinary approval.
- Prohibited: no one may carry out the procedure.

Answers and comments
Q19.
VCNZ has reviewed its position on extending the AWA exemption provisions to allow overseas qualified candidates for registration and veterinarians with non recent practice to gain practical experience/perform significant surgical procedures under supervision while preparing for the NZ National Veterinary Examinations (NZNVE) or to upskill in order to be issued with a practising certificate.
When VCNZ first alerted MPI to these issues some 18 months ago, it did so from the perspective of having been advised that its previous position that such individuals could be ‘treated as students’ under AWA was in fact not correct/legal. Refer to Appendix 1 for VCNZ NewsBrief article on this issue.

Having reflected on this issue, VCNZ now considers that these cases (and the situation of Massey post graduate students not eligible for registration without further examination) would be more appropriately dealt with under the provisions of the Veterinarians Act 2005. This is because:

- of the small numbers to be managed (4 – 9 final NZNVE candidates p.a., 7 – 10 recency cases p.a. and 1 – 5 post graduate students p.a.)

- those who are already registered under the Veterinarians Act but do not have a current practising certificate and are seeking to gain practical supervised experience in preparation for a return to practice can be accommodated by the issue of a practising certificate with conditions under sections 26 and 61 of the Veterinarians Act. This is considered a safer option as the circumstances of each case can be assessed by VCNZ on an individual basis with appropriate conditions applied such as supervision and reporting, a graduated return to practice programme, the informed consent of clients, continuing professional development requirements etc (refer to VCNZ Policy on Recency of Practice and s61 of the Veterinarians Act for further detail on the conditions available)

- the situation of candidates for the final NZNVE and post graduate students can be addressed under the s13 limited scope of practice provisions of the Veterinarians Act. VCNZ has agreed to proceed to consult on prescribing an additional (special purposes) limited scope of practice under s13 of the Veterinarians Act. Refer to this Gazette Notice for detail on the current limited scopes. The intention was that this new special purposes limited scope could be a pathway to registration, with conditions, for those with non recognised primary degrees but holding recognised specialist qualifications or having been accepted for a post graduate internship at Massey. VCNZ considers that this proposed special purposes limited scope will also be able to used to register final NZNVE candidates, with conditions, to enable them undertake certain significant surgical procedures, under direct veterinary supervision, in preparation for the final clinical examination – such as is the case in Western Australia. Again this is considered a safer option to exemption provisions in the AWA as the risks to be managed can be assessed and managed by VCNZ on an individual basis.

Therefore VCNZ does not agree that the AWA should be amended to allow veterinarians that are not yet NZ registered or do not have a current practising certificate to perform significant surgical procedures under the direct supervision of a NZ registered veterinarians

Q20.

VCNZ strongly agrees that the definition of controlled surgical procedures should be amended so that these can be conducted (with veterinary approval) by trained and competent technicians in addition to the owner or employees of the owner.

We also agree that the Act should allow for mandatory conditions to be placed on controlled surgical procedures and would appreciate the opportunity to input into their development.

We would also note that despite MPI and Government decisions not to proceed with VCNZ submissions on the regulation of veterinary paraprofessionals, we are still of the strong view that this is required to protect animal welfare and trade by ensuring that these practitioners are appropriately qualified, competent and fit to practise within defined scopes of practice, that standards exist and are monitored and that
accountability mechanisms are in place. Such a framework, would allow, as in the health sector, for greater delegation of veterinary technical tasks to appropriately qualified practitioners.

Q21
The Veterinarians Act 2005 is a certification system. Veterinarians are certified as having the required qualifications and skills to practise veterinary science. No-one may practise under the title of a veterinarian or hold themselves out as being able to practise as a veterinarian unless they are registered and hold a current practising certificate. However a certification system does not prevent non registered persons from practising veterinary science provided they do not use the protected title.

Under a licensing regime only a person licensed to do so may offer certain services. For example, under the Real Estate Agents Act 2008 a person must not carry out any real estate agency work (as defined by the Act) unless the person is licensed under the Act and acts within the scope of that licence; or is exempt from the licensing requirement.

Also the Health Practitioners Competence Assurance Act provides for a list of procedures that are restricted to registered health practitioners in accordance with their scope of practice.

Internationally most systems regulating the practice of veterinary science are licensing regimes.

In New Zealand the only third party (licensing) controls are contained in the:
- ACVM Act 1997 and Medicines Act 1981 which provide that only veterinarians have the right to prescribe restricted veterinary medicines and human medicines for veterinary use
- Animal Welfare Act 1999 which restricts a very limited range of significant surgical procedures to veterinarians

The AWA does not define what constitutes significant surgery or list the procedures that fall into the categories of significant or non significant. In the face of this uncertainty NZVA and VCNZ have both issued guidance on this issue (see Appendix 1 below), but this is not legally enforceable (except perhaps via VCNZ disciplinary processes in relation to the veterinarians who authorise non-veterinarians to undertake procedures considered to be significant).

VCNZ has therefore been seeking for some years, in the interests of protecting the public interest, and advising numerous inquirers, greater clarification around, and additions to, the list of significant surgical procedures (see Appendix 2 for December 2005 letter to Chair of NAWAC). It is unfortunate that in this time the only additional procedure able to be viewed as significant (horse castration) arose out of a successful prosecution.

We have consistently been advised by the then MAF that our 2005 recommendations were still being considered by NAWAC as to whether to recommend to the Minister that an Order in Council was required. We were also advised that a more appropriate/responsive mechanism to regulate significant surgical procedures could be via Codes of Welfare by limiting certain significant procedures to veterinarians.

It is therefore of some concern that the discussion paper is recommending that significant surgical procedures be classified in the Act. On the basis of our previous experience in attempting to effect change through Order in Council we have serious concerns about the impact of this. Given the speed of technological advances in this area we do not agree with the comment in the discussion paper that “only a few procedures require classification and change occurs slowly over a long period of time”.
We would appreciate the opportunity to contribute to the clarification of the test for classifying a procedure as significant and making the framework more easily understood.

4.7.5 What controls are appropriate for each of the surgical procedures listed?

VCNZ considers that the following controls are appropriate for the reasons set out in Appendix 2 Letter to NAWAC of 9 December 2005:

- Mulesing – prohibited
- Tail docking of horses – prohibited
- Laparoscopic artificial insemination of sheep and goats – controlled
- Embryo collection via exteriorized uterus (surgical embryo collection) in sheep and deer – significant
- Tail docking of dogs – prohibited
- Tailing shortening of cows – prohibited
- Desexing of companion animals – significant (while noting that there could be an argument for castration of cats to be a controlled procedure)
- Desexing of horses, llamas and alpacas – significant
- Tooth extraction in horses and companion animals – significant
- Liver biopsies – controlled in cattle, sheep and goats; significant for companion animals
- Removal of articulated dew claws – significant
- Caslick's procedure – significant
- Dubbing – controlled
- Surgical castration of livestock on farm within certain age limits and under certain conditions - controlled

VCNZ also considers that the following procedures should be classified as significant because of the significant animal welfare risks if carried out by those without knowledge of the relevant anatomy, aseptic techniques and access to restorative agents in the event of adverse outcomes:

- Rectal examinations in horses (see Appendix 2 letter to NAWAC of 9 December 2005)
- Endodontic equine procedures (refer to previous VCNZ correspondence with MPI on this issue and submission from the NZEVA Equine dental sub committee)
- Reducing equine incisors (refer to submission from NZEVA Equine dental sub committee)
Appendix 1 – VCNZ NewsBrief article of October 2011

Significant Surgical Procedures
Significant surgical procedures cannot be performed by registration examination candidates or veterinarians who don’t hold a practising certificate, regardless of the level of veterinary supervision.

Who can perform significant surgical procedures?
Under the Animal Welfare Act 1999 (the Act) significant surgical procedures can only be carried out by a veterinarian or a veterinary undergraduate student working under the direct and constant supervision of a veterinarian. The only exception to this is the dehulking of deer. This can also be performed by the owner, or an employee of the owner, of the animal/s acting under veterinary supervision.

This means that it is illegal for overseas qualified veterinarians seeking to gain practical experience before sitting the Council’s registration examinations to perform significant surgical procedures.

The same applies to vets who have taken time out from the profession and are seeking to gain practical experience before applying for a practising certificate. Unlike registration examination candidates, this situation can be addressed by the issue of a limited practising certificate to the vet with supervision requirements.

What are significant surgical procedures?
The Act does not provide an exhaustive list of significant surgical procedures but allows for procedures to be classified as significant or not significant where there is uncertainty that the procedure should be significant or where there is substantial public concern. To date only tail docking of horses, de-barking of dogs, declawing of cats and velvet removal have been classified as “significant”. Alternatively, recognition of a significant surgical procedure may follow a successful court prosecution under the Act, for example horse castration, or through Codes of Welfare, for example desexing of dogs. MAF will be considering what other procedures need to be declared significant as part of its current review of the Act.

Meantime the new Code of Professional Conduct and explanatory notes provide guidance on how to determine what might reasonably be considered to be a significant surgical procedure. This involves the 3 step process set out below. If the answer to the first two questions is yes and the answer to the third question is no, the surgical procedure can reasonably be considered to be significant.

Step 1: Does the procedure lead to significant pain and also involve:
- Entry into a body cavity or,
- Invasion of the periosteum or,
- Surgical removal of significant viable tissue?

Step 2: Does the procedure require:
- A detailed knowledge of anatomy and physiology and,
- A knowledge of the medical and surgical management of complications during and post surgery including: herniation, infection, haemorrhage, adhesions, shock, homeostasis, allergic reactions, pain, and,
- An understanding of pharmacology including; pharmacokinetics, and dynamics, anaesthesia and analgesia, allergic response, and,
- An understanding of pathophysiology, and,
- An understanding of asepsis and antisepsis?

Step 3: Is the procedure normally or commonly performed by non veterinarians in New Zealand?
Appendix 2 – VCNZ submission to NAWAC on significant surgical procedures, 9 December 2005

9 December 2005

Dr Peter O’Hara
Chairperson
National Animal Welfare Advisory Committee
Biosecurity New Zealand
PO Box 2526
Wellington
NEW ZEALAND

Dear Dr O’Hara,

MAF Reference Your ref: AW-03-07

In his letter of 30 May 2005 to the Veterinary Council (copy attached) Peter Kettle notes that a change to the classification of LAI in sheep is not being considered further at this stage as declaring the procedure to be a controlled surgical procedure would mean that lay operators would no longer be able to perform the procedure. In the Council’s opinion this does not deal with the problem: if the law ignores the procedure, it will be undertaken without control. The Council has recommended, and remains of the opinion, that Section 18 of the Animal Welfare Act should be amended to allow lay operators to undertake ‘controlled surgical procedures’ and/or intrusive manipulation as long as they:

a) are carried out under the supervision of veterinarians and those procedures are specifically provided for and
b) are controlled by regulations such as Standard Operating Procedures or Codes.

In the Council’s earlier correspondence (copy attached) it had sought for certain activities to be considered significant surgical procedures, these being:

- desexing of companion animals and horses
- tooth extraction
- rectal examinations
- liver biopsies
- spaying of heifers

The Council would add to this list:

- dubbing of poultry
- Caslick’s procedure

In his letter Peter Kettle asked the Council to assess each of the procedures listed against the criteria in section 6(4) of the Animal Welfare Act, and the following is the Council’s assessment. The Council has sought advice from experienced veterinarians who work specifically in those areas as well as from the New Zealand Veterinary Association.

Desexing of Companion Animals
a) This is a surgical procedure that involves the removal of parts of the reproductive system in both males and females. In the female, the ovaries, uterine horns and uterine body down to the cervix are removed from within the abdomen (generally known as speying). In the male, the testis and associated structures, including the epididymis and part of the spermatic cord, are removed through the scrotal wall (generally known as castration).

b) Both procedures are invasive and involve removal of tissues of significance, with speying also involving surgical entry into a body cavity. Such surgery causes significant pain, and, if not performed appropriately, carries the significant risk of untoward sequelae such as haemorrhage and infection. In order to ensure animal welfare, these animals require appropriate analgesia and general anaesthetic and the surgery should be performed by veterinarians because they have the requisite knowledge of anatomy and physiology, pharmacology and the medical and surgical management of complications.

c) The purpose of the procedure is to prevent both the ability and the desire to breed, with the aim of preventing the indiscriminate breeding that results in overpopulation of cats and dogs, necessitating high levels of euthanasia. Desexed pets are also much more easily managed by their owners.

d) The procedure of desexing of companion animals is well established in New Zealand. The castration of males and speying of females has been standard practice since the veterinary profession became established in New Zealand.

e) These surgical procedures should only be carried out by qualified veterinarians using appropriate analgesia and general anaesthetic.

Desexing of horses

a) The nature of the procedure is surgical. In horses it principally involves males and the surgical removal of the testicles although there are occasions where mares have the ovaries removed.

b) The effect of the procedure on the animal’s welfare is that this is invasive surgery which must involve chemical restraint and analgesia and more often full anaesthesia.

c) The purpose of the procedure in the male horse is to make the horse amenable for use as a companion animal.

d) The procedure is very well established in New Zealand.

e) The likelihood of the procedure being managed adequately by the use of codes of welfare or other instruments under this Act: In horses, because of the requirement for anaesthesia and the possible complications of that use, a veterinarian must undertake the procedure

Tooth extraction in companion animals
a) This surgical procedure involves the extraction of the entire tooth with its accompanying tooth roots. This requires a knowledge of the anatomy of the jaw structures, including blood and nerve supply, and of the teeth themselves, with their varied anatomy including roots numbering between one and three.

b) This is an invasive procedure that potentially causes significant pain, carries future welfare issues if not performed appropriately and carries the significant untoward sequelae (e.g. the puncture of the palatine artery in the hard palate). Therefore, the person performing this procedure needs a knowledge of anatomy and physiology.

c) The purpose of the procedure is to extract those teeth which are causing significant problems in terms of pain or discomfort to the animal because of such problems as tooth root abscess, tooth fractures and severe gum infections.

d) The procedure is well established in veterinary practice in New Zealand.

e) This procedure should only be carried out by veterinarians because they have the requisite knowledge of anatomy and physiology, pharmacology and the medical and surgical management of complications.

**Tooth extraction in horses**

a) The nature of the procedure is a surgical one. There are several scenarios where removal of horses’ teeth occur. “Wolf teeth” (1st upper premolars) are residual teeth with no function, they are often incriminated in discomfort in a riding horse’s mouth and are therefore often removed. These teeth can be very small roots or with large curved roots, the procedure requires curettage and loosening around the root with appropriate tools which allows elevation and removal. This is a painful procedure requiring some analgesia. Removal of ‘caps’ is the lifting off of immature teeth as the mature tooth emerges. It is important that a slightly loose ‘cap’ is not removed as a routine as the maturation of the underlying permanent tooth is dependent on the ‘cap’ providing protection until the appropriate time. Removal of diseased teeth can be a complicated procedure requiring specialised tools, appropriate knowledge, appropriate restraint and analgesia.

b) The effect of the procedure on the animal’s welfare is that it is invasive and causes significant pain, carries future welfare issues if not performed appropriately and carries the risk of significant untoward sequelae (e.g. the puncture of the palatine artery in the hard palate with the use of sharp metal objects in the mouth of a reactive horse).

c) The purpose of the procedure is to extract teeth which are causing discomfort to the riding horse and to remove diseased teeth which are causing problems with eating.

d) The procedure is established in New Zealand, currently being undertaken by both veterinarians and non-qualified laypersons.
e) The likelihood of the procedure being managed adequately by the use of codes of welfare or other instruments under this Act. The procedure should only be carried out with appropriate analgesia and possibly tranquillisation and therefore should only be performed by or under the direct supervision of a veterinarian.

Rectal examinations

a) This procedure involves a lubricated gloved hand being passed through the anus into the mare’s rectum to allow manual palpation (and with the addition of a hand held rectal probe the ultrasound visualisation) of the mare’s internal genitalia. The procedure may also be carried out in any horse as part of a clinical examination in conditions such as colic.

b) In horses, this procedure carries definite and grave welfare issues and is very different to the procedure in cows. Often a mare’s rectum, especially that of a maiden mare, will not be as relaxed as that of a cow and it is far more likely to rupture with poor examination technique and without recognising the need for appropriate bowel relaxation or sedation. The risk of untoward sequelae with this examination makes it a procedure that is definitely invasive, definitely carries a life threatening risk to the mare and may require the use of prescription animal remedies. For these reasons it is a procedure that should only be carried out by a veterinarian.

c) The purpose of the procedure is to allow examination of the mare’s internal genitalia as a means of determining the state of these organs, the timing of breeding of the mare and for pregnancy diagnosis.

d) The procedure is well established in New Zealand.

e) It is not likely that the procedure could be managed adequately, particularly for horses, by the use of codes of welfare or other instruments under this Act.

Liver biopsies

a) The nature of the procedure is a surgical one. It requires insertion of a biopsy needle through the thoracic cavity and into the peritoneal cavity. In cattle it is generally done with the animal conscious and standing, while in deer and sheep the subject is generally heavily sedated or anaesthetised. In cattle, following effective restraint in an appropriate crush or bale, a wound site is prepared on the right side of the animal within the 11th intercostal space and approximately 15 cm ventral to the transverse vertebral process. The area is infiltrated with local anaesthetic, and a biopsy needle (trochar and cannula) is inserted through a small stab incision made in the skin. The instrument is directed through the diaphragm and into the liver from which a sample is then obtained. Once the biopsy needle has been withdrawn, the incision area is treated with a wound powder or antiseptic ointment, and heals very quickly.

b) Provided careful site preparation has been carried out, and the procedure is not done during poor conditions such as wet weather there is very low incidence of wound infections (less than 1 per 250 when procedure done by an experienced veterinarian). Possible problems during the performing
of this procedure include perforation of a lungs, entry of air in the pleural cavity, sucked in as the needle enters the area of negative pressure, perforation of a major blood vessel of the liver (blood comes out of the biopsy needle when the trochar is removed, and there may be rapid sucking of air through the needle followed by only blood being aspirated), perforation of bowel, or accidental excitation through contact of the vagal nerve (the animal experiences severe respiratory difficulty and may collapse to the ground). While these instances occur only very rarely, they are nevertheless potential adverse outcomes and each would occur about once in every 1000 procedures (when undertaken by an experienced veterinarian).

c) The purpose of the procedure is to recover liver tissue for laboratory analysis, generally for the purpose of establishing a diagnosis of trace element status, or for monitoring the same following treatment. Experienced personnel in good facilities can perform this entire procedure in less than five minutes, and generally it is of only minimal discomfort to the animal provided the local anaesthetic has been properly administered and the animal is well restrained so it does not move during the procedure. A small proportion of animals experience some discomfort as a brief coughing episode or even "hiccup", but recover within five minutes. Occasionally if a skin blood vessel is cut during the skin incision, there may a small amount of haemorrhage from the wound. This will stop quickly with the application of pressure for 30-60 seconds.

d) The procedure is well established in New Zealand and is widely recommended as it is the most accurate means of assessing mineral status, especially for copper where blood/serum levels can be misleading as to mineral reserves stored in the liver. It is generally carried out by veterinarians, although there is anecdotal evidence that some veterinary technicians working under direct veterinary supervision may also be carrying out the procedure.

e) This procedure in cattle should be a veterinary-only procedure, with the only possible exception (for debate) being whether it might be permitted under direct veterinary supervision. There is significant margin for problems with this procedure as it involves entry of both the thoracic and abdominal cavities, and potential for the introduction of infection in these areas. There is also possibility of misadventure as described above, and in the instance that such might occur, if a veterinarian is carrying out the procedure, or is directly present, then appropriate remedial action and treatment can be carried out. Most veterinarians who carry out this procedure would have a clear Standard Operating Procedure which they followed. If this procedure were classified as a restricted surgical procedure, then that would give protection under the Act, and it would not require any specific Code to manage it. The requirement for sedation and/or anaesthesia in other species would effect control and limit it to a veterinary only procedure through control of the required drugs.

f) [Any other relevant consideration] Liver biopsy is generally regarded as a safe though invasive procedure. It is of interest to note that the recommendation following liver biopsy in humans is for 48 hours of bed rest - obviously not an option with our farmed animals.
Spaying of heifers

a) This is a surgical procedure. There are two techniques:
   (i) The open flank technique – this involves entry into the abdominal cavity through the skin and musculature on the flank of the animal, surgical excision of the ovaries (ovariectomy), and stitching of the abdominal wound.
   (ii) The “Willis Drop” technique – a blunt instrument is passed through the vagina, guided by the other hand per rectum, to the dorsum of the cervix and then punched through the wall of the vagina. The ovaries are then manipulated through a hole in the instrument which contains a cutting tool and the ovary is severed, falling to the floor of the abdomen. The vaginal wound is said to close on removal of the instrument and is not stitched.

b) Both methods are invasive procedures which involve surgical entry into body cavities, and removal or excision of tissues of significance. They are subject to all the potential problems – haemorrhage and infection for example – that need to be adequately managed in such procedures. They also involve pain and discomfort through surgical penetration of tissues and excision of the ovaries and manipulation of ovarian ligaments.

   Traditionally in Australia, where both methods have been performed by non-veterinarians, they have been carried out without pain relief, a situation that would compromise welfare.

c) These procedures have been used to improve the management of cattle in extensive farming conditions such as those found in the Northern Territory of Australia - spaying enables cull females to survive and achieve marketable body condition by preventing the stress of mismanaged pregnancy, calving and lactation.

d) The procedure has never become established in New Zealand, because we do not have to manage cattle in such extensive systems as in Australia. However, enquiries were made early in 2005 by an Australian non-veterinarian wishing to establish the practice here. Flank-spaying is designated an “act of veterinary science” in at least some Australian states (e.g. Queensland). Australian Veterinary Association (AVA) policy supports the spaying of cattle, by veterinarians, using the Willis Spay Technique until suitable alternative non-invasive methods of controlling oestrus and conception are developed. The AVA does not support the surgical flank spaying of cattle by non-veterinarians. There is no precedent in New Zealand for this surgical procedure to be performed by non-veterinarians.

e) At this time it is unlikely that there would be a commercial demand for the spaying of heifers in New Zealand. It is also apparent that non-surgical alternatives to spaying are under investigation in Australia which may in the future obviate the need for these procedures at all. However, should the situation arise, and a demand is demonstrated, it is clear that the flank method should only be done by a veterinarian. The Willis Drop method falls within the New Zealand Veterinary Association definition of a significant surgical procedure, involving as it does entry into a body cavity and removal of significant tissue, but could possibly lend itself to performance by a lay operator as a controlled surgical procedure.
However, the legislation – at this point at least - only allows controlled surgical procedures to be performed by the owners of animals, or their direct employees, who have undergone training and accreditation. As mentioned above, there is no precedent for this procedure being performed by lay operators in New Zealand.

**Dubbing of Poultry**

a) Dubbing is the surgical removal of the comb, and in some cases the wattles and earlobes of a chicken.

b) The tissues involved contain many blood vessels and nerves so removal causes pain and haemorrhage. This can be managed to some extent by the use of local anaesthesia and cautery. In the long term, these tissues have a role in temperature regulation which theoretically means that their removal could lessen a bird's ability to tolerate high temperatures, although this is unlikely to be a problem given New Zealand’s climate.

c) Dubbing has traditionally been carried out for both cosmetic and practical reasons and is a widespread practice amongst most keepers of old English gamebirds who would routinely have all their male birds dubbed, previously by themselves but latterly by a veterinarian. Dubbing purely for cosmetic reasons is not condoned within the veterinary profession. However, Old English Gamefowl are particularly aggressive, and dubbing has been routinely carried out to prevent damage to the very large and floppy combs of this and other gamefowl breeds. While separation of these birds would prevent attacks, there are situations where this is apparently not always possible.

d) The procedure has historically been performed by the poultry owners in New Zealand, using no anaesthetic and using cold water to stop haemorrhage. A review by NAWAC in 2002 suggested that if the procedure was necessary, it should be done under local anaesthetic by a veterinarian or under the direct supervision of a veterinarian.

e) If this procedure was to be performed by non-veterinarians, a code of practice under the ACVM Act pertaining to the training and ongoing supervision of those persons in the use and administration of a Prescription Animal Remedy would be required.

**Caslick's procedure**

a) The nature of the procedure is a surgical one, undertaken on horses. It involves local anaesthetic being injected into the proximal vulva, a thin piece of this anaesthetised proximal vulva then being removed and the resultant surgical wound being sutured to create a smaller vulva.

b) The effect of the procedure on the animal’s welfare is that it carries the risk of reduced breeding life if performed inappropriately.

c) The purpose of the procedure is to recreate a vulval seal in mares where required and thus reduce air entry to the vagina, this thus reduces inflammation of the vagina and uterus and therefore increases fertility.
d) The procedure is well established in New Zealand. It is carried out repeatedly in some mares because of their vulval-anal conformation or in older mares to prolong their breeding usefulness.

e) Whilst it is perhaps considered a minor surgical procedure, it requires a knowledge of anatomy, asepsis and surgical skills. The longevity of mares’ useful breeding life is largely reliant on the procedure being repeatedly carried out correctly and professionally with minimal vulval tissue damage. It is considered that the Caslick procedure should only be carried out by a veterinarian.

The Council submits the above assessments for your consideration, and thanks NAWAC for the opportunity to make comment.

If you would like more detail or explanation on the above please contact the Secretary and CEO to the Council,

Yours sincerely

Secretary and Chief Executive Officer
Veterinary Council of New Zealand

cc: Secretary to NAWAC
cc: , NZVA
SUBMISSION FORM

ANIMAL WELFARE MATTERS:
Proposals for a New Zealand Animal Welfare Strategy and Amendments to the Animal Welfare Act 1999

Please send your submission to the Ministry for Primary Industries by 5.00pm Friday
5 October 2012. Submissions can be emailed to awsubmission@mpi.govt.nz or posted to:

Animal Welfare Strategy and Legislation Review
Ministry for Primary Industries
PO Box 2526
WELLINGTON 6140

The questions in this form should be treated as a guide only – you can choose to answer any or all of the questions, or provide any other comments.


Submissions and a summary of submissions will be published on the Ministry’s website. If you or your organisation do not want information in your submission to be published, please make this clear in your submission and explain why. The Ministry will take this into account when deciding whether to publish the submission or release it under the Official Information Act 1982.

Personal Information

Your name: [Redacted]

Your organisation/sector/interest group: Victoria University Animal Ethics Committee.
Issue 1: New Zealand animal welfare strategy

Q1. Do you have any overall comments or feedback about the proposed strategy and its approach?
Q2. What are the risks and benefits of adopting this strategy? Can you think of any missed opportunities or unintended consequences?
Q3. Do the values reflect New Zealanders' views about animal welfare? Would you suggest something else and why?
Q4. Do you have any comments on the proposed approaches, leadership roles, or Government priorities?

Answers and comments

Q1.
We applaud this initiative from the Cabinet of Economic Growth and Infrastructure Committee to extend the duty of care for animal welfare. We agree with the need to develop an explicit animal welfare strategy, which views any violation of minimal animal welfare standards as unacceptable, and which is empowered to enforce universal compliance with mandatory standards, and to encourage non-regulatory activities that foster good animal welfare.

Q2.
We endorse agree that the proposed outcomes of the draft strategy are desirable:

* Better care of animals: That New Zealanders meet the needs of all our animals, and avoid unreasonable harm to animals affected by our activities.
* Reputation for integrity: That New Zealand’s animal welfare practices add value to our exports and contribute to our reputation as a responsible agricultural producer.

We do not foresee any major missed opportunities or unintended consequences.

Q3.
We endorse the three animal welfare strategies as outline in the cabinet paper:

* It matters how animals are treated -- it matters to the animals and it matters to us.
* We have responsibilities toward animals in our care and animals affected by our activities.
* Using animals is acceptable as long as it is humane and beneficial to humans and/or animals.

We agree that progressive animal welfare legislation must “go further than just preventing cruelty by placing an explicit obligation on all people in charge of animals to meet their animal needs.”

However, we do not see the failure to meet animal needs as sharply distinguished from cruelty.

Q4.
We agree that progressive animal welfare legislation must “go further than just preventing cruelty by placing an explicit obligation on all people in charge of animals to meet their animal needs.” However, we do not see the failure to meet animal needs as sharply distinguished from cruelty.

Issue 2: Standards for care and conduct towards animals
Q5. Do you agree with the proposal to replace codes of welfare with a mix of directly enforceable standards and guidelines?
Q6. What are the risks and benefits of this proposal? Can you think of any missed opportunities or unintended consequences?
Q7. What impact will the proposed changes have on you and/or your organisation or sector?

Answers and comments

Q5. Yes. We agree with the need to develop an explicit animal welfare strategy, which views any violation of minimal animal welfare standards as unacceptable, and which is empowered to enforce universal compliance with mandatory standards, and to encourage non-regulatory activities that foster good animal welfare. We welcome strategies that improve animal welfare from better planning, better skills and practices, more clear rules and sanctions, and measuring animal welfare performance.
Q6. n/a
Q7. No foreseeable negative impact.

Issue 3: Criteria for developing standards

Q8. Would the proposals to add "practicality" and "economic impact" to the set of criteria improve the decision-making process, or would you suggest something else?
Q9. Do you agree that having "transitions" and "exemptions" is a better way to handle the situations that currently fall under 'exceptional circumstances'?
Q10. What are the risks and benefits of these proposals? Can you think of any missed opportunities or unintended consequences?
Q11. What impact would the proposed changes have on you and/or your organisation or sector?

Answers and comments

Q8; We disagree that the terms "practicality" and "economic impact" should be included in statutory criteria for decisions on animal welfare. Such terms are vague, and do not offer clear guidance for action. Nearly every regulation will have some impact on practicality and will impose some economic cost. Because of this, they cannot be expected to settle regular debates about animal welfare. We agree however that any sensible regulation must tolerate transition periods and genuinely exceptional circumstances.

Q9. As an example of exceptional circumstances, however, we do not regard religious practices as valid. Cruelty of any kind, even when supported by religious traditions, must not be tolerated.
Q10. No.
Q11. No foreseeable impact.
Issue 4: Role of the National Animal Welfare Advisory Group

Q12. Do you agree there is still a role for an independent committee on animal welfare?
Q13. Do you agree that the committee should be able to publish its advice at its discretion?
Q14. Do you agree that the current membership of the committee is appropriate or does it need to be changed?

Answers and comments

Q12.
We are unclear why it is recommended that oversight of animal standards should shift from the National Animal Welfare Advisory Committee to the Ministry of Primary Industries (point 32 in the Cabinet paper.) It is asserted that "the function of developing regulations is more suited to the Ministry" however no evidence is given in support of this assertion. Clarification about the fate of the National Animal Welfare Advisory Committee, especially, is important both for ensuring high standards for animal welfare, and also for ensuring New Zealand's reputation for high ethical standards. This is because the Ministry of Primary Industries is not obviously suited to the task of providing ethical guidance.

Q13.
We cannot agree to without knowing the composition of the committee. Relatedly, we are unclear about the mechanisms by which "independent committees" will "provide expert advice on animal welfare... to ensure ethical treatment of animals used in research, testing and teaching" (point 16). We are also unclear about how "strong international links and engagement" (point 16) will be engaged.

Q14.
n/a

Issue 5: Live animal exports

Q15. Do you agree with the proposal to create directly enforceable standards for the export of live animals?
Q16. Do you agree with broadening the purpose of the exports part of the Act so that New Zealand’s reputation can be considered when making rules or deciding on applications?
Q17. What are the risks and benefits of these proposals? Can you think of any missed opportunities or unintended consequences?
Q18. What impacts will the proposal have on you and/or your organisation or sector?

Answers and comments

Q15.
Yes

Q16.
Yes.

Q17.
We see no risks that outweigh the ethical and economic benefits.

Q18.
None.

Issue 6: Significant surgical procedures
Q19. Do you agree with the proposals to change who can perform significant surgical procedures under veterinary supervision?

Q20. Do you agree that the Act should allow for mandatory conditions to be placed on controlled surgical procedures?

Q21. What are the risks and benefits of these proposals? Can you think of any missed opportunities or unintended consequences?

Q22. Are there any other ways the system should be improved?

Q23. What impact would the proposed changes have on you and/or your organisation or sector?

If you have a view on any of the procedures described in section 4.7.5 of the consultation document, please indicate how you think they should be classified:

- Not significant: can be carried out by anyone.
- Significant: may only be carried out by a veterinarian or a person who is acting under the direct supervision of a veterinarian and who is being taught veterinary science at undergraduate level.
- Restricted: as for significant surgical procedures plus may only be carried out if the procedure is in the animal’s interests and using appropriate pain relief.
- Controlled: as for significant surgical procedures plus may also be carried out by the owner of an animal, or their employee with written veterinary approval.
- Prohibited: no one may carry out the procedure.

Answers and comments

Q19.
Yes. However general standards need to be given to guide veterinary supervisors.

Q20.
Yes.

Q21.
Without clear guidelines, there is a risk for inconsistent standards.

Q22.
Yes, see answer to Q19.

Q23.
None.

Issue 7: Reporting of animals killed for research, testing or teaching

Q24. Do you agree that the number of animals killed humanely for research, testing and teaching should be included in official statistics?

Q25. What impact, including costs, would the requirement to report animals killed for use in research, teaching, and testing have on you or your organisation?

Q26. Can you think of any other changes that would improve the system for regulating animals used in research, testing and teaching?
Answers and comments

Q24.
No. They should not be included.

Q25. Any extra regulation of animals used for tissue would reduce the ability of the AEC to fully assess legitimate animal manipulations carried out in teaching and research at the University.

Q26.
The current system, with the guidance of the National Animal Ethics Advisory Committee (NAEAC), is working well in supporting the concept of the 3 R's of replacement, reduction, and refinement in scientific research. Scientists are much more aware than ever before of the need to maintain appropriate animal welfare standards.

The Victoria University of Wellington Animal Ethics Committee (VUW AEC) keeps track of animals killed for tissue. The Committee believes that it is an institutional responsibility to monitor this use, but does not agree that these figures should be included in the official statistics for animal manipulations. The Malaghan Institute for Medical Research uses the VUW AEC for approval of animal manipulations. We have read and support their submission which points out that statistics on animals killed for tissue should be presented separately from those where the animals are manipulated in an experimental protocol. This statistic has more in common with animals killed for food and other commercial purposes and should not be confused with animals that enter an experimental procedure that is subjected to ethical approval.

The VUW AEC evaluates a large number of applications for animal manipulation in research and teaching each year. Most use of animals for tissues that are used in research and teaching relates to these applications, and we require that institutions submit a brief application that links this animal use to research project approvals and reports animal numbers for our records. Therefore, the impact of reporting numbers of animals killed for tissue collection purposes on the VUW AEC's responsibilities and workload is minor. We strongly oppose introducing a separate project-based system of justification for killing animals humanely for research, teaching and testing for the following reasons:

1. it would result in a considerable increase in the workload of AECs with additional administrative workload, but without bringing any foreseeable advantage to animal ethics;

2. no animal manipulation is involved;

3. killing of domesticated animals for food and other commercial purposes, and for stock control (over 100 million annually with chickens included) does not require specific justification. It does however require humane killing overseen by a qualified vet;

4. in the light of point 3 above, it is imperative that there is transparency and consistency surrounding the humane killing of domesticated animals. Research teaching and testing should not be singled out for special treatment in this context.

As the Malaghan Institute noted in its submission, "an institutional approach to justifications would greatly reduce the regulatory burden of authorising animals to be killed for research, testing and teaching." Therefore, we support the view that institutions and organisations rather than individuals should take responsibility for stating the purpose for which the animals are killed.
Issue 8: Enforcement tools

Q27. Do you agree with the proposals to attach instant fines to some minor offences and give some animal welfare inspectors the ability to issue compliance orders?
Q28. What are the risks and benefits of this proposal? Can you think of any missed opportunities or unintended consequences?
Q29. What impact would the proposal have on you and/or your organisation or sector?

Answers and comments

Q27.
We support the proposal for a range of infringement offences and fines tied to new regulations. We also support the increase of the maximum infringement fee to $1,000, and furthermore suggest that this fee be allowed to rise at the rate of inflation. However, we remain unclear about the implications of the proposal to replace codes of welfare with a "mix of mandatory standards and guidelines that have no legal effect." Lacking legal power, how might these regulations meet the need for sanctions, as outlined in the Cabinet's proposal?

Q28.
No foreseeable risks.

Q29.
None.

Issue 9: Other proposed offences

Q30. Do you agree with the proposal to make drowning a land animal an offence?
Q31. Do you agree with the proposal to clarify that wilful and reckless ill-treatment offences apply to animals in a wild state?
Q32. What are the risks and benefits of these proposals? Can you think of any missed opportunities or unintended consequences?

Answers and comments

Q30.
Yes

Q31.
Regarding wild animals and pests, we see no principled reason for the exclusion of wild animals and pests from any animal welfare act. We resist any proposal that allows differences for treatment based on such distinctions, unless these differences are justified on ethical grounds.

Q32.
An inconsistent standard risks undercutting New Zealand's reputation as a world leader in Animal Welfare.
Issue 10: Technical amendments

Q33. Do you have any comments on any of the technical amendments proposed in Table 1?

Answers and comments

Q33.
No.

Any other comments

Q34. Do you have any other comments or feedback not covered by these questions?

Answers and comments

Q34.
None.
27 September 2012

Animal Welfare Strategy and Legislation Review
Ministry for Primary Industries
PO Box 2526
Wellington 6140
Sent by email: awsubmission@mpi.govt.nz

Submission: Animal Welfare Matters, MPI Discussion paper No. 2012/07

1.0 Introduction

Victoria University of Wellington (Research Office) would like to make the following brief submission on the Ministry for Primary Industries’ Proposals for an Animal Welfare Strategy and amendments to the Animal Welfare Act 1999. Our submission, rather than addressing the detail of MPI’s submission template, comments in general terms on selected proposed changes in the Discussion document. We are aware that the Animal Ethics Committee of Victoria University of Wellington is also making a submission, as is the Malaghan Institute of Medical Research.

2.0 Comment

We agree with the importance of treating animals humanely, both in the interests of the animals’ welfare and in the interests of promoting a caring society, and we agree that robust animal welfare practices will enhance New Zealand’s reputation as a responsible primary producer and exporter.

2.1 Standards of Care and Conduct Towards Animals: Codes of Welfare (and Minimum Standards), Regulations (Mandatory Standards), and Guidelines: Our understanding is that current Codes of Welfare and associated Minimum Standards have no penalties for non-compliance attached to them, and that they are not legally enforceable other than as evidence of an offence under (and presumably against the obligations of) the Animal Welfare Act. Three options to solve this problem are proposed by MPI, the preferred one being to replace Codes of Welfare with a mix of enforceable Mandatory Standards and unenforceable Guidelines.

While we do not find the shortcomings identified for options one and two compelling (for example, contrary to the second drawback noted, option one could potentially provide a “...broad base of clear Mandatory Standards with sanctions...” depending upon how extensively and clearly new Mandatory Standards were drafted) we are nevertheless comfortable with option three. In supporting option 3 we note:

- Care needs to be taken that capture of the process by special interest groups is minimised. For example, it is not entirely clear that Cabinet alone, being a political body, is necessarily “...well placed to resolve the value of conflicts and the balance between multiple outcomes...” Provision for other independent expert input, and their influence over the process, should be preserved.

- Transparency of the process needs to be maintained. One of the risks of institutionally internalising policy processes and making rules by regulation is that the opportunities for external input and scrutiny are reduced.
• The enforceable Mandatory Standards developed under option three should be meaningful in the sense that they clearly achieve the desired outcomes of an animal welfare regime, broadly specified in the Discussion document as; humane animal welfare practices and associated reputational benefits as an agricultural producer and exporter. Mandatory Standards that result in compromised outcomes, such as discussed under 2.2 below, will undermine the integrity of the animal welfare system and threaten its overall success.

2.2 Criteria to Apply in Developing Animal Welfare Standards: To maintain a robust animal welfare system it will be important to adhere, without concession, to the core values and outcomes of the system. These are defined as:

• Values: Society should ensure that animals affected by its activities are treated humanely.

• Outcomes: The treatment of animals in New Zealand reflects the integrity of our animal welfare system and builds our reputation as a responsible custodian of animals in our care.

The MPI Discussion paper proposes two changes to the Act regarding criteria applying to the development of animal welfare standards:

• That ‘practicality’ and ‘economic impact’ be explicitly added to the factors that must be taken into account before an Animal Welfare Code (and presumably in the future, Regulations and Guidelines) are recommended. The problem with these (and indeed the other factors that must be taken into account) is that they are open to enormous interpretation on at least two dimensions; (i) the extent of the ‘practicality’ (minor inconvenience or intractable impossibility) and ‘economic cost’ (small marginal cost or financial threat to an industry) issues, and (ii) the duration of their application that may be tolerated. Some boundaries should be put around these two considerations to limit their negative impact on good animal welfare practices, and ultimately on the integrity of the animal welfare system.

• That in exceptional circumstances animal welfare standards (regulations and guidelines) may be implemented that do not meet the general obligations of the Act. Two cases where this may occur are cited (i) where a transition period from current practices is deemed necessary and (ii) where religious (or cultural) practice justifies an exemption from animal welfare obligations under the Act for an indefinite period. While there may be circumstances where the first case is justified (and which more properly should be considered under bounded ‘practicality’ and ‘economic cost’ considerations discussed above) it is impossible to conceive of a situation where religious practices could justify an indefinite breach of the obligations of the Animal Welfare Act while also maintaining the integrity of New Zealand’s animal welfare system and the country’s reputation as a responsible manager of animal welfare.

2.3 Role of National Animal Welfare Advisory Committee: As noted in the MPI Discussion Paper, improved efficiency is an objective of the proposed changes to the administration of animal welfare. To this end if Welfare Codes and Minimum Standards are progressively replaced by Mandatory Standards under regulation and Guidelines (option three) then the functions of the National Animal Welfare Advisory Committee should be clarified in light of the enhanced role of MPI. Section 57 of the Act may need revision and clarification to establish the Committee’s role as advisory only, with no on-going operational function in terms of, for example, drafting Welfare Codes.

2.4 Significant Surgical Procedures: We find this part of the Act (and the Discussion document) difficult to understand, especially for those not routinely dealing and familiar with the Act. For example, ‘Significant Surgical Procedure’ is defined as being a ‘Restricted’ or ‘Controlled’ surgical procedure, but these terms appear not to be further defined other than as prescribed by Order in Council or, possibly, by who can perform the procedures. Some further clarity around these terms would be helpful. The discussion document suggests that such clarification is likely but it is silent on how. Beyond this we note:
• In a research and teaching environment, researchers and technicians are often better qualified and experienced than veterinarians to conduct significant surgical procedures. The continued reliance on veterinarian approval for significant surgical procedures in a research and teaching environment is therefore probably more a compliance cost than a check on quality.

• Caution should be exercised in providing for major rule changes, such as prohibiting certain surgical procedures, to be made by Order in Council as this "...provides the flexibility...without having to amend the Act." Having to amend the Act provides the discipline to ensure high quality policy development.

2.5 Reporting Animals Killed for Research, Testing and Teaching: Our comments on the proposal to include animals killed for research, testing and teaching within the definition of ‘manipulation’ are:

• Such a proposal creates one rule for animals killed for research, testing and teaching and another for animals killed for other purposes, when there is no obvious distinction to be made amongst the circumstances in which animals are killed.

• The inconsistency between classing animals killed for research, testing and teaching as a ‘manipulation’ but not so classifying animals killed under other circumstances is highlighted by the Discussion document’s admission that the second of the two test requirement justifying a ‘manipulation’ (the harm test) cannot and should not be applied in the case of a ‘manipulations’ involving killing. This exemption effectively confirms that killing animals for research, testing and teaching is no more a ‘manipulation’ than is killing animals for sport, pest control or agricultural production.

• Requiring animals killed for research, testing and teaching (being classed as a ‘manipulation’) to meet the first test of a ‘manipulation’ (benefit to society test) is most likely to just add to the bureaucracy of administering animals for research, testing and teaching and is unlikely to add in any meaningful way to the enhancement of the welfare of animals. This test is not required for animals killed in other circumstances so why should it be required for animals involved in research, testing and teaching?

• Providing statistics for the number of animals killed for research, testing and teaching is not a problem, but does not require that such animals be classed as a ‘manipulation’. Rather than extending the definition of ‘manipulation’ to provide for the collection of statistics on animals killed, the alternative is to add ‘number of animals killed’ to the ‘number of manipulations’ as a statistic that must be collected.

3.0 Conclusion
The foregoing comments are our general observations on selected proposals for an animal welfare strategy and changes to the Animal Welfare Act. We are grateful for the opportunity to make these comments and would be happy to provide any elaboration on our concerns should this be sought.

Yours faithfully

Deputy Vice-Chancellor (Research)
-----Original Message-----
From: Animal Welfare Submissions
Sent: Friday, 28 September 2012 2:24 p.m.
To: animalwelfare
Subject: FW: Tail banding of selected gundog breeds

Submission on the Animal Welfare Act Review

Dear Sir

The members of Waikato Gundog Club would like to put forward our submission.

We request that tail banding of selected gundog breeds continues to be allowed in NZ. When the tail is not shortened, dogs from these breeds frequently injure their tails whilst hunting through heavy vegetation. These dogs choose to work whenever the opportunity presents itself and will not hesitate to show frustration when prevented from doing so. Their fast tail action can lead to torn and bleeding tails which are painful and extremely difficult to treat. This is repetitive injury that happens with increasing frequency when the dog works. Such chronic injuries can lead to eventual amputation of the tail in the adult dog which is a major surgery resulting in considerable discomfort. Shortening the tail in very young pups eliminates the risk of injury and is considerably less painful and traumatic.

The Accredited Banders Scheme has been in place for two years and is audited by the NZKC to ensure compliance with agreed protocols and the Code of Animal Welfare. This scheme is in our opinion a sensible and humane solution. So for the welfare of working gundogs in NZ, we ask that you allow this practice to continue.

If there is any consideration being given to stop the banding of dogs in NZ, we request that we be informed and be given the opportunity provide further information and rationale on this matter.

Thank you for taking the time to read this submission.

Yours sincerely

President - Waikato Gundog Club Submitted By: Waikato Gundog Club
SUBMISSION FORM

ANIMAL WELFARE MATTERS:
Proposals for a New Zealand Animal Welfare Strategy and
Amendments to the Animal Welfare Act 1999

Please send your submission to the Ministry for Primary Industries by 5.00pm Friday 28
September 2012. Submissions can be emailed to awsubmission@mpi.govt.nz or posted to:

Animal Welfare Strategy and Legislation Review
Ministry for Primary Industries
PO Box 2526
WELLINGTON 6140

The questions in this form should be treated as a guide only – you can choose to answer any
or all of the questions, or provide any other comments.

The consultation document Animal Welfare Matters can be downloaded from the Ministry for

Submissions and a summary of submissions will be published on the Ministry’s website. If
you or your organisation do not want information in your submission to be published, please
make this clear in your submission and explain why. The Ministry will take this into account
when deciding whether to publish the submission or release it under the Official Information
Act 1982.

Personal Information
**Issue 1: New Zealand animal welfare strategy**

Q1. Do you have any overall comments or feedback about the proposed strategy and its approach?
Q2. What are the risks and benefits of adopting this strategy? Can you think of any missed opportunities or unintended consequences?
Q3. Do the values reflect New Zealanders' views about animal welfare? Would you suggest something else and why?
Q4. Do you have any comments on the proposed approaches, leadership roles, or Government priorities?

**Answers and comments**

Q1
We agree the need for a coordinated animal welfare strategy for New Zealand. In particular we support the move to enforceable welfare standards and a greater range of penalties.

Q2.
Any animal welfare strategy should include increased funding for the animal welfare sector. In light of the proposals within the document, this particularly applies to animal welfare inspectors, who will be responsible for enforcing proposed changes.

Q3
We believe the 'three animal welfare values' offered in the strategy generally reflect New Zealanders' views.

Q4
We believe a key priority of the strategy should be Education – of the public, and of relevant industries and their participants – regarding animal welfare in general, and of any changes to the Act and new standards established as a result.

We do not believe that the Ministry of Primary Industries should be leading the development of animal welfare standards – as it is also responsible for industries and organisations that benefit from the exploitation of animals, there is a significant conflict of interest. Instead, we would prefer that an independent body be established for this role. Or as an alternative, and to minimise costs, at least a separate department within the MPI should be established for dealing with Animal Welfare.

**Issue 2: Standards for care and conduct towards animals**

Q5. Do you agree with the proposal to replace codes of welfare with a mix of directly enforceable standards and guidelines?
Q6. What are the risks and benefits of this proposal? Can you think of any missed opportunities or unintended consequences?
Q7. What impact will the proposed changes have on you and/or your organisation or sector?

**Answers and comments**

Q5.
We agree with the proposal to replace codes of welfare with enforceable regulatory standards and guidelines.

Q6.
**Benefits:**
The move to regulations will give the Animal Welfare Act and the standards it imposes more weight, and any breach of the standards will have more serious consequences. We hope this
will result in animal welfare being taken more seriously by animal owners and by society in general, and that standards will be more widely adhered to due to the penalties. We also agree that the regulatory process as outlined in the MPI’s discussion document (4.3.3 Option 3) will be more robust than the current process for developing codes of welfare.

Risks:

We are concerned that the process for developing guidelines - to be initiated by the Director-General of the MPI with the relevant sector – represents a serious conflict of interests; this is the problem with the current system for developing codes of welfare. There is also a concern around who decides what should be a regulatory standard, and what should be only a guideline. We believe independence of decision makers in this whole process is paramount.

Q7.

Section 4.3.6 of the MPI discussion document notes that “there will be changes to the way that animal welfare inspectors carry out their compliance roles allowing more time correcting lower level breaches before offending becomes more serious.” As direct employers of animal welfare inspectors, this will have a direct effect on our organisation. There will obviously be a need for training of our inspectors once the amendments come in to force. This will obviously be a cost incurred by our organisation, which already struggles to meet existing costs and demand for our services being funded mainly by donations. We also see the move to legislated animal welfare standards as making the inspector’s role even more important. All the more reason the inspectorate should be funded by Government.

Issue 3: Criteria for developing standards

Q8. Would the proposals to add “practicality” and “economic impact” to the set of criteria improve the decision-making process, or would you suggest something else?

Q9. Do you agree that having “transitions” and “exemptions” is a better way to handle the situations that currently fall under ‘exceptional circumstances’?

Q10. What are the risks and benefits of these proposals? Can you think of any missed opportunities or unintended consequences?

Q11. What impact would the proposed changes have on you and/or your organisation or sector?

Answers and comments

Q8

We do not believe animal welfare standards should be based on “practicality” and particularly not on “economic impact”.

What is acceptable treatment of an animal should apply regardless of their situation – whether they are in someone’s back yard, or being farmed.

The terms “practicality” and “economic impact” are very broad and open to interpretation, and particularly open to abuse given the proposed role of the Ministry of Primary Industries and “relevant sectors” in generating the standards and guidelines – i.e. conflicts of interest.

Who decides, for example, what is ‘practical’, or what level of economic impact justifies a breach of the obligations under the Act? Again, the MPI should not be given this role because of its conflict of interest.

Practicality and economic impact are arguments that have been used under the current Act to continue practices most of society considers cruel and unacceptable, particularly in farming.
Reading the MPI discussion document, it appears these two ‘criteria’ are already applied in decision making, but without being explicitly stated as such. To avoid this occurring under new legislation, it may need to be explicitly excluded as a criteria.

If a truly independent body were given the task of developing the standards, the risk of adding ‘practicality’ and ‘economic impact’ to the criteria may be lessened.

Q9
We believe that the only instance where a standard be accepted that does not meet the obligations of the Act is when transitioning from current standards to new standards. The proposed change to classify these as “transition” standards, rather than “exceptional circumstances” is a good move to tighten this area up.

We expect it would be genuinely “exceptional circumstances” indeed where a practice may breach a regulatory standard but still meet the general obligations of the Act. In such a case, a proposed “exemption” may be acceptable.

Again, care needs to be taken regarding the process for deciding such cases.

Q10 benefits & risks are addressed under Q8 & Q9 above.

Q11
The impact of proposed changes to the Criteria for Developing Animal Welfare Standards on our organisation would be related to the specifics of the resulting standards, which our inspectors are tasked with enforcing.

Issue 4: Role of the National Animal Welfare Advisory Group

Q12. Do you agree there is still a role for an independent committee on animal welfare?
Q13. Do you agree that the committee should be able to publish its advice at its discretion?
Q14. Do you agree that the current membership of the committee is appropriate or does it need to be changed?

Answers and comments
Q12
There is a need for an independent committee on animal welfare, and it should be full time and funded by the government.

We believe its role should be greater than the proposed changes to the Act allows – ideally, much of the MPI’s role under the proposed changes should be given to an independent commissioner or independent body, to ensure the welfare of animals is the primary consideration in decision making; or at the very least, a separate department within the MPI.

The proposed legislative process to create the regulatory standards allows sufficient government involvement, without the MPI being so heavily.

Q13
If the NAWAC continues on the basis proposed in the MPI discussion document, it should definitely be able to publish its advice at its discretion. This should be funded by the government, so that cost does not prevent the public and politicians from having the full facts.

Q14
Current membership of the committee, as described in the MPI discussion document, seems appropriate, with the exception of the ability of the Minister to appoint anyone else deemed appropriate.
We recommend an independent Animal Welfare Commissioner be responsible for appointing members to the committee.

**Issue 5: Live animal exports**

Q15. Do you agree with the proposal to create directly enforceable standards for the export of live animals?

Q16. Do you agree with broadening the purpose of the exports part of the Act so that New Zealand’s reputation can be considered when making rules or deciding on applications?

Q17. What are the risks and benefits of these proposals? Can you think of any missed opportunities or unintended consequences?

Q18. What impacts will the proposal have on you and/or your organisation or sector?

**Answers and comments**

Q15

Yes, we agree with the proposal to create directly enforceable standards for the export of live animals. Conditions imposed on an Animal Welfare Export Certificate should be legally enforceable. There should be mandatory reporting on the outcome of all voyages, and independent monitoring systems in place.

Q16

We believe live export for slaughter should be banned permanently.

Q17

We would expect the introduction of enforceable standards for export of live animals to increase compliance with welfare standards and any specific conditions of export certificates, due to the threat of penalties for non-compliance. This will obviously improve the welfare of animals being exported.

Q18

It is unclear from the MPI discussion document what role animal welfare inspectors, specifically those employed by the SPCA will have in enforcing the new standards, so we cannot comment on the effect on our organisation at this time.

**Issue 6: Significant surgical procedures**

Q19. Do you agree with the proposals to change who can perform significant surgical procedures under veterinary supervision?

Q20. Do you agree that the Act should allow for mandatory conditions to be placed on controlled surgical procedures?

Q21. What are the risks and benefits of these proposals? Can you think of any missed opportunities or unintended consequences?

Q22. Are there any other ways the system should be improved?

Q23. What impact would the proposed changes have on you and/or your organisation or sector?

If you have a view on any of the procedures described in section 4.7.5 of the consultation document, please indicate how you think they should be classified:

- Not significant: can be carried out by anyone.
- Significant: may only be carried out by a veterinarian or a person who is acting under the direct supervision of a veterinarian and who is being taught veterinary science at undergraduate level.
- Restricted: as for significant surgical procedures plus may only be carried out if the procedure is in the animal’s interests and using appropriate pain relief.
- Controlled: as for significant surgical procedures plus may also be carried out by the owner of an animal, or their employee with written veterinary approval.
- Prohibited: no one may carry out the procedure.

**Answers and comments**

**Q19**
We agree with the proposals to allow vets not yet registered in NZ, or who do not have a current practicing certificate to perform significant surgical procedures under registered veterinary supervision.

**Q20**
We agree that the Act should allow for mandatory conditions to be placed on controlled surgical procedures, along with penalties and enforcement tools.

**Q21**
Mandatory surgical conditions should reduce the likelihood of suffering or mistreatment of animals during surgical procedures.

**Q22**
We also agree with the proposal to enable specific surgical procedures to be prohibited.

**Q23**
We do not anticipate the proposed changes in this section will have any significant direct impact on the operations of our organisation.

**Section 4.7.5**
We believe the following procedures should be PROHIBITED:
- Mulesing
- Tail docking of horses
- Tail docking of dogs
- Tail shortening of cows
- Comb removal from game poultry

The following procedures should be classified as SIGNIFICANT:
- Desexing of companion animals
- Desexing of horses, llamas, and alpacas
- Tooth extraction in horses and companion animals
- Laproscopic artificial insemination of sheep and goats

The following procedures should be classified as RESTRICTED:
- Liver biopsy
- Removal of articulated dew claws in dogs
- Caslick’s procedure
- Surgical castration of livestock on farm...
- Embryo collection via exteriorised uterus in sheep & deer

**Issue 7: Reporting of animals killed for research, testing or teaching**

Q24. Do you agree that the number of animals killed humanely for research, testing and teaching should be included in official statistics?
Q25. What impact, including costs, would the requirement to report animals killed for use in research, teaching, and testing have on you or your organisation?

Q26. Can you think of any other changes that would improve the system for regulating animals used in research, testing and teaching?

**Answers and comments**

Q24
We agree that the number of animals killed humanely for research, testing and teaching should be included in official statistics. If possible, a checking or verification process should also be implemented.

Q25
Our organisation is not involved in killing of animals for use in research, teaching, or testing, so we do not anticipate any impact on our organisation.

Q26
We do not agree with the proposal to make researches killing an animal for research, testing, or teaching purposes exempt from the 'harm-benefit' test. The argument that it would require animal ethics committees to "make a moral judgement on the sacrifice of life as part of the harm caused..." appears invalid – surely that is precisely the role of an ethics committee.

All cosmetic testing on animals should be permanently prohibited.

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**Issue 8: Enforcement tools**

Q27. Do you agree with the proposals to attach instant fines to some minor offences and give some animal welfare inspectors the ability to issue compliance orders?

Q28. What are the risks and benefits of this proposal? Can you think of any missed opportunities or unintended consequences?

Q29. What impact would the proposal have on you and/or your organisation or sector?

**Answers and comments**

Q27
Yes, we heartily agree with the proposal to attach instant fines to some minor offences and to give some animal welfare inspectors the ability to issue compliance orders without application to the District Court, and with the increase in maximum infringement fees to $1000.

Q28
**Benefits**
Prosecution under the Act is currently prohibitively expensive, especially taking into account the time required by an inspector in preparing and bringing the case to court. Generally this is funded by organisations such as the SPCA which operate almost entirely on donations and grants. Thus it is only extreme cases of animal abuses and neglect which are prosecuted through the courts.

This means much of the lower level breaches of the Act go unpunished, rendering the Animal Welfare Act ineffective.

We welcome any changes to make animal welfare standards more enforceable, in the hope that it acts as a greater deterrent to would-be animal abusers and thus prevents suffering of animals.
We hope that the proposed changes will emphasis to judges the severity of cases that still make it to court, and consequently encourage them to impose harsher sentences for those who are convicted.

Q29
The proposed changes to enforcement will have a significant impact on our organisation, as the direct employer of the officers tasked with administering the Act and much of the new penalty regime. We anticipate the need for more inspectors, more training, and more resourcing; all of which increases our costs. Our finances are already stretched, and our funding currently comes almost entirely from public donations and grants.

With the move to regulatory standards, the increased authority and importance of animal welfare inspectors' work under the Act, we consider it essential the inspectorate be funded by the government.

If already stretched SPCA branches are unable to employ sufficient inspectors, regardless of changes the Act will be ineffective, and animals will suffer as a result.

It seems only logical and fair that an officer appointed by government to administer and enforce government regulations be funded by the government.

As an example, even an honorary fisheries officer, under the Fisheries Act 1998 s.197 receives an annual honorarium from parliament of up to $1,000 plus reimbursement of actual and reasonable expenses incurred in the course of carrying out his or her powers and duties.

We reiterate our request that Animal Welfare Inspectors and their operations be fully funded by government.

Issue 9: Other proposed offences

Q30. Do you agree with the proposal to make drowning a land animal an offence?
Q31. Do you agree with the proposal to clarify that wilful and reckless ill-treatment offences apply to animals in a wild state?
Q32. What are the risks and benefits of these proposals? Can you think of any missed opportunities or unintended consequences?

Answers and comments
Q30
Yes, we agree drowning a land animal should be made an offence.

Q31
We agree that wilful and reckless ill-treatment offences should also apply to animals in the wild.

Q32
The obvious benefits of these proposals is to further prevent the suffering of animals.

Issue 10: Technical amendments

Q33. Do you have any comments on any of the technical amendments proposed in Table 1?

Answers and comments
Issue 3 - it is not stated what the 'administrative problems' associated with appointing animal welfare inspectors under the State Sector Act are. It is our concern that removal of this link will diminish the chances of government funding of the inspectors and their operations.

Issue 5 - we see no need to remove NAWAC or NAEAC from the category of 'local authorities' under the Local Government Official Information and Meetings Act. This would only make the information and operations of the organisations more difficult for the public to access.

We support all other proposals in Table 1 of the discussion document.

Any other comments

Q34. Do you have any other comments or feedback not covered by these questions?

Answers and comments
Regardless of any changes, the Animal Welfare Act and agencies tasked with ensuring animal welfare require proper government funding to be effective.

Ideally, animal welfare governance should be independent of industries with vested interests in the exploitation of animals.

The strategy acknowledges that "it matters to us" how animals are treated. To ensure this, and to allow NZ producers to compete on an equal footing, we propose that animal welfare standards be extended to imported animals and animal products.
Club Secretary
Weimaraner Club

21st September 2012

Animal Welfare Strategy and Legislation Review
Ministry for Primary Industries
P O Box 2526
Wellington 6140


My name is and as Club Secretary I am writing on behalf of The Weimaraner Club Inc whose members have been involved in breeding and exhibiting Weimaraners for over 30 years. This breed has been traditionally docked since the inception of the breed. Most of our members are also members of the New Zealand Kennel Club and the New Zealand Council of Docked Breeds.

We support the New Zealand Council of Docked Breeds and the New Zealand Kennel Club in their Submissions.

We also wish to have our Submission considered for the proposed Strategy and possible Amendments to the Animal Welfare Act 1999 and make our submission on the following Issues.

Issue 6. Significant surgical procedures

Tail Docking of dogs

We believe that that the Banding of Dogs Tails should continue to be considered a Controlled Procedure and that only persons who are members of an accredited Banding Scheme are permitted to band dogs.

The reasons for this are as follows:
1. Insufficient trial period of Tail Banding Panel

The Accredited Banders Scheme has been established and only NZKC Registered litter of traditionally docked breeds are to be banded. The Council considers that by restricting banding to being performed by accredited people only, they are being proactive in animal welfare and building a fence at the top of the cliff, as opposed to being the ambulance at the bottom.

Further, that only two years since the enforcement of the Code is not sufficient time to be able to accurately gauge if the panel is operating successfully and that only NZKC Registered, traditionally docked dogs are being banded.

2. Tradition of Docking

As guardians of their chosen breeds, breeders have the responsibility of maintaining the breeds against the individual blueprint of the breed — the Kennel Club Breed Standards. The Breed Standards capture and record the requirements of the ideal specimen and have been written as the benchmark of the breeds for in excess of 100 years. This is why it is referred to as the "Tradition" of docking. Yes it is historical but it is based on experience and breeds that were traditionally docked were most often docked to prevent damage.

Whilst Veterinarians have the ability to understand the internal working of the dogs — breeders have the responsibility of ensuring they are fit for purpose on the outside — and they take this responsibility extremely seriously.

Docked dogs successfully herd, hunt and trial as part of their daily lives! They are successful in the Show, Obedience and Agility rings and are valuable contributors to the Service Industries as Police, Guide and Rescue dogs and are not compromised by not having a tail.

3. Previous Decisions on Tail Docking

While reviewing the Code of Welfare (Dogs) during 2009/2010 the NAWAC Committee concluded the following (From the NAWAC Committee report published on the Ministry of Primary Industries Website).

"The National Animal Welfare Advisory Committee (NAWAC) considered, on the available evidence, that the amount of pain that a dog experiences when its tail is docked is reduced if the puppy is of a very young age. At this age, some of the connections in the puppy’s brain which carry signals to let the puppy experience pain are not yet fully developed and scientific evidence suggests that, at this age, the puppy does not experience pain as it would if the tail was removed in an older dog."

"The National Animal Welfare Advisory Committee (NAWAC) is aware of one accredited tail banding scheme that is managed by the New Zealand Kennel Club. More information is available on their website. Anyone can establish an accreditation scheme, as long as it meets the requirements in the code of welfare."

Since this Code came into force, there has been no new scientific evidence provided that disproves these findings!
4. Freedom of Choice

The Breed standards do not include a disqualification for traditionally docked dogs, which are exhibited with tails! This position is what we fight for with the most passion -- the "Freedom of Choice".

5. Conclusion

We believe that the claim that dogs are disadvantaged by not having a tail is emotive and not supported by evidence. The continued use of such over-emotive opinions or theories, such as expressed issues around ethical considerations, complications, impairment of normal function etc as opposed to those based on sound scientific proof are, simply just that -- opinions and theories.

Hardly sound building blocks for a robust Animal Welfare system!
Good morning

Thank you for the opportunity to comment on the proposed animal welfare strategy for New Zealand and associated amendment to the Animal Welfare Act 1999. We applaud the New Zealand Government for committing the time and resources to this project and would like to personally thank the Minister and the officials at the Ministry for Primary Industries for the inclusive manner in which consultation has been undertaken.

Please find attached the World Society for the Protection of Animals (WSPA) submission. In general, WSPA supports the proposed animal welfare strategy and associated changes to the Act. As is detailed in our submission believe that further changes could be made to improve the welfare of animals in New Zealand and strengthen the country’s reputation as a responsible producer and exporter of animal products.

If you have any questions regarding the contents of the WSPA submission, please do not hesitate to contact me.

We trust you find the submission useful and we look forward to further discussions as part of the Parliamentary Select Committee process in 2013.

Yours sincerely

[Signature]

WSPA New Zealand, Private Bag 93220, Parnell, Auckland 1151 IRD 84 887 730
Telephone 0800 500 9772 +64 (0)9 309 3901 Fax +64 (9) 336 1947
Email wsfa@wsfa.org.nz Web www.wsfa.org.nz
issue 1: New Zealand animal welfare strategy

Q1. Do you have any overall comments or feedback about the proposed strategy and its approach?
Q2. What are the risks and benefits of adopting this strategy? Can you think of any missed opportunities or unintended consequences?
Q3. Do the values reflect New Zealanders' views about animal welfare? Would you suggest something else and why?
Q4. Do you have any comments on the proposed approaches, leadership roles, or Government priorities?

Answers and comments

WSPA supports the proposed strategy and its approach.

In particular, WSPA would like to express its support for the:
- inclusion of the statement regarding animal emergency management - Contingency planning for and responses to adverse events; and
- the statement in the Executive Summary that notes that one of the priorities for the Government will be to - Work with sector and interest groups to address priority animal welfare issues such as .... preparing for adverse events.

WSPA believes it is crucial that this statement remains in the strategy to ensure that changes are made to the Government’s current policies, legislative underpinnings to those policies and local arrangements to ensure that production and companion animal welfare is adequately managed during an adverse event.

Please see the National Animal Welfare Emergency Management (NAWEM) Advisory Group’s submission for more information. WSPA is co-chair of NAWEM.

In addition, WSPA would also like to suggest that the Animal Welfare Strategy clearly states that New Zealand does not support the keeping of cetaceans in captivity.

In 2010, Conservation Minister Hon Kate Wilkinson stated in a letter to WSPA that the New Zealand Government was in favour of bringing the Marine Mammal Protection Act 1978 (MMPA) into line with the Department’s Conservation General Policy 4.4k, which states: “Whales and dolphins should not be brought into or bred in captivity in New Zealand or exported to be held in captivity, except where this is essential for the conservation management of the species.”

Following receipt of Kate Wilkinson’s letter, WSPA let its millions of supporters worldwide know that the New Zealand Government intended to take this positive step for animals and add its name to the growing list of countries which have adopted legislation banning the keeping of cetaceans in captivity, although the MMPA is at present yet to be amended.

Now that the new Animal Welfare Strategy is being formulated, it is the perfect opportunity to ensure that the protection of cetaceans from being held in captivity is reflected in the text of the Strategy, hence influencing future changes to the MMPA.

For more information, please see Appendix A - CAPTIVE CETACEANS: A DYING TREND.

Finally, whilst WSPA is pleased to see the values of the strategy include the idea of sentience, WSPA believes that it is essential that the strategy acknowledges the concept of sentience by clearly stating that the strategy applies to all animals that are sentient. It is widely accepted that animals can suffer and feel pain, and there is evidence to suggest they
can also feel positive emotions. As a result, WSPA would expect the strategy to champion the idea of sentience and to explore it in the amendments to the Act.

It is important to note that more than 2,600 New Zealanders added their name to a petition last year asking the Government to recognise that animals are sentient, can feel pain and suffer, when it reviews the country's animal welfare legislation next year.

For more information, please see Appendix B – ACKNOWLEDGING SENTIENCE: GIVING MEANING TO ANIMAL WELFARE.

**Issue 2: Standards for care and conduct towards animals**

Q5. Do you agree with the proposal to replace codes of welfare with a mix of directly enforceable standards and guidelines?

Q6. What are the risks and benefits of this proposal? Can you think of any missed opportunities or unintended consequences?

Q7. What impact will the proposed changes have on you and/or your organisation or sector?

**Answers and comments**

WSPA supports the proposal to replace codes of welfare with a mix of directly enforceable standards and guidelines.

There is a risk that in the drafting of these new regulations, some of the minimum standards currently sitting in the codes of welfare which cannot easily be translated into regulations will be lost. This will result in a very basic set of regulated standards which will refocus the Act on cruelty rather than welfare. In order to reduce this risk, there needs to be a commitment from the Minister to include as many of the existing minimum standards as possible in the regulations.

In addition, NAWAC needs to play more than just a consultative role in the process. The Minister should be required by the Act to consider NAWAC's advice before issuing an MPI produced guideline or recommending a draft regulation to Cabinet.

WSPA looks forward to being actively involved in the consultation process preceding the drafting of the new standards and regulations.

**Issue 3: Criteria for developing standards**

Q8. Would the proposals to add "practicality" and "economic impact" to the set of criteria improve the decision-making process, or would you suggest something else?

Q9. Do you agree that having "transitions" and "exemptions" is a better way to handle the situations that currently fall under "exceptional circumstances"?

Q10. What are the risks and benefits of these proposals? Can you think of any missed opportunities or unintended consequences?

Q11. What impact would the proposed changes have on you and/or your organisation or sector?
Answers and comments

Adding practicality and economic impact might be good for transparency, but who defines the threshold of what is impractical and uneconomic? There is a real risk that including these factors for every situation would a) increase cost and bureaucracy, and b) lead to outcomes that were not beneficial for animal welfare. WSPA suggests that if MPI adopts this proposal, it commits to setting out its decision making criteria and submitting this for public consultation.

Issue 4: Role of the National Animal Welfare Advisory Group

Q12. Do you agree there is still a role for an independent committee on animal welfare?
Q13. Do you agree that the committee should be able to publish its advice at its discretion?
Q14. Do you agree that the current membership of the committee is appropriate or does it need to be changed?

Answers and comments

WSPA agrees that there is still a role for an independent committee on animal welfare and supports NAWAC publishing its advice.

WSPA agrees that the current membership of the committee is appropriate but would suggest that NAWAC has the flexibility to co-opt additional members from time to time to provide expert advice.

WSPA also recommends that animal emergency management is added to the list of NAWAC’s functions as detailed in section 53.

Adding animal emergency management to NAWAC’s functions will ensure it remains a priority for the Government as detailed in the strategy document and is addressed in a timely and adequate manner.

Please see the National Animal Welfare Emergency Management (NAWEM) Advisory Group’s submission for more information. WSPA is a co-chair of NAWEM.

Issue 5: Live animal exports

Q15. Do you agree with the proposal to create directly enforceable standards for the export of live animals?
Q16. Do you agree with broadening the purpose of the exports part of the Act so that New Zealand’s reputation can be considered when making rules or deciding on applications?
Q17. What are the risks and benefits of these proposals? Can you think of any missed opportunities or unintended consequences?
Q18. What impacts will the proposal have on you and/or your organisation or sector?

Answers and comments

WSPA agrees with the proposal to create directly enforceable standards for the export of live animals. It strongly supports broadening the purpose of the exports part of the Act so that New Zealand’s reputation can be considered when making rules or deciding on applications.

WSPA supports the proposal of moving the CEPO which currently sits under the Customs and Excise Act into the new Animal Welfare Act, so that the issue of it expiring and leading to uncertainty is overcome.
However, WSPA believes an explicit and total ban would give greater certainty and send a stronger message to the international community. WSPA recommends that the Government solidifies and strengthens the proposed changes by introducing a specific ban on live animal exports when undertaken for slaughter.

A formal ban would allow New Zealand to consolidate its focus as an exporter of high quality chilled and frozen meat, and reflect to the world that the welfare of animals remains a priority for the people and Government of New Zealand. New Zealand has been at the forefront for setting the standards for so many issues relating to animal welfare. The opportunity not only to do what is best for the welfare of animals but also to have a positive impact on the economic, health and political arenas associated with the trade is too good to miss.

In addition, the current CEPO lists “livestock” as “sheep, cattle, deer, and goats” and so creates a loophole which would allow the export for slaughter of other livestock, such as pigs, which could not be ruled out in the future. WSPA strongly suggests that the ban is worded to apply to all animals, even those not traditionally considered as “livestock”, in order to close this loophole.

For more information, please see Appendix C - LONG DISTANCE TRANSPORT OF ANIMALS FOR SLAUGHTER: A TRADE IN SUFFERING.

The Act should also address the question of live animal imports, especially of exotic animals. WSPA recommends that the Act is amended to prohibit the importation of exotic animals by privately owned zoos; the importation of exotic animals by publicly owned zoos unless there is a clearly demonstrable plan for a species recovery programme; and a public consultation process is introduced for the importation of any new exotic large mammals which require large living spaces and complex environments (such as elephants, lions, tigers, bears and large primates) by a publicly owned zoo.

The strategy talks about ‘addressing animal welfare issues before problems occur’. Being able to assess animal welfare risks before exotic animals could be imported to New Zealand would clearly support this ideal and would avoid risks to the country’s reputation.

For more information, please see Appendix D - EXOTIC AND WILD ANIMALS FOR PUBLIC DISPLAY: AN UNNECESSARY ENTERTAINMENT.

Issue 6: Significant surgical procedures

Q19. Do you agree with the proposals to change who can perform significant surgical procedures under veterinary supervision?
Q20. Do you agree that the Act should allow for mandatory conditions to be placed on controlled surgical procedures?
Q21. What are the risks and benefits of these proposals? Can you think of any missed opportunities or unintended consequences?
Q22. Are there any other ways the system should be improved?
Q23. What impact would the proposed changes have on you and/or your organisation or sector?

If you have a view on any of the procedures described in section 4.7.5 of the consultation document, please indicate how you think they should be classified:

- Not significant: can be carried out by anyone.
- Significant: may only be carried out by a veterinarian or a person who is acting under the direct supervision of a veterinarian and who is being taught veterinary science at undergraduate level.
- Restricted: as for significant surgical procedures plus may only be carried out if the procedure is in the animal’s interests and using appropriate pain relief.
- Controlled: as for significant surgical procedures plus may also be carried out by the owner of an animal, or their employee with written veterinary approval.
- Prohibited: no one may carry out the procedure.

## Answers and comments

WSPA supports prohibiting the following surgical procedures:
- Mulesing
- Tail docking of horses
- Tail docking of dogs.

### Issue 7: Reporting of animals killed for research, testing or teaching

Q24. Do you agree that the number of animals killed humanely for research, testing and teaching should be included in official statistics?
Q25. What impact, including costs, would the requirement to report animals killed for use in research, teaching, and testing have on you or your organisation?
Q26. Can you think of any other changes that would improve the system for regulating animals used in research, testing and teaching?

## Answers and comments

WSPA supports the proposal to include the number of animals killed humanely for research, testing and teaching in the official statistics. This should also include the animals that are utilised to breed the animals directly used for research, testing and teaching purposes.

### Issue 8: Enforcement tools

Q27. Do you agree with the proposals to attach instant fines to some minor offences and give some animal welfare inspectors the ability to issue compliance orders?
Q28. What are the risks and benefits of this proposal? Can you think of any missed opportunities or unintended consequences?
Q29. What impact would the proposal have on you and/or your organisation or sector?

## Answers and comments

WSPA supports the proposal to attach instant fines to some minor offences and give animal welfare inspectors the ability to issue compliance orders.

WSPA believes it would be a missed opportunity if the money collected from the issuing of compliance orders was not channelled back into animal welfare.

### Issue 9: Other proposed offences

Q30. Do you agree with the proposal to make drowning a land animal an offence?
Q31. Do you agree with the proposal to clarify that wilful and reckless ill-treatment offences apply to animals in a wild state?
Q32. What are the risks and benefits of these proposals? Can you think of any missed opportunities or unintended consequences?
Answers and comments

WSPA strongly supports the proposal to make drowning a land animal an offence.

WSPA also strongly supports the proposal to clarify that wilful and reckless ill-treatment offences apply to animals in a wild state.

WSPA also suggests making changes to Section 29 to make it more precise in describing coursing and releasing animals from close confinement to be shot at. Australian states have legislation that is more precise and New Zealand should follow those examples.

Guidelines regarding recreational mammal hunting should be developed to provide guidance to the industry which, as well as promoting animal welfare, can be held up by the tourist industry as a promotional tool internationally.

Please see Appendix E - HUNTING: A HUMANE OPPORTUNITY.

Issue 10: Technical amendments

Q33. Do you have any comments on any of the technical amendments proposed in Table 1?

Answers and comments

Any other comments

Q34. Do you have any other comments or feedback not covered by these questions?

Answers and comments

WSPA proposes that the concept of sentience should be included in the Act. As such the Act would be worded as applying to all sentience animals as currently set out in section 2.

For more information, please see Appendix B – ACKNOWLEDGING SENTIENCE: GIVING MEANING TO ANIMAL WELFARE.

WSPA also strongly recommends that an amendment is made to the Act so that there is a statutory prohibition on the keeping of exotic and wild animals in circuses.

For more information, please see Appendix D - EXOTIC AND WILD ANIMALS FOR PUBLIC DISPLAY: AN UNNECESSARY ENTERTAINMENT.
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Overview

Purpose of paper
The purpose of this paper is to:

- Consider the developing science of animal sentience and its importance in policy development in relation to animals.
- Propose changes to the Animal Welfare Act 1999 to include reference to sentience.
- Request that the new Animal Welfare Strategy clearly states that New Zealand acknowledges the sentience of animals.

Western cultures are increasingly becoming concerned with matters of animal welfare, and this is recognised through policy development in relation to issues such as farming, the licensing of domestic dogs and the banning of certain practices such as fur farming and fighting animals. With animals receiving escalating media coverage, and society’s growing awareness of the suffering which can be caused to animals due to human neglect or cruelty, it is becoming clearer that science has a key role in informing debate in relation to the protection of animals.

“Animal sentience” refers to the fact that animals can feel pain and suffer, but also experience positive emotions such as joy and pleasure. Studies have found many animals to be capable of complex emotions which are often thought to be unique to humans, such as grief, empathy and jealousy. The scientific understanding of animal sentience is based on decades of research and evidence from neuroscience and cognitive ethology.

With the sentence of animals being proved through science, it has become an important foundation for the development of animal protection policy. New Zealand has always prided itself on having some of the best animal welfare laws in the world. There is an opportunity now to include sentence language in the new Animal Welfare Strategy and the Animal Welfare Act review, thereby keeping New Zealand at the forefront of animal protection policy and legislation.

Historical trends
Over the last 30–40 years, the science of animal sentience has grown in popularity among biologists and specifically neuroscientists (Duncan, 2006). The belief that at least mammals are sentient beings, capable of experiencing emotions and feelings, has been accepted by some since scientific records began. Since then, in line with the development of the field of animal welfare, animal sentience has grown to be an important and popular area of science. Following the publication of the influential book “Animal machines” (Harrison, 1964) and the follow-up investigation by the British Government (Brambell Committee, Command Paper 2836, 1965), scientists gradually accepted the importance of animal feelings in their welfare assessments (Dawkins, 1990; Duncan, 1987, 2006). This eventually grew into the recognition that governs the field today, which is that welfare is primarily concerned with animal feelings (Duncan, 1998, 2004).

As a result of this increased attention and funding in the area of animal sentience and developments in neuroscience, scientists have discovered an increasing amount about what animals are capable of experiencing. To date, most research has focused on vertebrates. It is now commonly accepted that all vertebrates are sentient due to the universal presence of a central nervous system and the similarity of the neurons and brain structure across the taxa (Boyle, 2009). This means that vertebrates are capable of feeling pain and do so in a similar way to humans (Turner, 2008), that they experience fear and distress, and that they can suffer from psychological disorders such as depression and post-traumatic stress.
syndrome (e.g. Ferdowsian et al, 2011). Understanding how an animal suffers and the emotions it experiences is instrumental in developing animal welfare policies and practice.

In the last decade, scientists have been researching the capacities of invertebrates, and research to date has suggested that at least complex invertebrates such as cephalopods may be capable of suffering (Elwood and Appel, 2009; Mather, 2008; Sherwin, 2001). Knowledge of these and other invertebrate species is growing and, as technology advances, scientists are increasingly able to better understand what other species can feel.

WSPA's policy

The World Society for the Protection of Animals (WSPA) believes that concern for animal welfare is driven by the understanding that animals are sentient beings and that their feelings matter. WSPA strongly believes that this knowledge should be a fundamental consideration in the treatment of animals. Consequently, WSPA proposes that animal sentience is acknowledged in the formulation of all policy and legislation affecting animals to ensure that their protection is based on the understanding that they are sentient beings with intrinsic value and not simply raw materials.

New Zealand's opportunity

New Zealand does not at present explicitly recognise the sentience of animals as part of its current Animal Welfare Strategy or in the Animal Welfare Act 1999.

The current review of these documents is the perfect opportunity to ensure that animal sentience is explicitly included and recognised as the cornerstone of the protection of animals. The insertion of sentience language within New Zealand's prevailing animal law and overarching strategy would bring the country into line with those which have already taken this important step forward for animal welfare, and act as a guiding example to other countries whose standards fall behind.
New Zealand Law in Practice: Implications for Animal Welfare

Introduction

Scientific findings have led to developments in moral and ethical thinking regarding the place of animals in society and how we should use or protect them. The animal kingdom is full of interesting and varied species, and much has been discovered about the biological or responsive similarity some animals have to human beings, or the surprising sophistication of certain species’ behaviour and responsiveness to their environment and to other animals. These advances in science are continuing to grow and to feed into greater understanding and the development of ethical concepts.

Today we have a much greater sense of our responsibility towards animals, and this is captured in the enactment of legislation protecting their needs and preventing unnecessary suffering. Simple insertion of sentence language in key texts can ensure that legislators base the formulation of policy on scientific fact, and that the public are clear as to the importance of such laws.

Sentience and animals

Sentience as the basis for animal welfare

It is acknowledged that animal welfare is primarily concerned with feelings, and it is the ability of animals to feel pain and joy that gives rise to the concern for their welfare (Duncan, 1996, 2004, 2006). If animals were automatically responding to stimuli without experiencing any emotion there would be no reason for concern. However, animals are sentient beings and, as a result, their feelings need to be considered. In practice, animal sentience is a key part of animal welfare investigations. Such research is based on assessing how positive or negative an animal is feeling. The inclusion of sentience in legislation is therefore essential to mirror what is recognised by animal welfare scientists and what is both the guiding and underlying principle of their animal welfare research.

Sentience as a simplified baseline

Sentience is known to be applicable to all vertebrates and there is reason to believe that some invertebrates, such as cephalopods, are also sentient (Duncan, 2006; Littin and Mellor, 2004; Mather, 2008; Sherwin, 2001). Using sentience as the criterion by which protection is merited provides clear and stable parameters, ensuring all beings capable of suffering are protected regardless of their function. For example, a rabbit would be protected to some extent because the rabbit is a sentient being, regardless of whether the rabbit is a pest, a research subject or a pet. Using sentience as a baseline for awarding protection reduces the risk of speciesism because it protects an animal on the basis of its capacity to feel, rather than on its function or cognitive ability.

On occasion, higher cognitive abilities such as theory of mind and language have been used as a basis for advocating for the rights of certain species such as the great apes (Cavalieri and Singer, 1993). However, an animal’s ability to suffer has been shown not to be reliant on cortex or total brain size (Boyle, 2009). Determining protection on the basis of cognitive abilities can be detrimental to animal welfare. If species that are deemed cognitively advanced are automatically credited with protection, what does that mean for those that are not and where would the line be drawn (Mendl and Paul, 2004)?
Using sentence as a baseline both creates a stable argument for why animals deserve legislative protection and indicates those which should be included. If sentence language is not inserted into key legislation, it undermines the rationale of the law and allows for interpretation in regard to when it is applicable and to which animals. Where animal laws acknowledge sentence, it demonstrates to the public that the treatment of animals should be based on the understanding that their feelings matter to us and to them.

**Sentience as a developing field**

Sentience is a developing science and over the last 40 years an increasing amount of research has been undertaken in this area (Bekoff, 2005; Duncan, 2006). As a result, there is a greater understanding of the capabilities of animals and where in the animal kingdom sentence lies (Boyle, 2009; Broom, 2007; Duncan, 2008). This knowledge continues to grow, which means that legislation relating to animals needs to be flexible in terms of which species are protected.

**Sentience as a holistic approach**

Increasingly, it is understood that good animal welfare is about more than just the avoidance of negative experiences for an animal, and is also about the provision of pleasurable ones (Balcombe, 2009; Mellor, 2012). This is the very definition of animal sentence – that animals are capable of feeling positive and negative emotions and experiences and that these matter to them (Broom, 2007). It is therefore necessary for reference to animal sentence to be included within legislation to demonstrate an understanding and acknowledgement that animals have an interest in living a good life – not just one that is free from suffering but also one that is rich with positive experiences (Mellor, 2012).

**Sentience provides meaning**

Describing animals as emotional beings capable of a range of experiences provides value and meaning to discussions regarding their welfare. The term "sentence" and what it represents can help to ensure that animals are viewed by the public as emotional and feeling beings rather than as commodities. Sentence language can be a powerful tool to evoke empathy and compassion towards animals, which in turn is beneficial in encouraging compliance with legislation and reducing the need for enforcement.
Other Countries’ Legislation

Bosnia and Herzegovina

The provisions of the Law recognise that all animals with developed senses and nervous systems can register sense stimulants which can lead to the sensation of pain, and protection extends to any other living organism for which there is no certainty of having non-sentient characteristics.

Chile

Law 20,380 (2009)
Animals are recognised in the Law as living and sentient beings.

Czech Republic

Animal Protection Act (1992)
The Act includes the following definition: “suffering of an animal’ means any condition of an animal caused by any stimulus or intervention, which the animal is incapable of relieving itself of and which causes pain, injury, health disorder or death to the animal.”

Hungary

The Protection and Humane Treatment of Animals Act (1998)
Chapter 1 of the Act states that the Act was created based on the Hungarian government's knowledge that "animals are capable of experiencing feelings, suffering and joy, and that their respect and the assurance of their comfort is a moral obligation of mankind". In recognition of the great value “the whole of the fauna and its constituent individuals represent for humanity”, the intention of the Act is to encourage the Hungarian Republic to “take an active part in the international efforts made for the protection and forbearance of animals; in order to ensure the rational protection and humane treatment of animals”.

Latvia

The opening paragraph of the Law states: “The ethical obligation of humankind is to ensure the welfare and protection of all species of animals, because every unique being is in itself of value. A human being has a moral obligation to honour any creature, to treat animals with empathic understanding and to protect them. Without a substantiated reason no one is permitted to kill an animal, to cause it pain, create suffering or to otherwise harm it.”

Monaco

Law 1128 (1969)
Article 1 of the Law states: “Animals are sentient beings which must be respected, cared for and protected.”

Nicaragua

The Protection and Welfare of Pets and Domesticated Wild Animals (2010)
There is reference to animal sentence in the law.
Poland

*Animal Protection Act (1997)*
The Act clearly states that animals are living creatures capable of suffering.

Serbia

*Animal Welfare Law (2009)*
The Law protects all vertebrate animals which are "capable of feeling pain, suffer and stress".

Slovenia

*Animal Protection Act (2007)*
The Act is applicable to all animals whose senses are responsive to external stimuli and have a developed nervous system to feel painful external influences. The Act will consistently be implemented for vertebrate animals, and for other animals in relation to the level of their sensitivity, in accordance with established experience and scientific knowledge.

Tanzania

*Animal Welfare Act (2008)*
The Act recognises that animals are sentient beings.
Way Forward for New Zealand Law: WSPA’s Submissions

Legislative action

Simple additions will ensure that sentience is reflected in the text of New Zealand’s Animal Welfare Strategy and the Animal Welfare Act, serving as a reminder to those responsible for animals or required to enforce animal laws of the necessity for protection. Suggestions are outlined below.

Animal Welfare Strategy

A clear statement should be included in the Animal Welfare Strategy that expresses New Zealand’s moral and scientific desire to protect the welfare of animals.

WSPA proposes the following wording:

New Zealand recognises and appreciates that advances in science have led to an understanding that animals are sentient beings, capable of experiencing feelings such as pain and suffering, joy and pleasure, and are therefore deserving of legal protection. New Zealand will look to formulate laws and develop policies that reflect these developments in science and recognise the importance of understanding the animals we live alongside.

Animal Welfare Act 1999

The long title states:

An Act –

(a) to reform the law relating to the welfare of animals and the prevention of their ill-treatment; and, in particular, –

(i) to require owners of animals, and persons in charge of animals, to attend properly to the welfare of those animals;

(ii) to specify conduct that is or is not permissible in relation to any animal or class of animals;

(iii) to provide a process for approving the use of animals in research, testing, and teaching;

(iv) to establish a National Animal Welfare Advisory Committee and a National Animal Ethics Advisory Committee;

(v) to provide for the development and issue of codes of welfare and the approval of codes of ethical conduct;

(b) to repeal the Animals Protection Act 1960

WSPA proposes that the following should be inserted after “An Act”:

(aa) to recognise that all sentient beings are capable of feeling positive and negative emotions and are therefore deserving of protection wherever possible:

It is also suggested that the definition of “animal” in section 2 should be amended to read:

(a) means any sentient live member of the animal kingdom that is –
References


HUNTING:
A HUMANE OPPORTUNITY

World Society for the Protection of Animals

June 2012
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Overview

Purpose of paper
The purpose of this paper is to:

- Consider contemporary society’s attitude to hunting.
- Examine how law-makers can ensure that cruel acts are not perpetrated on sentient animals under the guise of hunting.
- Recommend changes to the Animal Welfare Act 1999.
- Make recommendations to the new Animal Welfare Strategy.

Historical trends
For many thousands of years, people were dependent on hunting for subsistence. It was crucial to the hunter-gatherer societies before the domestication of animals and the dawn of agriculture. Despite dramatic changes to the way animals are reared and consumed in much of the world, hunting has never fully left society.

As societies became feudally structured the privilege of hunting was reserved for the landed gentry. Peasants were severely punished for poaching, although they were hunting for subsistence whereas the landed gentry were hunting mostly for sport. Much of the game killed for sport found its way to the dining halls of the feudal castles instead of to the cooking pots of the tenanted hovels.

In a perverse way, hunting for sport in Western countries is still the preserve of the landed gentry, except that the hunters have been replaced by the nouveau riche and those who can afford to pay the high fees charged for guided hunting expeditions.

The goal has not changed, in that the purpose of the hunt is to pitch the hunter against the quarry with the objective of bagging a trophy or to pass the time with outdoor pursuits. These days, the idea that hunting is to provide meat for the table out of necessity is irrelevant to the objectives of most trophy hunters.

However, it is important to note that many poorer people living in rural areas are increasingly turning to hunting to feed their families.

New Zealand’s mammals
There are, of course, no indigenous mammals in New Zealand other than two species of bat. Most game animals were introduced into New Zealand in the 19th century for the purpose of creating a hunting culture or, in the case of possums, to create a fur trapping industry.

Shortly after New Zealand was settled by Europeans, deer were introduced from England, and later from America, for sport. Herds have since grown to several million animals, and are now regarded by many as a pest and a menace to the native bush and high-country pasture. Government hunters were contracted to cull them as part of a campaign to control numbers.

Once deer became well established they became a threat to the viability of native forests and conservation estates as they had no natural predators. Deer were declared “noxious animals” under the Noxious Animals Act 1956, which included the axis deer, fallow deer, Japanese deer, Javan rusa deer, moose, red deer, sambar deer, Virginian deer (commonly known as the white-tail), wapiti, chamois and tahr (the last two species being species of goat rather than deer).
Pressure from farmers led to limited deer farming operations being authorised by the Wild Animal Control Act 1977.\textsuperscript{1} Responsibility for controlling deer farming rests with the Department of Conservation (DoC).

Originally deer farming was restricted to those areas of New Zealand that were marginal for any other agricultural purpose, but now deer farming is prevalent throughout New Zealand with only small areas prohibited from deer farming.

**Confusion around hunting laws**

It is often assumed that hunting is exempt from animal protection laws. This is not necessarily the case (see "Parliament's Intentions" below).

The current provisions of the Animal Welfare Act 1999, while well intentioned, do not provide certainty as to:

- Whether hunting is an exemption or an exclusion.
- Whether acts conducted while hunting which would not usually be considered part of normal hunts would still be capable of being lawful, even when acts of cruelty might be involved.
- The status of animals hunted on safari parks and game estates.

**WSPA's vision**

The World Society for the Protection of Animals (WSPA) is not lobbying for the prohibition of recreational hunting. While it is accepted that hunting is likely to continue, WSPA feels strongly that improvements can be made under the current law to provide for the welfare of hunted animals by placing greater responsibility on recreational hunters to ensure that animals are not subjected to unnecessary pain and suffering.

**New Zealand’s opportunity**

In the 12 years that have passed since the Animal Welfare Act 1999 was enacted, other like-minded Western and Commonwealth countries have surpassed New Zealand in the legislative protection given to hunted animals. With the review of the law now taking place, New Zealand has a prime opportunity to regain credibility in this area and ensure that hunted animals are not subjected to unnecessary acts beyond those which society deems acceptable.

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\textsuperscript{1} Wild Animal Control Act 1977, s 12A.
Hunting under New Zealand Law

Introduction

Part 9 of the Animal Welfare Act 1999 deals with hunting under the subheading "Exceptions in relation to hunting or killing." In summary:

- Hunting per se is not unlawful under the Animal Welfare Act 1999.
- It is not unlawful to hunt or kill any animal in a wild state or any wild animal or pest. This is not unlawful to hunt or kill an animal or pest in accordance with:
  - Any other Act.

These provisions do not specifically exempt the hunting and killing of wild animals and pests from the general provisions of the Animal Welfare Act 1999. Therefore, it is assumed that if, in the act of hunting an animal, a person causes the animal unnecessary or unreasonable pain or distress, the hunter could still be liable for an offence of ill-treating an animal under section 29(a).

Definitions

The Animal Welfare Act 1999 does not specifically define the word "hunt", but does provide that the term "hunt or kill", in relation to animals, includes:

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2 Sections 175–178:

175. Hunting or killing — Subject to sections 176 to 178 and Part 6, nothing in this Act makes it unlawful to hunt or kill —

(a) any animal in a wild state; or
(b) any wild animal or pest in accordance with the provisions of —
(i) the Wildlife Act 1953; or
(ii) the Wild Animal Control Act 1977; or
(iii) the Conservation Act 1987; or
(iv) the Biosecurity Act 1993; or
(v) any other Act; or
(c) any wild animal or pest; or
(d) any fish caught from a constructed pond.

176. Hunting in safari parks — (1) Subject to section 178 and Part 6, nothing in this Act makes it unlawful to hunt a wild animal that is available for hunting in a safari park.

(2) Notwithstanding subsection (1) and section 175, where a person has hunted and captured a wild animal in a safari park (not being an animal that has been captured for the purpose of facilitating its imminent destruction), this Act applies in relation to that person as the person in charge of that animal.

177. Captured animals — (1) Notwithstanding section 175, but subject to subsection (2), —

(a) where a person has in captivity an animal captured in a wild state (not being an animal that has been captured for the purpose of facilitating its imminent destruction), this Act applies in relation to that person as the person in charge of that animal; and
(b) where a person has in captivity an animal captured in a wild state (not being an animal caught by fishing) for the purpose of facilitating its imminent destruction, section 12(c) applies in relation to the killing of that animal.

(2) Nothing in subsection (1) applies in relation to a wild animal that is hunted and captured in a safari park.

(3) Nothing in section 175 limits the application of any of the provisions of this Act in relation to —

(a) deer kept in captivity for the purposes of farming (not being deer available for hunting on a safari park); or
(b) mustelids kept in captivity as pets.

178. Certain provisions relating to traps and devices not excluded — Sections 175 and 176 do not restrict the application of sections 34 and 36.

3 Animal Welfare Act 1999, s 175(a) and (c).
4 Animal Welfare Act 1999, s 175(b).
(a) hunting, fishing, or searching for any animal and killing, taking, catching, trapping, capturing, tranquilising, or immobilising any animal by any means:

(b) pursuing or disturbing any animal ...

The Wildlife Act 1953 provides that "hunt or kill", in relation to any wildlife, includes:

the hunting, killing, taking, trapping, or capturing of any wildlife by any means; and also includes pursuing, disturbing or molesting any wildlife, taking or using a firearm, dog, or like method to hunt or kill wildlife, whether this results in killing or capturing or not; and also includes every attempt to hunt or kill wildlife and every act of assistance of any other person to hunt or kill wildlife

It should be noted that a statutory definition is confined to its own statute and is not transferable to another statute.

It might be of interest to note that Dominique Thiriet of the James Cook University Law School explains hunting this way:

Hunting is generally defined as the act of pursuing or chasing game or other wild animals. The meaning of the term is rarely defined in Australasian legislative instruments although it is often included in the definition of "take". ... 

Clearly, hunting encompasses a wide range of activities. Yet all have in common the deliberate intention to kill animals, whether the ultimate goal of the activity, the death of animals, is achieved or not. ...

The Shorter Oxford English Dictionary defines "hunting" as:

To go in pursuit of wild animals or game; to engage in the chase.

Safari parks
Safari parks (sometimes referred to as game estates) are farms where income is derived from wild animals being hunted on the farm. Under the Wild Animal Control Act 1977, safari parks must have a permit from DoC. The areas where deer may be held in safari parks are those specified for deer farming in the Deer Farming Notice No 4, 1986. Other wild animals such as tahr and chamois can only be held on safari parks where safari parks are within the feral range of those animals.

There needs to be clarity in law outlining whether hunting in safari parks is subject to the general provisions of the Animal Welfare Act 1999.

It is worth noting that a majority of hunting estates are not fenced or enclosed in any way and therefore would not be classified as safari parks.

Statutory rules for hunting
In New Zealand there are no statutory rules for hunting, despite the Primary Production Select Committee stating in 1999 that there should be guidelines in place.

In the United Kingdom a code of practice has been developed by the British Association for Shooting and Conservation. While it has no statutory basis, it - along with Australian states' own codes of practice - could be a foundation from which to consider what a similar code for New Zealand might encompass.

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8 See "Way Forward for New Zealand Law: WSPA's Submissions" below.

9 Reproduced in Appendix 1.
WSPA believes that codes of practice should be developed for deer and other forms of hunting, including pig hunting with dogs, and hunting small mammals such as rabbits, hares and possums.

**Hunting laws exemption confusion**

Prior to the Animal Welfare Act 1999 coming into force on 1 January 2000, the Animals Protection Act 1960 stated about hunting:

19 Exemptions

(1) Nothing in this Act shall render unlawful –

... 

(c) The hunting, snaring, trapping, shooting, or capturing of any animal in a wild state; 

...

This section had the heading (marginal note) “exemption”, so it is logical to assume this meant that hunting was exempt from the Animals Protection Act 1960. However, this is not the case as the section wording does not use the word “exempt” but rather uses the phrase “Nothing... shall render unlawful”.

Under the Acts Interpretation Act 1924, which applied at the time the Animals Protection Act 1960 was in force:

5 General rules of construction

... 

(f) The division of any Act into parts, titles, divisions, or subdivisions, and the headings of any such parts, titles, divisions, or subdivisions, shall be deemed for the purpose of reference to be part of the Act, but the said headings shall not affect the interpretation of the Act:

(g) Marginal notes to an Act shall not be deemed to be part of such Act:

So it follows that, as the only place the word “exemption” was used was within the marginal note, such a word could not and did not contribute to the interpretation that hunting was exempt.

However, the Interpretation Act 1999 came into force on 1 November 1999 – two months before the Animal Welfare Act 1999 – which changed the rules of interpretation:

5 Ascertain meaning of legislation

(1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

(2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.

(3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

So, as can be seen, headings to sections and marginal notes now form part of the material that aids legislative interpretation.

Applying these interpretive rules to the current Animal Welfare Act 1999, the subheading under Part 9 is “Exceptions in relation to hunting or killing” and the word “exemption” is not used. The specific provision, which came into effect on 1 January 2000, is:
175 Hunting or killing

Subject to sections 176 to 178 and Part 6,\(^\text{10}\) nothing in this Act makes it unlawful to hunt or kill –

(a) any animal in a wild state ...

Therefore, WSPA proposes that hunting is not and never has been exempted from the legislation and, while acts of hunting might in themselves be lawful, any act which is not part of the normal practice of hunting which results in ill-treatment should be investigated with a view to prosecution.

**Ambiguous terminology**

There is general confusion in New Zealand as to what constitutes a game estate, a safari park or both.

**Game estates**

For the purposes of the Animal Products Act 1999, a game estate is "a place within which animals are kept (whether all of the time or only some of the time), as if in the wild, for the purpose of providing opportunities for persons to hunt or catch them as recreational catch as if in the wild".\(^\text{11}\) The Animal Products Act is administered by the Ministry for Primary Industries (MPI) and has no function in controlling or guiding the practical activities of hunting. It is concerned solely with the consumption of meat obtained from a hunt. Animals kept on a game estate are not required to be confined by fencing, whereas fencing is implied on a safari park.

**Safari parks**

In the Wild Animal Control Act 1977, a safari park is defined as "a farm where income is derived from wild animals being hunted on the farm". *Animal Law in New Zealand* discusses the confusion surrounding safari parks:\(^\text{12}\)

Where the animals are kept in captivity within a fenced area, the operator cannot operate without a safari park permit issued by the Department of Conservation under the Wild Animal Control Act 1977. Once the permit is issued, ownership of the animals transfers from the Crown to the person holding them.

Wild animals ranging freely on private land without perimeter fencing remain the property of the Crown, but commercial hunting can operate provided the hunters have the permission of the landowner. These are not safari parks as defined in the Wild Animal Control Act 1977.

Parliamentary counsel made a mistake in using the term "safari park". ... Many game estates are not farms; they are extensive forested areas on fenced private property not associated with any farming activity. By using the term "safari park" instead of "game estate", the provision has excluded many members of the New Zealand Association of Game Estates unless the game estate is operated as part of a farming operation. The Animal Welfare Act 1999 should instead have used the term "game estate".

It is probable that most so-called safari hunting does not take place on a safari park as defined but on uncontrolled game estates or conservation land controlled by DoC.

**Another place for hunting – conservation land**

Hunting on conservation land is controlled by DoC through the Conservation Act 1987. Permits are issued by DoC.\(^\text{13}\)

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\(^{10}\) Part 6 relates to the use of animals in research, testing and teaching.

\(^{11}\) Animal Products Act 1999, s 658.

Anyone can apply to DoC for a permit online. The process takes no more than a few minutes, and the permit is issued by email by immediate return with no checks on the applicant. There is no cross-referencing to the police as to whether or not the application is permitted under the Arms Act 1983, and no requirement to satisfy DoC that the applicant is a competent hunter.

Game estates versus safari parks

Whereas safari parks are controlled by DoC under the Wild Animal Control Act 1977, game estates are controlled by the MPI under the Animal Products Act 1999. While the MPI publishes a list of game estates (and there are only 11), DoC does not publish a list of safari parks.

The essential difference between a safari park and a game estate is that animals are confined to safari parks by fencing whereas wild animals can come onto or leave game estates at will.

There are numerous commercial tourist activities that endorse guided tours on the promoters' own land and elsewhere, albeit unfenced. On the face of it these should be listed as game estates but only 11 are actually registered with the MPI as such. Few would meet the criteria of being a safari park.

While this has more relevance to the control and consumption of meat products from hunting rather than animal welfare issues, it highlights the need for clarity in definition and consistency through regulation.

38. Hunting, etc — (1) The Director-General may, —

(a) if it is in accordance with the management plan (if any) of a conservation area; and

(b) having regard to the safety of members of the public who are likely to be in the area, or any part of it, or any other land near the area, —

issue permits for hunting in the area or any specified part of it.

(2) A permit may be issued under subsection (1) either unconditionally or subject to any conditions the Director-General thinks fit.

(3) The Director-General may charge for the issue of a permit under subsection (1) any fee not exceeding the appropriate proportion of the costs of administering the issue of such permits.

(4) Every person commits an offence against this Act who, knowingly and without a permit in that behalf issued under subsection (1) or section 262ZH, or knowingly and otherwise than in compliance with any conditions subject to which such a permit has been issued, —

(a) discharges any hunting weapon on, into, or over any conservation area; or

(b) molest or pursues any animal in a conservation area; or

(c) captures, kills, poisons, tranquillises, traps, or immobiliises by any means, any animal in a conservation area; or

(d) has in possession any animal or animal product; or

(e) whether or not any animal or animal product is taken, takes or uses in or over any conservation area any aircraft, dog, hunting weapon, net, poison, ship, snare, or vehicle, for the purpose of molesting, pursuing, capturing, killing, poisoning, tranquillising, trapping, or immobilising, by any means, any animal; or

(f) takes any animal product in a conservation area; or

(g) whether or not any animal product is taken, takes or uses in or over any conservation area any aircraft, dog, net, ship, or vehicle, for the purpose of taking any animal product; or

(h) enters any conservation area with a hunting weapon, net, trap, or snare, or with poison; or

(i) sets any net, trap, or snare, on any conservation area; or

(j) allows any animal to molest, pursue, or kill, any animal, in a conservation area.

(5) Nothing in subsection (4) applies to any fish.

(6) Every person commits an offence against this Act who uses, receives, sells, or otherwise disposes of any animal or animal product, knowing it to have been taken in contravention of subsection (4).

(7) Evidence that any person was found in any conservation area in possession of any animal, animal product, natural resource, or plant, capable of being captured or taken in that area shall, for the purposes of proceedings under this section or section 39, be evidence that the person captured or took it in the area.

(8) In any such proceedings, the averment that any land is a conservation area shall be sufficient without proof of the fact, unless the defendant proves to the contrary; and all plans, maps, leases, licences, certificates, and copies certified as true under the hand of the Director-General or Chief Surveyor shall be sufficient evidence of their contents without production of original records and without the personal attendance of those officers or proof of their signatures, unless the defendant adduces evidence to the contrary and the interests of justice requires the attendance of one of the officers.

See Appendix 2.

Releasing an animal from captivity

Internationally, an estate where animals are kept caged and only released to be shot at by fee-paying clients is often known as a safari park. In the United States the practice is rife, with specific breeding programmes, and many ex-circus animals and unwanted exotic pets are purchased by the operators of these parks.

In New Zealand it would constitute an offence under the Animal Welfare Act 1999 if a person:¹⁶

releases an animal, being an animal that has been kept in captivity, in circumstances in which the animal is likely to suffer unreasonable or unnecessary pain or distress ...

The Primary Production Select Committee’s intention in creating this offence was to replace two offences in the Animals Protection Act 1960, i.e. hare coursing¹⁷ and pigeon shooting. However, the wording in the 1999 Act is vague and would require the prosecution to prove the likelihood of pain or suffering, which is very difficult in the circumstances. No prosecution has been taken under this provision, which could be testament to the impracticality of the law as it stands.

Other countries have tackled the issue with greater effect, making the law more precise. For example, in Australia, Queensland defines “prohibited event” as including:¹⁸

(c) coursing or another event in which an animal is released from captivity to be hunted, injured or killed by another animal;

(d) an event in which an animal is released from captivity to be hunted, or shot at by, a person without an appropriate acclimatisation period between the release and the hunting to reduce stress to the animal;

Codes of welfare

The Animal Welfare Bill 1997 ("the Hodgson Bill"), introduced in 1996, would have allowed the National Animal Welfare Advisory Committee (NAWAC) to make codes of welfare in relation to any animal use. However, in 1998 the Ministry of Fisheries (along with the New Zealand Fish and Game Council) made strong submissions that were intended to cause the Select Committee to shy away from allowing codes of welfare that could impact on commercial fishing and recreational hunting. Of concern to the Select Committee at the time was the suggestion by officials of the Ministry of Fisheries that the Government would need to compensate the holders of fishing quotas if a code of welfare diminished their catch in any way. However, the idea of compensation is irrelevant in relation to the recreational hunting of mammals (or recreational fishing).

The Select Committee had a preference for guidelines to be issued for hunting under section 57(f) of the Animal Welfare Act 1999, and may not have recommended that codes of welfare for hunting be excluded had it been known that no action would be taken on guidelines in the next 12 years.

New Zealand would take a major step forward by creating a code of welfare for hunting. Under the current law this would require an amendment to section 68 of the Animal Welfare Act 1999, which at present restricts codes of welfare to animals that are owned.

¹⁶ Animal Welfare Act 1999, s 29(g).
¹⁷ Hare coursing is where a hare is released from a trap and pursued and killed by hounds in an enclosed area. While the sport is widespread in the UK and more so in Ireland, it is unlawful in New Zealand: Animal Welfare Act 1999, s 29(c).
¹⁸ Animal Care and Protection Act 2001 (Old), ss 20.
New Zealand Law in Practice: Implications for Animal Welfare

Recent case studies

As hunting is not a prohibited activity it has to be accepted that, despite a person’s best intention to kill an animal outright, there are times when animals are injured prior to a kill being made. If the animal’s welfare is put first in these circumstances, it is possible to take swift action to end that animal’s suffering.

However, in recent years, some incidents stand out whereby people have taken action to cause animals to suffer greatly under the guise of hunting or pest control, and because of the lack of clarity surrounding the application of the Animal Welfare Act 1999 in regard to hunting no action was taken. In all three cases outlined below, no prosecution followed due to the perception of the investigators that hunting is exempt from the current New Zealand general animal protection law and therefore that proceedings could not be initiated. These cases highlight the need for better protection of hunted animals under the law and greater clarity as to criminal liability in these circumstances.

Crossbow on safari estate

The details of this case are sketchy, but it is believed that in the last decade an incident occurred whereby an international tourist/hunter hit a deer at close range with a number of arrows shot from a crossbow. None killed the animal and eventually a safari park guide stepped in and shot the deer with a firearm. While it is arguable that such an act went outside the concept of what the public would accept as normal hunting, government officials came to the initial view that the incident was exempt and therefore no investigation followed.

A Ministry of Agriculture and Forestry (MAF) Investigator’s response was:

My initial assessment would be that there does not appear to be any obvious offence. Looking at ss 175 and 176 it’s clear that hunting deer in a safari park is ok, anyway most safari parks effectively just hold wild deer so the actual hunting isn’t a problem. The question is then the number of arrows and the time etc that were required to bring about the animals eventual destruction.

If we were provided evidence that there was reckless, wilful or unreasonable delay in the destruction following its initial incapacitation (by that I would mean its stopped running and is down) then I guess we could investigate but the fact that a bow hunter took several shots to bring down the animal is not in my opinion an issue and would not in of itself be a prob. Having to shoot several arrows at a deer is probably common, I would imagine that a single arrow kill would not be the norm – I am not a bow hunter however so I don’t know for sure. Safari parks are also often trophy animal hunting places so it may have been a very large stag. At the end of the day it might be argued that the hunter/guide acted appropriately for shooting the animal to end its suffering (i.e. they complied with the Act).

The public’s reaction to such an incident might be quite different, in that they would expect legal proceedings to follow. However, with the confused interpretation of sections 175 and 176 it is understandable that government investigators continue to take such a cautious approach based on spurious interpretations of the current law.

Control of starlings with explosives

In 2007, John van Vliet detonated explosives on his apple orchard in the Wairarapa. His objective was to kill a flock of starlings that were eating the apples from his orchard. Although many died instantly, many others were caught in the flames and fell to the ground wounded and helpless, suffering from singed feathers and broken limbs. Despite
considerable public condemnation, and overwhelming evidence that van Vliet arranged the explosion and that birds suffered considerably, MAF opted not to take a prosecution. At the time, MAF's legal opinion was that no offence under the Animal Welfare Act 1999 had occurred. This was not tested in court.

**Deer drowning**

In October 2008, three men were on a fishing trip on Lake Okataina near Rotorua when they saw a deer in the nearby bush which then leapt into the water. They then allegedly chased the deer in their boat, jumped on its back, put a rope around its neck and held it underwater until it drowned. They admitted that the deer was likely to have been terrified. The SPCA investigated, but were unsuccessful in interviewing the alleged offenders. Their solicitor claimed that they were merely trying to euthanase a wild animal that had been injured.

This was never tested in court because, firstly, there was never an in-depth investigation that included interviews of the alleged offenders; and, secondly, the informal view of a Crown prosecutor influenced the SPCA investigator into the view that the likelihood of winning the case was relatively slim. This case did not go ahead because there was a lack of evidence. The decision was not made by any robust interpretation of section 175 of the Animal Welfare Act 1999.
Parliament's Intentions

Parliament produced two reports on the Animal Welfare Bills\(^9\) which were before it from 1997 to 1999.

The first, _Consideration of the Animal Welfare Bills_, which accompanied the first reading of the Bill, referred to hunting thus:\(^2^0\)

**Application of the Bill to animals in a wild state**

The Bill does not apply to hunting, fishing, and pest control. This carries over the specific exemption in the current law but with three qualifications. Where animals are captured alive, for reasons other than their imminent destruction, the general obligations relating to the care of the animals and prevention of their ill-treatment apply. Where animals are caught alive (other than those caught by fishing), for the purpose of their imminent destruction, they must be killed humanely. The Bill also provides for traps or devices used in the course of hunting or fishing to be restricted or prohibited by Order in Council (except for the purpose of reducing the risks of fishing to non-target species). The Bill contains a list of matters that the Minister must have regard to before recommending any such order and requires prior consultation.

This wording was careless. By saying that “The Bill does not apply to hunting”, the Primary Production Select Committee implied that there was a blanket exemption. “Exception” is not the same as “exemption”.

The Bill itself referred to “exception” not “exemption”. If it was Parliament’s intention to exempt hunting from the provisions of the Animal Welfare Act 1999 then the more precise wording would have been “Nothing in Parts 1 and 2 prevents animals being hunted” or “Nothing in this Act shall apply to hunting”.

This was precisely the way that research, testing and teaching were made exempt from the general provisions of Parts 1 and 2: “Nothing in Parts 1 and 2 prevents animals being used in research, testing, or teaching in accordance with this Part.”\(^2^1\)

The second paper was the Select Committee’s report to Parliament on the Animal Welfare Bill (No 2) 1998.\(^2^2\)

**Hunting or killing of animals in a wild state**

Clause 156 excludes the hunting or killing of animals in a wild state. This includes wild animals as defined in the Wild Animal Control Act 1977 (WAC Act) and pests.

Most submitters on this issue sought to widen the application of the Bill to include hunting and fishing as provided for in the Hodgson Bill. They considered this would demonstrate responsible attitudes towards practices which were increasingly coming under international scrutiny. We were also advised that the intent of the Hodgson Bill was that codes of conduct would have two functions. One function would be to acknowledge that hunting and fishing have animal welfare implications that would not be acceptable for the same species in captivity. The second function would be to allow for the control of existing or potential hunting and fishing practices that are or might be unacceptable on animal welfare or ethical grounds. It was suggested that requiring these activities to be governed by codes of conduct is ethically much more defensible than sanctioning them by legislation.

The RNZSPCA submitted that codes of conduct would encourage people such as hunters to develop a greater awareness of animal welfare issues and to take responsibility for their own actions as well as those of their peers. The Royal Forest and Bird Protection Society noted that while pests had welfare entitlements, indigenous species, such as sea lions caught as a result of fishing operations, did not.

\(^{9}\) Animal Welfare Bill 1997 ("the Hodgson Bill") and Animal Welfare Bill (No 2) 1998 ("the Government Bill").

\(^{2^0}\) N.E. Wells, Animal Law in New Zealand, pp 822–823.

\(^{2^1}\) Animal Welfare Act 1999, s 61(1).

\(^{2^2}\) Report of the Primary Production Committee on the Animal Welfare Bill (No 2), April 1998.
The New Zealand Fish and Game Council strongly opposed the inclusion of hunting and fishing. It considered hunting and fishing were an extension of the natural predator-prey relationship that exists in nature and any controls would interfere with this. The fishing industry, in submissions made on the Hodgson Bill, also expressed strong opposition. It said current methods such as hooks on lines are likely to cause some degree of pain and distress. Given there are no other practical alternatives, any prohibition or controls on methods could have significant economic effects. A comprehensive regime is already in place which includes the development of catch limits and population management plans setting maximum levels of fishing related mortality. The additional overlay of animal welfare standards could adversely affect this regime and have legal implications for the Crown.

We examined this issue very thoroughly and explored options in setting standards on hunting, fishing and pest control within the context of primacy being given to social, economic and other factors. We also sought the advice of DoC, the Ministry of Fisheries and the New Zealand Fish and Game Council (in its capacity as an advisor to the Minister of Conservation). While we agreed that society’s approach to the killing of animals in the wild is different to its approach to the killing of companion and production animals, we identified a number of substantive matters which need to be addressed before any decision is made to include hunting and fishing –

- The proposal to include hunting and fishing of wild animals has raised issues which have not been subject to wide public consultation.
- If controls on killing animals in the wild were predicated on all current hunting and fishing methods being able to continue, the costs of developing a code of conduct may not be justified because there may be no welfare benefits to the animals or such benefits may be small.
- If a genuine attempt was made to reduce pain and suffering during hunting and fishing, it is likely that some types of hunting or fishing would need to be prohibited. This could have significant economic, environmental and social consequences such as –
  - Disputes of interest could arise if fishers had difficulty catching their entire quota
  - The ability of Government departments such as DoC or the Ministry of Fisheries to administer their legislation could be significantly affected
  - Pest control could become difficult or even impossible for pest techniques that are not necessarily substitutable
  - There are implications for customary fishing, particularly in relation to the Settlement Act 1992
  - The difficulty of changing the long standing culture of hunting and fishing
- It would be extremely difficult to enforce the standards set in codes.

We decided that hunting, fishing and pest control should continue to be excluded. We preferred that NAWAC encourage the development of voluntary codes of practice (where these are not already available) which address steps that can be taken to ensure the welfare of the target animals (our recommendation on clause 49 refers) (emphasis added).

We recognise, however, that the general issue of whether the Bill should apply to hunting and fishing is a significant one.

**Hunting on private land**

*Provision for commercial hunting of wild animals on private land*

There are a number of operations in New Zealand that provide commercial hunting opportunities on tracts of privately owned land. Most are one of two types –

- The area of land is large without perimeter fencing and the wild animals are totally free range
- The wild animals are always contained within effective perimeter fencing.

Where the animals are kept in captivity within a fenced area, the operator cannot operate without a safari park permit issued by DoC under the WAC Act. Once the permit is issued, the ownership of the animals transfers from the Crown to the person holding them.

Wild animals ranging freely on private land without perimeter fencing remain the property of the Crown but commercial hunting can operate provided the hunters have the permission of the landowner. These are not safari parks as defined in the WAC Act.

We consider that, where wild animals are owned or in a person’s charge and contained by fencing, they should be subject to the obligations under Part 1. We note that the needs of the animals would be assessed subject to the qualifications in clause 4 relating to the environment and circumstances of the animals and accordingly the obligations on those in charge of the
animals would generally be minimal. This approach was supported by the New Zealand Game Estates Association (NZGEA).

However, where wild animals in safari parks are being hunted, we consider it would be inconsistent to apply the obligation in clause 11(1)(c) relating to the need to kill such animals humanely. We recommend new clause 156A to provide that the owner or person in charge of animals available for hunting in a safari park is subject to the provisions of Part 1 except for the provisions in clause 11(1)(c). Safari park is defined by reference to the definition in the WAC Act.

Conflict arises from the statutory functions of two departments. On the one hand, DoC issues permits for safari parks under section 12B of the Wild Animal Control Act 1977, yet it is the MPI that lists game estates:

12B Safari parks

(1) No person shall operate a safari park, except pursuant to and in accordance with and under the conditions stated in a permit issued for the purpose by the Director-General.

(1A) The requirement to hold a permit under subsection (1) is in addition to the requirement to hold a permit or licence under section 12, and to complying with section 12A.

(1B) A permit must not be issued under subsection (1) unless the Director-General is satisfied that the requirements of sections 12 and 12A have been complied with.

(2) For the purposes of section 9(2) and of subsections (9) to (11) of section 12, a permit issued under subsection (1) shall be deemed to be a permit issued under section 12(3)(a).

(3) The Minister may from time to time, by notice in the Gazette, specify those areas or places in which safari parks are prohibited.

(4) Any animal that escapes from its enclosure and strays while being lawfully captured, conveyed, or held in captivity for the purposes of a safari park shall remain the property of the owner if that animal is identified in accordance with an identification system approved under the National Animal Identification and Tracing Act 2012 or in accordance with an identification system approved under section 50 of the Biosecurity Act 1993 and approved by the Director-General for the purposes of this Act.

(5) Notwithstanding subsection (4), the following provisions apply in relation to any animal that has escaped from a safari park and is on Crown-owned land:

(a) any person acting in the course of his or her duties as an employee of the Department, and any other person acting pursuant to a special or general authority conferred for the purpose by the Director-General, may hunt and kill the animal and dispose of the animal:

(b) no person is required to notify the owner of the animal that it has been killed or disposed of:

(c) no person is required to return the animal to the owner:

(d) the owner shall not be entitled to receive any compensation by reason only of the hunting, killing, or disposal of the animal under the authority of this subsection.

(6) Every person commits an offence against this Act who, while keeping any animal in captivity in a safari park, fails to maintain the enclosures on the land so as to prevent the escape of the animal or so that the enclosures no longer comply with any prescribed specifications.

"Safari park" means a farm where income is derived from wild animals being hunted on the farm.23

The MPI has the statutory function to list game estates by authority of Part 5A of the Animal Products Act 1999:24

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65B What is a game estate?

A game estate is a place within which animals are kept (whether all of the time or only some of the time), as if in the wild, for the purpose of providing opportunities for persons to hunt or catch them as recreational catch as if in the wild, being animals of a species, kind, or description specified for the purposes of this section by notice under section 167.

While it seems clear that in 1999 the Primary Production Select Committee's intention was to exempt hunting itself from the provisions of the Animal Welfare Act 1999, the Parliamentary Counsel Office drafting did not entirely capture that intention when it came to the actual wording.
Other States and Countries

UK

Animal Welfare Act 2006
The Animal Welfare Act 2006 (UK) makes no reference to hunting but it does provide an exemption for fishing:

59 Fishing
Nothing in this Act applies in relation to anything which occurs in the normal course of fishing.

While the Animal Welfare Act 2006 (UK) defines “animal” as “a vertebrate other than man”, the Act only provides for protected animals, which does not include wild animals.26

2 “Protected animal”
An animal is a “protected animal” for the purposes of this Act if --
(a) it is of a kind which is commonly domesticated in the British Islands,
(b) it is under the control of man whether on a permanent or temporary basis, or
(c) it is not living in a wild state.

Wild Mammals (Protection) Act 1996
The Wild Mammals (Protection) Act 1996 (UK) is more specific:

1 Offences.
If, save as permitted by this Act, any person mutilates, kicks, beats, nails or otherwise impales, stabs, burns, stones, crushes, drowns, drags or asphyxiates any wild mammal with intent to inflict unnecessary suffering he shall be guilty of an offence.

The “exceptions” provision goes further:

2 Exceptions from offence under the Act.
A person shall not be guilty of an offence under this Act by reason of --
(a) the attempted killing of any such wild mammal as an act of mercy if he shows that the mammal had been so seriously disabled otherwise than by his unlawful act that there was no reasonable chance of its recovering;
(b) the killing in a reasonably swift and humane manner of any such wild mammal if he shows that the wild mammal had been injured or taken in the course of either lawful shooting, hunting, coursing or lawful pest control activity ....

The UK approach of specifically naming in section 1 physical acts that are offences has much to commend it and should be considered as part of New Zealand law. Had this wording been included in New Zealand law, the Rotorua deer drowning incident would clearly have been an offence, as may have the Greytown starling bombing case.

The UK deals with hunting in a separate piece of legalisation, the Hunting Act 2004, but that law is restricted to banning the hunting with dogs of all wild mammals in England and

25 Emphasis added.
Wales, including fox, deer, hare and mink, except where it is carried out in accordance with the conditions of one of the exemptions set out in the Act. It also bans all hare coursing. While the legislation does not specifically spell it out, this law is concerned with anti-fox hunting.

However, the UK concept of hunting is the pursuit of foxes, hares, deer, etc on horseback with dogs. It is the policy of the current Government of the UK that there will be a free vote in the House of Commons to repeal the Hunting Act 2004. The Hunting Act 2004 does not address deer stalking.

Australia

A feature of Australian animal welfare legislation is that each state is able to prescribe codes for hunting, unlike New Zealand.

Australian Capital Territory

Game parks are prohibited in ACT.\footnote{Animal Welfare Act 1992 (ACT), s 18.}

- **game park** means premises where –
  - (a) animals other than fish are confined; and
  - (b) the taking and killing of those animals as a sport or recreation is permitted on payment of a fee or other consideration.

- **take**, in relation to an animal, includes hunt, shoot, poison, net, snare, spear, pursue, capture and injure the animal.

New South Wales

New South Wales law provides for a statutory defence.\footnote{Prevention of Cruelty to Animals Act 1979 (NSW), s 24.}

24 Certain defences

(1) In any proceedings for an offence against this Part or the regulations in respect of an animal, the person accused of the offence is not guilty of the offence if the person satisfies the court that the act or omission in respect of which the proceedings are being taken was done, authorised to be done or omitted to be done by that person:

- (b) in the course of, and for the purpose of:
  - (i) hunting, shooting, snaring, trapping, catching or capturing the animal …

While it is the New South Wales courts that would determine whether the statutory defence were available, in practice a prosecution would not commence proceedings if such a defence were obvious.

Game parks are specifically prohibited in New South Wales.\footnote{Prevention of Cruelty to Animals Act 1979 (NSW), s 19A.}

- **game park** means premises within the boundaries of which:
  - (a) animals are confined, and
  - (b) the taking or killing of those animals as a sport or recreation is permitted by virtue of the payment of an admission fee or the giving of other consideration.
This appears on the face of it to be the equivalent of a New Zealand safari park. However, in New Zealand, while animals are confined to a safari park by fencing, in NSW they too are confined but “confine” is defined differently as meaning confined in a cage.

While NSW legislation does not specifically say so, a game park or safari park is generally meant as an area where animals are confined in a cage or compound and then released so that a fee-paying client can shoot them on their release.

**Northern Territory**

Through its Animal Welfare Act 1999 (NT), the Northern Territory prohibits activities that involve hunting of animals released from captivity:

21 **Competitions, hunting and baiting etc**

(1) A person must not advertise, promote, take part in or be present at a match, competition or other activity in which an animal is to be released from confinement for the purpose of being:

(a) hunted, caught, confined, killed or caused suffering by another animal ...

Northern Territory law allows for codes that relate to hunting, and there is a defence for acts that are in accordance with a code of practice:

25 **Contents of adopted code of practice**

(1) An adopted code of practice may specify requirements:

(a) for the keeping, treatment, handling, transportation, sale, killing, hunting, shooting, catching, trapping, netting, marking, care, use, husbandry or management of an animal or a class of animal ...

79 **Defences**

(1) It is a defence to a prosecution for an offence under this Act if the defendant establishes that the act or omission constituting the offence, or an element of the offence, was:

(a) in accordance with an adopted code of practice ...

**Queensland**

Other than prohibited events as mentioned below, the Animal Care and Protection Act 2001 (Qld) makes no reference to hunting. While codes of practice about animal welfare may be made,\(^{30}\) codes related to hunting are not specified:

20 **Meaning of prohibited event**

(1) A **prohibited event** means any of the following events –

... 

(c) coursing or another event in which an animal is released from captivity to be hunted, injured or killed by another animal;

(d) an event in which an animal is released from captivity to be hunted, or shot at by, a person without an appropriate acclimatisation period between the release and the hunting to reduce stress to the animal;

... 

\(^{30}\) Animal Care and Protection Act 2001 (Qld), s 13.
South Australia
Section 13(3) of the Animal Welfare Act 1985 (SA) provides that:

... a person ill treats an animal if the person –

... (e) releases the animal from captivity for the purpose of it then being hunted or killed ...

There is no other reference to hunting or a statutory defence for hunting:

Nothing in this Act renders unlawful anything done in accordance with a prescribed code of practice relating to animals.

Tasmania
The Animal Welfare Act 1993 (Tas) does not apply to practices “used in the hunting of animals done in a usual and reasonable manner and without causing excess suffering ...”.

There is no provision for codes of practice for hunting in Tasmania.

Victoria
The Victorian Bureau of Animal Welfare has issued a code of practice for hunting.

Compliance with such a code is a defence.

Western Australia

**prohibited activity** means an activity that involves releasing an animal, or putting an animal somewhere, for the purpose of enabling the animal to be –

(a) shot at (whether with a firearm or any other weapon);
(b) hunted by a person or another animal;
(c) fought by a person or another animal; or
(d) chased by another animal, other than an animal of the same species.

North America

Two state provisions are highlighted.

New York State

1. A person is guilty of aggravated cruelty to animals when, with no justifiable purpose, he or she intentionally kills or intentionally causes serious physical injury to a companion animal with aggravated cruelty. For purposes of this section, “aggravated cruelty” shall mean conduct which: (i) is intended to cause extreme physical pain; or (ii) is done or carried out in an especially depraved or sadistic manner.

2. Nothing contained in this section shall be construed to prohibit or interfere in any way with anyone lawfully engaged in hunting, trapping, or fishing, as provided in article eleven of the environmental conservation law ...

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31 Animal Welfare Act 1985 (SA), s 43.
32 Animal Welfare Act 1993 (Tas), s 4(1).
33 Reproduced in Appendix 3.
35 Animal Welfare Act 2002 (WA), s 32(5).
36 Emphasis added.
Alaska

(b) Each animal that is subject to cruelty to animals under (a)(1)–(4) of this section shall constitute a separate offense.

(c) It is a defense to a prosecution under this section that the conduct of the defendant...

(4) was necessarily incidental to lawful fishing, hunting or trapping activities;\(^{38}\)

Central Europe

France

In order to have the right to hunt in France, it is necessary to have a hunting permit (permis de chasser). Hunters have to pass theory and practical exams before being given a licence. Both of these exams are organised by the National Hunting and Wildlife Agency, ONCFS (Office National de la Chasse et de la Faune Sauvage) and are held all year round.

Germany

A national hunting exam as specified under German federal hunting law must be taken and passed to qualify for a hunting licence. The exam includes both a written and an oral test as well as a shooting test. The main areas covered are:

- Knowledge of different species of game.
- Basic animal biology.
- Game damage prevention.
- Farming and forestry.
- Firearms laws and techniques.
- Hygienic inspection and treatment of game.
- Determination of game meat for human consumption.
- Wildlife, nature and landscape conservation laws.

Netherlands

In the Netherlands, a hunting exam is obligatory and a hunting licence is required.

Scandinavia

Sweden

Sweden has virtually closed its land to new hunters. About half the land in Sweden is owned by the state and large companies, particularly in the northern and central regions. On the greater part the hunting rights are leased out to individuals or hunting associations. As almost all hunting land is already accounted for, there are few opportunities to lease shooting rights in Sweden. However, many foreign hunters are invited to enjoy “exchange hunting” in Sweden.

With this system a foreign hunter can invite a Swedish hunter to hunt in his own country and is invited, in return, to hunt in Sweden. Another increasingly popular option is to go hunting in Sweden as a “paying guest”, and more and more landowners and hunting cooperatives offer this opportunity to both Swedish and foreign visitors.

Everyone who goes hunting in Sweden must pay an annual hunting conservation fee. The fee is valid for one year, from 1 July to 30 June the following year. If foreign visitors do not have comprehensive insurance cover which is valid in Sweden they must take out a

\(^{37}\) N.Y. Agric. & Mkts. Law § 353-a (2010): Aggravated cruelty to animals.

special hunting insurance policy which covers both personal accidents and third party liability.

Foreign hunters who want to go hunting for moose in Sweden can arrange through their host to visit a moose-hunting training range before the hunt. Many landowners and hunting hosts make it a requirement that moose hunters must have passed a recognised test at the bronze level before they take part in the hunt. During the test, hunters shoot at a life-size figure of a moose at a distance of 80 metres. The test involves shooting at the figure both while it is stationary and when it is "running".

The Swedish hunting laws are very strict, particularly regarding wounded animals. When hunting ungulates it is a requirement that a specially trained tracker dog can be available within two hours. For certain bird species it is a requirement that a dog is present during the shoot. It is a duty of the Swedish hunting hosts to ensure that these requirements are observed.\(^\text{39}\)

**Norway**

To obtain a hunting permit in Norway the applicant must pass the hunter's test or shooting qualification test. Hunting, catching and fishing are to be carried out in such a way as to be conducive with appropriate animal welfare standards.\(^\text{40}\) The king has the statutory authority to set standards.

**Denmark**

Denmark requires applicants for a hunting licence to submit to a mandatory examination, covering species, game biology, firearms, safety, hunting, regulations and shooting test for rifle hunting. A mandatory firearms course is required.

**South Africa**

New rules for hunting in South Africa came into effect in 2008. In broad terms the new rules restrict the species of animals that can be hunted and the means by which they can be killed.\(^\text{41}\)

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\(^{40}\) *Animal Welfare Act (Norway).* § 20.

\(^{41}\) Reproduced in Appendix 4.
Way Forward for New Zealand Law: WSPA’s Submissions

Legislative action

Animal Welfare Act 1999
The following legislative provisions are in need of a major overhaul to:

- Review definitions.
- Change the functions of NAWAC under section 57 to enable a code of welfare for hunting.
- Clarify the legislation as it applies to release of confined animals for hunting, safari parks and game estates.

WSPA submits that the following amendments to the Animal Welfare Act need to be considered.

Definitions in the context of recreational hunting
Add to Part 9:

175A Interpretation

In this Part –

recreational hunting means to pursue or stalk a mammal for food or sport whether or not a fee is charged for the hunting and includes searching for any animal and killing, taking, catching, trapping, capturing, tranquillising, or immobilising any animal by any means; and pursuing or disturbing any animal; but does not include the taking of animals in a commercial or pest control operation or the pursuit or stalking of a mammal using a vehicle or an aircraft; and hunt has a corresponding meaning.

mammal means all mammals found in a wild state but does not include small mammals

Fishing needs to be separated from the definition of “hunting” and a different definition developed.

Clarify sections 175 and 176, “exception” and “exemption”
Amend section 175 as follows:

Subject to sections 176 to 178 and Part 6, nothing in this Act makes it unlawful to do anything which occurs in the normal course of recreational hunting.

A specific offence provision related to hunting needs to be provided for.\textsuperscript{42}

175B Offences

Any person who mutilates, kicks, beats, nails, or otherwise impales, stabs, burns, stones, crushes, drowns, drags, or asphyxiates any wild mammal with intent to inflict unnecessary suffering commits an offence.

Animal coursing
Section 29 needs to be more precise in describing coursing and releasing animals from close confinement to be shot at. Australian states have legislation that is more precise and New Zealand should follow those examples with this amendment:

\textsuperscript{42} Based on s 1 of the Wild Mammals (Protection) Act 1996 (UK).
Further offences

A person commits an offence who –

... 

(g) takes part in coursing or any other event in which an animal is released from captivity to be hunted, injured, or killed by another animal; or 

(gg) takes part in an event in which an animal is released from captivity to be hunted, or shot at, by a person without an appropriate acclimatisation period between the release and the hunting to reduce stress to the animal; or 

Guidelines

It was the Primary Production Select Committee’s intention that, as a start, NAWAC should be the catalyst for industry guidelines for hunting. NAWAC has, in the 12 years since the Animal Welfare Act commenced on 1 January 2000, failed to address this issue but now should make it a priority as a first step towards legislative change.

First steps can commence without any legislative change, whereas it would require an amendment to the Animal Welfare Act to enable codes of welfare to apply to hunting.

There is no impediment to NAWAC doing what the Select Committee expected of it under section 57(f), i.e.:

(f) to promote, and to assist other persons to promote, the development of guidelines in relation to –

... 

(ii) the hunting or killing of animals in a wild state.

Prior to the commencement of the Animal Welfare Act 1999, the former Animal Welfare Advisory Committee promoted codes of recommendations and minimum standards which, although not enforceable as statutory instruments, provided various industries with guidelines that vastly improved animal welfare (e.g. the Code of Recommendations and Minimum Standards for the Welfare of Animals Transported within New Zealand).43

Similarly, guidelines issued for hunting under section 57(f), while not having the same enforceability as a code of welfare, will nevertheless provide guidance to the industry which, as well as promoting animal welfare, can be held up by the tourist industry as a promotional tool internationally.

Permits for hunters

The current permitting of hunters is facile and has no benefits for controlling animal welfare in hunting ventures on conservation land. Permits are issued by DoC with no enquiry as to the suitability of the applicant to hold a licence. A hunting permit can be obtained from DoC directly online within three minutes of starting the application.

No questions are asked other than those related to the identity of the applicant. No enquiry is made as to whether or not the applicant holds a police firearms licence, has any criminal convictions or is aware of the conditions required of hunters.

A prime example of this had tragic consequences when three young hunters decided to go on a night shoot in a vehicle on a conservation estate. The consequences were that a young school teacher, Rosemary Ivins, was shot dead having been mistaken for a deer. The four offenders all held DoC permits obtained online yet seemed blissfully unaware that a prohibition on night shooting was a condition of their permit. All pleaded guilty to charges of

43 AWAC, Code No 15.
breaching their hunting permits by hunting after dark and unlawfully discharging their weapons.

Licences issued by New Zealand Fish and Game are no better and can also be purchased online for fishing and game, i.e. shooting game birds. New Zealand Fish and Game has no jurisdiction to issue licences to hunt mammals on conservation land or anywhere else.

If it is determined that recreational hunters and fishers should hold some form of permit, serious consideration would need to be given to the interaction between the agencies concerned — DoC for conservation land, DoC for safari parks, MPI for game estates and the police for firearms.

Administrative action

Most Australian states have promulgated codes of practice for hunting. In New Zealand there cannot be a code of welfare for hunting without a legislative change. However, the current legislation allows for guidelines and WSPA submits that this should be the first step.

While section 57(f) does not require NAWAC to initiate the promulgation of guidelines, NAWAC is required to “promote, and to assist other persons to promote, the development of guidelines in relation to ... the hunting or killing of animals in a wild state”.

The development of guidelines should be initiated, using the framework of code development set out in section 70 whereby any person can prepare a draft code of welfare. The draft could be based on codes of practice promulgated by Australian states and the deer stalking code of practice produced by the British Association for Shooting and Conservation, but obviously needs to be contextualised to New Zealand.

Organisations that should have an interest in such guidelines would be:

- WSPA.
- New Zealand Deer Stalkers Association.
- New Zealand Fish and Game Council.
- DoC.
- MPI.
- New Zealand Association of Game Estates.
- Royal New Zealand SPCA.

While it might be desirable to develop guidelines for every aspect of recreational hunting, shooting and fishing, that would be a formidable task. Instead, WSPA submits that a start be made on recreational mammal hunting only.

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44 Reproduced in Appendix 1.
Appendix 1

British Association for Shooting and Conservation – Deer Stalking Code of Practice

Deer stalking
This Code of Practice has been produced to provide an introductory guide to deer stalking. Although much of the code is applicable to stalking in the Highlands it has been written primarily with the lowland, woodland shooter in mind. This is because the Highland rifle generally has the benefit of a professional stalker, while the woodland stalker is more often operating alone.

The need for deer culling
For many people deer stalking is a recreational activity, but it is also necessary to protect agricultural crops and forestry and indeed, deer, since they are prolific breeders and, if numbers are allowed to increase unchecked, may become prey to starvation and disease. The culling of deer should always take place as part of a deer management plan which considers both the welfare of the animals and the damage they may cause. Wherever appropriate, the management plan should involve close liaison and co-operation between neighbouring landowners and stalkers.

The deer stalker’s obligations
Always remember that your quarry has a strong emotive appeal to many people who have little knowledge of deer management. They will judge deer control by your behaviour.

The rifle you are using is capable of killing over great distances and every shot taken must be totally safe. A responsible stalker will have third party liability insurance, but the best insurance is responsible firearms handling.

It is the stalker’s responsibility to know, and understand, the laws relating to the sport and, in particular, to be able to identify deer and to know when and where to shoot. The responsible stalker will, in addition, observe the Countryside Code at all times.

Knowledge and experience
All stalkers should aim to gain knowledge and experience both in the practice of stalking, and in the ecology of the deer. This can be gained either through recognised training courses, the expert guidance of an experienced stalker or a combination of both. Stalkers can demonstrate a level of competence through attainment of the Deer Stalking Certificate.

In Scotland a review of deer stalker competence will be carried out by SNH before April 2014.

Consideration for the deer
Although deer are comparatively large animals, the vital areas for clean kills are small. No one should consider stalking unless they can consistently shoot a group of three shots within a 10cm target at 100m.

A shot should be taken at a range that will ensure a humane kill. Shots should never be taken at a moving or badly positioned deer, in poor visibility, through cover, or at any time when your aim is not steady. After taking a shot, always assume that you have hit the deer.
until you have proved otherwise by thorough searching. Always follow up and humanely despatch a wounded deer, regardless of the time and effort involved.

Deer and the law

The law regarding the killing and taking of deer is not consistent throughout the UK. In both Scotland and Northern Ireland the legislation is different from that governing England and Wales.

In summary, the following are some of the more important provisions, but this is NOT to be taken as a complete or authoritative statement of the law.

Although the Deer Acts and Orders contain exceptions, particularly to allow occupiers to protect their crops (certain conditions apply) from excessive damage, and to permit mercy killing of an animal to prevent suffering, the stalker must NOT …

- use anything except legal firearms to kill deer
- shoot out of season unless authorised to do so
- shoot at night (one hour after sunset to one hour before sunrise) except under licence
- shoot from a moving vehicle, or use a vehicle to drive deer (vehicle includes aircraft)
- sell venison in Scotland, except to a licensed venison dealer.

A Game Licence is no longer needed to kill or take deer, anywhere in the UK.

Firearms and ammunition

The stalker must only use a rifle and ammunition which are legal for the species of deer being shot. In addition to compliance with the law the stalker should be guided by knowledge, experience and personal preference in their choice of a rifle and ammunition. The legal requirements are laid down in the several Deer Acts and Orders. For example:

England and Wales

For Muntjac and Chinese Water deer only — a rifle with a minimum calibre of not less than .220 inches and muzzle energy of not less than 1000 foot pounds and a bullet weight of not less than 50 grains may be used.

For all deer of any species — a minimum calibre of .240 and minimum muzzle energy of 1,700 foot pounds is the legal requirement.

Northern Ireland

For Muntjac and Chinese Water deer only — a rifle with a minimum calibre of not less than .220 inches and muzzle energy of not less than 1000 foot pounds and a bullet weight of not less than 50 grains may be used.

For all deer of any species — a minimum calibre of .236 inches, a minimum bullet weight of 100 grains and minimum muzzle energy of 1,700 foot pounds is the legal requirement.

Scotland

For roe deer, where the bullet must weigh at least 50 grains AND have a minimum muzzle velocity of 2,450 feet per second AND a minimum muzzle energy of 1,000 foot pounds may be used.

For all deer of any species — the bullet must weigh at least 100 grains AND have a minimum muzzle velocity of 2,450 feet per second AND a minimum muzzle energy of 1,750 foot pounds.

It must be stressed that all these figures are the minimum legal requirement.

For all deer stalking the bullet must be of a type designed to expand/deform on impact.
To ensure safe and humane shooting, stalkers must practise and maintain their skill with the rifle and must check at regular intervals that their rifle is still zeroed correctly – i.e. that the bullet is striking a selected point of aim at a chosen range.

The rifle must ALWAYS be test-fired, and the zero verified or corrected, after a knock or other impact, or after any unaccountably wild shot. No one should continue stalking in such a case, until this zeroing (or sighting-in) has been done.

**Other equipment and aids**

A responsible stalker will always carry:

- a telescope or binoculars for the correct identification of quarry. They will NOT use the rifle scope for this purpose.
- a serviceable knife of appropriate design.
- a torch, if stalking in the evening, to look for hair or blood signs.
- a bipod or stick, about the same height as the stalker, to steady the forward hand.

All deer stalkers would be well advised to have access to a dog trained to locate dead or wounded deer, but steady to other wildlife.

...

**Safety**

Always ensure that there is a solid backstop behind the deer before taking the shot and that you have an uninterrupted view of the foreground.

Never assume that thicket woodland will stop a bullet, or, that a thicket is unoccupied.

Always check that the line of shot is unobstructed.

Shooting from high seats (in woodland) is generally safer than shooting from ground level but rifles must always be unloaded before climbing in and out of a high seat.

Always check the bore of your rifle before loading, especially if there is the slightest danger of the bore having been fouled with mud or snow.

Always apply the safety catch after loading and do not release it until you are about to take the shot.

Always unload your rifle before entering a house or any other building.

Always unload before crossing an obstacle.

If, for any reason, it is necessary to leave a rifle in a (locked) vehicle, ensure that it is out of sight and remove the bolt and ammunition where practicable and carry them with you together with your firearms certificate.

**Taking a shot**

Safety is paramount – never take a shot if there is the slightest doubt about safety.

Always identify your deer and ensure that no other deer, or any other animal is behind it and could be wounded by your shot passing through the target.

Never fire at a deer unless you are absolutely sure that it is well within your effective killing range.

Always ensure that your deer is broadside on and a shot through the heart or lungs is strongly recommended. The brain is a very small target and for this reason head shots should be avoided except for humane dispatch as they can result in a shattered jaw or nose bone.
Never take a shot at a running deer – sooner or later this will result in a wounded deer (the exception being a second shot at a wounded deer). If in any doubt over any shot don’t fire.

Before the shot, mark the position of the deer by reference to some adjacent feature – bush, tree or rock, for example, and then, if the deer runs off into cover, always assume that you have hit it.

Immediately load another round, apply the safety catch and then wait. You should learn to recognise the behaviour of deer, shot in different parts of the body, as this will dictate how long you should wait before following up. Whatever the circumstances, wait at least five minutes.

You should then approach the spot where the deer was standing and search for signs such as hair and blood. If you cannot find the carcass, do not give up. Follow the blood trail slowly, if possible with the aid of a trained dog. At all times be prepared to shoot again if necessary, but remember that at a range of a few metres the bullet will strike below the point of aim.

Carcass handling

All stalkers must be capable of gralloching and inspecting a deer carcass. It is advisable to take lessons from a professional, or attend an appropriate training course.

Carcasses should be gralloched immediately after shooting and the pluck cleaned out as soon as possible – within 30 minutes in the summer.

After gralloching, the carcass should be hung up to drain, and as soon as possible, transferred to a cool, dry, fly-proof store. Within a reasonable period of time it should be chilled to 7°C or below.

If the carcass is to be taken to an approved game handling establishment (AGHE), then the stalker must have trained hunter status and a written declaration will have to be completed for each carcass.

Even in very cold weather, carcasses left to lie overnight may be spoiled, and they may be attacked by predators in any weather.

Produced jointly by the British Association for Shooting and Conservation and the British Deer Society.

Appendix 2

Game Estates

The Animal Products Amendment Act 2002 inserted new Part 5A into the Animal Products Act 1999. Part 5A “Game Estates” clarifies the treatment of game estate animals and game estate animal material. Game estates engaged in certain activities are required to be listed and need to comply with various requirements.

The policy intent is to:

- allow game estate animals to be treated like wild animals – that is they can be killed and then processed in the regulated system for trade;
- treat client hunters of game estates the same way as recreational hunters killing animals in the wild – meaning they may personally butcher, consume or use the game estate animal they have bagged or use a homekill and recreational catch service provider if they wish.

It is intended that this new law will provide for New Zealand’s genuine commercial game estate hunting businesses, maintain separation of regulated and unregulated product, and enable the necessary level of compliance and audit of the animal product risk management system, including the traceability of game estate material and product. The benefits of the proposal are that it will allow:

- MAF, primary processors, and homekill and recreational catch service providers to know who the game estate operators are;
- primary processors to determine whether an animal can be accepted for processing in the regulated system; and
- homekill and recreational catch service providers to determine if the person asking for services is entitled to do so under the Act.

What is a game estate?

A game estate is a place within which animals are kept (whether all of the time or only some of the time), as if in the wild, for the purpose of providing opportunities for persons to hunt or catch them as recreational catch as if in the wild.

Specific provisions of the Animal Products Act

Section 65C of the Animal Products Act sets out what the law allows:

1. A client hunter may kill or process a game estate animal himself or herself (either on the game estate or on the client hunter’s own property), or have it processed by a listed homekill or recreational catch service provider.
2. A game estate operator may dress and process a game estate animal for a client hunter only if the operator is a listed homekill or recreational catch service provider, except in the situation where the operator only carries out limited processing, such as removing trophy heads or skinning the killed animal or the preparation and serving of the recreational catch as a meal to its catcher or members of the catcher’s party.
3. A game estate operator may also –
   (a) have any game estate animal from the estate (whether or not caught or killed by a client hunter) killed or processed by a listed homekill or recreational catch service provider for the operator’s own use or consumption as if the operator were the owner and farmer of the animal;
   (b) sell or otherwise dispose of any parts of a game estate animal (including such things as skins, hides, and trophy heads) from the operator’s estate, by
whomever caught or killed or processed, that are not for human or animal consumption;

(c) sell or dispose of any parts of such an animal to a renderer (this may be subject to conditions imposed by the NZFSA).

4. A game estate operator who is listed with the NZFSA may also present killed game estate animals for primary processing in the regulated system for use or consumption as regulated animal product.

Listing of game estates

A game estate must be listed with the NZFSA if –

1. Any edible parts of game estate animals killed by client hunters on the game estate are allowed by the operator to be removed by the client hunters (except to the extent they are intended for use as trophies); or

2. The operator wishes to supply game estate animal material for processing as regulated animal product.

Application for game estate listing

A person who wishes to operate a listed game estate must apply to the NZFSA.

www.foodsafety.govt.nz/ellibrary/industry/Game_Estates-Clarifies_Treatment.htm
Appendix 3

Code of Practice for the Welfare of Animals in Hunting (revision no 1) – Victoria

Preface

The Prevention of Cruelty to Animals Act 1986, administered by the Department of Primary Industries, has the purpose of protecting animals, encouraging the considerate treatment of animals and improving the level of community awareness about the prevention of cruelty to animals. It establishes fundamental obligations relating to the care of animals in general terms. Details of obligations are found in codes of practice that are made under the provisions of the Act. These set out minimum standards and recommendations relating to important aspects of the care of animals. They are developed following a process of consultation with stakeholders and the community.

They reflect the views and values held by Victorians with respect to the care and use of animals. It is recommended that all those who care for or use animals become familiar with the relevant codes.

Codes are issued after review by the Animal Welfare Advisory Committee. This committee is comprised of members who have knowledge and expertise in particular areas such as animal welfare, veterinary science, animal uses in research, agriculture, the commercial use of animals and the standards and conduct of ethical use of animals.

This particular code has also been reviewed by the Hunting Advisory Committee. The purpose of the code is to prevent cruelty and encourage the considerate treatment of animals that are hunted or used for hunting.

This Code of Practice for the Welfare of Animals in Hunting (Revision Number 1) was issued by a notice published in the Government Gazette on 17 March 2005 under Section 7 of the Prevention of Cruelty to Animals Act 1986.

1. Introduction

1.1 This Code aims to prevent cruelty and encourage the considerate treatment of animals that are hunted or used for hunting.

1.2 This Code recommends membership by recreational hunters of approved hunting organisations.

1.3 To protect the welfare of hunted animals, this Code clearly defines the only type of animals that may be used to assist hunters and the acceptable method in which these animals can be used.

1.4 This Code does not approve of hunting where one animal is permitted to inflict an injury that causes another animal to suffer.

1.5 In this Code, hunting includes the use of any legal firearm or bow capable of humanely killing the animal hunted.

2. Definitions

"Approved hunting organisation" is a hunting organisation approved by the Bureau of Animal Welfare, which promotes ethical hunting, and compliance of members with this Code.
"Bureau of Animal Welfare" means the Bureau of Animal Welfare, Department of Primary Industries.

"Firearm" has the same meaning as under the Firearms Act 1996.

"Foxhound" is a dog classified by the Australian National Kennel Council as a "foxhound".

"Game" means any animal declared to be game under the Wildlife Act 1975.

"Gundogs" are dogs as defined under the Wildlife Act 1975 and the associated regulations as "gundogs" and conforming to the breed standards of the Australian National Kennel Council.

"Hunting" includes the pursuit, trailing, stalking, searching for or driving out of an animal where the deliberate intention is to kill the animals being hunted.

"Legislation relating to hunting" includes:

- Catchment and Land Protection Act 1994 and associated regulations.
- Domestic (Feral and Nuisance) Animals Act 1994 and associated regulations.
- Firearms Act 1996 and associated regulations.
- Wildlife Act 1975 and associated regulations.

"Scent-trailing hounds" are dogs as defined under the Wildlife Act 1975 and the associated regulations as "hounds" and conforming to the breed standards of the Australian National Kennel Council.

"The Wild" in relation to any animal means the natural habitat of the animal, or independent, unpossessed or natural state and not an intentionally domesticated or capture state regardless of the location.

3. Hunter conduct

MINIMUM STANDARDS

3.1 Hunted animals must at all times be free and unrestricted in the wild.

3.2 Firearms and ammunition or bows and arrows must be used that will humanely kill the species being hunted.

3.3 An animal must only be shot at when:

- it can be clearly seen and recognised;
- it is within the effective range of the firearm, ammunition, or bow and arrow and the skills of the hunter; and
- a humane kill is likely.

3.4 Shooting an animal in the wild for the purpose of testing the proficiency of hunters, or hunting equipment, is not permitted.

3.5 A hunter must shoot to cause a quick and painless death.

3.6 Every animal which is shot must be immediately examined to ensure that it is dead. Every animal which isn't dead on retrieval must be humanely destroyed immediately.

3.7 If an animal is wounded and escapes, all reasonable attempts must be made to locate it so it can be killed quickly and humanely before hunting another animal.

3.8 Hunters must be aware of and observe all regulations and legislation that relates to hunting and the use of firearms.

3.9 The hunting of game birds released from captivity must only occur at establishments licensed under the Wildlife Act 1975 for hunting of game birds.
RECOMMENDED BEST PRACTICE

3.10 Nets may be used to catch foxes that have gone to ground or rabbits forced from burrows by ferrets. No other devices should be used to restrict animals to an area.

3.11 To produce a quick and painless death a hunter should:
   • shoot to hit the area occupied by the brain or heart of an animal when using a rifle;
   • shoot to have the animal in the centre of the pattern at the point of impact when using a shotgun;
   • shoot to hit the heart/lung area when using a bow and arrow.

GUIDELINE

3.12 A trained dog, scent-trailing hound or gundog may help to quickly locate an injured animal.

4. Use of dogs in hunting

MINIMUM STANDARDS

4.1 Dogs must not be used in hunts under conditions where there is an unacceptable risk to them of heat exhaustion or a serious accident.

4.2 Dogs used for hunting must not be permitted to worry, maim or injure animals.

4.3 Scent-trailing hounds that bite deer, or any gundog used to point, flush or retrieve that makes an unprovoked attack or maims another animal, must not be used for hunting.

4.4 Dogs must not be used to attack or hold pigs.

4.5 Any dog used to point or flush pigs that makes an unprovoked attack or maims another animal must not be used for hunting.

4.6 Scent-trailing hounds used for hunting deer must be registered with the Department of Sustainability and Environment. These hounds must be identified in accordance with the provisions of the Wildlife Act 1975 and the associated regulations.

4.7 Scent-trailing hounds must not be allowed to wander unchecked or out of control of a hunter.

4.8 Juvenile scent-trailing hounds must be accompanied by at least one trained hound when hunting.

4.9 If one scent-trailing hound team fails to locate a Sambar Deer, or loses the trail of a deer, use of another team of scent-trailing hounds on that trail is not permitted. A coordinated hunt by two or more teams is not permitted.

RECOMMENDED BEST PRACTICE

4.10 Dogs used to assist hunters should be healthy and in good physical condition. If these animals are injured, they should receive prompt first aid or professional treatment.

4.11 Gundogs used to assist hunters should be bred from stock that instinctively hunt in the manner prescribed in this Code. They should be selected for behavioural characteristics such as a non-aggressive temperament, obedience, be trained to obey commands from the hunter to only hunt certain types of wild animals and to ignore distractions in the field.

Gundogs may be used to point or flush sambar deer, ducks, quail, foxes, hare, or rabbits or to retrieve duck, quail, hare or rabbits. A gundog should retrieve without causing physical injury so that the animal retrieved can be killed humanely by the hunter.
4.12 **Scent-trailing hounds** may be used to locate hunted animals by scent trailing subject to the conditions of this Code.

Scent-trailing hounds should only be released from the leash on a Sambar Deer mark. Scent-trailing hounds should not be started on any female known or suspected to have a small calf. A maximum of two juvenile scent-trailing hounds in training may be used in any hound team.

**GUIDELINE**

4.13 Dogs may be used to point or flush pigs.

5. **General provisions**

**MINIMUM STANDARDS**

5.1 When hunting deer, a female with a calf too young to survive alone should not be shot. If a female in milk is killed, every effort should be made to locate the calf. If the calf is too young to survive alone, it must be killed humanely.

5.2 Fox hunters who use hounds and horses must be members of an approved hunting organisation who use horses and hounds for hunting foxes. The only hounds permitted to be used for this purpose are "foxhounds" identified by a legible ear tattoo and registered with the approved organisation.

5.3 A means of humane killing must be available to kill a fox if required during a hunt using horses and hounds.

5.4 Live animals must not be used to feed or train ferrets in captivity.

5.5 Ferrets that savage rabbits must not be used in hunting.

**RECOMMENDED BEST PRACTICE**

5.6 **Duck hunting.** When hunting ducks a hunter should not fire into flocks of flying ducks but should single out a duck and fire when that duck is within range. A hunter may only fire at a duck on water if it is wounded and after ensuring it is safe to do so.

5.7 **Fox hunting with horses and hounds.** Foxes hunted using foxhounds and horses should not be headed or deliberately diverted for the purpose of prolonging the hunt. A fox that has gone to ground should not be pursued again on that hunt.

5.8 **Rabbit hunters** may use ferrets to drive rabbits from burrows. Ferrets used to hunt rabbits should be healthy and in good physical condition. Hunters should have digging equipment and every effort should be made to regain a ferret lost in hunting.

Appendix 4

New Rules for Hunting in South Africa – Summarized Version by SCI (Governmental Affairs Offices)

The summary below has been reviewed by South African officials for accuracy. These rules go into effect on 1 February 2008.

Special Restrictions on Lion and Rhino hunting – (Lion however, temporarily excluded from Large Predators list)

The hunting of captive-bred “listed large predators” (cheetah, spotted hyena, brown hyena, wild dog, leopard), white rhinos or black rhinos is prohibited –

- If the animal has not been released from captivity and been self-sustainable for at least 24 months (that is, it is not a “put and take” animal)
- If the animal is in a controlled environment
  - This does not include fenced land on which there is a self-sustaining population that is managed “extensively” (that is, with minimum human intervention for water, food etc.)
  - There is no minimum size for either a controlled environment, an intensive operation or an extensive operation
- If the animal is under the influence of a tranquilizer or immobilizing agent
- For a listed large predator, if it is hunted in an area adjacent to a holding facility for listed large predators
- By use of a gin (leghold) trap

Methods of hunting: All of the following are prohibited in the hunting of a listed threatened or protected species [See the list at the end of this summary], except in the case controlling damage causing animals:

- **Bow hunting** – No bow hunting of listed large predators, white rhino, black rhino, crocodile or elephant (thick skinned animals)
  - [note: in the proposed rule no bow hunting was allowed except as the provinces authorized it];
- **Handguns and other firearms** –
  - No use of automatic weapons (“a weapon, which after it has been discharged, automatically reloads and fires when the trigger thereof is pulled or held in a discharged position),
  - No use of a weapon using a rimfire .22 or smaller caliber
  - No use of shotguns, except for birds
  - No use of airguns
- **Lights** – No use of flood or spot lights, except for
  - controlling damage causing animals
  - culling
  - hunting leopards and hyenas
  - [note: the proposed rule would have allowed the use of lights for tracking a wounded animal]
- **Vehicles** – No hunting by using a motorized vehicle, except for
  - tracking an animal in an area where the hunt takes place over long ranges
    - [note: the proposed rule also provided that the animal could not shot from the vehicle except in the case of a wounded animal]
  - Controlling damage causing animals
  - Culling
- Allowing a physically disabled (as defined by the World Health Organization) or elderly (over 65) person to hunt

- **Enclosures, drugs** – No hunting of an animal which is tranquilized or immobilized by drugs or trapped against a fence or in a small enclosure where the animal does not have a fair chance to evade the hunter
  - [note: "small enclosure" is not defined]

- **Darting** – No darting, except by a vet or person authorized by the vet for veterinary; scientific; management or transport purposes

- **Dogs** – No hunting with dogs, except for tracking a wounded animal or flushing, pointing and retrieving listed threatened or protected species
  - [note: in the proposed rules this was limited to birds]

- **Bait** – No use of bait for listed threatened or protected species, except
  - dead bait for leopards and hyenas
  - bait for marine or aquatic species

- **Luring** – No use of sounds, smells or any other induced luring method — only for management of damage causing animals

- **Poison, traps, snares, spears** – No hunting with these! Except
  - for the control of damage-causing animals;
  - traps for the hunting of marine or aquatic species

- **Aircraft** – No hunting by aircraft, except for
  - Tracking an animal where the hunt takes place over long ranges
  - Culling
  - Controlling damage causing animals

**Additional Notes**

**Listed Threatened or Protected Species** – The rules apply to the species listed under the Biodiversity Act of 2004 as Critically Endangered, Endangered, Vulnerable, or Protected. These include:

- **Endangered**: tsessebe, black rhinoceros, mountain zebra, African wild dog, oribi;
- **Vulnerable**: cheetah, Samango monkey, bontebok, roan antelope, suni, lion, leopard, blue duiker
- **Protected**: white rhinoceros, black wildebeest, spotted hyena, black-footed cat, brown hyena, serval, elephant, Sharpe's Grysbok, reebuck, Cape fox

**Hunting permits** –

- Hunting permits will be issued by provincial authorities; game farm owners can obtain permits to cover hunting on their property.

- Recognition will be given to hunters who are members of a "recognized hunting organization" however, membership is still not compulsory.
  - [note: Associations have to apply for Government Recognition after 1 February 2008 – SCI in South Africa has already applied]

- A non-South African hunter must be accompanied by a professional hunter, and the hunt must have been organized by a hunting outfitter;

- A permit-holder must have the permit in his possession during the hunt

**Hunting of rhino** –

- Any one client may not hunt more than one rhino and export the horns for trophy purposes per year;

- The horns must be exported with the rest of the hunting trophies and may not be exported as hand baggage;

**No Sport hunting for damage causing animals** – The rule bans sport-hunting by "hunting clients" (that is, non-South Africans who are paying for a hunt) for damage causing animals.
• "Damage causing" = causes losses to livestock; damages cultivated trees or crops or other property; presents a threat to human life; or is present in such numbers that agricultural grazing is materially depleted.

**Culling** – "Culling" can include management hunts on game farms.

**Alien species** – No permits are allowed to move "listed threatened or protected animals" (see below)
- into extensive wildlife systems outside their natural distribution range [meaning either from outside South Africa or, for South African species, outside their normal range in South Africa] only if the area the animals will be moved to is a protected area – the rest will be regulated in terms of the alien species provisions in NEMBA;
- if there is a risk of transmitting disease;
- hybridization would occur with other species in the extensive system.

**Captive breeding** – No captive breeding of listed large predators is allowed unless the breeder agrees in writing that the animals will not be bred, sold, supplied or exported for hunting activities that are prohibited under these rules. The same applies to the sale, supply, export, purchase or acquisition of black rhinos and white rhinos.
- An exception is allowed for listed large predators, black rhinos and white rhinos that were bred in captivity but were rehabilitated in an extensive system and have been fending for themselves in that system for at least 24 months.

**Recognition of Hunting Organizations** – Hunting organizations already in existence have three months, after 1 February 2008, in which to apply for "recognition" by Government. In order to obtain recognition, the organization must –
- Have a code of ethical conduct and good conduct and must enforce that code against its members
  - The code must require compliance with legislation regulating the hunting industry, along with any conditions expressed in national hunting permits;
  - The code must define the criteria for the hunting of listed threatened and protected species in accordance with the fair chase principle and must require its members to hunt in compliance with those criteria
  - The code must provide for disciplinary steps, including suspension and expulsion of members.
- Report hunting violations to the South African Police Service
- Have a clear policy on broad based black economic empowerment to include persons from disadvantaged communities as members.

www.scdsouthernfries.org/docs/content/2489/SA%20Goverment%20TOPS%20Regulations%20-%20Revised%20July%202010.pdf
EXOTIC AND WILD ANIMALS FOR PUBLIC DISPLAY:
AN UNNECESSARY ENTERTAINMENT

World Society for the Protection of Animals

June 2012
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Overview

Purpose of paper

The purpose of this paper is to:

- Consider contemporary society’s attitude to wild animals in circuses and exotic animals in zoos, and their use in the production of television and film.
- Recommend changes to the Animal Welfare Act 1999 which reflect the growing concern for these animals and the legislative safeguards which need to be enacted to protect their welfare.
- Put forward proposals for the new Animal Welfare Strategy in line with these considerations which will ensure that issues relating to the welfare of exotic and wild animals are properly recognised.

This paper looks at the keeping of exotic or wild animals in three situations:

- Circuses.
- Public and privately owned zoos.
- Film and television productions.

There is no legislative definition of “exotic animal” in New Zealand law so, for the purpose of this paper, the World Society for the Protection of Animals (WSPA) adopts the definition of “exotic animal” in New Zealand’s Animal Welfare (Circuses) Code of Welfare 2005:

Exotic animals means any species which are not domestic, companion or farm animals and that have not been approved for general release under the Hazardous Substances and New Organisms Act 1996 but must remain in permanent containment (these animals are also known as “new organisms” under the Hazardous Substances and New Organisms Act).

For the purpose of this paper, WSPA adopts the definition of “wild animal” as “any animal which is of a species not commonly domesticated in New Zealand and usually found living wild in any country”.

WSPA’s proposals

WSPA proposes the following amendments to the Animal Welfare Act 1999 and for the following to be included in the Animal Welfare Strategy:

1. Start the process to amend the Circuses Code of Welfare so that there is a de facto prohibition on the keeping of exotic and wild animals in circuses.
2. Amend the Animal Welfare Act 1999 so that there is a statutory prohibition on the keeping of exotic and wild animals in circuses. This should form part of the current review of the Act.
3. Prohibit the importation of exotic animals by privately owned zoos.
4. Prohibit the importation of exotic animals by publicly owned zoos unless there is a clearly demonstrable plan for a species recovery programme.
5. Introduce a public consultation process for the importation of any new exotic large mammals which require large living spaces and complex environments (such as elephants, lions, tigers, bears and large primates) by a publicly owned zoo.
6. Severely restrict the use of wild and exotic animals in television and film productions.
WSPA’s policy

- WSPA is absolutely opposed to the taking and killing of wild animals for purposes not essential to humans or the welfare of the animals, particularly when they do not pose a threat to the safety and security of humans.
- WSPA is opposed to the use, confinement, exhibition or performance of animals for commercial gain and/or human entertainment.
- WSPA has serious reservations about the educational value of many existing zoological collections, including dolphinariums, and therefore does not consider that claims for the “educational value” of many animal exhibits can be justified.
- WSPA believes that animals should not be kept in zoological collections unless they form part of a valid conservation programme, the object of which is their eventual rehabilitation and release into the wild, and unless the animals can be kept in a “semi-natural” environment which meets their physiological and behavioural needs.
- Where the taking and/or keeping of wild animals is still permitted, WSPA believes that this should be strictly limited under licence and the most humane methods possible should be required.
- WSPA opposes the use of animals in sport or for entertainment when such use is contrary to the animals’ nature, or may involve suffering or otherwise adversely affect their welfare.
- WSPA is totally opposed to exhibitions or presentations of wild animals in circuses and travelling menageries.
- WSPA believes that, wherever animals are used in the making of films or television programmes or in the theatre, they must not be caused any suffering nor be portrayed in a manner demeaning to their species.
Circuses

Ancient circuses

Circuses that display exotic or wild animals, and even domesticated animals, are on the decline around the world.

The circus had its origins in Ancient Roman times when savage animal spectacles were matched only by the brutality of gladiatorial contests. Preceding the Roman Empire, the Greeks staged chariot racing and the exhibition of animals. The Latin word “circus” comes from the Greek “kirkos” meaning “circle or ring”.

The more modern type of circus became popular in the late 19th and 20th centuries, with travelling shows in big tops pioneered by Barnum & Bailey’s “The Greatest Show on Earth”, which originated in the USA but travelled Europe at the turn of the 20th century.

Types of circus

In the 21st century there are three general types of circus.

The Barnum & Bailey / Moscow Circus type

These are hangovers from the 19th century travelling shows that kept exotic and wild animals as a travelling menagerie and/or to perform acts which are not part of the animal’s natural behaviour. These circuses flourished after World War II, but their decline began after the advent of television and with the development of other large entertainment activities.

The Weber Bros type

These are circuses that may have featured exotic or wild animal acts but no longer do so. They often feature horse and pony performances, but many of the acts required by the equines are not dissimilar to practices undertaken during horse shows, equestrian events and even pony clubs. As they contain no exotic or wild animals these circuses fall outside the scope of this paper.

The Cirque du Soleil type

These are a modern type of circus whose appeal is expanding worldwide. They are noted for the extraordinary skills of their acrobats and other human performers, but contain no animals at all and have never travelled with animals. These circuses include the renowned Canadian company Cirque du Soleil, New Pickle Family Circus, Zirc Circus, Circus Oz, Flying Fruit Fly Circus and Circus Aotea. As they contain no animals these circuses fall outside the scope of this paper.

Circuses in New Zealand

The first circus known to have come to New Zealand was as early as 1856. At their peak in the 1950s and 1960s, three-ring circuses came mainly from Australia and included Solways and Wirth’s Circus.

The last international circus to come to this country which included exotic animals was the Moscow Circus in 1993. The Royal New Zealand SPCA unsuccessfully prosecuted the circus promoters, Edgleys, for failing to carry out the instructions of an animal welfare inspector. The prosecution was dismissed because of a technicality in the issuing of

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1 Some of the background information in this paper is derived from N.E. Wells, Animal Law in New Zealand, Thomson Reuters, Wellington, 2011.
inspectors’ warrants by the Ministry of Agriculture and Forestry (MAF) at the time. However, the Moscow Circus has not returned to New Zealand.

At the turn of the 21st century, when the Animal Welfare Act 1999 commenced, there were three New Zealand circuses which contained exotic species: Whirling Bros, Ridgways and Circus Magic. Circus Magic closed in 2000 after an attempt to sell two chimpanzees to a Fijian circus owner fell through. Eventually, Lola (an old chimpanzee) and Buddy (her offspring) were shipped to a sanctuary in Samoa, where Lola fell sick soon after landing in the country and died just days later.

Cary Ridgway succumbed to pressure from animal welfare campaigners and allowed his remaining chimpanzees to be repatriated to the Chimfunshi Wildlife Refuge in Zambia. His brother Charlie Ridgway moved his Ridgways Circus to Australia and, with it, the last performing chimpanzee.

The last New Zealand circus with exotic animals toured under a variety of names: Whirling Bros Circus, Circus International and, more recently, Loritz Circus. Its sole exotic animal was a 39-year-old African elephant which was later taken in by Franklin Zoo, a private zoo in South Auckland.

There are now no circuses in New Zealand that keep exotic or wild animals.

Code of welfare

Investigations have shown that methods of training animals to “perform”, and the living conditions of circus animals, often cause them physical and mental suffering. In New Zealand, those responsible for the welfare of animals must ensure that they are provided with an “opportunity to display normal patterns of behaviour”. Also, any ill-treatment of animals falls short of the statutory obligation to provide for their physical, health and behavioural needs, which leaves circus proprietors vulnerable to prosecution since the Animal Welfare Act 1999 came into effect and this became a strict liability offence.

The previous law in New Zealand regarding animals was the Animals Protection Act 1960, which stated that prosecution of an offence required proof beyond reasonable doubt of a wilful act. To circumvent this, the Animal Welfare Act 1999 made six voluntary codes deemed codes of welfare which continued in force, and the code regarding circuses was one of these. Originally these codes of welfare had a lifespan of three years, but in 2002 that was extended until the end of 2004.

The Animal Welfare (Circuses) Code of Welfare 2005 came into effect on 1 January 2005. It applies to New Zealand-based circuses as well as any international circus that brings acts containing animals to New Zealand. However:

- A circus operator must not acquire a circus animal unless it has the necessary staff and facilities to provide for the needs of the animal.
- Circuses must hold a minimum of two compatible individuals of a particular exotic species, unless a consulting veterinarian has advised that it is in the best interests of a particular individual animal to remain with the circus, or a circus animal dies leaving a solitary member of its own species.

The Circuses Code of Welfare also contains a minimum standard for disease and injury control which specifies:

- A daily check for signs of ill-health or injury.

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2 Animal Welfare Act 1999, s 4(c).
7 Minimum Standard No 1.
8 Minimum Standard No 11.
• Contractual arrangements with a consulting veterinarian experienced with each exotic species held.

This minimum standard will become increasingly difficult to comply with, as there are currently no veterinarians in New Zealand outside zoos with any competency in exotic animals.

A minimum standard for the transportation of circus animals specifies that:⁹

• Vehicles must be strong enough to contain the animal, and must provide enough space to enable the animal to travel in a natural position without risk of injury.

• Vehicles must provide adequate ventilation.

Relevance to today’s situation

With the new Animal Welfare Strategy and the review of the Animal Welfare Act 1999, this is the perfect opportunity for the New Zealand Government to respond by introducing a complete prohibition on the keeping of any exotic or wild animals in circuses. This would bring New Zealand into line with other countries that have already enacted laws in this area. This change in legislation would have no financial effect on any business or entity, as no exotic or wild animals are currently held in any circus in New Zealand.

A code of welfare can restrict an activity but cannot prohibit it.¹⁰ With this in mind, WSPA recommends that a provision prohibiting the keeping of exotic and wild animals in a circus or the importation of animals for that purpose should be included in the review of the current Animal Welfare Act 1999.

In the meantime, some judicious amendments to the Circuses Code of Welfare would have the same effect.

Therefore, WSPA also recommends that the Circuses Code of Welfare be reviewed with the intention that clauses are added to Minimum Standard No 1 (Animal Acquisition and Holding) which state:

• An exotic or wild animal must not be imported into New Zealand for the purpose of being held in a circus.

• An exotic or wild animal must not be transferred from a zoo, or from any type of private ownership, to a circus.

• No exotic or wild animal must be used in or owned by a circus.

Consequential amendments would then be required to remove the species-specific standards in section 8 of the Code.

International opposition to circuses

Thanks to developments in science and the dissemination of information, the public’s understanding of animal welfare and its attitude to animals being kept in captivity for entertainment is changing. There has been a distinct tide against the keeping of wild and exotic animals in circuses, as the confined living conditions, constantly changing environment and requirements of performance cause suffering and stress to these animals.

Animals in circuses live most of their lives caged in tiny enclosures which contain no or limited environmental enrichment, unable to interact normally with other animals of the same species. They often demonstrate stereotypic and abnormal behaviour patterns indicative of prolonged stress and suffering. As circus animals do not contribute to any educational, conservational or scientific cause, their confinement and the requirement for them to perform have been concluded by many to cause unnecessary and insupportable cruelty.

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⁹ Minimum Standard No 12.

Worldwide circus bans

A significant number of countries have banned the keeping or use of exotic or wild animals in circuses.

Europe


**Czech Republic**: Nationwide ban on the use of certain species of animals in circuses – Animal Protection Act 1992 – Section 14a, Paragraph 1b.


**Hungary**: Nationwide ban on the use of wild-caught animals in circuses – Governmental Decree 222/2007 (VIII.29) Section 12(3).


**Poland**: Nationwide ban on the use of wild-born animals in circuses – Animal Protection Act (1997) Article 17(1).

**Serbia**: Nationwide ban on the use of wild animals in circuses – Animal Welfare Law – Article 7(35).

**Sweden**: Nationwide ban on the use of certain species of animals in circuses – Animal Welfare Ordinance – Section 35.

Central and South America


**Costa Rica**: Nationwide ban on the use of wild animals in circuses – Welfare Law 7451.


**Paraguay**: Nationwide ban on the use of wild animals in circuses – Resolution 2002/12, June 2012.

**Peru**: Nationwide ban on the use of wild animals in circuses – Law number 29763 – Forestry and Wildlife Law.

Asia


**Israel**: Nationwide ban on the use of wild animals in circuses.

**Singapore**: Nationwide ban on the use of wild animals in circuses.

**Taiwan**: Nationwide prohibition on the import or export of protected wildlife for circuses.
Municipal or state bans

A number of countries have local bans on circuses.

**Argentina:** Local bans on the use of animals in circuses in over 20 cities including a ban in the city of Buenos Aires.

**Australia:** Local bans on the use of animals in circuses in several towns including Parramatta and Lismore.

**Brazil:** Local bans on the use of wild and domestic animals in circuses in the districts of Rio de Janeiro, São Paulo, Pernambuco, Paraíba, Rio Grande do Sul, Espírito Santo, Mato Grosso do Sul and Alagos.

**Canada:** Local bans on the use of animals in circuses in over 20 municipal jurisdictions.

**Chile:** Local ban on the use of wild and domestic animals in circuses in the city of Santiago.

**Colombia:** Bogotá has banned the use of wild animals in circuses as of June 2012. Also, following a vote in Congress to end the use of animals in circuses nationwide, the Bill has now moved to the Senate, with two further votes required for it to become law across the country.

**Ireland:** Local bans on the use of animals in circuses in Cork and Fingal.

**New Zealand:** A number of local authorities have banned circuses from public parks but have no authority to ban circuses on private land.

**Spain:** Local bans on the use of animals in circuses in several towns including the capital cities of Catalonia (Barcelona, Tarragona, Lleida and Girona) and San Fernando de Henares (autonomous community of Madrid).

**UK:** Over 200 local authorities have bans on animal circuses (more than two thirds of these ban all performing animals, the remainder ban only wild animals). Public consultation showed that 94.5% of the public support a ban on wild animals in circuses, and in 2011 the Government announced that this law would be enacted soon.

**USA:** Local bans on the use of animals in circuses in over 25 cities, located in 12 states throughout the East and West Coasts.
Zoos

Introduction

Menageries and zoological gardens have existed in various cultures since the Egyptians first established them around 2500 BC. The Roman elite collected exotic animals from all over the empire to supply the animal spectacles in the Coliseum. The first tigers, which were a gift from an Indian rajah to Caesar Augustus, ended up in the Coliseum. Emperor Trajan (AD 53–117) celebrated the Roman conquest of Dacia with 123 consecutive days of games in which 11,000 animals were slaughtered including lions, tigers, crocodiles, bulls, stags, elephants, rhinoceros, giraffes and snakes.

Opposition to zoos in the past has been largely critical of the concrete and iron bars type of zoo which was prevalent up to the latter part of the 20th century and which still exists in many countries around the world today. Within countries which have for some time recognised the importance of ensuring the welfare of animals kept in confinement, the zoo industry has over recent years adopted a more enlightened approach to displaying animals, with an emphasis on open enclosures, conservation and rehabilitation programmes, and education.

The role of zoos

Modern zoos have several functions including those related to recreation, entertainment, education, wildlife conservation and research. The education and conservation functions are recognised as being increasingly valuable, especially as natural habitats for wildlife decrease.

However, zoos have a number of limitations – most notably, it is difficult and expensive to provide even part of the richess of experience, freedom of movement and quality of life that the animals would experience if left in natural populations in the wild. Captive situations restrain an animal’s natural movement, foraging, feeding, hiding, escaping and mating behaviours, and restrict appropriate (or allow inappropriate) social interactions.11

The standard of zoos varies across the world. While some provide more complex captive environments (naturalistic displays with appropriate substrates, plants, hiding places, perches, etc) which are able to mitigate the behavioural problems often associated with the stresses of being held in captivity, other zoos keep animals in terrible conditions and barren environments, with additional stresses caused by visitors to the attraction from whom they are unable to escape. The latter type of zoo does not usually serve any education or conservation purpose.

The World Association of Zoos and Aquariums (WAZA) produced a code of ethics as an instruction to its members. This code details the circumstances under which it is acceptable to exhibit animals and states that "All exhibits must be of such size and volume as to allow the animal to express its natural behaviours". WAZA states that, where wild animals are used in presentations, such shows "must; (a) deliver a sound conservation message, or be of other educational value, (b) focus on natural behaviour, (c) not demean or trivialise the animal in any way".12

New Zealand zoos

In New Zealand, most of the traditional wildlife parks have been upgraded and have a focus on conservation and/or rehabilitation, which complements the country’s tourist industry and

reputation as an ethical and natural place. Nonetheless, it is disappointing that a number of zoos still contain exotic animals simply as a tourist attraction and with no focus other than making money – for example, Paradise Valley Springs, Zion Wildlife Kingdom, Reptile Park and Butterfly Creek.

Privately owned zoos are considered by many to be circuses without wheels. There is no commitment to the principles of conservation and education put forward by WAZA. Public entertainment is clearly the priority, at the expense of the welfare of the animals. Private zoos which are focused on making money often provide unsuitable living conditions for the animals they keep and put profits before welfare.

Any zoo which contains dangerous exotic or wild animals has an obligation to the animals, its staff and the public to observe at least minimum standards in health and welfare at all times. Allowing private zoos responsibility for these animals without the oversight and ability to control daily functions (as is the case with publicly owned zoos) means that standards are less likely to be maintained when financial and other pressures mount.

In addition, zoo owners, including territorial authorities, are able to make decisions on the importation of exotic animals with ease and without proper consultation with experts or the wider public. In 2010, Auckland City Council decided to import two elephants from Sri Lanka despite international opposition. The reasons for that opposition are set out in a letter to the Council dated 20 September 2010.\(^{13}\)

It is WSPA’s view that any zoo which does not adequately provide for the welfare needs of the animals it keeps, and does not have a clearly demonstrable plan for conservation and education, should face a moratorium on importing or acquiring any new animal or replacement animal.

**Welfare of exotic animals**

Exotic animals are of particular concern with regard to their confinement in zoos, due to limitations in being able to replicate all aspects of the natural environment where they came from. Even exotic animals that have been bred for generations in captivity are known to suffer if they are prevented from performing highly motivated behaviours, and still show a need to perform certain activities seen in their wild counterparts.\(^{14}\)

All animals in zoos deserve to live in a suitable environment with adequate social interaction and enrichment to alleviate stress, but society has an increased responsibility for exotic animals which are likely to need a more complex environment and have greater welfare requirements. Any decision to import or house these animals in New Zealand should be thoroughly considered, and only publicly owned zoos which can be properly overseen should be able to import these animals if certain criteria are met.

Welfare considerations in respect of the importation of exotic animals are as follows.

**Movement of animals**

Any movement of zoo animals needs to be carefully considered and properly decided, with the assistance of experts and taking account of public opinion, as there are obvious and serious potential welfare impacts not only on the animal in question but also on any group which it is being moved from or into.

**Disposal of “surplus” animals**

Overpopulation and overbreeding are common problems in zoos which can compromise welfare. The disposal of surplus animals by zoos represents a significant concern for the animals’ welfare and acts against the conservation ideal of reputable zoos. Wherever

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13 See Appendix 1.
possible, animals should be reintroduced into the wild. Any form of transfer of animals from zoos to circuses, laboratories or animal traders must be prohibited.

**Disease transmission**

The transmission of diseases is thought to occur faster and be more commonplace in captivity than in the wild. When exotic animals are brought into zoos there is the risk of the current zoo stock being exposed to exotic pathogens from the new animals. In addition, any exotic disease brought into a zoo by an animal could be transmitted by zoo attendants and visitors. There are also concerns that highly stressed animals which have had to endure transportation and are attempting to adapt to their new environment are more prone to infections themselves, which puts their welfare at risk.

**Wild-caught animals in zoos**

The transfer of animals from a wild or free-ranging environment to a captive one, the separation of social animals from their groups and families, and the transfer of territorial animals from their home range into unfamiliar environments cause severe stress to animals. The capture of animals from the wild for the purpose of transfer to zoos should be explicitly prohibited unless it is for the animal’s benefit.

**Code of welfare**

Zoo proprietors were vulnerable to prosecution when the Animal Welfare Act 1999 came into effect on 1 January 2000 as there is a statutory obligation to ensure that animals are provided with an "opportunity to display normal patterns of behaviour". As a zoo cannot duplicate all normal patterns of behaviour for exotic animals, the keeping of animals in zoos generally results in a shortfall of the obligations laid down by law.

To circumvent this, the Animal Welfare Act 1999 made six voluntary codes deemed codes of welfare which continued in force, and the code regarding zoos was one of these. Originally these codes of welfare had a lifespan of three years, but in 2002 that was extended until the end of 2004.

The Animal Welfare (Zoos) Code of Welfare 2005 came into effect on 1 January 2005. In addressing the physical, health and behavioural needs of animals in a zoo, the Code provides relevant minimum standards.

**Normal patterns of behaviour**

It is difficult, if not impossible, to provide opportunities to display normal patterns of behaviour for each species held in a zoo. The Zoo Code of Welfare provides no inspection system which ensures that the minimum standards are being complied with or even how the zoo entity intends to provide these opportunities.

**Wild animal rehabilitation**

Most publicly owned New Zealand zoos have species recovery programmes that involve the rehabilitation and release of wild animals, particularly protected species. However, it cannot be said that every animal in a zoo is part of a species recovery programme. Most are not. There are few, if any, privately owned zoos with species recovery programmes.

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19 “Zoo is a site on which animals are kept for public exhibition, education, conservation, research or entertainment and usually will hold a range of exotic (new organisms), domestic and native species. For the purposes of this code, a zoo also includes a containment facility approved under the Biosecurity Act 1993 for the purpose of holding animals in containment, and includes animal parks and aquariums.” Animal Welfare (Zoos) Code of Welfare 2005, section 1.9.
20 See Appendix 2.
Privately owned zoos

There are a number of zoos in New Zealand displaying exotic animals which are not in public ownership. These privately owned zoos present specific concerns in relation to animals. The main problems relate to unreliable funding, lack of oversight for all welfare issues and no responsibility to react to public concerns for animals, all contributing to worrying welfare standards for the animals.

For example, Paradise Valley Springs in Rotorua has held African lions since the 1970s. Originally the wildlife park housed retired circus lions born in Australia, but for over 20 years it has been breeding lions. According to its website, "Some former cubs and members of the pride have been donated to other Wildlife Parks and Zoos throughout New Zealand and to Australia". The wildlife park prides itself on allowing visitors to touch and photograph lion cubs, and its ethos is that the public is able to get very close to the big cats. Its publicity material states that it is "the only place in New Zealand where you can pat a Lion Cub".

WSPA believes that these are totally inappropriate activities which allow unnecessary handling of these vulnerable animals and do not provide any educational value for the public. Animals are being irresponsibly bred at Paradise Valley Springs merely to provide a tourist attraction, and an obvious concern is the fate of the cats when they are no longer cute cubs that can be petted and what happens to them when the numbers exceed the space available.

Prohibition on the importation of exotic animals

WSPA insists that the current review of the Animal Welfare Act 1999 and the new Animal Welfare Strategy presents a real opportunity for New Zealand to improve its welfare standards for animals kept in captivity. We strongly suggest that provision is made so that:

- Private zoos and animal collectors are expressly prohibited from importing exotic animals.
- Publicly owned zoos are prohibited from importing exotic animals unless there is a clearly demonstrable plan for a species recovery programme.
- Local authorities are not able to import large mammals which require large living spaces and complex environments (such as elephants, lions, tigers, bears and large primates) for public zoos without the consent of the Government and following a formal process of public consultation.

The criteria on which the Ministry for Primary Industries (MPI) bases its decision with regard to the second and third points above must aim to ensure that the physical, emotional and mental needs of the individual animal will be met, and should be based on sound scientific and ethical judgement. The welfare of the animal should not be compromised in order simply to allow the public access to the animals or for entertainment purposes.

Each importation request should be considered on a case-by-case basis and all applications self-funded. Public notification should also be added as part of the process.

Due to concerns around the standards and long-term funding of private zoos, it is also felt that the transferring of animals from public to private zoos should be expressly prohibited, otherwise private zoos could simply exploit this loophole which prohibits them from adding further exotic animals from overseas to their collections.

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21 http://www.paradisev.co.nz/.
Film and Television Productions

Introduction

The birth of the film industry in the late 19th century brought a new means of animal exploitation. Animals were easily obtained for use in the production of television and film and – as they did not require payment and were not able to complain about their conditions – were seen as disposable. Many thousands of animals were killed or seriously harmed while on set, both during filming and off camera.

The RSPCA (covering England and Wales) was sufficiently concerned as early as the silent era of film-making to take action:22

Many scenes in films have, in the past, shown that either cruelty has been inflicted on animals in the making of them or that the films themselves cannot exert anything but harmful effect in their callous disregard of animal suffering: an influence that must be wholly bad, especially in the case of young audiences. Accordingly, the Society, in 1913, made representations to the Film Censor, Mr. Redford, shortly after his appointment. It will be understood that he is not an official appointed by Government but holds his position and is paid for by the cinema trade for their own protection. He undoubtedly carries out a useful task.

When the Rt. Hon. Edward Shortt, K.C., was President of the Board of Censors, he appointed in 1935 a Film Consultation Panel, on which the R.S.P.C.A. was represented, for the purpose of reviewing films containing animal scenes. It is significant that the very first film viewed by this panel was unanimously rejected.

The Society also tried to grapple with the problem through Parliament and in 1937, the Cinematograph Films (Animal) Act came into force. This measure, which was presented by Sir Robert Gower and Lord Cauley, laid it down that no person shall exhibit to the public any film, if in connexion with its production, any scene was organized or directed in such a way as to involve the cruel infliction of pain or terror on any animal or the cruel goading of any animal to fury.

American westerns

In the United States, "Wild West Shows" were brought to the silver screen as early as 1911. There was no protection for horses, which were without doubt the most abused animal in the movie industry. A cruel method of causing horses to trip used widely in the Hollywood movie industry was the running-w wire:23

It was named for an old range method of breaking wild horses in which they were tied to a moving wagon with a long rope. If they fought the line or tried to run in a different direction, the moving wagon simply pulled them down.

In the movies, the practice was modified and became deadlier. Piano wire was attached to a horse's front legs with a leather strap and then run up through a ring on the saddle horn, where it was secured; the other end of the wire was connected to a buried stake. On cue, the horse would begin to run, and the rider would jump just before the wire ran out, and the horse took a hard and often fatal fall. In 1938, 125 horses were rigged with Running Ws for the bog scene in The Charge of the Light Brigade, which was shot in the Mojave Desert and starred Errol Flynn. At the call of "Action" the cavalry took off across a dry lakebed, but when the wires were triggered, the stunt quickly turned into a bloody pileup, each horse tripping and falling headfirst into the horses ahead of it. By the time it was over, many animals and riders were seriously injured, and twenty-five horses had died – either killed in action or destroyed later because of broken legs. "I never saw so many good men and horses smashed up in one day in all my years in the picture business," stuntman Jack Montgomery told his family that night over dinner. "I've

23 D. Stillemen, Mustang; the Saga of the Wild Horse in the American West, Boston, Houghton Mifflin Co, 2008.
always thought those Humane Society people with their 'reps' snooping around on every set or
location were a bunch of busybodies. But by God, today every cowboy on the set stood behind
the rep when he set up a howl."

Such a collective action startled producers; it violated the code of the West, in which everyone
and every critter took care of himself. And it was the first time that stuntmen — unsung cast
members like the horses who routinely got killed during performances — had joined together in
protest about conditions on a movie set, a concern that fuelled the growing call for an actors’
union. Meanwhile, Errol Flynn had gone public with the story of what had happened in the
making of The Charge of the Light Brigade. In spite of the ensuing outcry for reform, many more
horses would die before new guidelines moved through the approval process and Hollywood
began following a stricter code for treatment of equine actors.

Later movie productions

The 1970 USA production of the movie Patton involved a controversial scene where General
Patton was depicted shooting some donkeys that were impeding the progress of the
American army through Sicily. It was alleged by a film extra that the crew killed the animals
with strychnine, and had also clubbed a donkey to death and blown up a horse by tying
dynamite to its belly. The movie was shot in Spain and was not subject to any monitoring by
an animal welfare group.

It was not until the 1980 movie Heaven's Gate was shot in Montana that the film industry
started to self-regulate its use of animals. The film included a real cockfight, several
shocking horse trips, and a horse blown up with a rider on its back. The public backlash
prompted the Screen Actors Guild (SAG), the Alliance of Motion Picture and Television
Producers, and the American Humane Association to cooperate on monitoring the use of
animal actors. However, this arrangement only applies to filming in the State of California or
where a member of SAG is cast in the production.

Around the world it tends to fall to each country to regulate the use of animals in its film
and television industry, either through self-regulation or by statute.

Filming in New Zealand

New Zealand was not a prolific producer of feature length movies until the latter part of the
20th century with the success of The Lord of the Rings trilogy. Nonetheless, New Zealand
has for some time been sought after as a location for its scenery, not only by American
productions but more recently as the backdrop for Bollywood (Indian) movies.

However, the treatment of animals used in filming has been a source of concern for some
time. During the filming of Wild Horses, a 1984 movie about the Kaimanawa horses,
unsubstantiated allegations surfaced that a horse had been injected with a sedative to cause
it to fall while at full gallop. Attempts by the Royal New Zealand SPCA to monitor the use of
animals in that movie were frustrated by the movie's producers.

The Lord of the Rings trilogy has propelled New Zealand into the mainstream of
international film and television production. A number of factors contribute to this: a pool of
technical talent, the lower cost of production and the spectacular locations. With productions
of film and television on the rise, it is essential that standards to monitor the use of animals
in productions in this country are created and independently overseen. At present only one
organisation, the Animal Welfare Institute of New Zealand (AWINZ), has experience in
providing independent support and monitoring of New Zealand productions.

Major production companies and producers of note are electing to involve independent
animal monitors in both the pre-production planning and the use of animal actors on set and
on location, but, for those who are not so considerate of the animals they are using, it is
important that regulatory standards are set and upheld.
Regulatory control

There is currently no regulatory control of the use of animals in film and television productions in New Zealand with regard to ensuring their welfare. While a code of welfare for animals used in film and television productions is currently in development, it will not have the force of law until it is gazetted by the Minister for Primary Industries after a recommendation by the National Animal Welfare Advisory Committee.

Both AWINZ\(^{24}\) and the Screen Production and Development Association of New Zealand\(^{25}\) have produced codes of practice for the use of animals in film and television productions. Neither is a statutory code of welfare but both provide useful guidelines.

Animal Welfare Act 1999

It could be argued that there is some protection for animals used in filming under the general standards laid down in the current Animal Welfare Act 1999. While this is true, the current detail is not sufficient to cover all situations which are likely to arise during filming.

It is the responsibility of the person in charge of the animal to ensure that its needs are met (i.e. its physical, health and behavioural needs) and that the animal is not ill-treated. Pressure from the director of the production company to put an animal at risk in order to get a particular shot could expose the person in charge to liability for ill-treating the animal. While the director would not be the primary person who ill-treated the animal, he or she could still be culpable as being a party to any offence.

Wild and exotic animals used in filming

Wild and exotic animals are often used in the television, film, music video and advertising industries despite the advanced techniques of computer generation and motion capture. There are significant concerns regarding the welfare of these animals kept in captivity and used for these purposes, including the following.

The environment of the “set”

Noise, bright lights, unusual smells, unfamiliar people and the film set are all unavoidable stressors for animals used in the television and film industries and would detrimentally impact most animals, especially wild or exotic species. Such stressors can cause short-term and chronic behavioural effects (such as aversion, alarm, increased vigilance, aggression or stereotypical behaviours) and physiological effects (such as increased heart rate and cortisol levels in urine).\(^{26}\)

Training

Training animals to respond in a particular way when prompted by cues often relies heavily on physical domination and fear to ensure constant attention and compliance.\(^{27}\) Injuries can be caused by inappropriate handling, and by training animals to perform unnatural tasks and assume unnatural positions.\(^{28}\) Most wild and exotic animals would not usually interact with humans when left in their natural environment, always preferring to flee (where possible) than to remain and face potential conflict. "Training" does not rid these animals of these wild instincts, which have to be suppressed; depression, aggression or lethargy are commonplace among wild animals required to "perform" in captivity.

\(^{24}\) AWINZ, Code of Standards for the Use of Animals in Film and Television Productions, Auckland, AWINZ, 2009.
\(^{27}\) Animals In Film, Born Free Foundation. Available at http://www.bornfree.org.uk/fileadmin/user_upload/files/zoo_check/Animals_in_film.pdf.
To make potentially dangerous wild animals “safe” to handle, it is usually necessary to hand-rear them from a very young age. In some cases this requires the animal being removed from its mother shortly after birth (often at around 2 or 3 days old in the case of tigers and other large cats). This causes tremendous stress for both the mother and her offspring, and can have negative effects on the health and behaviour of the offspring. Some animals also have teeth, claws or other body parts removed or altered so that they cause less of a risk to the handlers and those participating in the filming.29

Extensive travelling
Animals used in filming industries are frequently transported on long journeys to accommodate location requirements. The forced movement, human handling, noise, cage motion and increased confinement constitute sources of stress for a captive wild or exotic animal.30 They often spend many hours confined to travelling crates in between filming “takes”, causing the animals additional distress and frustration.31

Housing and restriction of natural behaviours
In captivity, many species of wild and exotic animals are not provided with the opportunity to perform their natural behaviours, as they are often restricted in their movement, foraging, feeding, fleeing from stressors, mating behaviours and social interaction. For example, on film sets it is often unavoidable that animals are housed in inadequate cages and with limited environmental enrichment, resulting in significant negative consequences for behaviour and welfare. The behavioural restrictions on animals used in these industries are increasingly being recognised as having a serious negative impact on captive wild animals’ cognitive and normal social development and health.32

“Retirement”
What happens to the animals when they are no longer “usable” or required in filming is a concern. It is predominantly younger animals that are used in the film, television and advertising industries, and, once they have outgrown their “photogenic” stage or become difficult to handle, these animals face an uncertain future. For example, in captivity a tiger can live for over 20 years and is very expensive to feed and house securely in a suitable environment. It is therefore unlikely that the companies which supply lion and tiger cubs, for example, will provide a safe and suitable retirement for all the animals they breed. Many unwanted animals end up in zoos, private animal collections or laboratories or are euthanased.33

Limiting the use of wild and exotic animals in filming
With increasing technological advances, the use of most animals in the filming of media productions should be redundant. With the specific and very serious concerns for the welfare of exotic and wild animals in these situations, WSPA believes that the review of the Animal Welfare Act 1999 and the new Animal Welfare Strategy provides a perfect opportunity for their use in the production of television and films to be strictly limited.

Computer generation and motion capture now counter any argument for the need to use live exotic animals in film and television productions. The worrying and increasing practice
by private owners and some New Zealand zoos to hire out these animals for film and television productions and live entertainment is morally questionable, and should not be tolerated in a country which prides itself on having some of the best welfare standards for animals in the world.

If wild and exotic animals are imported for use in filming only to be re-exported when the production has finished, not only are there fundamental welfare failings but this is also contrary to the principles of conservation and safeguarding native species against the spread of zoonotic diseases. Moving animals internationally simply to use live creatures in productions not only puts the animals under enormous stress but also runs a high risk of introducing unwanted organisms that could affect animals already here.

The use of wild and exotic animals in media productions should be viewed with concern by the MPI. High standards must be delivered from production companies in relation to the use of any animal, and the MPI should explore why there is a necessity to use such animals in each production. The welfare of any animal, especially wild and exotic species, should not be risked for the sake of entertainment.
Appendix 1

Letter to Auckland City Council dated 20 September 2010

We the under-signed are writing to you about the recent decision of the Auckland City Council to support the expansion of the Auckland Zoo to allow the acquisition of additional Asian elephants. We urge you to reconsider this decision in light of the following information:

1. No urban zoo in the world can adequately cater to the needs of elephants. Sound science tells us that elephants are social animals that spend their lives in and around families of closely related individuals, moving across vast areas. Family life cannot be created in a zoo and there is growing evidence that simply placing unrelated elephants together does not simulate natural social life. Urban zoos can neither provide sufficient space for elephants, nor sufficient environmental complexity.

2. Importation is highly expensive and logistically complex. Auckland Zoo could only acquire additional elephants by importing them from overseas. The only sources are existing zoo breeding programs or populations of elephants in the Asian countries in which elephants live naturally.

3. Removing elephants from existing zoo programs will neither assist the sustainability of zoo elephant populations nor assist the welfare of the elephants involved. Existing zoo populations of Asian elephants, internationally, are not self-sustaining because of a combination of insufficient genetic diversity and skewed age structure.

4. Removing elephants from Asian countries is unethical. The recent importation of elephants from Thailand to Australia revealed a range of issues including the current impossibility of proving that imported elephants are actually captive born and not plundered from the wild.

5. The attempted importation of elephants to New Zealand would generate great international controversy. The good name of both the City of Auckland, and of New Zealand as a country, will be damaged.

6. Building for urban elephants is always more expensive than initially estimated. Even attempting to create basic living conditions for a "herd" of elephants in Auckland Zoo will be extremely expensive. The estimate of $NZ13 million is almost certainly an under-estimate. The National Zoo in Washington has recently spent an astonishing $US50 million ($NZ65.85 million) on basic and inadequate facilities for a proposed total of nine elephants. In Australia, the Melbourne Zoo and Sydney's Taronga Zoo each spent in excess of $AU15 million ($19.5 million).

7. Elephants are very expensive to keep. The ongoing maintenance of elephants in urban zoos has been estimated to cost not less than $NZ100,000 per specimen per year, not including the maintenance of facilities and capital depreciation. To maintain a "herd" of 10 elephants, not less than $NZ1 million per annum should be allocated.

8. Urban elephants are NOT a sound investment. It has been demonstrated that elephants in an urban zoo are not a permanent draw-card sustaining high zoo visitation over time. The birth of elephant calves can result in peaks in visitor numbers but over time such attractions fade and in the long-term they are not cost-effective.

9. Elephants do not fit the Auckland City "brand". Elephants can be readily experienced in many places around the world and their presence in Auckland Zoo would not enhance Auckland or New Zealand as a destination for visitors.

We urge you to reconsider the Council's decision to support the acquisition of Asian elephants by Auckland Zoo. The elephant Burma should be sent to live with other elephants in an open-range zoo or sanctuary.
Appendix 2


Minimum Standard No 6 – Food and Water

(a) Zoo animals must receive adequate quantities of food and nutrients to enable each animal to
   (i) maintain good health;
   (ii) meet its physiological demands; and
   (iii) avoid metabolic and nutritional disorders.
(b) Dietary supplements must be given where food or the environment does not provide essential elements.
(c) Where appropriate to the species, all animals must have continuous access to drinking water that is palatable and not harmful to health.
(d) Food and drinking water must be provided in such a way as to allow each animal easy access to sufficient quantities, to prevent undue competition and injury, and to prevent the risk of contamination.
(e) Daily checks must be made of the effectiveness of all self-feeding and automated feeding and watering systems.
(f) The feeding of live prey must not be used unless there is no suitable alternative to meet the nutritional needs of the predator, and where the cost (through distress) to the prey is significantly outweighed by the benefit to the predator.
(g) Toxic substances must not be kept in food preparation or storage areas.

Minimum Standard No 7 – Physical Environments

(a) The method of containment must not cause harm to the animals.
(b) Water-filled or dry moats used for containment must have a means of escape back to the enclosure for animals falling into them.
(c) Animals in terrestrial environments must be provided with:
   (i) sufficient shelter and shade to provide protection from extremes of wind, rain, flooding, temperature and glare for their comfort and welfare;
   (ii) levels of temperature, ventilation, lighting (both levels and strength), and quietness suitable for the comfort and well-being of the particular species;
   (iii) dry areas which are freely draining.
(d) Animals in aqueous environments must be provided with:
   (i) water of temperatures, salinity, oxygenation, and pH that is appropriate to the species;
   (ii) water which is free of harmful pollutants;
   (iii) enclosures which are durable, watertight, non-porous, non-abrasive, non-toxic and easily cleaned;
   (iv) protection from waste-water and excessive runoff from land and buildings entering the pools.
(e) Animals using both aqueous and terrestrial environments must have appropriate access to areas of both environments and be able to move from either environment without difficulty.
(f) Enclosures must be designed, constructed and maintained so as to –
   (i) be out of range of any neighbouring exhibits housing predator species or territorial animals if this causes distress; and
   (ii) provide space, refuge areas or barriers giving individual animals the opportunity to isolate themselves from other animals in the enclosure and the public gaze; and
   (iii) provide appropriate areas, materials and substrate for animals to construct nests and beds, and safely incubate or give birth to their young and raise them if breeding is possible; and
   (iv) not allow unsupervised public access where that access is likely to lead to harm to the animals; and
(v) prevent the animal from escaping where its welfare is likely to be compromised outside the enclosure.

Minimum Standard No 11 – Normal Patterns of Behaviour

(a) A behavioural and environmental enrichment programme appropriate to the species must be developed and implemented for each species of animal held.
(b) Facilities and provision for normal patterns of behaviour must take into account growth in animals and must be capable of satisfactorily providing for their needs at all stages of their growth and development.
(c) All animals must be given an opportunity appropriate to their species to exercise daily in an area with provision for behavioural enrichment.
(d) Animals must not be routinely tethered except for safety or demonstration reasons, in emergencies, or to facilitate management practices directly benefiting the animal. The tether must not cause physical or prolonged psychological harm.
(e) Pinioning involving significant muscle, tendon, or bone damage to the wing must only be undertaken by a veterinarian and with appropriate pain relief for the bird.
(f) Animals removed from their enclosures for interaction with the public must have been trained or habituated for such interaction and be under the direct control of an animal keeper who has the appropriate ability, knowledge, and professional competence to ensure that such interaction is managed properly.
(g) If animals are trained or perform, –
   (i) the techniques used must be appropriate for the species and the individual animal’s physical and mental capabilities; and
   (ii) sessions must be of a length of time determined by the animal’s reaction and condition but without over-working the animal; and
   (iii) food deprivation and/or electric prods must not be used; and
   (iv) methods must be based on immediate positive reinforcement; and
   (v) training and command implements must be used in such a manner that does not cause unreasonable or unnecessary pain, injury or distress to an animal.

Minimum Standard No 12 – Fear and Distress

(a) Animals must be handled and managed only by, or under the supervision of, appropriately qualified and experienced staff.
(b) Handling must be done with care in order to protect the animal’s welfare and to avoid unnecessary discomfort, stress and physical harm.
(c) Any direct physical contact between animals and the visiting public must be for restricted periods of time and under conditions consistent with the animal’s welfare and not likely to lead to distress.
(d) Animals must not be forced to perform where this would cause them undue stress or negatively impact on their physical or mental health.
(e) Animals temporarily accommodated away from others must not be separated for such a period of time that would cause difficulties when reintroduced to their group unless required for veterinary treatment.
(f) Alternative provisions, such as modifying the physical or social environment, or relocation to a more acceptable enclosure, must be made for individuals or species showing chronic signs of distress related to their environment and management.

Minimum Standard No 14 – Wild Animal Rehabilitation

(a) Rehabilitation of wild animals must be carried out in such a manner that –
   (i) the health of existing zoo animals is protected; and
   (ii) it does not cause unnecessary pain or distress by prolonging the lives of animals that are obviously diseased, injured or stressed and have little prospect of recovery.
(b) Wild animals must not be exhibited while being rehabilitated unless the animal is not subjected to distress associated with being exhibited and all other standards of this code are met.
(c) When a wild animal is returned to its natural habitat, care must be taken to ensure it is not released in circumstances in which it is likely to suffer unnecessarily.
CAPTIVE CETACEANS:
A DYING TREND

World Society for the Protection of Animals

June 2012
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Overview

Purpose of paper

The purpose of this paper is to:

- Consider contemporary society’s attitude to the keeping of cetaceans (whales, dolphins and porpoises) in captivity for public display.
- Ensure the Animal Welfare Strategy clearly states that New Zealand does not support the keeping of cetaceans in captivity.
- Influence future changes to the Marine Mammals Protection Act 1978 (MMPA) which are in line with science and public thinking.

With increased media coverage and society’s growing awareness of the intense suffering experienced by cetaceans kept in confinement for public display, including the release of documentaries such as The Cove, it is becoming increasingly difficult to see a place for this cruelty in a civilised society which prides itself on maintaining high animal welfare standards. It can no longer be effectively argued that marine and dolphin theme parks serve any real educational or conservation purpose. Around the world, people are realising the truth behind this industry, with growing numbers citing the cruelty of whale and dolphin captivity as a reason why the keeping of cetaceans in captivity should be banned.

In New Zealand in June 2008, a Government Select Committee concluded that it would not be “appropriate” to allow the keeping of new dolphins at Napier Marineland, even if funding were available for remodelling the marine park to house new dolphins. A month later, Napier City Council voted 10 to 2 to close Napier Marineland to the public when the remaining dolphin, Kelly, died.

In 2010, Conservation Minister Hon Kate Wilkinson stated in a letter to the World Society for the Protection of Animals (WSPA) that the New Zealand Government was in favour of bringing the MMPA into line with the Department’s Conservation General Policy 4.4k, which states: “Whales and dolphins should not be brought into or bred in captivity in New Zealand or exported to be held in captivity, except where this is essential for the conservation management of the species.”

In her letter, the Minister also stated that a change to the MMPA to prohibit the holding of dolphins for public display would be considered as part of any wider future review of the Act.

Following receipt of Kate Wilkinson’s letter, WSPA let its millions of supporters worldwide know that the New Zealand Government intended to take this positive step for animals and add its name to the growing list of countries which have adopted legislation banning the keeping of cetaceans in captivity, although the MMPA is at present yet to be amended.

Now that the new Animal Welfare Strategy is being formulated alongside a review of the Animal Welfare Act, it is the perfect opportunity to ensure that the protection of cetaceans from being held in captivity is reflected in the text of the Strategy. In addition, the New Zealand Government needs to make the required changes to the parts of the MMPA which relate to the holding, taking, and importing to and exporting from New Zealand of marine mammals (sections 4, 5, 6, 7, 8, 9 and 10) to prohibit these actions from taking place. All other sections of the MMPA would remain unchanged. This amendment to New Zealand’s legislation would bring the country into line with those which have already taken this important step forward for animal welfare, and act as a guiding example to other countries whose standards fall behind.

These proposed changes to the MMPA are supported by New Zealand’s conservation and animal welfare groups, leading marine biologists (including Dr Karen Stockin and

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1 See Appendix 1.
Dr Rochelle Constantine), leading animal welfare academics (including David Mellor),\textsuperscript{2} and many international organisations and marine biologists.\textsuperscript{3}

**Historical trends**

In June 1938, the first cetacean was held in captivity for the entertainment of paying visitors—a bottlenose dolphin at “Marine Studios”\textsuperscript{4}. It was here that the discovery was made that dolphins could be trained to perform tricks.

Recognising the popularity of Marine Studios, more dolphinariums were set up elsewhere. In the 1960s, keeping dolphins in zoos and aquariums for entertainment purposes increased in popularity after the 1963 *Flipper* movie and subsequent *Flipper* television series. In 1966, the first dolphin was exported to Europe. In these early days, dolphinariums could grow quickly due to a lack of regulation and limited awareness of animal welfare.

**New Zealand’s captive cetaceans**

New Zealand has only had one captive cetacean facility—Napier Marineland, in the Hawkes Bay. Its first dolphin was caught and put on display in January 1965. By January 1966 Napier Marineland had 11 dolphins, which were wild-caught using a spring-loaded mechanism which clamped onto the dolphins’ tail.

By the end of the 1970s, at least 50 dolphins had died at Napier Marineland, including two dolphins that were fed nails by vandals in November 1969.

The first and only common dolphin born into captivity at Napier Marineland was in November 1965. The mother was pregnant when she was caught from the wild but the baby died soon after being born at the facility.

Napier Marineland’s last two remaining dolphins, Shona and Kelly, died in 2006 and 2008 respectively. They had been at Marineland since December 1974.

Dolphins caught for the centre were housed in a 1,620,000 litre set of pools, which included a show pool and a holding pool. The facility’s “swim with the dolphins” programme officially opened in December 1992.

**WSPA’s policy**

WSPA, recognising the sentience of cetaceans, is opposed to these species being kept in captivity for public display purposes.

WSPA does not believe there is any valid educational value in dolphinariums or other enclosures that justifies the suffering caused by keeping these intelligent, social creatures in captivity; and therefore does not consider that claims for the “educational value” of cetacean exhibits can be justified.

In addition, WSPA believes that animals should only be kept in zoological collections if they form part of a valid conservation programme, the objective of which is their eventual rehabilitation and release into the wild; and in these circumstances the animals must be kept in a semi-natural environment which meets their physiological and behavioural needs.

**New Zealand’s opportunity**

New Zealand does not at present hold any cetacean species in captivity. With a successful whale and dolphin watching industry which enables the animals to remain in their natural environment, and which also provides an opportunity to educate the public about those

\textsuperscript{2} See Appendix 2.
\textsuperscript{3} See Appendix 3.
\textsuperscript{4} The name “Marineland of Florida” later replaced “Marine Studios.”
species that are a part of the native fauna for which the country is famous, New Zealand has
the opportunity to live up to its reputation as a country with excellent animal welfare,
environmental and conservation policies.

Many countries around the world have already introduced legislation prohibiting the
taking, holding, importing and exporting of cetaceans. Mexico, Hungary, India, Switzerland,
Vietnam and Malaysia have all banned the import or export of dolphins, or both; and Chile,
Costa Rica, Norway, Luxembourg, Slovenia, Croatia and Cyprus have also banned the
keeping of these animals in captivity.

Unfortunately, New Zealand legislation does not provide similar levels of protection for
cetaceans and therefore threatens to undermine the country's work in the South Pacific
Region and in other countries where dolphin exploitation through public display may be
perceived as a lucrative industry. It also seriously contradicts our progressive position in
relation to marine mammal welfare, including our acknowledged expertise on the
management of strandings and our firm stance on whaling.

However, New Zealand has the opportunity to rectify this inconsistent approach, firstly
with a clear statement in the Animal Welfare Strategy rejecting a future where cetaceans are
kept in captivity, and secondly by changing the MMPA to ban the holding and taking of
cetaceans, and their importation to and exportation from New Zealand.
Cetaceans under New Zealand law

Introduction

New Zealand’s MMPA governs the protection, conservation and management of marine mammals within New Zealand waters. The Department of Conservation (DoC) is responsible for administering the Act.

The MMPA restricts the right to take marine mammals, whether alive or dead, from New Zealand’s 200 nautical mile (370 km) Exclusive Economic Zone without first obtaining a permit from the Minister of Conservation. The word “take” is expressly defined in the Act to include take, catch, kill, injure, attract, poison, tranquillise, herd, harass, disturb, possess or brand the mammal, or separate any part of a marine mammal carcass. Any person who “takes” a marine mammal without a permit commits an offence and is liable to imprisonment of up to six months or a fine of up to NZ$250,000.

Likewise, the MMPA allows the holding of marine mammals in captivity and the importation into and exportation from New Zealand of any marine mammal if a permit has been granted by the Minister of Conservation. When making a decision on a permit application, the Minister is required to assess the need to conserve, protect or manage any marine mammal, to consider any international agreement to which New Zealand is a party and to take into account any submissions received.

There is no specific reference to cetaceans in the Animal Welfare Act 1999. However, any cetaceans kept in captivity would be covered by Part 1 of the Act as they are effectively owned animals.

Conservation policy loophole

Most New Zealanders are horrified when told the facts about captive cetacean facilities and the compromised lives that these intelligent animals are forced to live simply to provide a form of entertainment for the public. They are equally as shocked to discover that, although it is illegal to catch cetaceans in New Zealand waters, it is still legal (under certain circumstances) to import them to be kept in captive facilities.

The current loophole in the MMPA seriously contradicts DoC’s Conservation General Policy 4.4k, which states that “whales and dolphins should not be brought into or bred in captivity in New Zealand or exported to be held in captivity, except where this is essential for the conservation management of the species”.

The MMPA overrules the General Policy, and so places New Zealand at risk of having a new dolphinarium or other cetacean park established contrary to the intentions of the conservation policy.
New Zealand Law in Practice: Implications for Animal Welfare

Introduction

In a submission from November 1998 addressed to the Primary Production Select Committee, which was at the time considering the two Animal Welfare Bills that subsequently became the Animal Welfare Act 1999, Professor David J Mellor recommended that special protection should be granted in the Act for hominids (Great Apes) and cetaceans.

Scientific findings have led to developments in moral and ethical thinking regarding the place of non-human animals in our society and how we legitimately use them; these have resulted in changes in our understanding of the capacities and needs of animals. Features of note are their biological similarity to human beings, the sophistication of their behaviour and responsiveness to the environment and to other animals, their potential for cognition and other features of their biological sensitivity. These developments in science and ethical concepts relate especially to mammals, and most particularly to Great Apes and cetaceans.

Today we have a much greater sense of our responsibility towards cetaceans, particularly in relation to not putting them in harm’s way through capture from the wild, retention in captivity and unnecessary transfer between environments.

Developments in science

Physiology

There is compelling physiological and behavioural evidence that cetaceans have large brains which enable a range of complex behaviours. The brains of toothed whales and dolphins are significantly larger than those of any non-human primates and are second only to human brains when measured with respect to body size (Marino, 1998).

Behaviour and stress

Many captive cetaceans show signs of stress in the captive environment. There have been observations of stereotypical behaviour in whales and dolphins, and evidence of self-inflicted mutilation (Marino and Frohoff, 2011). Furthermore, there have been reports of captive whales and dolphins injuring and killing humans. This behaviour is not typical of cetaceans – there is no record of orca killing any humans in the wild despite this having happened in captivity (Marino and Frohoff, 2011).

Sentience

Species of cetaceans have shown the characteristics of sentient animals, with their pain and adrenal systems functioning in the same way as those of other mammals (Reiss and Marino, 2001; Desportes et al, 2007; Broom, 2007). Examples of behaviour which demonstrates their higher cognitive abilities are displays of empathy (Connor, 2000) and grief (Couqiuiaud, 2005). Culture and the transmission of learned behaviour is one of the key attributes of cetaceans which sets them apart from many other non-human species (Marino et al, 2000).

Animal welfare impacts

Reduced lifespan

The management of wild species in a captive environment poses significant challenges with regard to meeting their physical, health and behavioural needs, as required by the Animal
Welfare Act 1999. As the lifespan of cetaceans kept in captive enclosures is often reduced (Small and DeMaster, 1995), it is self-evident that at least some of those needs have not been met over the period of captivity.

**Confined space for highly migratory diving animals**
The confined living area of these animals is a major impediment for three reasons. Firstly, cetaceans (by and large) are migratory, so that captivity thwarts their natural propensity to swim hundreds, even thousands, of kilometres annually.

Secondly, the largest aquariums in the world still represent exceptional confinement in relation to the natural habitat of cetaceans. This is true whether the aquariums consist of the concrete/glass pools commonly used for public displays or of enclosed sea areas. Thirdly, all aquariums cannot provide for the natural diving behaviour of cetaceans.

**Barrenness of the aquarium environment**
The complexity, variety and range of the natural sea and river environment are impossible to duplicate in a concrete/glass pool, and are only marginally improved where there are enclosed sea areas. Providing toys, training and other regular human-cetacean interactions and performances may mitigate the effects of the barren environment to some extent, but cannot fully substitute for the complexity of their natural habitat. Apparent stereotypical behaviour has been seen in captive cetaceans (Gyrax, 1993), and, for other confined wild species, such behaviour has long been regarded as an index of the adverse effects of a barren environment (Mellor et al, 2009).

**Auditory/acoustic stress**
Auditory capability is a major sensory modality in cetaceans. Acoustic dissonance through reverberation and echo from the hard surfaces of the concrete/glass enclosures, together with crowd noise during performances, may contribute to psychopathological behaviour in some animals (Maple, 1981; Krause, 1989; Tudge, 1992; Tromborg and Coss, 1995; Bassos and Wells, 1996). Noise from water pumps and other aquarium machinery can also be a factor (Krause, 1989).

Damaging effects of auditory stressors in aquariums are a major cause for concern.

**Restricted opportunities for social interaction with other cetaceans**
Cetaceans are known to be intelligent mammals which often have complex social structures. With few exceptions, cetaceans in the wild form mixed-sex pods which comprise many individuals; for example, there are usually 5–20 individuals in common dolphin pods (Coleman, 1991), up to 100 members in bottlenose dolphin groups (Gyrax, 1993) and 6–40 in pods of orcas (Coleman, 1991). It is obvious that in pool-type aquariums the space available limits the number of animals that can be kept together, and this inevitably reduces the scope and variety of natural interactions between animals to their detriment.

**Risks from human contact**
When exposed to human contact, cetaceans are susceptible to increased risk. Some of those dangers are noted above, while others include: injuries during performances, or due to collisions with structures in small pools, or from accidental or deliberate interference from the public; and health hazards associated with their complete dependence on aquarium staff to provide appropriate food, and problems due to water contamination and/or inadequate servicing of aquarium water to maintain suitable quality.

**Trauma caused during capture from the wild and transfer between institutions**
Both the capture of wild cetaceans and the transfer of previously held cetaceans between institutions are known to be extremely hazardous for the animals. In a study of 1,256 bottlenose dolphins caught from the wild, the mortality rate during their first 25 days in
captivity was at best 52% and at worst 92%, depending on how the reader interprets the figures provided by Small and DeMaster (1995). The mortality rate when transferring previously held dolphins to other institutions was little better.

These findings accord with observations that dolphins do not seem to ever completely adjust to handling/restraint, even after experiencing considerable exposure to it while in captivity (Thomson and Geraci, 1996). Even the best of the above mortality rates is clearly unacceptable in animal welfare terms (Mellor et al, 2009).
Croatia

*M*Nature Protection Act (OG 70/05), Ministerial Ordinance concerning the conditions of keeping protected animals in captivity, marking methods and keeping records (OG 70/08)*

The Ministerial Ordinance prohibits the keeping of live specimens of all cetacean species in captivity. This primarily concerns a prohibition on keeping cetaceans for commercial purposes in dolphinariums, aquariums and seawater pools. Exceptions can be granted in the case of confiscated, seized or abandoned animals and for the temporary holding of sick or injured animals for treatment and recovery.

Cyprus

*Council of Ministers policy (October 1999)*

The Council of Ministers adopted a policy that, in effect, bans the holding of cetaceans in captivity.

India

*Wildlife Protection Act (1972)*

The importation of wild animals (parts and products), including all cetaceans, is prohibited.

Italy

*Decree 469 “Regulations on the maintenance in captivity of dolphin specimens belonging to the species Tursiops truncates” (December 2001)*

Article 3 prohibits swimming with dolphins and all public interaction with dolphins (including feeding and touching).

Mexico

*Decree adding Article 55 to its Wildlife Act (2000) (January 2006)*

The Decree prohibits the importation and exportation of all cetaceans ("The importing, exporting and re-exporting of specimens of any species of marine mammal ... or any parts or derivatives thereof is prohibited unless intended for scientific research, subject to authorisation being obtained from the Ministry"). Mexico also established a moratorium on the capture of cetaceans in its waters in 2001.

Philippines

*Fisheries Administrative Order 185, series of 1992*

The Order prohibits the taking or catching, selling, purchasing and possessing, transporting and exporting of dolphins. It was subsequently amended in 1997 to include whales and porpoises, making it illegal to “sell, purchase, possess, transport or export” all cetaceans (dead or alive) without a permit from the Bureau of Fisheries and Aquatic Resources.

Slovenia

*Decree on the course of conduct and protection measures in the trade in animal and plant species (Official Gazette of RS, No 39/08)*

Article 16 of the Decree prohibits the use of all cetaceans for commercial purposes, including commercial dolphinariums and therapeutic programmes.
USA

Marine Mammal Protection Act (1972)
The Act regulates the capture and importation of marine mammals and marine mammal products.
Way Forward for New Zealand Law: WSPA’s Submissions

Legislative action

Animal Welfare Strategy
A clear statement should be included in the Animal Welfare Strategy that expresses New Zealand’s moral and scientific opposition to keeping cetaceans in captivity for public display purposes.

WSPA proposes the following wording:

New Zealand recognises and appreciates that advances in science have led to a greater understanding of and appreciation for cetacean species. As cetaceans are sentient, intelligent beings which have complex social structures and exhibit behaviours which we, as humans, value, it is clear that there is moral and ethical opposition to the keeping of cetaceans in captivity for public display purposes.

Marine Mammals Protection Act 1978
The necessary amendments need to be made to the parts of the MMPA which relate to the holding, taking, importing to and exporting from New Zealand of marine mammals (sections 4, 5, 6, 7, 8, 9 and 10) to prohibit these actions from taking place.
References


20 JAN 2009

Chief Executive
WSPC New Zealand
Private Bag 93220
Parnell
AUCKLAND 1151

Dear Mr [Name],

Thank you for your letter of 21 November 2009 regarding an amendment to the Marine Mammals Protection Act (MMPA) 1978 to prevent the holding of cetaceans for public display.

As the Minister stated in the meeting with you last year, the New Zealand Government does not support the keeping of cetaceans in captivity. For this reason, as you are aware, the Department's Conservation General Policy 4.2 states that:

While cetaceans should not be brought into or bred in captivity in New Zealand or exported to be held in captivity, except where this is essential for the conservation management of the species.

It is not possible to change the General Policy without a substantial process of public consultation.

The Government is in favour of bringing the Marine Mammals Protection Act into line with the General Policy, and New Zealand's approach to the keeping of cetaceans in captivity. Ideally, the Act and the General Policy would be consistent and, as indicated at your meeting with the Minister, a change to the Act will be considered as part of any wider review of it.

Yours sincerely,

Associate Minister of Conservation
Appendix 2

Animal Welfare Science and Bioethics Centre

Hon Tim Groser
Minister of Conservation
Parliament Buildings
Wellington

1 November 2009

Dear Hon Tim Groser,

I understand that the World Society for the Protection of Animals (WSPA) is requesting that you initiate an amendment of the Marine Mammal Protection Act (MMPA) 1978 to prohibit the holding of cetaceans for public display.

I wish to support this initiative, but independently, as a recognised authority on animal welfare (see brief curriculum vitae below). I note that in 2002, when I was Chairman of the National Animal Welfare Advisory Committee (tenure 1999-2003), I provided detailed advice on this matter to the then Minister of Agriculture who communicated it to the then Minister of Conservation.

I have provided here with an updated version of the advice I prepared at that time, because its principal features still apply today.

General background

In a submission (dated November 1998) to the Primary Production Select Committee, which was then considering the two Animal Welfare Bills that subsequently became the Animal Welfare Act 1999, I made several points about changes in international views on the relationship between humans and other animals. These points were made specifically in the context of what, if any, special protection should be provided in the Animal Welfare Act for hominids (Great Apes). However, I included reference to cetaceans as well.
I noted then that, internationally, there was a clear trend towards providing greater protection for hominids (Great Apes) and other primates, as also for cetaceans (whales, dolphins, porpoises). In the intervening seven years the significant public and scientific concern that underlay that trend has become very much stronger.

Developments in moral and ethical thinking regarding the place of non-human animals in our society, and how we may legitimately use them, have reflected changes in our understanding of the capacities and needs of animals. Features of note are their biological similarity to human beings, the sophistication of their behaviour and responsiveness to the environment and to other animals, their potential for cognition, and other features of their biological sensitivity. These developments in ethical and moral thinking have related to animal species generally, but especially to mammals, and most particularly the Great Apes and, running a close second, cetaceans as well.

Those developments have led to a much greater sense today of the responsibilities we have towards all animals with which we interact, responsibilities expressed through the guardianship roles we adopt and the protections we afford them. These protections, in the case of cognitively advanced wildlife species, include not putting them in harms way through capture from the wild, retention in captivity and transfer between captive environments. New Zealand is in the fortunate position at present of no longer having any cetaceans in captivity.

I strongly recommend that a prohibition be placed on the retention of cetaceans in captivity for public display for the reasons enumerated below which relate to the very significant negative animal welfare consequences of doing so.

Specific animal welfare concerns

1. **Reduced life span.** The management of wild species in a captive environment poses significant challenges with regard to meeting their physical, health and behavioural needs, as required by the Animal Welfare Act 1999. As the life span of cetaceans kept in aquaria is often reduced (Small and DeMaster, 1995), it is axiomatic that at least some of those needs have not been met over the period of captivity.

2. **Confined space for highly migratory, diving animals.** This is a major impediment for three reasons. First, cetaceans, by and large, are migratory, so that captivity thwarts their natural propensity to swim hundreds, even thousands, of kilometres annually. Second, the largest aquaria in the world still represent exceptional confinement in relation to the natural habitat of cetaceans. This is true whether the aquaria consist of the concrete/glass pools commonly used for public displays or enclosed sea areas. Third, all aquaria thwart the natural diving behaviour of cetaceans.

3. **Barrenness of the aquarium environment.** The complexity, variety and range of the natural environment are impossible to duplicate in concrete/glass pool aquaria, and are only marginally improved in enclosed sea areas. Providing toys, training and other regular human-cetacean interactions and performances may mitigate the effects of the
barren environment to some extent, but cannot fully substitute for the challenges and variety of the natural environment. Apparent stereotyped behaviour has been seen in captive cetaceans (Gryax, 1993), and in other animals such behaviour has long been regarded as an index of adverse effects of a barren environment (Mellor, Patterson-Kane and Stafford, 2009).

4. Auditory/acoustic stress. Auditory capability is a major sensory modality in cetaceans. Acoustic dissonance, through reverberation and echo from the hard surfaces of concrete/glass enclosures, together with crowd noise during performances, may contribute to psychopathological behaviour in some animals (Maple, 1981; Krause, 1989; Tudge, 1992; Tromborg and Cost, 1995; Bassos and Wells, 1996). Noise from water pumps and other aquarium machinery can also be a factor (Krause, 1989). Deleterious effects of auditory stressors in aquaria are a major cause for concern.

5. Restricted opportunities for social interaction with other cetaceans. With few exceptions, cetaceans in the wild form mixed-sex pods which may comprise 5-20 individuals in common dolphins (Coleman, 1991), up to 100 members in bottlenose dolphins (Gryax, 1993) and 6-40 in orcas (Coleman, 1991). It is obvious that in pool-type aquaria the space available limits the number of animals that can be kept together and that such limits inevitably reduce the scope and variety of natural interactions between animals, to their detriment.

6. Risks from human contact. When exposed to human contact, cetaceans are indeed exposed to increased risk. Some of those risks are noted above. Others include injuries during performances, or due to collisions with structures in small pools, or from accidental or deliberate interference from the public; and health hazards associated with their complete dependence on aquarium staff to provide appropriate food, and problems due to water contamination and/or inadequate servicing of aquarium water to maintain adequate quality.

7. Trauma caused during capture from the wild and transfer between institutions. Both the capture of wild cetaceans and the transfer of previously held cetaceans between institutions are known to be extremely hazardous for the animal. In a study of 1,256 bottlenose dolphins caught from the wild, the mortality rate during the first 25 days in captivity at best was 52% and at worst was 92%, depending on how the reader interprets the figures provided by Small and DeMaster (1995). The mortality rate when transferring previously held dolphins to other institutions was apparently little better. This accords with observations that dolphins apparently do not completely adjust to handling/restraint even after experiencing considerable exposure to them while in captivity (Thomson and Geraci, 1985). Even the best of the above mortality rates is clearly unacceptable in animal welfare terms.

Comments

Animal welfare is multifactorial. A good animal welfare status requires us, as custodians of the animals, to meet their nutritional, environmental, health, behavioural and mental needs.
(Mellor, Patterson-Kane and Stafford, 2009) – this wide range of needs is encompassed in the Animal Welfare Act 1999 where it refers to the "physical, health and behavioural needs" of animals.

Cetaceans are apparently highly intelligent, social, wild animals. I believe that they have a special status and therefore merit special protection. Only a small proportion of them can survive capture and/or transfer, and all of them will experience major deprivations and other forms of welfare compromise in captivity. I do not think that the harms done to cetaceans by keeping them in captivity can be justified by arguments of educational benefit and tourist novelty when there are numerous other avenues in New Zealand to gain similar experiences.

I therefore strongly recommend that you take steps to prohibit the holding of cetaceans in captivity for public display.

Yours sincerely,

Co-Director, Animal Welfare Science and Bioethics Centre
Professor of Animal Welfare Science
Professor of Applied Physiology and Bioethics
Massey University
Palmerston North

References


Brief Curriculum Vitae – Professor David J Mellor

David Mellor is currently Professor of Applied Physiology and Bioethics, Professor of Animal Welfare Science and Co-Director of the Animal Welfare Science and Bioethics Centre at Massey University in New Zealand, positions he has held since 1998. Previously at Massey, between 1988 and 1998, he was Professor and Head of the Department of Physiology and Anatomy in the Veterinary Science Faculty. Between 1969 and 1987 he was Head of the Physiology Department at the Morayfield Research Institute in Edinburgh Scotland. He has a BSc(Hons) from New England University (1966) and a PhD from the University of Edinburgh (1969). He has been made an Honorary Associate of the Royal College of Veterinary Surgeons (HonAssocRCVS – 2002) and an Officer of the New Zealand Order of Merit (ONZM – 2007) for his contributions to the advancement of animal welfare science and practice in New Zealand and internationally.

His other activities have included: World Organisation for Animal Health (OIE) Ad Hoc Group member (2003-2005), Chairman, NZ National Animal Welfare Advisory Committee (1999-2005) and Member, NZ National Animal Ethics Advisory Committee (1993-1998), both of which are Ministerial Advisory committees; Executive Vice-Chairman of the Australian and New Zealand Council for the Care of Animals in Research and Teaching (ANZCCART) in NZ (1992-1998). Accordingly, he has wide experience of integrating scientific, veterinary, industry, consumer, animal welfare, legal, cultural and other interests during the development of national animal welfare standards, regulations and legislation, chiefly in New Zealand, but also internationally.

Professor Mellor has more than 442 publications in his areas of expertise, at least 235 of which are significant works of scholarship, including 4 books.
Appendix 3

Hon Tim Groser
Minister of Conservation
Parliament Buildings
Wellington

24 November, 2009

Dear Hon Tim Groser

I am writing on behalf of the undersigned to ask for your assistance to amend New Zealand's Marine Mammal Protection Act (MMPA) 1978 to prohibit the holding of cetaceans for public display.

With the release of documentaries like The Cove, it is becoming increasingly difficult to argue that dolphin theme parks serve any real educational or conservation purposes. The general public is starting to realise the truth behind this industry, with more and more people citing the cruelty of dolphin captivity as a reason why their governments' should ban the keeping of cetaceans in captivity.

Many countries around the world already have legislation prohibiting the taking, holding, importing and exporting of dolphins. Mexico, Cyprus, Hungary, India and Malaysia have all banned the import or export of dolphins, or both, and Chile, Costa Rica, Croatia and Cyprus have also banned the keeping of these animals in captivity.

Earlier this year, an alliance of European and international animal welfare and conservation groups launched a public campaign calling on the EU to implement a ban on the construction of new dolphinariums, plus a ban on the trade of whales and dolphins into the EU, in EU applicant countries and Switzerland.

We are concerned that New Zealand's MMPA does not provide the same levels of protection, thus undermining the country's progressive stance on marine mammal conservation and welfare.

The current loophole in the MMPA also seriously contradicts the Department of Conservation's 'Conservation General Policy 4.4k' which states that, 'whales and dolphins should not be brought into or bred in captivity in New Zealand or exported to be held in captivity, except where this is essential for the conservation management of the species'.

The MMPA overrules the General Policy placing New Zealand at risk of seeing a new dolphinarium established contra to the intentions of the conservation policy.
We, the undersigned, urgently request that the New Zealand Government, in the most efficient and expedient way possible, amend the MMPA to prohibit the taking, keeping, importing and exporting of cetaceans for display or zoological purposes, in accordance with the international progress on this issue.

Kind regards

Programmes Manager
World Society for the Protection of Animals

On behalf of:

New Zealand organisations and individuals

Chief Executive Officer, New Zealand Vet Association (NZVA)
Head of Department, Department of Natural Sciences, Associate Dean Research, Faculty of Social and Health Sciences, Unitec Institute of Technology
School of Biological Sciences, University of Auckland
Marine Ecology, Coastal Marine Research Group, Institute of Natural Sciences, Massey University
Institute of Veterinary, Animal and Biomedical Sciences, Massey University
Senior Lecturer, Public Law, Environmental Law and International Environmental Law School, Otago University
Associate Director, Coastal and Marine, New Zealand Tourism Research Institute, AUT University
National President, New Zealand Royal SPCA
Executive Director, Greenpeace New Zealand
Senior Biologist, Whale Dolphin Conservation Society
Campaign Director, Save Animals from Exploitation (SAFE)
Chief Executive Officer, Project Jonah New Zealand
Executive Director, WWF New Zealand
General Manager, Royal Forest and Bird Protection Society of New Zealand Inc

Marine Conservationist
International organisations and individuals

Honorary President, Tethys Research Institute, Italy
IWC Scientific Advisor and Alternate Commissioner for
Luxembourg

Department of Environmental Science & Policy,
George Mason University, USA
Peruvian Centre for Cetacean Research (CEPEC),
Pucusana, Lima, Peru
President, Tethys Research Institute and Pew Marine
Conservation Fellow
Ecology and Evolutionary Biology, University of Colorado,
Boulder
Neuroscience and Behavioural Biology Program, Emory University,
Atlanta, USA
Director of the documentary *The Cove*
featured in the documentary *The Cove*
and, Sea Vida, Venezuela
Chairman, The Nordic Oceanica Society
Animal Welfare Institute, USA
Bluevoice, USA
Born Free Foundation
Born Free USA
British Divers Marine Life Rescue
Campaigns Against the Cruelty to Animals, Canada
Canadian Marine Environment Protection Society, Canada
Coalition For No Whales In Captivity, Canada
Gesellschaft zur Rettung der Delphine e.V., Germany
Captive Dolphin Awareness Foundation, USA
Care for the Wild International
Centro de Conservación Cetácea, Chile
Cetacean Society International
Dauphin Libre, Belgium
Earth Island Institute
Earthtrust, Hawaii
Eastern Caribbean Coalition for Environmental Awareness
Elsa Nature Conservancy, Japan
Finns for the Whales, Finland
Free Willy Keiko Foundation, USA
Humane Society International
International Animal Rescue
Irish Seal Sanctuary, Ireland
Lifeforce Foundation, Canada
Marine Connection, UK
New York Whale and Dolphin Action League, USA
OceanCare, Switzerland
Ocean Friends, USA
Oceanic Preservation Society
Orca Network, USA
Pro Wildlife, Germany
RSPCA UK
Save Japan Dolphins
Society for the Conservation of Marine Mammals, Denmark
The Dolphin Project, USA
The Humane Society of Canada
Voice for Animals Humane Society, Canada
Whale Dolphin Conservation Society (WCS)
World Society for the Protection of Animals (WSPA)
Zoocheck Canada, Canada
LONG DISTANCE TRANSPORT OF ANIMALS FOR SLAUGHTER: A TRADE IN SUFFERING

World Society for the Protection of Animals

June 2012
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Overview

Purpose of paper

The purpose of this paper is to:

- Consider contemporary society’s attitude to animals being transported long distances for slaughter.
- Present a case for a legislative ban on the export of live animals for slaughter as part of the Animal Welfare Strategy and the Animal Welfare Act 1999 review process.

In November 2007, the New Zealand Government introduced the Customs Export Prohibition (Livestock for Slaughter) Order (CEPO). Although not a blanket ban, the new legal requirement prevents live animal exports for slaughter unless the risks to New Zealand’s trade reputation can be adequately managed.

The World Society for the Protection of Animals (WSPA) wholeheartedly supports the introduction of the CEPO, but urges the New Zealand Government to go one step further and prohibit all future exports of livestock for slaughter, regardless of the country of disembarkation and the standards imposed on the trade.

Despite efforts by a number of countries to improve the welfare of transported livestock, WSPA believes it is impossible to prevent the inherent suffering caused to animals transported lengthy distances by sea.

As previous experience has shown, the transportation of livestock over long distances, regardless of their destination, poses numerous animal welfare risks. The two most disastrous examples of livestock exports from Australasia are the Comor Express, which in 2003 resulted in the death of 6,692 sheep, and the MV Beurlay, which in 2002 resulted in the death of around 380 cattle and 1,400 sheep. While these are the worst examples of welfare abuse where the animals concerned suffered shocking conditions for the sake of this trade, it is clear that no livestock export occurs without its casualties.

In Australia, despite the development of the Australian Standards for the Export of Livestock, the Australian Government and livestock industry have not been able to prevent the deaths of tens of thousands of sheep each year. Suffering caused by such extensive journeys in these conditions is simply unavoidable.

According to the Ministry of Agriculture and Forestry’s (MAF) 2004 figures, the mortality rate on the country’s last sheep shipments in 2004 was just under 1%, which is approximately 320 sheep. This is despite the introduction of the Code of Recommendations and Minimum Standards for the Sea Transport of Sheep from New Zealand in 1991 and the setting of the minimum age of sheep exports in 1994.

In the Australian live export industry, over three quarters of all sheep deaths occur on the ship itself, with about one fifth of the deaths occurring at the discharge port and a very small number occurring in the pre-export assembly depot.

Incidents involving ships travelling from New Zealand, such as those mentioned above, would be detrimental to our reputation as a “clean, green and humane” exporter. New Zealand’s agricultural exports are reliant on delivering premium products linked to sustainability while maintaining our standard as a worldwide leader in animal welfare.

It is essential to retain the confidence of consumers. Potentially, even a small decline in trade due to consumer resistance to New Zealand agricultural exports would have a greater impact on the economy than any lost revenue from restricting livestock exports for slaughter elsewhere.

Thanks to developments in science and a growing understanding of sentience, animals are now generally recognised by the public as beings which are deserving of humane treatment throughout their lives regardless of their intended use. Livestock are not simply
another agricultural product – the animals should be protected from mistreatment, and society is demanding that certain welfare criteria are met.

The long distance transportation of animals falls well short of providing animals with this level of protection, and contradicts New Zealand’s pioneering animal welfare legislation and usually high standards.

As the Animal Rights Legal Advocacy Network concluded (ARLAN, 2004):

... live sheep export is fundamentally incompatible with the principles of the Animal Welfare Act 1999.

... As has been seen, the practice of live sheep exports has had a troublesome and tragic history and although attempts have been made at improving the practice, it still presents numerous animal welfare questions that have not been properly addressed. In New Zealand the Animal Welfare Act 1999 specifically covers the care and transportation of live animals and it is the author’s opinion that several sections of the Act are likely being breached when sheep are exported under the current conditions. ...

Equally troubling [are] the difficult issues of jurisdictions and enforcement that can arise in situations where a breach occurs on a ship not registered in New Zealand and which is outside New Zealand territorial waters. As these ships originate in New Zealand, this country’s government must retain the ability to supervise every aspect of the shipping process. Indeed, the inability to properly do so, given the historical evidence of welfare issues, is a large point in favour of halting the shipments entirely.

In order to best provide for the welfare of sheep, it is therefore submitted that no live sheep exports should take place from New Zealand, as it cannot be guaranteed that such sheep will be transported in a manner which will not cause them to “suffer unreasonable or unnecessary pain or distress”. Nor can it be said that each animal will be “properly attended to”, or provided “reasonably comfortable and secure accommodation” for the purpose of “maintaining acceptable welfare standards”.

A firm decision by the Government to solidify a ban could be a significant turning point in the history of the long distance transportation of animals for slaughter, not only for this country but more broadly for those who look to New Zealand as a leader on issues relating to animal welfare.

History of the trade

On 15 February 1882, the sailing ship Dunedin left New Zealand on a 98-day voyage to London. For the first time, it was carrying 5,000 frozen sheep carcasses the 12,000 miles to Britain, in a bold venture for the newly formed Bell-Coleman Mechanical Refrigeration Company.

When the meat export reached the Port of London, people were amazed. The Times newspaper reported: “Today we have to record such a triumph over physical difficulties as would have been unimaginable very few years ago. New Zealand has sent into our London market five thousand dead sheep in as good condition as if they had been slaughtered in some suburban abattoir.”

Concern over the unnecessary transportation of live animals following the success of the trade in refrigerated carcasses has lasted for generations. In 1868, Samuel Plimsoll, an English Member of Parliament, unsuccessfully petitioned for a Bill in Parliament to prohibit the importation of live cattle for food.

These days, cattle from New Zealand are not exported for slaughter and are instead always transported by sea as carcasses. However, the overseas trade in live sheep from New Zealand continued more persistently. The last export of sheep for slaughter from New Zealand was in 2003. The export of carcasses has proven to be a successful industry – New
Zealand is the world’s largest exporter of halal slaughtered sheep meat and has been exporting frozen and chilled meat to Saudi Arabia for many years.

**Opposition to New Zealand’s live export industry**

The majority of the New Zealand Government and public have shown that they are fundamentally opposed to such exports.

In December 2008, WSPA commissioned The Nielsen Company to undertake a public opinion poll to ascertain New Zealanders’ views on the country resuming its live sheep trade. Only 26% of those asked stated that they wanted New Zealand’s live sheep trade to resume. Around 81% believed the best method for transporting meat overseas was as frozen or chilled meat from animals slaughtered in New Zealand.

Going against this public feeling, on 23 March 2009, in reply to a parliamentary question by Sue Kedgley from the Green Party, Agriculture Minister Hon David Carter released the following statement:

Since 2004, New Zealand has been negotiating towards a bilateral Arrangement with Saudi Arabia to re-open the way for the export of live sheep for slaughter. Agreement has been reached on a number of substantive issues, although there is no timetable for the completion of negotiations.

The draft Arrangement followed the same terms as the agreement drawn up between Australia and Saudi Arabia which has paved the way for the resumption of live sheep exports from Australia.

Although the Minister insisted that any future exports would have to meet strict animal welfare standards as laid out in the CEPO, the public outcry both within New Zealand and internationally was significant.

The Government received thousands of letters from New Zealanders horrified at the news that the country was considering resuming its live sheep trade.

More than 26,460 people from 123 countries signed petitions addressing the New Zealand Prime Minister, and numerous animal welfare organisations – including Compassion in World Farming and the Humane Society International – wrote to the Agriculture Minister asking him not to allow this cruel and unnecessary trade to resume.

The issue received significant media attention, with the Sunday programme running a feature questioning the benefits to the country of resuming a live sheep trade.

Federated Farmers also expressed the need for animal welfare standards to be maintained, and publicly stated that they would be making enquiries with MAF to ensure that the highest standards were imposed.

By September 2009, Hon David Carter, to his credit, was no longer talking about the live sheep trade as being an “opportunity” for New Zealand farmers. His office was instead stressing that strict animal welfare standards, both during transport and on arrival, would have to be met if the exports were to resume, and that any new agreement with Saudi Arabia would not automatically herald a resumption of the trade.

Hon David Carter stated in a letter to WSPA that:

… animal welfare is vitally important to New Zealand and I am very aware of the strong public opinion on this matter. I am also conscious of international animal welfare organisations’ opposition to the long distance transportation of live animals for slaughter.

I can assure you that as Minister of Agriculture, I am committed to protecting and promoting New Zealand’s reputation as a responsible exporter of agricultural products and that I will continue to work in Government to achieve this objective.
WSPA's policy

WSPA would like to see an end to all long distance transport of animals for slaughter, so that the export of animals for food is replaced by a carcass-only trade.

WSPA advocates that food animals should be slaughtered as close as possible to the point of production. This is best for the welfare of the animals concerned and has human health benefits, preventing the spread of disease.

WSPA believes that transport by sea for animals destined to be slaughtered for their meat should be forbidden, except where it is necessary to reach the nearest slaughterhouse and is in the best interests of the animals concerned.
Live Animal Exports under New Zealand Law

Introduction

New Zealand exports a wide range of species including horses, deer, cats, dogs, bees, goats, day-old chicks, ferrets, wallabies, embryos and semen. Livestock are especially sought after due to their high genetic value and as New Zealand is free from most major exotic diseases. Groups that are too large for transport by air are shipped by sea.

New Zealand has not been shipping any cattle for slaughter for some time, and the export of live sheep for slaughter has dwindled since the 1990s, with the last shipment being in 2003. The country does, however, export live cattle and sheep for breeding.

Animal Welfare Act and animal exports

Part 3 of the Animal Welfare Act 1999 protects the welfare of animals which are being exported live from New Zealand by ship or aircraft, ensuring that the risks the animals face are minimised.

Under the Animal Welfare Act 1999, all animals for export (unless specifically exempted) must be issued with an animal welfare export certificate (AWEC), which takes account of animal welfare requirements and covers compliance with standards.

The Director-General will assess a formal application on its merits on a case-by-case basis, taking into account the relevant factors under the law. For more complex voyages, the Ministry for Primary Industries (MPI) will provide regular progress updates on the evaluation of the application until a decision is reached.

If the Director-General grants an application, the applicant will be provided with an "in-principle" AWEC. This will specify, in writing, conditions that must be met before the MPI verification agency port veterinarian issues the final AWEC on the day of export.

The Director-General will, as a minimum, impose conditions requiring:

- That the livestock are fit and healthy for the journey.
- That the ship or aircraft and other relevant aspects of the export comply, as appropriate, with the MPI sea transport standard(s) or the International Air Transport Association Live Animals Regulations.
- That the applicant submit a voyage report to the MPI within 10 working days of completing the journey.

An experienced New Zealand stock handler must accompany shipments of cattle. Some shipping companies also send veterinarians. All shipments are inspected by an MPI veterinarian before they depart.

A shipping report is completed at the end of each voyage which records any deaths, the weather, feed and water supplies, and any issues which affected the welfare of the animals.

Sea-bound shipments have additional requirements as outlined in the Maritime Rules, which are monitored by Maritime New Zealand. These cover ventilation, feed and water, space requirements, pen height requirements, etc.

Some animals are exempt from the need to obtain such certificates under law where the risk to their welfare from being transported is considered to be low. This includes crabs, crayfish, fish, lobsters, octopuses, squid, poultry hatching eggs, pet animals departing on any ship, and cats and dogs exported to Australia.

Flights longer than six hours, and sea transport, are not exempt from the requirement for an AWEC because the welfare of animals during longer travel is at greater risk from
environmental factors such as extreme temperature and associated physiological changes such as dehydration.

**Interface with Department of Conservation legislation**

Section 52 of the Animal Welfare Act clarifies the link with animals being exported in accordance with conservation legislation. It requires exporters of animals acting under conservation legislation to meet certain animal welfare requirements, as well as meeting the specialist conditions of the Department of Conservation (such as the Trade in Endangered Species Act 1989). An AWEC is not required in these circumstances.

**Customs Export Prohibition (Livestock for Slaughter) Order**

The CEPO explicitly prevents all exports of livestock for slaughter unless approval is obtained on a specific case-by-case basis from the Director-General of the MPI. Factors which the Director-General may take into account when considering exemptions include making sure the importing country meets relevant World Organisation for Animal Health (OIE) guidelines relating to the slaughter, unloading, post-journey handling and transport of livestock. In accordance with the requirements of New Zealand’s Animal Welfare Act 1999, exporters will also need to satisfy the Director-General as to the conditions for the international transport of livestock up to the point of disembarkation. Where livestock are being transported by sea, there may be requirements for an MPI-accredited veterinarian to accompany the shipment, for experienced stock handlers to be on board, and provision to be made for rapid disembarkation and, if required, quarantine.

When the CEPO expired in December 2010, it was rolled over for a further three years to allow the MPI to look at the broader issue of live exports as part of the Animal Welfare Act review.¹

Livestock as defined in the CEPO is only “cattle, deer, goats, or sheep”. While there is no current demand for the live export for slaughter of anything other than sheep, with the rules as they are at present under the CEPO any other breed of livestock (pigs, alpaca, etc) could be exported for slaughter without the consent of the Director-General, which is a very concerning loophole.

Awassi New Zealand Ltd is currently the only company that wants to export live sheep from New Zealand. Awassi has a 50,000 strong flock it wishes to export. Between 1986 and 2002, the company transported more than 4 million sheep from New Zealand to Saudi Arabia.

However, no formal application to export has been made since the CEPO has been in place, so in many respects the standing of the CEPO has yet to be tested. In theory, the Director-General could at any time, depending on the circumstances, consent to the export of sheep to the Middle East for slaughter.

**World Trade Organization**

As a member of the World Trade Organization (WTO), New Zealand has certain obligations under WTO agreements. Due to this, New Zealand cannot prohibit the export of animals to other WTO member countries on the basis of management procedures in the country of importation.

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¹ See the MPI’s website at www.mpi.govt.nz.
New Zealand Law in Practice: Implications for Animal Welfare

Introduction

Transportation is one of the most stressful events in the life of a farmed animal. The debate regarding live exports takes place against a background of growing evidence that long distance transport may be linked with the spread of animal and human diseases, and increasing international public concern for animal welfare.

According to the Food and Agriculture Organization of the United Nations (FAO), "transport of livestock is undoubtedly the most stressful and injurious stage in the chain of operations between farm and slaughterhouse" and can lead to a significant loss of production. Stress might have a negative effect on the immune system and this can result in increased susceptibility to infection and increased infectiousness.

The European Food Safety Authority recognises these issues and concludes that "Transport should therefore be avoided wherever possible and journeys should be as short as possible" (EFSA, 2004).

This view is reinforced by the Federation of Veterinarians of Europe, which has stated: "Animals should be slaughtered as near the point of production as possible. The journey time for slaughter animals should never exceed the physiological needs of the animal for food, water or rest. The long distance transport of animals for slaughter should be replaced, as much as possible, by a carcass only trade" (FVE Position Paper, 2001).

WSPA has identified the long distance transport of animals for slaughter as one of the greatest causes of suffering of animals in the world, and is working with governments to replace the live transportation of animals with a carcass-only trade to make the meat industry more humane and sustainable.

Animal welfare issues

Transporting animals involves changes to their whole environment. They are moved from familiar areas and encounter strange materials, smells, sights, sounds and vibrations; they are handled differently and are mixed with unfamiliar animals; they are subjected to changes in temperature and air movement; they are possibly hurt or injured; and they are restricted in space, feed and water. Animals involved in long distance transport suffer from an increased chance of disease, stress, hunger, thirst, discomfort, pain, frustration, fear, distress, injury and, in some cases, death.

The biggest contributors to sheep mortality during live exports are persistent failure to eat (known as inanition, which accounts for nearly half of all deaths) and/or salmonellosis (which causes about one fifth of all deaths). Inanition occurs primarily due to the animals being transferred from a pasture-based diet to a concentrated pellet feed, which they are not used to. A smaller proportion of sheep, estimated at about 10%, die through trauma such as injuries sustained during loading or handling procedures, and around 5% die from other diseases. Sheep that have not fed are predisposed to salmonellosis, and stress is known to be involved in lesion development. The main causes of death in cattle are heat stroke, trauma and respiratory disease.

However, mortality rates alone are not an accurate measure when it comes to assessing the welfare of animals being transported. Those that die on an export journey are at the most extreme end on a scale of suffering; unfortunately, a huge percentage of animals suffer from

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2 FAO, 2011.
pain, injury, disease and severe distress during long distance transportation but their conditions might not result in death prior to reaching the slaughterhouse.

The long duration of exports from New Zealand and the changes to the animals’ environment provide particular and more drastic challenges compared to other short distance transport. Vessels can encounter hazardous seas and extreme changes of temperature and humidity, particularly during long journeys from the southern to the northern hemisphere. For example, animals travelling from a relatively cool New Zealand winter can encounter midsummer air temperatures in Middle East waters of around 40°C.

The temperature inside the ship is difficult to regulate as heat is generated by the livestock and the ship’s engines, which is often combined with a high ambient temperature, making heat stress a common and serious problem on export vessels.

Other common stressors affecting the animals’ welfare during a long sea journey include noise, motion sickness, changes in lighting patterns and novel environments.

Cattle or sheep are unable to predict all of the movements of the ship, especially when it is near to shore where the wave motion is complex. There is anecdotal evidence of stress to these animals caused by high seas, as well as evidence of motion sickness.

All animals use changes in photoperiod as cues to time events in the circadian rhythm of activity. The transition from the natural day length to an artificial, controlled lighting pattern of continuous low intensity light provided by fluorescent tubes on the ship is sudden and without precedent for most animals coming off pasture.

It is not only the sea journey itself which exposes the animals to stress and physical suffering. The export process involves more than just the shipping of livestock – it begins with the mustering of the stock, often on remote properties, and it ends with the animal being slaughtered weeks later in the country of destination. In between, the stock are handled at least five or six times and the whole process is likely to last between one and two months. Little is known about the cumulative effects of these combined stresses on the welfare of the animals, but it is possible that multiple stressors could make the animals anxious, depressed or enter a phase of learned helplessness, in which they become unresponsive to the environment around them and unwilling to fight for their survival.

Loading and unloading
Many studies have shown that loading and unloading are the most stressful part of transport. The huge impact that loading may have on the welfare of animals results from a combination of several stressors that impinge on them in a very short period of time.

One of these stressors is forced movement as the animals are herded on and off trucks and boats. Secondly, psychological stress is caused by the change in being moved into unknown surroundings. Mixing unfamiliar animals can result in an increase in aggression, which in turn leads to additional stress. Also, loading requires close proximity to humans and this can cause fear in animals that are not habituated to human contact. Finally, pain may result from mishandling of animals at loading and, in particular in the case of exports, unloading when undertaken by poorly trained stock handlers in foreign countries.

Poor welfare during loading is evidenced by animals stopping, animals turning and being difficult to drive, fear vocalisations, high heart rate, high cortisol concentrations in plasma or saliva, and high concentrations of other hormones such as prolactin and vasopressin.

Physiology and disease
The FAO describes live animal transport as “ideally suited for spreading disease”, given that animals may originate from different herds or flocks and are “confined together for long periods in a poorly ventilated stressful environment”.

Although, in many countries, systems are in place to avoid the transport of animals that show signs of disease, the problems arising from moving subclinically infected animals and the difficulties of detection remain unresolved.
Of the diseases known to be transmitted during transport, the American Veterinary Medical Association (2007) considers foot and mouth disease (FMD) to be the world’s most economically devastating. Others include classical swine fever, exotic Newcastle disease of birds, bovine viral diarrhoea, African swine fever, swine dysentery, swine vesicular disease, porcine reproductive and respiratory syndrome, post-weaning multisystemic wasting syndrome, porcine dermatitis and nephropathy syndrome, enzootic pneumonia, bovine rhinotracheitis, glanders and sheep scabies (FVE, 2001).

Historically, dozens of outbreaks of FMD have been tied to livestock movements (USDA/APHIS, 1994) and contaminated transport vehicles (OIE/FAO, 2001).

Although the origin of the 2001 British FMD outbreak was blamed on the illegal importation of contaminated meat (UK House of Commons Library, 2001), the subsequent devastating spread across the United Kingdom was, according to the OIE, “mainly attributed to the movement of subclinically infected animals, principally of sheep, and by contact with contaminated vehicles used for the transportation of these animals” (OIE/FAO, 2001). The extensive spread facilitated by long-range transport not only makes easy eradication impossible but also undermines “regionalisation”. Regionalisation is the OIE policy allowing affected areas of a country to be risk-stratified independently, thereby limiting international trade losses that would otherwise mount should an entire country be given a single disease-affected status.

Including tourism losses, the cost of the 2001 UK outbreak has been estimated at $20 billion (AVMA, 2007). The further spread of this FMD outbreak into France was via the export of infected sheep, and the spread of the disease into the Netherlands was traced to certified FMD-free calves imported from Ireland; the latter contracted the virus in transit at an overnight resting stop in France. Thus, it is clear that live animal transport plays a significant role in both the spread and the transmission of infectious disease.

**Human health risks**

As costly and disruptive as livestock disease outbreaks can be, long distance live animal transport can also facilitate the spread of animal pathogens with the potential to cause human disease.

For example, Rift Valley fever (RVF) is known to be endemic in most of the sub-Saharan countries, but in September 2000 the first outbreak of the disease outside Africa occurred in Saudi Arabia and Yemen, due to the transport of animals from the Horn of Africa to the Arabian peninsula. From September 2000 to February 2001, a total of 124 human deaths and 884 hospitalised patients were reported in Saudi Arabia, and there were a further 121 human deaths and 1,087 hospitalisations in Yemen. But, due to the magnitude of the outbreak across a large geographical area, the total number of infections was unknown, with data from previous outbreaks suggesting that the number of hospitalised patients represented a small percentage (<1%) of those actually infected. The potential for further spread of the disease in the region is well acknowledged, particularly during the celebration of the Eid festivals, when large movements of animals occur from the Horn of Africa to the Arabian peninsula (FAO, 2007).

The Nipah virus emerged in 1998 on an industrial pig farm in Malaysia and become one of the deadliest of human pathogens, causing relapsing brain infections and killing 40% of those infected. The disease erupted in the northern part of the Malaysian peninsula, but was trucked nationwide through the live transport of animals. “A hundred years ago, the Nipah virus would have simply emerged and died out,” the Thai Minister of Public Health explained. “Instead it was transmitted to pigs and amplified. With modern agriculture, the pigs are transported long distances to slaughter. And the virus goes with them” (Gregor, 2007). In the Malaysian outbreak, the Nipah virus took the lives of approximately 100 people.
Economic losses

Limiting live animal transport will contribute not only to improved animal health and welfare but also to good economics. Although imposing live animal transport regulations can be costly in the short term, David Byrne, the former European Commissioner for Health and Consumer Protection, said that he remained "convinced that the longer-term gains, in terms of increased bio-security and healthier animals, will reap greater economic rewards into the future" (Byrne, 2003).

Data from the export industry in Australia for 2007 estimates the death rate for sheep to be around 1% for the journey from their country to the Middle East. Although this might sound low, it equates to a staggering 37,409 dead animals out of a total of 3.7 million sheep exported that year (DAFF, 2008). Even at the estimated value of AUD$50 per head recorded for these animals the year before (Agra CEAS, 2008), this equates to a loss of AUD$1.9 million.

Cattle mortality is relatively rare in transit, but due to the higher value of each animal the total economic loss can mount up. The average death rate for cattle transported from Australia to South East Asia, the Middle East/North Africa and Mexico was 0.10% in 2007. This equates to 747 dead animals out of a total of 712,320 cattle exported (DAFF, 2008). At the estimated value of AUD$650 per head (Agra CEAS, 2008), this equates to a loss of AUD$0.5 million.

In addition to mortality losses, long distance transport can affect carcass characteristics and cause economic losses in terms of quality of the meat. Inanition (failure to eat) associated with transport is likely to be an important cause of carcass and meat quality depreciation. Pre-slaughter stress might result in paler chicken thigh meat and tougher rabbit leg meat and can contribute to the formation of dark, firm and dry meat in beef and pale, soft and exudative meat in pork.

The main meat quality problem associated with cattle is bruising. When bruising is severe it decreases the quantity of marketable meat. For example, in the Pantanal region of Brazil, a study on the influence of transport on carcass bruising in cattle concluded that, of 121 carcasses assessed, 102 (84.3%) had one or more bruises. The total from all cattle was 270 bruises, which resulted in the removal of 56.1 kg of meat. Maria (2008) reviewed 37 scientific studies regarding the effect of transport on cattle, and concluded that 95% found a significant effect on carcass or meat quality.

Long distance transport can also lead to a reduction of slaughter yield, an effect which can only be partially explained by fasting. Much of the loss is from carcass components and not simply gastrointestinal fill. Pigs transported for 11 hours might lose a commercially significant 3% of their body weight; sheep transported for 18 hours could suffer as much as an 8% mean loss of live weight; and the transport and holding of goats could result in a 10% loss of live weight.

Another indirect economic impact of long distance transport of animals for slaughter arises from the introduction of trade barriers following disease outbreaks.

The 2000 outbreak of RVF in East Africa, which spread to Saudi Arabia and Yemen, prompted Saudi Arabia and several Gulf states to ban livestock imports from eight East African countries. This ban reduced East African exports by 75% (USAID, 2008). An earlier outbreak of the disease in East Africa in 1998 resulted in a trade ban estimated to cost $100 million of lost exports from Somalia and Ethiopia alone, and disruption in families and communities that depend heavily on livestock for their subsistence (FEWS NET, 2000).

However, countries are slowly starting to respond to this market uncertainty. The focus of the livestock export trade in landlocked Ethiopia has begun to shift from a traditional reliance on the live animal trade to exporting frozen goat meat to Gulf states and frozen beef to some
countries including by airfreight to Egypt. The recurring disruption in the livestock trade from East Africa to the Middle East caused by disease outbreaks has helped trade competitors such as Australia, which has a low disease status, to maintain their products in Middle East markets.

Long distance transport of animals is never devoid of risk. Shipments may be rejected if the threshold for certain diseases among the animals on board is exceeded, leading to a suspension of trade between the countries. An example that received global media coverage was the Cormo Express shipment of Australian sheep that was rejected by Saudi Arabian authorities in 2003 due to an incidence of scabby mouth.

The consignment of 57,937 sheep destined for Saudi Arabia left Freemantle, Australia on 5 August. When it arrived at Jeddah on 21 August, the Saudi authorities rejected the shipment on the (albeit questionable) grounds that 6% of the animals suffered from scabby mouth when the threshold was 5%. Subsequent negotiations by industry and Australian Government representatives with a large number of countries failed to gain acceptance of the consignment. By the time the sheep were accepted and unloaded in Eritrea on 24 October the sheep had been on the vessel for 80 days and there had been a total of 5,691 (9.8%) deaths. Throughout the disaster there was a lot of public and international pressure on the Australian Government to resolve the problem and prevent it from reoccurring.

This dispute resulted in a suspension of trade between Australia and Saudi Arabia, and a third review of the live export trade in Australia. The impact was also felt in New Zealand, where there were renewed calls for the Minister of Agriculture to ban live trade from New Zealand which incurs similar risks. As a consequence, the New Zealand authorities did not approve any further animal shipments to the Middle East after 2003.

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Other Regions and Countries

Growing social concern

In 2007, WSPA commissioned a series of opinion polls around the world to explore the degree to which the public is concerned with farm animal welfare, and long distance transport in particular.

In the USA, 93% of those polled considered it important that farm animals raised for human consumption are treated humanely. Seventy-four per cent considered that the 28 hours which the current federal American legislation allows animals to be transported without food, water or rest is too long. And 68% considered it extremely important to reduce the time farm animals should be transported in order to reduce the spread of disease. Sixty-three per cent agreed that it is extremely or very important to limit the journey times in order to reduce the risk of food contamination.

In Canada, an even higher percentage felt it is important to treat farm animals humanely (96%) and two thirds (68%) thought it is extremely or very important for farm animals to be treated humanely. After hearing about the journey times allowed in Canada (which has the highest among developed nations), almost all Canadians (96%) indicated it is at least somewhat important to limit the maximum amount of time farm animals can be transported before they are provided with food, water or rest, so that animal suffering is reduced. Seventy-five per cent thought it is extremely or very important to reduce transportation times and thus disease transmission. Seventy-four per cent thought it is extremely or very important for transportation times to be limited, so the risk of food contamination is reduced.

In Australia, the opinion poll regarding the public perception of the Australian live export trade showed that 57% agreed that the country should end the trade, and 74% believed that the best way to transport meat overseas is chilled or frozen meat from animals slaughtered in Australia.

The social concern for the welfare of animals and the negative welfare implications of animal transportation is not limited to Europe, North America and Australasia. Polls in China and Brazil showed similar results. Although fewer than one in 10 Chinese (7%) felt that they have some knowledge about the conditions under which animals are farmed in China, the majority of people interviewed (73%) felt that the treatment of farm animals is important to some extent and 34% thought it is very important. An overwhelming majority of Chinese (82%) agreed to some extent that, in order for society to be truly civilised, animal welfare must be a key priority and 39% strongly agreed with this statement. In Brazil, although only one in six Brazilians (17%) felt they have some knowledge about the treatment of farm animals in their country, 79% said that the treatment of these animals is important to some extent and 25% of these said that it is very important.

Over the last 30 years, campaigns against the long distance transport of animals mainly in Australia, Europe and North America have received a fair amount of political, public and media attention. Motivated by concern for the welfare of these animals, animal welfare organisations advocate replacing long distance transport with slaughter as close to the farm as possible or a carcass-only trade.

Shifting towards a carcass-only trade

A phase-out of long distance transport of animals for slaughter to drastically improve the welfare of the animals concerned, and prevent outbreaks of animal diseases and potentially serious public health problems, may be tenable if there is careful investment, planning and a working partnership between governments and the livestock sector. In addition, the shift to a
carcass-only trade is likely to have positive social and economic benefits. There are several possible types of approach to achieve this transition.

A 2005 European Directive (95/29/EC, amending 91/628/EEC) concerning the protection of animals during transport made exports of sheep from the UK less viable, and so these have drastically declined. From a peak of around 2 million sheep exported in 1993, sheep exports declined to around 100,000 sheep in 2006, which were mainly to France and other EU countries. It should be added that, although live sheep as well as lamb exports declined following the FMD outbreak in 2001, lamb exports have since then steadily risen, while live sheep exports remained at much lower levels than the pre-FMD outbreak (Red Meat Industry Forum, 2007a).

A Council Regulation (EC No 1/2005) that came into effect in 2007 introduced further restrictions on the transport of livestock in the EU, by setting lower livestock densities, and a limit of 24 hours for the transport of pigs and horses and 28 hours for cattle, sheep and goats. After this time limit, animals have to be unloaded at resting points and provided with food and water for 24 hours before continuing the journey. In addition, horses have to be transported in single partitions.

The effects of proper and full implementation of this Regulation mean that the carcass trade has the potential to become more profitable than the live animal trade. For example, such is the case for horses transported from Spain to be slaughtered in Italy. A detailed economic analysis of this trade completed by the International League for the Protection of Horses (now World Horse Welfare) concluded that, from an economic point of view, the trade becomes uneconomical if the new Regulation is adhered to on journeys from southern Spain (i.e. journeys that take over 24 hours). Journeys that take less than 24 hours (i.e. from northern Spain) also become less profitable as fewer horses can be transported per journey and more vehicles or trips would be needed.

Although the exports of cattle and beef have been heavily influenced by the outbreak of BSE in 1996 and FMD in 2001 (Red Meat Industry Forum, 2007b), the UK has had a long involvement in calf exports to veal farms in other European countries. This trade has caused protests as the calves were sent to farms using rearing systems that did not meet UK standards. However, after the interruption of the trade following the outbreak of BSE, the country had the problem of how to deal with surplus male Holstein/Friesian dairy calves. The Beyond Calf Exports Stakeholders Forum was convened in 2006 and comprised farmers, industry bodies, milk and beef processors, retailers, welfare assurance bodies, animal welfare organisations and consumers. The Forum came together to address the surplus of male dairy calves born in the UK, and increase the uptake of these calves into the domestic beef chain, in order to avoid them being euthanased or exported to veal farms (Beyond Calf Exports Stakeholders Forum, 2008). Since then, key retailers in the UK such as Tesco and Marks & Spencer started phasing out the sale of imported veal in favour of domestically reared veal (Food Productivity Daily, 2008).

Another example of evolving to accommodate less live transportation comes from Namibia. The opening of the EU beef market to Namibia had a positive impact on the domestic meat industry and resulted in a shift from exporting live cattle to South Africa to increasing chilled/frozen meat exports. The stringent requirements from the EU required a concerted response from the Namibian farm industry, which came in the form of the Farm Assured Namibian Meat Scheme (FAN Meat), managed by the Meat Board of Namibia and monitored by the Directorate of Veterinary Services. In 1989, only 46% of all Namibian cattle marketed were slaughtered in Namibia and the remaining 54% were exported live to South Africa. By 2001 the position had reversed, and 58% of all cattle were being slaughtered in Namibia and 42% exported live to South Africa.

The momentum towards banning the unnecessary live export of animals for slaughter is increasing. Public pressure is mounting and, as the economic losses associated with the trade become more evident, the justification for continuing live export diminishes. Pressure
regarding the welfare of farm animals has led to the suspension of live exports from various places, including a port in Brazil in 2008, and the arguments against lifting the current ban in New Zealand are strong. The international community is looking to the country to lead the way once again in respect of the welfare of animals. The standard New Zealand sets across the range of animal welfare issues means that the reintroduction of live animal exports for slaughter would be at odds with other welfare requirements and the general consensus that good animal welfare is part of the country’s culture.
Legislative action

WSPA urges the New Zealand Government to seize the current opportunity of this review to solidify and strengthen the prohibition already in place regarding the live export of animals for slaughter.

New Zealand's CEPO explicitly prevents all exports of livestock for slaughter unless approval is obtained on a specific case-by-case basis from the Director-General of the MPI. As this Order is time-limited and could easily be overturned, giving less certainty to the farming and related industry, WSPA recommends the specific banning of live animal exports when undertaken for slaughter.

In addition, the current CEPO lists "livestock" as "sheep, cattle, deer, and goats" and so creates a loophole which would allow the export for slaughter of other livestock, such as pigs, which could not be ruled out in the future. WSPA strongly suggests that the ban is worded to apply to all animals, even those not traditionally considered as "livestock", in order to close this loophole.

WSPA feels that the only way to effectively manage the current temporary situation in order to give certainty to the public, industry and the international community is for a total ban on the export of live animals for slaughter. This will enable industry to adapt and be able to invest long-term in the export of chilled and frozen meat, and will reflect to the world that the welfare of animals remains a priority for the people and Government of New Zealand.

As an absolute minimum, the CEPO could be included in the redrafted Animal Welfare Act following the review, so that the issue of it expiring and leading to uncertainty is overcome. However, an explicit and total ban would give greater certainty and send a stronger message to the international community. New Zealand has led the way in setting the standard for so many issues relating to animal welfare. The opportunity not only to do what is best for the welfare of animals but also to have a positive impact on the economic, health and political arenas associated with the trade is too good to miss.
References


SUBMISSION FORM

ZOO AQUARIUM ASSOCIATION


Please send your submission to the Ministry for Primary Industries by 5.00pm Friday 28 September 2012. Submissions can be emailed to awsubmission@mpi.govt.nz or posted to:

Animal Welfare Strategy and Legislation Review
Ministry for Primary Industries
PO Box 2526
WELLINGTON 6140

The questions in this form should be treated as a guide only – you can choose to answer any or all of the questions, or provide any other comments.


Submissions and a summary of submissions will be published on the Ministry’s website. If you or your organisation do not want information in your submission to be published, please make this clear in your submission and explain why. The Ministry will take this into account when deciding whether to publish the submission or release it under the Official Information Act 1982.
Introduction

The Zoo & Aquarium Association (ZAA) is the peak industry body in Australasia with over 80 member institutions in New Zealand, Australia and the South Pacific. All members strive to achieve best practice and must meet rigorous minimum standards in animal welfare, visitor engagement and husbandry practice for continued membership of the Association.

Our member organisations provide social profit and social good to our community in the form of community learning, employment of staff, suppliers and contractors, partnerships for conservation, research and veterinary science and economic development outcomes through tourism and leisure expenditure. The zoo and wildlife park industry thrives on innovation and leadership in animal care and has experience in both native and exotic fauna. We applaud the development of further improvements in animal welfare paradigms in New Zealand and support the change for good.

This submission is on behalf of the New Zealand member institutions including all four of the major NZ zoos (Auckland, Wellington, Hamilton Zoos and Orana Wildlife Park).

Ensuring the best possible animal welfare outcomes is at the very heart of what our Association and member institutions stand for. In this respect, we have developed a comprehensive Policy Statement on Animal Welfare and this document is attached and forms part of our formal submission. More information about ZAA can be obtained from www.zooaquarium.org.nz.

The Association generally supports the proposals for a New Zealand Animal Welfare Strategy and amendments to the Animal Welfare Act 1999. We applaud the intention to provide for improved collaboration and partnerships between the Crown and industry bodies in the interests of improved animal welfare for all animals in New Zealand.

President
Zoo & Aquarium Association

Chairperson – NZ Branch
Zoo & Aquarium Association NZ

Personal Information
Issue 1: New Zealand animal welfare strategy

Q1. Do you have any overall comments or feedback about the proposed strategy and its approach?

ZZA is very supportive of the proposed strategy and its approach. Progressive animal welfare legislation that goes further than just preventing cruelty and places an explicit obligation on all people in charge of animals is considered essential. While NZ's current animal welfare system is generally sound, we applaud the approach that will provide for improved animal welfare outcomes.

Q2. What are the risks and benefits of adopting this strategy? Can you think of any missed opportunities or unintended consequences?

It will be necessary to ensure that MPI is adequately resourced to enable the timely development of the regulations, once the legislation is changed to enable them. Failure to plan for this is a key risk to the successful implementation of the strategy.

A key opportunity that has been missed is allowing for the implementation of regular welfare inspections where it is practical and cost effective to do so, rather than continuing to rely on receipt of complaints as the main trigger of welfare investigations. This approach would be particularly relevant to the zoo industry as registered containment facilities are already inspected annually by MPI for containment to maintain registration. These annual inspections could easily be extended to cover welfare considerations if the legislation allowed for this.

We implore the Minister to give this suggestion serious consideration. Although ZZA members voluntarily subscribe to high standards, we remain concerned about some non-member facilities that tarnish the reputation of the zoo industry in NZ as a whole.

Q3. Do the values reflect New Zealanders' views about animal welfare? Would you suggest something else and why?

We consider the values adopted in the strategy are a fair reflection of the views of New Zealanders in relation to animal welfare.

Q4. Do you have any comments on the proposed approaches, leadership roles, or Government priorities?

We welcome the acknowledgement of the importance of industry in leading the promotion of best practice. ZZA is well placed to build on our role in this respect. A full accreditation scheme promotes a high standard of welfare for all animals in our members' care. Our member institutions have a huge role to play in reaching out and engaging with our communities and visitors. A survey carried out in 2009 revealed that ZZA members hosted 2,296,038 visitors collectively to our NZ member institutions that year. It is estimated that the annual visitors now total in excess of 2.5 million per annum. This places our industry in a unique position to lead the way in terms of educating New Zealanders about good animal welfare practices.
Issue 2: Standards for care and conduct towards animals

Q5. Do you agree with the proposal to replace codes of welfare with a mix of directly enforceable standards and guidelines?

ZAA strongly endorses the approach to replace codes of welfare with a mix of directly enforceable standards and guidelines. As outlined, codes of welfare are not directly enforceable and therefore it remains most concerning that there is no direct penalty for breaching minimum standards.

Q6. What are the risks and benefits of this proposal? Can you think of any missed opportunities or unintended consequences?

As outlined above, it is essential that MPI is adequately resourced to enable the efficient development of regulations within 6-12 months as proposed. ZAA will welcome the opportunity to develop the zoo industry guidelines together with MPI.

Q7. What impact will the proposed changes have on you and/or your organisation or sector?

The impact on the Association and members will be nil or minimal at most as we already ascribe to the highest standards of animal welfare on a voluntary basis.

Issue 3: Criteria for developing standards

Q8. Would the proposals to add “practicality” and “economic impact” to the set of criteria improve the decision-making process, or would you suggest something else?

ZAA support adding “practicality” and “economic impact” to the set of criteria in an effort to improve the decision making process. At the very least it will provide for improved transparency in relation to these factors.

Q9. Do you agree that having “transitions” and “exemptions” is a better way to handle the situations that currently fall under ‘exceptional circumstances’?

ZAA agree that having “transitions” is a better way to handle situations that currently fall under “exceptional circumstances”. We strongly oppose permanent “exemptions” from animal welfare obligations under any circumstances.

Q10. What are the risks and benefits of these proposals? Can you think of any missed opportunities or unintended consequences?

There is a risk of tarnishing the reputation of NZ if any permanent “exemptions” from animal welfare obligations are allowed. Of course, abolishing such exemptions may have a short term impact on NZ exports until new markets are established. The key benefit of banning permanent “exemptions” is that NZ will be able to demonstrate that it is a world leader in respect to animal welfare and will not accept or allow animal suffering on any grounds.

Q11. What impact would the proposed changes have on you and/or your organisation or sector?

The proposed changes will not impact on ZAA or its member institutions.
Issue 4: Role of the National Animal Welfare Advisory Group

Q12. Do you agree there is still a role for an independent committee on animal welfare?

ZAAG generally supports the retention of an independent committee on animal welfare such as NAWAC.

Q13. Do you agree that the committee should be able to publish its advice at its discretion?

The best animal welfare outcomes will rely on a transparent approach. Therefore, we see no reason for their advice to the Minister to remain confidential as is the case at present. Rather, we support the information being made public as is the case with equivalent committees in other jurisdictions.

Q14. Do you agree that the current membership of the committee is appropriate or does it need to be changed?

The range of skills and experience represented on NAWAC remains relevant. We question whether there is a need to increase the size of the membership to enable smaller subcommittees to share the workload of reviewing the industry sector guidelines.

Issue 5: Live animal exports

Q15. Do you agree with the proposal to create directly enforceable standards for the export of live animals?

ZAAG agrees with the proposal.

Q16. Do you agree with broadening the purpose of the exports part of the Act so that New Zealand’s reputation can be considered when making rules or deciding on applications?

We agree with this approach. Furthermore, ZAA would give full support to a blanket ban on the export of live animals for the purpose of slaughter.

Q17. What are the risks and benefits of these proposals? Can you think of any missed opportunities or unintended consequences?

The proposal may allow for prohibitive cost implications for the NZ zoo industry as an unintended consequence since it is largely focussed on improved regulations surrounding the live export of farm animals for commercial purposes. ZAA member zoos participate in cooperative international breeding programmes for many of the endangered species we hold. This requires occasional export of animals in the interests of the sustainability of conservation and breeding programmes and these are non-commercial transactions.

Q18. What impacts will the proposal have on you and/or your organisation or sector?

As outlined above, it could potentially provide for prohibitive cost implications for the export of zoo animals on a non-commercial basis.
Issue 6: Significant surgical procedures

Q19. Do you agree with the proposals to change who can perform significant surgical procedures under veterinary supervision?

ZAA support the proposals.

Q20. Do you agree that the Act should allow for mandatory conditions to be placed on controlled surgical procedures?

ZAA agrees that the Act should allow for mandatory conditions.

Q21. What are the risks and benefits of these proposals? Can you think of any missed opportunities or unintended consequences?

A benefit of the proposal for the zoo industry is that it would allow for visiting overseas veterinarians to assist with complex procedures.

Q22. Are there any other ways the system should be improved?

None identified.

Q23. What impact would the proposed changes have on you and/or your organisation or sector?

No impacts identified as ZAA member institutions utilise the services of a qualified veterinarian for all surgical procedures.

If you have a view on any of the procedures described in section 4.7.5 of the consultation document, please indicate how you think they should be classified:

- Not significant: can be carried out by anyone.
- Significant: may only be carried out by a veterinarian or a person who is acting under the direct supervision of a veterinarian and who is being taught veterinary science at undergraduate level.
- Restricted: as for significant surgical procedures plus may only be carried out if the procedure is in the animal's interests and using appropriate pain relief.
- Controlled: as for significant surgical procedures plus may also be carried out by the owner of an animal, or their employee with written veterinary approval.
- Prohibited: no one may carry out the procedure.

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<th>ZAA's views:</th>
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<td>Mulesing - Prohibited</td>
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<td>Tail docking of horses - Restricted</td>
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<td>Laparoscopic artificial insemination of sheep and goats - Significant</td>
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<td>Embryo collection via exteriorized uterus in sheep and deer - Significant</td>
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<td>Tail docking of dogs - Restricted</td>
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<td>Tail shortening of cows - Restricted</td>
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<td>Desexing of companion animals - Significant</td>
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<td>Desexing of horses, llamas and alpacas - Significant</td>
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<td>Tooth extraction in horses and companion animals - Significant</td>
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<td>Liver biopsy - Restricted</td>
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<td>Removal of articulated dew claws in dogs - Restricted</td>
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<td>Caslick's procedure - Restricted</td>
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<td>Comb removal from game poultry - Restricted</td>
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<td>Surgical castration of livestock - Restricted</td>
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Issue 7: Reporting of animals killed for research, testing or teaching

Q24. Do you agree that the number of animals killed humanely for research, testing and teaching should be included in official statistics?

ZAA agrees.

Q25. What impact, including costs, would the requirement to report animals killed for use in research, teaching, and testing have on you or your organisation?

No impacts identified.

Q26. Can you think of any other changes that would improve the system for regulating animals used in research, testing and teaching?

None identified.

Issue 8: Enforcement tools

Q27. Do you agree with the proposals to attach instant fines to some minor offences and give some animal welfare inspectors the ability to issue compliance orders?

ZAA agrees with this approach. We are concerned that the maximum infringement fee being increased to $1,000 still does not provide for an appropriate deterrent and would support the maximum penalty being increased to $5,000. While a maximum of $1,000 would be an appropriate deterrent for a private pet owner, it falls far short of providing any genuine deterrent in the case of large commercial operators that have purposely breached their obligations for pecuniary advantage.

Q28. What are the risks and benefits of this proposal? Can you think of any missed opportunities or unintended consequences?

The key risk of the proposal is that enforcement staff must consistently exercise their discretion. We support the development of operating guidelines as outlined in the proposal in an effort to mitigate this risk. As outlined above, we support the introduction of periodic animal welfare review visits where practical and cost effective to do so (e.g. combined with MPI containment audit visits in the zoo industry sector). The “response to complaints” approach alone is not appropriate and should be expanded where possible to provide for the best animal welfare outcomes.

Q29. What impact would the proposal have on you and/or your organisation or sector?

ZAA see this proposal as providing for positive benefits for members. It has been a continuing concern that non-member facilities that do not ascribe to high standards reflect poorly on the industry as a whole. This proposal will allow MPI to take action more quickly for improved animal welfare outcomes.
Issue 9: Other proposed offences

Q30. Do you agree with the proposal to make drowning a land animal an offence?

ZAA agree with the proposal to make drowning a land animal an offence.

Q31. Do you agree with the proposal to clarify that wilful and reckless ill-treatment offences apply to animals in a wild state?

ZAA agree with the proposal to clarify that wilful and reckless ill-treatment offences apply to animals in a wild state. All animals in New Zealand deserve humane treatment.

Q32. What are the risks and benefits of these proposals? Can you think of any missed opportunities or unintended consequences?

None identified.

Issue 10: Technical amendments

Q33. Do you have any comments on any of the technical amendments proposed in Table 1?

ZAA is comfortable with the technical amendments proposed in Table 1 and has no further comments to add.

Any other comments

Q34. Do you have any other comments or feedback not covered by these questions?

Thank you for the opportunity to comment on the proposals. ZAA looks forward to continuing to work positively in partnership with MPI towards improvement in animal welfare standards for all animals in New Zealand. We are in a unique position to educate the hundreds of thousands of New Zealanders that regularly visit our member facilities about the appropriate care of animals.

ZAA has developed an Animal Welfare Position Statement which demonstrates the importance the Association and its members place on achieving the highest standards of animal welfare. The ZAA Animal Welfare Position Statement is included below and forms part of this submission.
ANIMAL WELFARE POSITION STATEMENT

Executive summary

This Animal Welfare Position Statement is an initiative of the Zoo and Aquarium Association. The statement has been developed in partnership with the Australian Animal Welfare Strategy and supports the strategy goal to outline directions for future improvements in the welfare of animals in Australia.

The Association recognises the benefits of an industry specific approach to animal welfare. The position of the Association is that all zoos and aquariums have a responsibility to ensure a high standard of animal welfare for all animals in their care. The Association maintains that the conservation, education, research and recreational goals of zoological organisations must be underpinned by positive animal welfare.

Australasian zoos and aquariums maintain a unique and diverse collection of non-domestic species.

This Statement recognises the high level of importance the zoo industry places on animal welfare. The Statement has been developed to provide Association members with contemporary knowledge about animal welfare.

The Association has developed a framework that recognises the progression from traditional animal welfare models (focused on mitigating negative welfare states) to a more contemporary model that focuses on providing positive welfare states. The Association has adopted the Five Domains model (Mellor et al 2009), which recognises the affective (psychological) states of welfare in animals.

The Five Welfare Domains and examples of related positive states (Green and Mellor 2011) are:

Physical Domains
1. Nutrition: e.g. appropriate consumption of nutritious foods is a pleasurable experience
2. Environmental: e.g. benign conditions offer adaptive choices and variety
3. Health: e.g. physically sound (uninjured, disease-free) animals enjoy good health
4. Behaviour: e.g. environment-focused and inter-animal activities are satisfying and engaging
Mental Domain
5. Mental or Affective State: e.g. animals experience comfort, pleasure, interest and confidence
The perspectives outlined in this Animal Welfare Position Statement provide a contemporary framework for thinking about animal welfare. The Association expects member organisations will develop their own animal welfare position statements and continue maintaining and improving welfare for all animals in their care. Member organisations are encouraged to use this framework when developing their own statements and any related welfare assessment tools.

**Preface**

The development of this Animal Welfare Position Statement (the Statement) is an initiative of the Zoo and Aquarium Association (the Association), with financial support from the Australian Animal Welfare Strategy (AAWS).

The Association developed an external consultative group made up of members of the zoo industry, New Zealand welfare and ethics academics and the Australian Veterinary Association. The consultative group conducted extensive literature reviews.

**Context**

The Association recognises the need for an animal welfare approach that is relevant and applicable to the zoo industry in Australia and New Zealand and that the approach needs to consider current societal expectations.

Zoos and aquariums present potentially challenging environments in which to devise a comprehensive approach to animal welfare, predominantly due to the diversity of species in care.

It is within these contexts that the Statement provides a framework for member organisations to develop their own organisation-specific welfare position and assessment tools.

**Scope**

The aim of this Statement is to present a contemporary welfare approach that can be utilised to ensure positive animal welfare. While an approach to animal welfare that is relevant to modern zoos and aquariums should also consider the ethical positions associated with keeping captive-, non-domestic animals, it is essential to differentiate between animal welfare and ethics.

Within Australia and New Zealand we have democratically accepted the use of animals for a range of purposes including in agriculture, as pets, and for sport and recreation. This ethical position is accepted in our society; therefore this Statement will focus on welfare and will give no further consideration to ethical positions.

Zoos and aquariums provide conservation, education, research and recreation for the community providing a significant socio-economic contribution to society.

- Zoos and Aquariums are increasingly involved in government led ‘breed to release’ programs. In these circumstances the *IUCN Guidelines for Re-Introductions* are applied.
The Association’s Animal Welfare Position Statement

The position of the Association is that all zoos and aquariums have a responsibility to ensure a high standard of animal welfare for all animals in their care. The Association maintains that the activities carried out by zoo organisations must be underpinned by positive animal welfare.

Australasian zoos and aquariums maintain a unique and diverse collection of non-domestic species and the Association recognises that an industry specific approach to animal welfare is required. This industry specific framework recognises the high level of importance placed on animal welfare and provides a model that the zoo industry can apply to assist with achieving positive animal welfare.

The Association maintains an Accreditation Program to substantiate its members’ animal welfare practices.

Furthermore the Association expects regulatory authorities to carry out their obligations for welfare inspections. To support this expectation the Association has worked with governments to develop and establish contemporary animal welfare standards and guidelines for exhibited animals.

Contemporary perspectives on animal welfare

Animal welfare science is a relatively recent discipline. It has evolved significantly during the last three decades and, accordingly, considerable advances in animal welfare have been achieved. Consistent with an emerging and evolving discipline are the numerous attempts to characterise and define animal welfare.

The Association and the AAWS recognise the OIE definition of animal welfare (OIE = World Organisation for Animal Health, formerly Office International des Epizooties):
“Animal welfare means how an animal is coping with the conditions in which it lives. An animal is in a good state of welfare if (as indicated by scientific evidence) it is healthy, comfortable, well nourished, safe, able to express innate behaviour and is not suffering from unpleasant states such as pain, fear, and distress.

Good animal welfare requires disease prevention and veterinary treatment, appropriate shelter, management, nutrition, humane handling, and humane slaughter/killing. Animal welfare refers to the state of the animal; the treatment that an animal receives is covered by other terms such as animal care, animal husbandry, and humane treatment.”1

Three generally accepted animal welfare orientations have emerged in the last decade. These are the biological function, affective state and natural living orientations, all of which provide different perspectives on animal welfare.15 An integrated approach to these orientations has been recently proposed giving consideration to the following characteristics:
- welfare is a state that exists within an animal
- animal welfare relates to experienced sensations (negative, positive or neutral)
- the combined sensory and neural inputs from within an animal's body and from its environment, after processing by the brain, constitute the animal's current experience (i.e. its welfare status); welfare status can change as the inputs change
- these experiences are subjective states which cannot be directly measured but can be assessed via indirect indices
- welfare may vary along a continuum from poor to good.

These characteristics, focusing on the experiences of an animal, emphasise the affective state, or the psychological wellbeing of an animal. This is in contrast to historical approaches which were focused on eliminating and minimising negative physical states in order to avoid poor welfare outcomes. Such approaches strongly emphasised biological function, or the physical wellbeing of an animal, and at best resulted in neutral welfare states.

Due to advances in animal welfare science and the identification of the aforementioned characteristics, positive affective states are now recognised, in addition to biological function, and are considered to be an integral component of an animal's welfare. A positive affective state can be achieved when both the physical and mental needs of an animal are met. This approach is encompassed in the Five Domains model of animal welfare, proposed and subsequently revised by Mellor and others, and has been chosen by the Association as a contemporary welfare framework for animal welfare assessment in the zoological setting.

The Five Domains (nutrition, environment, health, behaviour and mental state) represent areas of potential welfare compromise and, conversely, areas where welfare can be enhanced. The first four domains, encompassing potential negative-to-positive nutritional, environmental, health and behavioural elements, are largely physical or functional. Sensory inputs from these physical domains provide subjective experiences for the fifth (mental) domain, which also receives sensory inputs elicited by external stimulation.

**Animal welfare in zoos and aquariums: strengths, challenges and opportunities**

To be relevant and credible, an industry specific approach to animal welfare must be consistent with current concepts in animal welfare and as such must be a 'living' document that is revised and updated as animal welfare science evolves. The Five Domains model of animal welfare assessment provides a contemporary framework for assessing welfare that can be applied across taxonomic groups and as such this model is of particular value to zoological organisations, which hold a diverse array of species.

Animal welfare is generally difficult to assess objectively, however a range of indirect measures (such as behavioural indices) can be used to give an indication of the welfare status of a given animal. For the industry to be confident it is achieving positive animal welfare, it is important that methodologies to quantify and assess welfare outcomes in captive animals are developed and routinely applied in the zoo setting.

Animal welfare science draws on expertise from numerous disciplines. This multidisciplinary approach is already embraced by zoos and aquariums. Examples include veterinary involvement in the development of behavioural or husbandry programs and scientists specialising in animal behaviour and nutrition being engaged in management and research.
of zoo collections. Engaging external subject matter specialists to increase animal welfare knowledge, complemented by the skills encompassed by animal managers and keepers, can only enhance animal welfare in zoos and aquariums.

Zoos and aquariums have taken a strong lead in several areas of animal welfare research including behavioural analysis and non-invasive physiological assessment of stress. Despite this a number of authors have identified gaps in the science of animal welfare as it applies to zoos and aquariums. Such gaps provide opportunities for the zoo and aquarium industry to contribute to the knowledge of animal welfare science through participation in research projects and broad dissemination of project findings.

Five Domains

Behaviour
The zoo industry has had a well-demonstrated focus on both behavioural research and behavioural enrichment over recent decades. The methodologies employed in these endeavours can be readily applied to the assessment of animal welfare and in attaining positive welfare outcomes. Despite this, and as previously mentioned, knowledge gaps do exist. Various natural behaviours exhibited by some species in the wild have been shown to be predictive for poor welfare outcomes in captivity under typical management regimes. One example is the association between wide-ranging lifestyles and large home range sizes in the wild and a high incidence of stereotypies and high neonatal mortality in carnivores in captivity.

It is important to note that many behaviours are stimulus driven and a full range of natural behaviours may not be exhibited in captivity due to different stimuli in captivity compared with the wild. The exhibition of ‘wild type’ behaviours does not necessarily occur as a result of, or equate with, good animal welfare.

Behaviours are frequently species specific requiring careful, skilled interpretation. Choice, through exposure to a range of diverse environmental conditions, is likely to be just as important for attaining better welfare outcomes for captive species, as are enrichment practices promoting ‘wild type’ behaviours.

Nutrition
While the nutritional requirements of domestic species are well described, enabling nutritionally complete diets to be designed, manufactured and assessed with relative ease, meeting the requirements for nondomestic species is a complex task. The nutritional requirements are poorly known for many non-domestic species.

Many non-domestic species live successfully and reproduce in captivity on diets that may not completely meet their nutritional needs. Further challenges for zoos and aquariums include the requirement to meet not only a given species’ nutritional needs but also the physical form requirements and an animal’s psychological needs in relation to diet and mode of food acquisition, for example, providing live food for amphibians and variable foraging opportunities for ungulates.

Zoos and aquariums can contribute to knowledge relating to nutritional developments associated with species-specific diets and taste preferences. This can be achieved by
undertaking nutritional analyses or by sharing information with those parties participating in nutritional, taste and preference research.

Environment
Zoos and aquariums have a responsibility to consider individual and species specific environmental requirements, whilst also taking into account public expectation (aesthetics, visibility etc.) and logistical constraints (finances, site etc.), when designing and constructing enclosures for animals in their care. First, the needs of the animal should always be a primary concern in enclosure design. Additionally, a thorough welfare assessment of the suitability of housing a given species or individual in a given enclosure or zoo should be undertaken prior to the acquisition or movement of animals.

Physical health
On the basis of the Five Domains model the health of animals can be broadly divided into physical and psychological health. To ensure the physical health of collection animals, zoos and aquariums require proficient keeping staff, high husbandry standards, access to veterinary care and implemented management systems which ensure timely intervention when health care is required. A regularly reviewed preventative medicine program should be in place. For some species longevity in captivity exceeds that experienced in the wild and geriatric care has become a growing focus of veterinary medicine in recent decades. Quality of life should take precedence over longevity. Euthanasia is not a welfare issue.

Affective state (psychological health)
Only, when needs in the abovementioned four physical domains are met, can a positive affective state be achieved. Thus, when needs in all Five Domains are met, in a context where key elements of natural living are also addressed, positive states of welfare can exist.

The growing recognition of the importance of affective states may present some challenges as there are potential difficulties associated with assessing the affective state of animals. Nonetheless there are a number of indirect indices which can be measured enabling credible and scientific assessment of the affective state of an animal.

Welfare assessment of zoo and aquarium animals
Quantitative assessment of welfare by zoos and aquariums is required in order to measure the effectiveness of animal welfare endeavours. This requires commitment of appropriate resources. Welfare assessment should be focused on animal based outcomes (as opposed to human based inputs). Several methodologies are already employed for welfare assessment in zoos and aquariums. These tools allow for assessment of potential welfare compromise in the Five Domains and fall into four broad categories:

- behavioural analysis
- physiological analysis (biological measures of poor or good physical function and stress)
- physical health
- population level welfare analysis

Considered alone each of the above methodologies have potential limitations. When combined a more accurate assessment of an animal's welfare can be obtained. Additionally,
for individual animals the concept of ‘quality of life’ assessment (life quality assessed from the animal perspective) has recently been proposed, e.g. methods used to guide the decision-making relating to the on-going care of animals on a daily basis to assess their quality of life.\(^8\)

Research into and the understanding of animal welfare is generally biased towards domestic mammals, carnivores and primates. For animal welfare outcomes to consistently improve across all taxonomic groups, the Association is of the opinion that there is a need to broaden the taxonomic scope of zoo and aquarium animal welfare science.

**Conclusion: Expectations and achieving positive animal welfare outcomes**

The perspectives in this Statement provide a contemporary framework for thinking about animal welfare.

Member organisations are encouraged to think in these terms when developing their own statements and any related policies and procedures. Approaches to achieving positive animal welfare are evolving, progressing as science provides new information.

The Association recommends that members develop their own animal welfare position statements and maintain and improve welfare for all animals in their care.

**References**


