Part 1:
Legal and Philosophical Frameworks of Animal Law

Saving our Silent Slaves:
Legal and Ethical Challenges to Speciesism

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‘The French have already discovered that the blackness of the skin is no reason a human being should be abandoned without redress to the caprice of a tormentor. It may one day come to be recognised that the number of the legs, the villosity of the skin, or the termination of the os sacrum are reasons equally insufficient for abandoning a sensitive being to the same fate…The question is not, Can they reason? nor, Can they talk? but, Can they suffer?’

1 Introduction

1 Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* (2nd ed, 1823)
In 1963, Martin Luther King announced to the world of a dream for equality between humans of all races.² Fifty-one years later, so too lives a dream that equality will become reality between all species.³ Although animal liberation has been an ideology and issue present throughout history,⁴ never before have the rights of animals been as prevalent as they are in modern day society.⁵ The animal movement is the next revolution.⁶ As Singer identified in 1975, ‘over the last few years, the public has gradually become aware of the existence of a new cause: animal liberation’.⁷ Nevertheless, thirty years on, Singer⁸ identifies that the ideologies of the early 1970s reflected that ‘scarcely anyone thought that the treatment of individual animals raised an ethical issue worth taking seriously’.⁹ When comparing those ideals with those of the modern day, however, Singer recognises a considerable difference of opinion over the thirty years.¹⁰ Furthermore, the present world has come a long way from the logic of Descartian in the 17th century, where animals were treated as ‘automatons’,¹¹ and an animal’s ‘squeals, squeaks and cries in response to various stimuli were regarded as nothing more than the sounds of improperly functioning machines’.¹²

² Martin Luther King, ‘I Have A Dream…’ (Speech delivered at the March on Washington, Washington, 28 August 1963).
⁴ Ibid.
⁵ Ibid.
⁶ Ibid.
⁹ Ibid.
¹⁰ Ibid.
¹¹ R Descartes, Discourse on the Method (Cottingham, Stoothoff and Murdoch, The Philosophical Writings of Descartes) 139 (first published 1637).
This paper aims to focus on the legal and philosophical framework of animal law by drawing attention to the issue of speciesism,\(^{13}\) prevalent in present society. This essay intends to illustrate that moral and legal changes need to be made in order to eliminate speciesism. In doing so, this essay will first briefly analyse the moral views of animals, placing much weight on the theories developed by Regan. The essay will look at the concept of equality verses equal consideration of rights, and some of the inconsistencies in Regan’s rights theory, namely discrimination based on: times of necessity, age, and the class of animals.

This paper will move on to philosophically address how animals are perceived in law, by briefly scoping the discussion around the property status of animals, which needs to be removed, and legal personhood. In this section, focus will also be had on the need for legal personality to be given to all animals, and the use of the ‘non-property guardianship’ model for companion animals as an addition to legal personality. The essay will follow on to a discussion on the reality of an anti-speciesist society, with focus placed on instincts and the need for meat in the diets of certain species (including humans) being problematic in achieving such a goal. Ultimately, this paper recognises that change needs to be achieved one tiny step at a time and that the purpose of this paper is to provide a hopeful perspective toward anti-speciesism, although achievement of all the recommendations may be somewhat difficult in reality, since change is limited by ‘physical, economic, political, religious, historical, legal, and physiological obstacles’.\(^{14}\) Finally, this essay will provide recommendations as to how to limit and eventually eliminate speciesism entirely by the use of a two phase model, whereby societal and legal changes need to be adopted before any significant progress can be made.

It is important to note that this essay will adopt a view that animals deserve moral consideration and any debates regarding consciousness and related issues will not be discussed in the scope of this paper. Furthermore, due to the limits placed upon this paper, the author will only focus on animal law in an Australian, western, context. Moreover, as this paper aims to analyse speciesism through an essentially philosophical lens, no direct focus

\(^{13}\) Analogous to racism and sexism, speciesism refers to an arbitrary, irrational and morally unjustifiable preference for the interests of humans over animals on the basis of species’: Steven White, ‘Exploring Different Philosophical Approaches to Animal Protection Law’ in Peter Sankoff, Steven White and Celeste Black (eds), Animal Law in Australasia (The Federation Press, 2nd ed, 2013) 31, 34; Richard D Ryder, Victims of Science (Davis-Poynter, 1975) 16.

will be placed on specific case law or sections of statute. The reader is also to consider that
due to these restrictions, the issues mentioned above can only be covered so in brief in the
scope of this essay.

2 The Current Moral Views of Animals: An Analysis

2.1 Equality vs Equal Consideration of Interests

Also known as ‘inherent value’, the concept of equal consideration of interests requires that
‘equal moral weight [be given] to comparable interests, regardless of who has those interests’. However, as White identifies, this concept does not mean that humans and
non-humans are to be treated equally since ‘the interests of humans and animals differ, so
that, for example, humans may have an interest in a claim to free speech that is obviously not
shared by animals in the same way. What is fundamental here is that the interests of
animals need to be considered in the same respect as any other being, human or non-
human. Yet there needs to be an understanding that rights must reflect the individual needs
of different species.

The problem with this concept, however, is that it is limited by what are included in the
definition of “interests”. Furthermore, since humans will inevitably be constructing any
formal document outlining such rights, such a document is at risk of being inevitably tainted
by the perspectives and ideals of the particular human writing on the behalf of non-human
animals. Moreover, as has been seen in human rights history, structuring and restricting

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15 White, above n 13, 34.


17 White, above n 13, 35.

18 Ibid.

19 See generally ibid.


rights for particular groups, based on the needs of such groups, is in itself potentially discriminatory.\textsuperscript{22} Though this concept possesses much credit, it is an issue that is far too complex for the scope of this paper, and thus will not be considered further.

Nonetheless, there still remains a need for equal consideration of the interests of all species, based on the notion that all species have intrinsic value as a life.\textsuperscript{23} Furthermore, countless theorists have compared the moral treatment of non-human animals with the treatment of young children and the impaired,\textsuperscript{24} with research showing that many animals possess qualities that are even more developed than many young human children and impaired humans.\textsuperscript{25} The author thus wishes to emphasise the importance of how moral attitudes are expounded on these human individuals, and that equal moral respect and rights should thus be given to non-human animals with the same or higher levels of development, as a minimum standard. Thus, ultimately, to take a step towards combating speciesism, it is vital that changes be made to the moral perception of non-human animals.

\textbf{2.2 Regan, Rights and Consistency}

Regan, a rights theorist, provides some very persuasive points in potentially combating speciesism.\textsuperscript{26} For instance, Regan identifies that humans do not require meat to survive.\textsuperscript{27} Furthermore, in regard to research animals, Regan's rights theory proposes that 'no one, whether human or animal, is ever to be treated as if she were a receptacle, or as if her value

22 Ibid.


24 Singer, above n 8, 185.


were reducible to her possible utility for others’. Regan’s rights theory thus possesses many merits. However, this paper does not support the clear inconsistency in Regan’s theory with regard to necessity and animal types, as these limitations are speciesist in nature.

Regan’s “worse-off principle” grants that there are some circumstances that allow animal rights to be predominated by humans. This is, undoubtedly, in clear conflict with the fight against speciesism emphasised in this essay. This concept provided by Regan merely reemphasises animals as a “less important” species when it comes to a moment of truth. However, any “necessity” defence should be viewed indiscriminately between the species, and thus apply as it ordinarily would in criminal law.

Furthermore, Regan limits his rights theory only to mammals of at least one year old, yet the basis on which Regan determines this concept is arguably not well founded. Additionally, such a theory conflicts directly with the notion of anti-speciesism by marginalising species from certain rights. Thus, though Regan provides a set of ideals that may potentially successfully combat speciesism, the inconsistency present makes Regan’s rights theory difficult to accept in its entirety. Thus, a slight variation of Regan’s rights theory is supported by this paper, in that his theory should apply to all species of all ages and levels of development. Furthermore, the necessity argument should apply to non-human animals no differently as it would to humans.

3 How Animals are perceived in Law: A Philosophical Account

3.1 Animals as Property

It has been described that the ‘property status of animals renders meaningless any balancing that is supposedly required under the humane treatment principle or animal welfare laws’. 28 Regan, above n 26, 392-393.

29 Ibid 77-78.

30 See R v Dudley and Stephens (1884) 14 QBD 273 DC.

31 Regan, above n 26, 77-78.

Francione explains that this is ‘because what we really balance are the interests of property owners against the interests of their animal property’.

Furthermore, criticisms provided by Epstein that the property status of animals could provide a positive perspective for animals, in turn, can be criticised, for this concept can be potentially successful only with companion animals, and is thus flawed.

As Francione further identifies, ‘as long as animals are treated as a form of property, their interests are not likely to be accorded more weight than they are under the framework of legal welfareism’. Thus, it can be understood that any move towards anti-speciesism involves the removal of the property “label” from non-human animals. Though this is a relatively small step, it is a ‘necessary step towards the achievement of an animal rights agenda where, to all intents and purposes, animals are regarded as the moral equals of humans’.

### 3.2 Legal Personality

Once property status is removed, it gives room for legal personality to be formed. However, arguably, it may be awarded even while animals are regarded as property by simply modifying it. Favre and Douglas provide a good alternative which is somewhere in between a property and legal personality status and rides on a revised version of social contract theory: ‘non-property guardianship’. The concept of ‘non-property guardianship’ provides many merits. For one, it assumes a more formal form of responsibility to companion humans. Secondly, the term “guardian” implies a less controlling notion over animals, and

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33 Ibid.


39 White, above n 13, 44.

40 Favre, above n 37.
more of a caring type of responsibility.\textsuperscript{41} Thirdly, the “guardianship” concept reflects a similar rights structure used with children and the impaired, thus giving animals the same standards as applicable to humans.\textsuperscript{42}

However, in conflict with Favre’s view, the notion of “guardianship” should not be formed as a limb of property law, but instead within a new set of statutes solely governing animal rights. This is because moving as far away from the property “label” as possible is a direction that is favourable in combating speciesism.\textsuperscript{43} In addition, the “guardianship” model may only apply successfully to companion animals, as guardianship would not be appropriate for animals without human companions.\textsuperscript{44} Thus, it is suggested that legal personality operate with non-companion animals in the same way it would with companion animals, yet without the “guardianship” element. In this regard, a more appropriate step would be to give all non-human animals legal personality, with companion animals being given further “guardianship” rights. This would not be to favour companion animals, but to give companion animals the rights necessary for their particular position as companions. Furthermore, as discussed earlier, it is important that legal personality not be limited to practical autonomy, but instead be based on the intrinsic value of an individual life.

\textbf{3.3 Differentiating Interests}

The analysis of property and legal personality brings to light the notion that, in reality, different rights and freedoms apply differently for various classes of animals. For instance, as explained above, in addition to legal personality, the ‘non-property guardianship’ model should be applicable to companion animals due to their positions as companions to humans, while the ‘non-property guardianship’ model would not apply to non-companion animals.\textsuperscript{45}

\begin{itemize}
\item \textsuperscript{41} Ibid.
\item \textsuperscript{42} Singer, above n 8.
\item \textsuperscript{44} Generally speaking, for the purposes of this paper, the term ‘companion’ animal includes all animals in human care (such as pets, zoos animals, etc.) but does not include animals that are not in human care (such as those in the wild).
\item \textsuperscript{45} Francione, above n 32; Douglas, above n 38.
\end{itemize}
Also, there obviously needs to be an understanding of the specific needs and instincts of particular animals.\textsuperscript{46} The fact is that certain needs and instincts may impede on the rights of beings from another species, thus preventing the “victimised” species certain rights. For example, a lion in the wild should have the right to hunt and kill as it would naturally since this is an important part of the behavioural and physical needs of this particular type of animal. However, if it is in the nature of one type of animal to eat another, would it be within the scope of speciesism that the “victimised” animal be denied the freedom to live for the sake of another animal’s freedom to hunt and act with natural instinct? Similarly, would it be within the scope of speciesism to allow an animal the freedom to hunt with natural instinct at the cost of another animal’s right to life? Obviously, there is no clear answer that would allow both rights to coexist.

This reflects on what is considered through a universalist approach,\textsuperscript{47} where the differences of each animal are not considered. This paper disagrees that the degree of animal complexity should deny certain organism’s fundamental rights. However, it is understandable for rights to be applied with respect to the particular type of animal involved, thus this paper leans more towards a capabilities approach.\textsuperscript{48} In this respect, it is important not to compare non-human animals with humans, as provided by similarity arguments.\textsuperscript{49} This is because this notion is, in itself, discriminatory as it does not respect each species as equally deserving recipients of rights as the next species. In other words, it is important that humans are not the central focus and “guide” for granting rights.

Additionally, what the lion scenario may bring to light is the argument in support of farming animals for food, since humans, as omnivores,\textsuperscript{50} also have been said to have the right to eat

\textsuperscript{46} See generally White, above n 13.

\textsuperscript{47} See White, above n 13, 45-49; DeGrazia, above n 16, 112.


\textsuperscript{49} See White, above n 13.

\textsuperscript{50} Although it should be noted that this is arguable, with considerable research proving that humans were ‘not meant to eat meat’: Deneen, above n 27; Regan, above n 26, 330-353; Towell, above n 27. However, this subject, like many others identified in the scope of this paper, is far too deep to discuss considering the restrictions placed upon this essay and will not be focused on any further.
food including meat. 51 If leaning toward this perspective, it could be considered that farming may be deemed necessary. However, in rebutting such a proposal, it is important to identify the negativity associated with farming and its conflict with anti-speciesist ideals. 52 Furthermore, it is not necessary. 53 Prior to farming practices, humans hunted just as the lion did in the scenario described above. 54 Therefore, considering this, farming for meat would be inappropriate and unnatural. 55 In fact, using this wave of thinking, the only understandable manner of including meat in a one’s diet would be to hunt animals individually and not in excess.

Thinking further into this concept, it has been argued by many academics that humans do not need to eat meat in order to survive. 56 Furthermore, one only need look at a supermarket isle to realise that non-human animal meat, at the cost of another’s life, is in abundance, excess and taken for granted. 57 Moreover, meat, in today’s world, is treated as more of a delicacy rather than a necessity. 58 Nonetheless, regardless of whether or not humans once needed meat in their diets, it is clear that in the present day Western world, where a variety of foods are at one’s fingertips, meat is not a necessity. 59 Thus, the requirement to take a life for food in order to aid survival, as it may apply to other animal species, no longer applies to


53 Ibid.


55 Farming for non-meat products such as eggs, milk, etc., however, pose yet again another dilemma. Regrettably, due to the restrictions placed upon this essay, the farming of non-meat products cannot be discussed, with focus only on the farming of meat.


58 Ibid.

59 Ibid.
humans.\textsuperscript{60} Therefore, the taking of a life for the fulfilment of human hunger and nutrition is no longer, in the modern world, a necessity, and this concept should thus be reflected in law.\textsuperscript{61} Nevertheless, the author realises that the changes suggested by this paper are not only highly optimistic, but dramatic to the point of being unrealistic since ‘legal rights for animals must proceed one step at a time, as progress is impeded by physical, economic, political, religious, historical, legal, and physiological obstacles’.\textsuperscript{62} This is the bitter reality of fighting speciesism. However, as will be discussed in the remaining section below, the purpose of this paper is to provide a brief philosophical account of how animals \textit{should} be treated through a change in moral ideals and law: as equal and respected, with no barrier placed on the basis of species. The author recognises that the sheer \textit{reality} of such a hope is certainly some time away, and it is equally certain that many more lives will be lost before the struggle is over.

4 The Journey to Justice

4.1 The Road Ahead

‘Prima facie, it is not possible to rule out, in advance of understanding the consequences, the use of animals in a variety of exploitative settings. In the case of ceasing to eat meat, for example, abolition would cause social and economic upheaval’.\textsuperscript{63} Though this may very well be the case, it is important for the reader to be reminded of the struggles for equality faced by other marginalised groups. Only 190 years ago was slavery a legal practice.\textsuperscript{64} Furthermore, it has only been 52 years since Aboriginal woman have been given the right to vote.\textsuperscript{65} The world is continuously moving; with time, it is changing; it is, arguably, gradually striving to become more balanced and more neutral.

\textsuperscript{60} Ibid; Regan, above n 26, 330-353.

\textsuperscript{61} See also Diamond, above n 56.

\textsuperscript{62} Wise, above n 14, 19.

\textsuperscript{63} White, above n 13, 41.

\textsuperscript{64} Slave Trade Act 1824 (Cth) made slavery a criminal offence in Australia.

It is not the intention of this paper to focus purely on the limits to ending speciesism. The purpose of this paper is to provide a beacon of hope to non-humans and to all those supporting the end of speciesism. Certainly, the change associated with ending speciesism will journey a long – and probably rocky, winding, and steep – road. Yet, any change in removing once-acceptable notions of discrimination from both the ideals of society and the legal system involves time, persistence and patience.

Nonetheless, what can be attributed through the research focus of this paper, are two elements which are equally important in fighting speciesism. They are:

(1) A change in the ideals and moral standards of society; and

(2) A change in the law.

4.2 Moral Standards

Lovvorn has made it clear in his writings of support of the law in creating change, suggesting the requirement of ‘footsoldier, not philosophers’.66 However, Lovvorn also states that ‘the law does not change society, society changes the law’,67 which only reiterates the importance of moral change, since without moral change in society, the law would remain unmoved.68 Furthermore, as White identifies,69 there is an importance of philosophical thinking in stimulating interest in animal treatment regarding prompting legal change, as has been done thus far.70 Changes in how discrimination has been regarded in law, whether it relates to speciesism or other forms, have a basis in the analysis from varying schools of thought that preceded that law.71 Thus, the importance of philosophical thought and the moral change of how animals are regarded in society are of immeasurable importance. Not only does such thinking create awareness of activities that may currently be ignored or uncovered, but it also aims to find possible solutions through the examination of important issues via the lens of


67 Ibid 149.

68 White, above n 13, 50-51, 59.

69 Ibid 48.

70 Ibid 51; Singer, above n 8.

71 Ibid.
differing philosophical perspectives. This paper suggests that methods to help change the current moral perception of speciesism, inherent in the ideals of society, should include but not limit itself to awareness, education, and the teaching of non-speciesist alternatives.

5. Legal Change

In addition to changing the morals and ideals of society, a change in international and domestic law is necessary in order to adequately and successfully combat speciesism, and maintain such an ethic. This paper proposes the following changes:

5.1 International Law

This should include the formation of an international minimum standard of animal rights\textsuperscript{72} as a United Nations Universal Declaration endorsed by signatories.\textsuperscript{73} International law is arguably symbolic since the sovereignty of individual nations prevents adequate enforcement and signatories are not obliged to actually enact or amend related domestic law.\textsuperscript{74} However, international law provides awareness of the importance of certain issues in the global arena.\textsuperscript{75} Furthermore, forming an international minimum standard heightens the general moral thinking relating to non-human animals and the fight against speciesism, as it places animals at the same level of importance as humans; their rights recognised at the international level.\textsuperscript{76}

5.2 Domestic Law

Though the complexity of this concept cannot be adequately discussed in the scope of this paper, it is recommended that change includes changes at the state and federal levels, with provincial, territorial, regional and local levels following suit. A body of anti-speciesist

\textsuperscript{72} Although this will not be developed further in the scope of this paper, it is important to quickly note the specific reference to “rights” rather than “welfare” since welfarism would simply reinstate the position animal law is currently lost in: see White, above n 13.


legislation needs to be formed, outlining the fundamental rights of all species including human and non-human animals. Ideally, an amendment to the Australian Constitution, although arguably only symbolic, would be powerful in combating speciesism and concreting Australia’s intentions in supporting anti-speciesism. Furthermore, many other areas of law expressly or impliedly supporting speciesist connotations would need to be amended accordingly.

It is recommended that the change would reflect the major points discussed in this essay, including, but not limited to:

- Removing the property “label” from animals
- Granting that all species have legal personality

In addition to this, the ‘non-property guardianship’ model would apply to companion animals

- Rights would not be limited to species of a particular age, class, or level of complexity, etc., but based on their intrinsic value of life.
- In regard to non-companion animals only, if an animal’s rights to instinct and food conflict with the rights of another to live, the natural and physiological needs of those animals need to be considered
- In regard to humans, as the consumption of animals is no longer a necessity, animal consumption would not be acceptable.

6 Conclusion

As White explains, ‘even if it may not be possible to come to any prescriptive, all embracing conclusions about the way we should conceptualise our relationship with animals, including law, we can conclude with considerable confidence that prevailing approaches are inadequate’. Change is needed in both the moral ideals of society, and the legal field. Moral perceptions and the law go hand in hand as each influences the other, thus meaning that any change will involve a long and patient journey.

The author accepts that the recommendations proposed in this paper may be regarded as “rigid” to those readers with more anthropocentric beliefs. However, this paper merely

78 White, above n 13, 39.
highlights, ever so briefly, the possibility of what a less discriminatory world may look like. A perception of the recommendations in this paper as “rigid” thus only illustrates how, though the world has moved on from the horrifyingly backward thinking of Descartes, society is still entrenched in discriminatory ideology. Nonetheless, it is inspiring to consider just how far rights for animals have come. Thus, as the fight for animal liberation continues to gain momentum through time, this era marks the dawning of a new movement: past gender, race, religion, or class, and to that of non-human animals.

79 Descartes, above n 11.
Bibliography

Articles/Books/Reports


Descartes, R, *Discourse on the Method* (Cottingham, Stoothoff and Murdoch, *The Philosophical Writings of Descartes*) 139 (first published 1637)


Green, PC and E Gullone, ‘Knowledge and attitudes of Australian Veterinarians to Animal Abuse and Human Interpersonal Violence’ (2005) 83 *Australian Veterinary Journal* 17

Gregory, Neville and Temple Grandin (eds), *Animal Welfare and Meat Production* (CABI, 2007)


King, Martin Luther, ‘I Have A Dream…’ (Speech delivered at the March on Washington, Washington, 28 August 1963)


McEwen, Graeme, Submission to Attorney-General, Panel Submissions to the Attorney-General 3 September 2008


Regan, Tom, Defending Animal Rights (University of Illinois Press, 2001)

Regan, Tom, The Case for Animal Rights (University of California Press, 1983)


Regan, Tom and Peter Singer (eds), Animal Rights and Human Obligations (Prentice Hall, 1989)

Ryder, R, *Victims of Science* (Davis-Poynter, 1975)

Sankoff, Peter and Steven White (eds) ‘Animal Law in Australasia – A new dialogue’ (Federation Press, 2009)


Sankoff, Peter, Steven White and Celeste Black (eds), *Animal Law in Australasia* (The Federation Press, 2nd ed, 2013)


Singer, Peter, ‘Moral Experts’ (1972) 32(4) *Analysis* 115


White, Steven, ‘Exploring Different Philosophical Approaches to Animal Protection Law’ in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia* (The Federation Press, 2013) 31


**Cases**

*R v Dudley and Stephens* (1884) 14 QBD 273 DC

**Legislation**

*Animal Care and Protection Act 2001* (Qld)

*Animal Care and Protection Regulation 2012* (Qld)

*Slave Trade Act 1824* (Cth)

**Other**


Explanatory Notes, Criminal and Other Legislation Amendment Bill 2011 (Qld)


