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**Recognising animal sentience:
Including minimum standards for opportunities
to display normal patterns of behaviour in codes
of welfare in New Zealand**

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Abstract

This paper considers the impact of the recognition that animals are sentient in the 2013 amendment to the Animal Welfare Act 1999, examining the rationale for the change and the drivers underpinning the current legal approach to animal welfare in New Zealand. It concludes that although the intention of recognising animal sentience may be largely symbolic, the result of the change must ultimately be to improve animal welfare in New Zealand, and that better recognition of minimum standards for providing animals with the opportunity to display normal patterns of behaviour should be included in the codes of welfare developed under the Act.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 7476 words.

Subjects and Topics

Animal welfare

Animal sentience

Codes of welfare

I Introduction

In 2015, the Animal Welfare Act 1999 (the Act) was amended¹ to include recognition that animals are sentient.² This applies to all animals covered by the Act. Recognising that animals are sentient means acknowledging their ability to have positive and negative emotional experiences, of which the opportunity to display normal patterns of behaviour is an essential component.³ Minimum standards and best practice for care of and conduct towards animals are provided for in codes of welfare developed under the Act. The codes do not provide sufficiently for farmed animals to be given the opportunity to display normal patterns of behaviour, despite this being identified in the Act as a need that owners and people in charge of animals are required to meet.⁴ The effect of this omission is that sentience is not currently being recognised in the implementation of the Act.

The Act has also been amended to include the ability to issue regulations and compliance notices. While the introduction of regulations is unlikely to assist in the recognition of sentience,⁵ the Ministry for Primary Industries (MPI) which administers the Act,⁶ has stated that “when new regulations are issued, codes of welfare may also have to change.”⁷ As the codes will no longer be the primary means of communicating expected standards of care and conduct to the industry, they will need to be revised to fit with the new regulatory structure, presenting an opportunity to rectify the omission of minimum standards for meeting behavioural needs in the codes. This paper considers how the codes should change to appropriately recognise sentience of farmed animals. It sets out

¹ The Act was amended by the Animal Welfare Amendment Bill 2013 (107-2).

² The relevant part of the long title of the Act reads:

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 recognise that animals are sentient: ...

³ This is established in a number of articles, including Emily Meller “If animals are sentient, what then?” *Overland* (24 October 2014) at <overland.org.au/2014/10/if-animals-are-sentient-what-then/>, Catherine Douglas, Melissa Bateson, Clare Walsh, Anais Bedue and Sandra Edwards “Environmental enrichment induces optimistic cognitive biases in pigs” (2012) 139 *Applied Animal Behaviour Science* 65 at 72, and Lori Marino and Christina M. Colvin “Thinking Pigs: A Comparative Review of Cognition, Emotion, and Personality in *Sus domesticus*” (2015) 28 *International Journal of Comparative Psychology* and discussed further later in this paper.

⁴ Animal Welfare Act 1999, s 10.

⁵ As noted later in this paper, it appears that the regulations will not address the behavioural needs of animals.

⁶ The Act states that it is administered by the Ministry for Primary Industries.

⁷ <www.mpi.govt.nz/protection-and-response/animal-welfare/codes-of-welfare/>.

the framework for animal welfare in New Zealand, the intentions behind the inclusion of sentience in the Act, and the current operation of the codes of welfare and how opportunities to display normal patterns of behaviour are provided for in the codes, demonstrating that the current provisions in the regulatory framework do not adequately provide for the recognition of sentience in farmed animals. It then examines the rationale for the introduction of regulations and considers why recognition of sentience is important in that context. It concludes with recommendations for changes to codes of welfare to enable sentience of farmed animals to be adequately recognised.

II The framework for animal welfare in New Zealand

A Providing for welfare and preventing ill treatment

The Act is the primary statute in respect of the welfare of companion and farmed animals in New Zealand. It provides for the welfare and prevention of ill-treatment of animals owned by or in the charge of any person.⁸ Welfare is provided for in codes of welfare,⁹ based on requirements in the Act to meet animals' physical, health, and behavioural needs, and alleviate unreasonable or unnecessary pain and distress.¹⁰ Prevention of ill-treatment is provided for by the specifying of cruelty offences, the banning of certain farming practices, and obligations on owners and people in charge of animals.¹¹ The definition of "animal" is broad and includes any live member of the animal kingdom that is a mammal, reptile, amphibian, bird, fish, octopi, squid, crab, lobster or crayfish, including any mammalian foetus, or any avian or reptilian pre-hatched young, that is in the last half of its period of gestation or development.¹²

The ability to issue regulations was included in the Act in July 2016 and introduces a further aspect to the regulatory framework.

B What is animal welfare?

While prevention of ill treatment of animals is obviously important, merely ensuring that animals are not badly treated will not achieve recognition of sentience; to properly recognise sentience, the welfare needs of animals must be met. "Welfare" is not defined

⁸ Animal Welfare Act 1999, long title.

⁹ The Act establishes procedures for the development, issue, amendment, review, and revocation of codes of welfare at s 68. Section 79 of the Act states that the codes are disallowable instruments for the purposes of the Legislation Act 2012.

¹⁰ The meaning of "welfare" in the Act is set out in the following section.

¹¹ Part 2 of the Act addresses ill-treatment towards animals and Part 8 sets out infringement offences.

¹² Animal Welfare Act 1999, s 2.

in the Act,¹³ but an analysis of the legislation indicates it has a clear meaning. Part 1 of the Act is entitled “Care of animals” and creates obligations and offences in respect of animal welfare. In particular, s 9(1) states “the purpose of this Part is to ensure that owners of animals and persons in charge of animals attend properly to the welfare of those animals,”¹⁴ and goes on to say that “accordingly” owners and people in charge of animals are required to “ensure that the physical, health, and behavioural needs of the animals are met.”¹⁵ “Welfare” therefore includes meeting the physical, health, and behavioural needs of animals, which are defined in s 4 as food and water, proper handling, shelter, protection from and treatment for injury and disease, and the opportunity to display normal patterns of behaviour.¹⁶ These needs are based on the “five freedoms”¹⁷ and must be “appropriate to the species, environment, and circumstances of the animal”¹⁸ and met in accordance with good practice and scientific knowledge.¹⁹ This provides a strong platform for the recognition of sentience in farmed animals to be implemented.

C Enforcement of the Act

Enforcement of the Act is undertaken by MPI in partnership with the Royal New Zealand Society for the Prevention of Cruelty to Animals (SPCA). MPI employs eleven full-time and five part-time animal welfare inspectors “who deal mainly with rural animal welfare issues.”²⁰ The SPCA’s 94 inspectors and 42 auxiliary officers focus on urban areas and

¹³ It has been suggested that “[a]nimal welfare... as defined by law, is a state where the animal does not experience pain or distress that is unreasonable or unnecessary.” (Ian Robertson “Applying “Sentience” in the Animal Welfare Act 1999” (2015) At The Bar <www.nzbar.org.nz> at 17). However, while the offences in the Act focus on ill-treatment and could be said to be underpinned by such a definition, the Act indicates that the concept of welfare is broader than this.

¹⁴ Animal Welfare Act, s 9(1).

¹⁵ Animal Welfare Act, s 9(2)(a). This Part also creates requirements around the treatment of ill or injured animals, surgical procedures and transportation of animals.

¹⁶ Peter Sankoff “The animal rights debate and the expansion of public discourse: is it possible for the law protecting animals to simultaneously fail and succeed?” (2012) 18 Animal Law Review 281 at 301.

¹⁷ “The “five freedoms” is a core concept in animal welfare that originated in a UK government report in 1965 and was then refined by the Farm Animal Welfare Council.”:

<cfhs.ca/info/understanding_animal_welfare>.

¹⁸ Animal Welfare Act 1999, ss 10 and 4.

¹⁹ Animal Welfare Act 1999, s 10.

²⁰ Ministry for Primary Industries “Options to Amend the Animal Welfare Act 1999: Regulatory Impact Statement” (May 2013) retrieved from

<www.treasury.govt.nz/publications/informationreleases/ris/pdfs/ris-mpi-oawa-may13.pdf> at 8-9. It is also noted that veterinarians are employed as animal welfare inspectors at slaughter premises, and the New Zealand Police are deemed to be animal welfare inspectors.

companion animals.²¹ In 2013, MPI reported an average of 16,000 animal welfare complaints each year over the past five years,²² with 95 per cent of those dealt with by the SPCA, and less than 100 prosecutions brought from all investigations each year.²³ There are no regular inspections of farms and the model is complaints-driven, meaning that the focus is on responding to concerns about ill-treatment rather than ensuring minimum standards for welfare are met. Further, given the vast discrepancy between the number of inspectors for farmed animals and those for companion, MPI's ability to enforce the Act is of concern.

²¹ Above n 20 at 9.

²² Above n 20 at 9.

²³ The example of 95 per cent is from 2011 (above n20 at 9) and is used as a typical example in the quoted text.

III Inclusion of recognition of sentience in the Act

A Inclusion of sentient

Recognition of animals as sentient is in the long title to the Act, which states:²⁴

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 recognise that animals are sentient:

The inclusion was made following submissions on the Animal Welfare Amendment Bill 2013 (the Bill), including from the World Society for the Protection of Animals²⁵ and the National Animal Welfare Advisory Committee (NAWAC), which submitted:²⁶

The Animal Welfare Act should be the place where society is reminded of this quality of animals, as recognizing their sentience is central to understanding how we should treat them. NAWAC responds to the question “Why?”, [sic] by asking “Why not?”

²⁴ The long title in full reads:

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 recognise that animals are sentient:
 - (ia) 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.

²⁵ World Society for the Protection of Animals “Acknowledging animal sentience: giving meaning to animal welfare” September 2012 at <www.parliament.nz/resource/en-nz/50SCPP_EVI_00DBHOH_BILL12118_1_A359867/690c9fc65054a64c8f10ff783e967a7e662f6162>

²⁶ National Animal Welfare Advisory Committee “Submission to the Primary Production Committee on the Animal Welfare Amendment Bill 2013” at <www.parliament.nz/resource/mi-nz/50SCPP_EVI_00DBHOH_BILL12118_1_A360478/8f2b32bf473077954f61e38064c70108a09a7332>.

There was debate around where the wording should be included. MPI submitted that reference to sentience should not be included in the definition of animal in the Act, as “there remains some uncertainty about how sentient some animals are,”²⁷ in particular fish, crustaceans and squid. If sentience was included in the definition, it submitted, it would be possible “to argue that those animals no longer fell under the jurisdiction of the Act”,²⁸ and they would lose protections, and conversely, if science were to prove that insects, for example, are sentient, the full duties of care of the Act would have to be extended to them. Therefore, the decision was made to include the wording in the long title, with NAWAC and MPI both suggesting that it would be “largely symbolic.”²⁹ MPI also stated:³⁰

Including sentience within the preamble to the Act would not impact the detail of any of the rights, duties and obligations set out within the Act, but it would shape the overall spirit and intent of the Act.

Whatever the expectations of submitters to the Bill, “standard legal procedure and principles of legislative interpretation mean that adding a word ... creates something new / additional with corresponding shifts in legally required changes in behaviour, responsibilities and accountabilities.”³¹ Long titles have been used in the Courts in applying the purposive approach³² (that is, interpreting a statute in light of its purpose). The effect of including recognition of animal sentience in the Act must therefore be to inform the interpretation of the Act.

B Meaning of “sentient”

There is no definition of “sentient” in the Act. However, the intended meaning can be discerned from Select Committee records. NAWAC submitted that “[s]entience is the ability to feel, or perceive, or be conscious, or have subjective experiences as distinct from the ability to reason.”³³ At the second and third readings of the Bill, Primary

²⁷ Ministry for Primary Industries “Animal Welfare Amendment Bill: Issues Paper developed by the Ministry for Primary Industries: Preliminary analysis of primary issues raised by submissions to the Primary Production Select Committee” 5 December 2013 at 9.

²⁸ Above n 27 at 9.

²⁹ Above n 26 and above n 27 at 9.

³⁰ Above n 27 at 9.

³¹ Ian Robertson “Applying “Sentience” in the Animal Welfare Act 1999” (2015) At The Bar <www.nzbar.org.nz> at 16.

³² JF Burrows *Statute Law in New Zealand* (3rd ed, LexisNexis, Wellington 2003) at 166.

³³ Above n 26.

Industries Minister Nathan Guy described sentience of animals:³⁴ “[T]hat is, that animals can have feelings, perceptions, and experiences that matter to them,” and Jonathan Young described it as animals’ “ability to feel, to perceive, and to experience.”³⁵ Recognising animal sentience therefore means recognising that animals can have positive and negative experiences,³⁶ and this in turn means that providing the opportunity for animals to have positive experiences through the opportunity to display normal patterns of behaviour is an important part of providing for the welfare of those animals.

C Reasons for recognising sentience in the Act

1 Reconciling New Zealand’s approach domestically and internationally

There were a number of reasons for including sentience in the Act. New Zealand has a strong international reputation in animal welfare,³⁷ and has ratified the Treaty of Lisbon,³⁸ which in 2009 declared that animals are sentient beings.³⁹ Reference to sentience of animals has since been incorporated into domestic legislation in France, Germany, Austria and Switzerland,⁴⁰ providing the basis for an international standard for animal welfare. In recommending that the Act recognise animal sentience in the preamble, MPI stated:⁴¹

This change would ... bring New Zealand legislation into line with international animal welfare legislation and with our stated international position [and the New Zealand Animal Welfare Strategy].

³⁴ Hansard “Animal Welfare Amendment Bill — Second Reading” 26 November 2014, at <www.parliament.nz/en/pb/hansard-debates/rhr/document/51HansD_20141126_00000040/animal-welfare-amendment-bill-second-reading>.

³⁵ Hansard Volume 705 Page 3164 5 May 2015 at <www.parliament.nz/en/pb/hansard-debates/rhr/document/51HansS_20150505_00001079/young-jonathan-animal-welfare-amendment-bill-third-reading>.

³⁶ Above n 3.

³⁷ Ministry for Primary Industries “Animal welfare matters: Proposals for a New Zealand Animal Welfare Strategy and amendments to the Animal Welfare Act 1999” MPI Discussion Paper No: 2012/07.

³⁸ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, European Union 2007/C 306/01 (13 December 2007).

³⁹ The Treaty states: “In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.”

⁴⁰ Above n 31 at 16.

⁴¹ Above n 27 at 9.

2 *New Zealand's international reputation and the importance of reflecting societal views*

Protecting New Zealand's international reputation in animal welfare protects the economic value of the primary sector, on which New Zealand's economy is largely based.⁴² The New Zealand Animal Welfare Strategy states:⁴³

New Zealand ... relies on animals for substantial parts of its economy... . New Zealand's animal welfare practices add value to our exports by contributing to our reputation as a responsible agricultural producer. Animal welfare is increasingly important for accessing premium markets and differentiating New Zealand's products.

The evolution of societal attitudes towards animal welfare in New Zealand is reflected in the legislative development. The Act has been described as “ground-breaking for New Zealand... establish[ing] a legal threshold for a duty of care to animals [because it was]... the first piece of legislation in the world that legislated for the Five Freedoms.”⁴⁴ In 2009, Tuckwell noted that the introduction of the Act in 1999 had heralded a change from the prevention of cruelty under the Animals Protection Act 1960 “to the establishment of positive obligations on owners and people in charge of animals.”⁴⁵ Subsequent amendments to the Act continued to reflect evolving views on animal welfare. The 2010 amendment increased sentencing provisions for animal cruelty offences and created a new offence of reckless cruelty to animals.^{46,47} The 2013 Amendment then focused on animal welfare, with the purpose being to “improve the

⁴² Neil Wells *Animal Law in New Zealand* (Brookers Ltd, Wellington, 2011) at 19.

⁴³ Ministry for Primary Industries “Animal Welfare Matters: New Zealand Animal Welfare Strategy” Wellington, May 2013.

⁴⁴ Above n 42 at 23.

⁴⁵ Joanna Tuckwell “Animal Welfare Act: codes of welfare” (2009) 7 NZLJ 267 at 267.

⁴⁶ The Animal Welfare Amendment Bill 2010 states:

“Purpose: The main aim of this Bill is to amend the Animal Welfare Act 1999 (the Act) to increase the maximum sentence for animal cruelty from three to five years, create a new offence of reckless cruelty to animals, and to “make the Animal Welfare Act work better”.”

⁴⁷ At that time, the Minister of Agriculture said that increasing incidences of animal cruelty were horrifying New Zealanders and Government intended to introduce stronger measures to deal with the issue: David Carter, Minister of Agriculture “Government adopts animal cruelty bill” 2 February 2010, Media Release <www.beehive.govt.nz/release/government-adopts-animal-cruelty-bill>.

enforceability, clarity, and transparency of the New Zealand animal welfare system.”⁴⁸
In 2015, Robertson suggested that the incorporation of sentience in the Act: ⁴⁹

...creates legal obligations and responsibilities on animal caregivers to ensure that the animal has a positive quality of life experience that includes demonstrable comfort, pleasure, interest and confidence.

New Zealand’s positive international reputation on animal welfare may derive from the incorporation of social views, particularly in relation to the development of the codes of welfare. It has been noted that an important aspect of the development of the codes is the required public consultation,⁵⁰ which encourages discussion about the way animals should be treated, keep animal welfare in the public eye, and may lead to changing attitudes towards animal welfare; it has been proposed that this discourse could lead to improvements in welfare standards:⁵¹

New Zealanders today have embraced discussion of the way animals should be treated as a subject that is serious and deserving of ongoing scrutiny.... [and may make] meaningful improvements in the lives of animals.

If New Zealand is to retain its positive international reputation, it is therefore critical that the country keeps pace with evolving social expectations for animal welfare. MPI has quoted primary industry leaders as stating that “New Zealand must do more to protect the significant financial benefit derived from New Zealand’s reputation for quality, sustainable and trustworthy agricultural products.”⁵² If New Zealand is to derive a financial benefit from recognising sentience of farmed animals, that recognition must actually be implemented. International attention will quickly identify any regression.

⁴⁸ Animal Welfare Amendment Bill 2013 (introduced in 2015): “This bill proposes amendments to the Animal Welfare Act 1999 to improve the enforceability, clarity, and transparency of the New Zealand animal welfare system.” <www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/00DBHOH_BILL12118_1/animal-welfare-amendment-bill>.

⁴⁹ Above n 31 at 20.

⁵⁰ Section 71 of the Animal Welfare Act 1999 requires public notification of draft codes, s 72 provides that NAWAC may consult with persons who make submissions on a code, and s 73 provides that in considering the content of a draft code, NAWAC must have regard to submissions made and consultation undertaken.

⁵¹ Above n 16 at 319.

⁵² Above n 20 at 8, quoting the KPMG Agribusiness Agenda 2012 (kpmg.com/nz/aa2012).

IV The codes of welfare

A Issue and purpose of codes

MPI currently lists 18 codes for specific companion and agricultural animals as well as for slaughter, transport, animal husbandry, and circuses and rodeos.⁵³ The codes establish minimum standards and recommend best practice for care of and conduct towards animals.⁵⁴ They are issued by NAWAC, which is established under the Act⁵⁵ to advise and make recommendations to the Minister,⁵⁶ including on “the issue, amendment, suspension, revocation, and review of codes of welfare.”⁵⁷ NAWAC members are appointed by the Minister and are expected to represent knowledge and experience across a range of relevant disciplines.⁵⁸

B Development of codes

The Act provides that any person may prepare a draft code of welfare.⁵⁹ To this end, NAWAC has prepared guidelines for writing codes of welfare.⁶⁰ Many of the codes originally prepared under the legislation have now been updated, but the initial drafts, on which the current versions are based, were generally prepared by industry; for example, the Animal Welfare (Pigs) Code of Welfare 2005 was prepared by the New Zealand Pork Industry Board;⁶¹ the Animal Welfare (Deer) Code of Welfare 2007 was written by a group convened by Deer Industry New Zealand;⁶² and the Animal Welfare (Layer Hens) Code of Welfare 2005 was drafted by the Egg Producers Federation of

⁵³ <www.mpi.govt.nz/protection-and-response/animal-welfare/codes-of-welfare/>.

⁵⁴ Animal Welfare Act 1999, s 68.

⁵⁵ Animal Welfare Act 1999, s 56.

⁵⁶ The Act states that it is administered by the Ministry for Primary Industries; therefore references to the Minister in the Act are to the Minister for Primary Industries. NAWAC is also charged with certain functions regarding traps (ss 57(c), 57(d) and 57(f)).

⁵⁷ Animal Welfare Act 1999, s 57(e). NAWAC is also charged with certain functions regarding traps (ss 57(c), 57(d) and 57(f)).

⁵⁸ Section 58(3) of the Act provides that the Minister must, in making appointments[,] ... have regard to the need for the Committee to possess knowledge and experience in ... [veterinary science, agricultural science, animal science, the commercial use of animals, the care, breeding, and management of companion animals, ethical standards and conduct in respect of animals, animal welfare advocacy, the public interest in respect of animals, environmental and conservation management, and any other area the Minister considers relevant.] Under s 58(2)(c), the chairperson of the National Animal Ethics Advisory Committee must also sit on NAWAC.

⁵⁹ Animal Welfare Act 1999, s 70(1).

⁶⁰ National Animal Welfare Advisory Committee “Guidelines for Writing Codes of Welfare” June 2009.

⁶¹ Animal Welfare (Pigs) Code of Welfare 2005 at 1.4.

⁶² Ministry for Primary Industries “Animal Welfare (Deer) Code of Welfare 2007 Report” at <www.mpi.govt.nz/document-vault/1419>.

New Zealand.⁶³ While this reflects the importance of the codes accurately recognising and providing for current farming practices, and assists in protecting the economic value of the primary sector, it may not allow objective development of animal welfare standards, nor the ability to strike an objective balance between economics and animal welfare, due to industry ‘capture’. Further, it means that the codes are not consistent as each has a different author and heavily reflects the needs of a particular sector of the industry.

C Enforcement of codes

The codes are not enforceable in their own right, as there is no statutory obligation to comply or offence of failing to comply.⁶⁴ Evidence of failure to meet minimum standards under a code may be used to support prosecution for an offence, and likewise evidence that minimum standards have been met may be used as a defence;⁶⁵ however, the type of prosecutions taken in New Zealand means that these considerations are unlikely to be central to any case.⁶⁶ Prosecutions are generally only undertaken for serious ill-treatment; MPI received 698 complaints in the year to December 2015, five per cent of which resulted in prosecutions.⁶⁷ In 2013, MPI reported that to that date there had only been two prosecutions for failure to meet minimum standards.⁶⁸ Therefore, while technically a failure to meet minimum standards constitutes ill treatment and is in contravention of the Act, from a practical perspective this may not be acted on. Further, the best practice provisions in the codes are recommendations only and carry no legal weight. As noted above with regard to animal welfare inspectors, the model is of punishing negative behaviour rather than enforcing positive obligations.

⁶³ Laura Lincoln “The Animal Welfare Amendment Bill 2013: A critique of the amendments aimed at improving the enforceability, transparency, and efficiency of the Animal Welfare Act 1999” (2013) Faculty of Law, Victoria University of Wellington.

⁶⁴ Above n 45 at 273.

⁶⁵ Section 13(1A) of the Act provides that evidence that a code was not complied with may be used to support a prosecution, and s 13(2)(c) provides that proof that minimum standards were met may be used as a defence: <www.mpi.govt.nz/protection-and-response/animal-welfare/codes-of-welfare>.

⁶⁶ Recent Court reports do not reveal any recent cases regarding farmed animals; however, the following two media articles relate to dairy farmers being charged for breaking cows’ tails: New Zealand Herald “Dairy farmer admits to breaking tail of nearly 50 cows” 19 August 2016 <www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11697286> and Stuff “Taranaki farmer sentenced for breaking tails of 157 cows” 2 December 2015 <www.stuff.co.nz/business/farming/dairy/74637267/Taranaki-farmer-sentenced-for-breaking-tails-of-157-cows>.

⁶⁷ Above n 20 at 11.

⁶⁸ Above n 20 at 11.

D Meaning of “minimum standards” for the purpose of codes of welfare

The term “minimum standards” is not defined in the Act but its meaning is established by s 73(1)(a), which states that NAWAC, when considering a draft code, must “be satisfied that the proposed standards are the minimum necessary to ensure that the purposes of this Act will be met.”⁶⁹ As discussed above, one of the purposes of the Act⁷⁰ is to ensure that owners and people in charge of animals attend properly to the welfare of those animals. This is followed by obligations established by s 10 to meet the physical, health and behavioural needs of animals in accordance with good practice and scientific knowledge,⁷¹ and the definition of physical, health, and behavioural needs at s 4,⁷² based on the five freedoms. Therefore, the Act requires that codes include minimum standards based on the five freedoms.

E Minimum standards for the provision of the opportunity to display normal patterns of behaviour in the codes

1 “Minimum standards” or “priority behavioural requirements”?

The opportunity to display normal patterns of behaviour is the most complex need to implement of the five freedoms. Animals cannot ultimately survive without food, water, shelter, and essential medical treatment, and improper handling may cause obvious physical harm. These aspects are addressed in all the codes. In respect of behaviour of farmed animals:⁷³

[D]omesticated animals have inherited from their wild ancestors many physical, emotional and social needs that are redundant in farms. Farmers routinely ignore these needs without paying any economic price. ... [T]he agricultural revolution gave humans the power to ensure the survival and reproduction of domesticated animals while ignoring their subjective needs.

Animals can survive in a farming environment without having their behavioural needs met; they can live and breed without having the opportunity to display normal patterns

⁶⁹ Animal Welfare Act 1999, s 73(1)(a).

⁷⁰ Animal Welfare Act, s 9.

⁷¹ Animal Welfare Act, s 10.

⁷² Section 4 states that physical, health, and behavioural needs include proper and sufficient food, proper and sufficient water, adequate shelter, opportunity to display normal patterns of behaviour, physical handling in a manner which minimises the likelihood of unreasonable or unnecessary pain or distress, and protection from, and rapid diagnosis of, any significant injury or disease.

⁷³ Yuval Noah Harari “Industrial farming is one of the worst crimes in history” 25 September 2015 at <www.theguardian.com/books/2015/sep/25/industrial-farming-one-worst-crimes-history-ethical-question>.

of behaviour. Further, some normal patterns of behaviour, such as extensive locomotion and sexual behaviours, are incompatible with certain types of farming. NAWAC's guidelines on writing codes of welfare address the issue thus:⁷⁴

Normal behaviour

Animals must be provided the opportunity to display normal patterns of behaviour Because most domestic animals are constrained from exhibiting the full repertoire of behaviours that their wild counterparts might exhibit, minimum standards should deal with any priority behavioural requirements of the species ... and how to avoid behavioural or physiological problems that may occur as the result of deprivation of the opportunity to express those behaviours.

An example of the application of the “priority behavioural requirements” approach is in the Animal Welfare (Layer Hens) Code of Welfare 2012.⁷⁵ NAWAC's report on that code states:⁷⁶

Behaviours considered important for laying hens are feeding, drinking, perching, sleeping, preening, dustbathing, ground pecking, wing flapping, scratching, nesting, head shaking, tail wagging, feather ruffling, beak wiping, unilateral wing-leg stretching and avoiding predators ... [while] extensive locomotion and exploration, sexual behaviour and brooding ... are considered non-essential for a bird's welfare...

Despite the extensive list of behaviours acknowledged as important by NAWAC, the code lists only five behaviours:⁷⁷

Hens must have the opportunity to express a range of normal behaviours. These include, but are not limited to nesting, perching, scratching, ground pecking, and dustbathing.

⁷⁴ Above n 60 at 11.

⁷⁵ National Animal Welfare Advisory Committee “Animal Welfare (Layer Hens) Code of Welfare” 7 December 2012.

⁷⁶ National Animal Welfare Advisory Committee “Animal Welfare (Layer Hens) Code of Welfare Report” (2012) retrieved from <eggfarmers.org.nz/eggfarmers/wp-content/uploads/2012/07/nawac-layer-hen-code-06-12-12.pdf> at 10.

⁷⁷ Above n 75: Minimum Standard 12(a) at 23.

These behaviours apply to layer hens in colony cages,⁷⁸ which the Egg Producers Federation of New Zealand⁷⁹ touts as “an initiative that places New Zealand in the forefront of egg industry innovation worldwide,”⁸⁰ stating that “[e]ach Colony enclosure, which caters for between 20-60 birds, includes a nest area, perches and a scratch pad.”⁸¹ Colony cages are currently being phased in to replace battery cages,⁸² yet many of the behaviours listed as important by NAWAC are not able to be displayed by hens in colony cages to the extent that it has been questioned whether the code is consistent with the principles of its governing legislation.⁸³ Hens are not able to dustbathe in the cages, despite this being one of the five behaviours provided for in the code.⁸⁴ Further, even the minimum standards in the code may be met in a manner that falls short of providing for the hens’ welfare – for example, by providing one nesting area for a number of hens.⁸⁵

In contending that it is “not ... essential that every hen is able to display all normal patterns of behaviour”⁸⁶ NAWAC states that “many birds choose not to express the behaviours that they have been given the opportunity to express.”⁸⁷ However, this cannot be an argument that hens do not need to be provided with these opportunities, because the statutory requirement is that animals have the opportunity to display normal patterns of behaviour – not that they actually display the behaviours.⁸⁸ While it must be accepted that there are limitations on the opportunities for normal behaviour that can be provided, it is questionable whether using “priority behavioural requirements” in this manner is

⁷⁸ “A colony cage is a modified and enlarged enclosure with more space than cages and with perching, nesting and scratching areas. This system may be referred to as a furnished or enriched cage.” Above n 75 at 4.

⁷⁹ “The Egg Producers Federation of New Zealand (EPF) is the national body representing the interests of all commercial egg farmers, including free-range, barn, colony and cage egg farming systems”: <eggfarmers.org.nz/about-eggs/about-epf>.

⁸⁰ Egg Producers Federation of New Zealand “The colony egg production system: See for yourself” 21 March 2016 at <eggfarmers.org.nz/news/the-colony-egg-production-system-see-for-yourself>.

⁸¹ Above n 80.

⁸² Above n 75 at 1-2.

⁸³ Danielle Duffield “Battery Hens” (2013) 6 NZLJ 235 at 239.

⁸⁴ NAWAC’s report on the layer hens code (above n76) notes that submissions on the draft code raised concerns about hens’ inability to dustbathe in colony cages (at 10), and that “NAWAC considers that the presence of a scratching area in colony cages is sufficient for hens to perform dustbathing behaviour” (at 11). This means that hens will be able to “exhibit dustbathing behaviour” (at 11) rather than actually dustbathe.

⁸⁵ Above n 83 at 238.

⁸⁶ Above n 75 at 10.

⁸⁷ Above n 75 at 10.

⁸⁸ Animal Welfare Act 1999, s 4(c).

consistent with the legislative requirements, particularly if farmers are directed to manage behavioural and psychological problems resulting from deprivation of behaviours, rather than providing the opportunity to express the behaviours.

2 *Appropriate to the species, environment, and circumstances of the animal*

As mentioned above, behavioural needs of animals must be met in a way that is “appropriate to the species, environment, and circumstances of the animal.”⁸⁹ This “qualifies [human responsibility regarding the care and treatment of animals] in terms of the circumstances of the animal.”⁹⁰ It does not impact on the requirement to provide animals with the opportunity to display normal patterns of behaviour.

3 *Good practice*

“Good practice” is not defined in the Act. NAWAC has developed an interpretation, which is set out in each code of welfare:⁹¹

[Good practice is a] standard of care that has a general level of acceptance among knowledgeable practitioners and experts in the field; is based on good sense and sound judgement; is practical and thorough; has robust experiential or scientific foundations; and prevents unreasonable or unnecessary harm to, or promotes the interests of, the animals to which it is applied. Good practice also takes account of the evolution of attitudes about animals and their care.

It has been noted that “good practice” is not merely “current practice”:⁹²

Codes of welfare ... are designed to reflect the views of NZ society at large. They do not simply codify current thinking and practice within the industry sector.

Good practice in terms of providing opportunities to display normal patterns of behaviour should be reflected in minimum standards in the codes.

⁸⁹ Animal Welfare Act 1999, s 4.

⁹⁰ Ian A Robertson *Animals, Welfare and the Law: Fundamental Principles for Critical Assessment* (Routledge, London, 2015).

⁹¹ National Animal Welfare Advisory Committee “Animal Welfare (Pigs) Code of Welfare 2010” at 37.

⁹² C E O’Connor and PJ O’Hara “Developing an outcome-based regulatory approach to animal welfare in New Zealand” (undated) at 2-3.

4 *Scientific knowledge*

As with good practice, scientific knowledge is not defined in the Act and NAWAC sets out its interpretation in the codes:⁹³

[Scientific knowledge is] knowledge within animal-based scientific disciplines, especially those that deal with nutritional, environmental, health, behavioural and cognitive/neural functions, which are relevant to understanding the physical, health and behavioural needs of animals. Such knowledge is not haphazard or anecdotal; it is generated by rigorous and systematic application of the scientific method, and the results are objectively and critically reviewed before acceptance.

A review of the codes raises concern that scientific knowledge of animals' behavioural needs may not be adequately recognised. In applied animal behaviour science, qualitative behavioural assessment is a method of animal welfare research that uses descriptors of an animal's emotions to determine that animal's affective state; it is:⁹⁴

[A] 'whole animal' methodology which integrates information from multiple behavioural signals and styles of behavioural expression (body language) directly in terms of an animal's emotional expression."

Within this field, a significant body of peer-reviewed research exists from which normal patterns of behaviour for various species of farmed animals can be established. For example, a recent study investigated the impact of enriched or barren environments on the affective states of pigs, concluding that "environmental enrichment induces optimistic cognitive bias indicative of a positive affective state"⁹⁵ – that is, pigs have a positive emotional experience if they are in a better environment. A recent review of scientific research studies of cognition and emotion in pigs:⁹⁶

...identified a number of findings from studies of pig cognition, emotion, and behavior which suggest that pigs possess complex ethological traits similar, but not identical, to dogs and chimpanzees.

⁹³ Above n 91 at 38.

⁹⁴ Kenneth M.D. Rutherford, Ramona D. Donald, Alistair B. Lawrence, and Françoise Wemelsfelder "Qualitative Behavioural Assessment of Emotionality in pigs" (2012) *Applied Animal Behavioural Science* 139(3-4) 218-224 at 218.

⁹⁵ Catherine Douglas, Melissa Bateson, Clare Walsh, Anais Bedue and Sandra Edwards "Environmental enrichment induces optimistic cognitive biases in pigs" (2012) 139 *Applied Animal Behaviour Science* 65 at 72.

⁹⁶ Lori Marino and Christina M. Colvin "Thinking Pigs: A Comparative Review of Cognition, Emotion, and Personality in *Sus domesticus*" (2015) 28 *International Journal of Comparative Psychology* at 2.

The Animal Welfare (Pigs) Code of Welfare 2010⁹⁷ identifies that biting can be a particular behavioural issue to be managed in pigs, including vulva, tail and ear biting.⁹⁸ It is noted that:⁹⁹

Tail docking reduces the occurrence of tail biting, but does not address the underlying causes. Other methods of managing tail biting include the provision of straw, more food and additional space.

This statement indicates that the underlying cause of tail biting in pigs is the nature of the environment provided. The introduction of a method such as tail docking to reduce biting, rather than address the underlying causes by providing an enriched environment, does not meet the spirit or intent of providing for the behavioural needs of animals as required in the Act, nor appropriately take into account current scientific knowledge.

With regard to dairy cattle, the Code of Welfare: Dairy Cattle¹⁰⁰ lists only one behavioural need in its minimum standards, which is that “[d]airy cattle must be able to lie down and rest comfortably for sufficient periods to meet their behavioural needs.”¹⁰¹ Behavioural needs of calves are not addressed. Scientific evidence records the importance of play behaviour in beef and dairy calves, identifying a number of possible advantages of play: it increases an animal’s agility, which can be used to quickly correct balance in case of slipping or falling; it enhances an animal’s ability to cope mentally with unexpected situations; and it leads to a positive emotional state.¹⁰² Calf play behaviour includes fast galloping, interrupted by sudden change of direction, bucking, hind leg kicking, body rotations and twists.¹⁰³ There has been significant debate in New Zealand recently over the treatment of bobby calves,¹⁰⁴ prompting MPI to issue a guide

⁹⁷ <www.mpi.govt.nz/document-vault/1445>.

⁹⁸ National Animal Welfare Advisory Committee “Animal Welfare (Pigs) Code of Welfare 2010” at 17.

⁹⁹ Above n 91 at 27.

¹⁰⁰ National Animal Welfare Advisory Committee “Animal Welfare (Dairy Cattle) Code of Welfare 2014”.

¹⁰¹ This appears in both Minimum Standards 8 and 9, “Stand-off Areas and Feed Pads” and “Housing Cows and Calves” above n 99 at 14 and 15.

¹⁰² Robert Somers “Play behaviour of dairy and beef calves living in a semi-natural environment” (2012) Utrecht University, Veterinary Medicine.

¹⁰³ Margit Bak Jenson “Play Behaviour In Dairy Calves” 10 August 2010 at <www.thedairysite.com/articles/2462/play-behaviour-in-dairy-calves/>.

¹⁰⁴ For example, Catriona MacLennan “Action needed on shocking dairy cruelty” 30 November 2015 New Zealand Herald. Bobby calves are essentially a waste product of the dairy industry, existing because cows must become pregnant to induce lactation. Two million bobby calves are slaughtered in New Zealand every year. The process involves removing the calf from the cow immediately after or within a few hours or days of birth. The Ministry for Primary Industries “Caring for bobby calves being transported for

to the care of bobby calves during transport for processing.¹⁰⁵ The guide provides for such things as gentle handling of calves, and that they must have dry navels and hard hooves before being transported. There is no requirement for them to have the opportunity to express normal behaviours, and certainly no requirement for them to be able to do fast galloping interrupted by sudden changes of direction. MPI is also introducing regulations on calf welfare,¹⁰⁶ but these also do not cover behavioural needs. The Act does not provide for differential treatment depending on the lifespan of the animal. Although bobby calves may only have a short life, they are covered under Act to the same extent as other animals and accordingly their behavioural needs should be specified.

5 Minimum standards are not provided for

Plainly, the codes do not include minimum standards that provide for the opportunity to display normal patterns of behaviour. It would appear that the codes therefore do not meet the requirement of s 73(1)(a) as they do not include standards that are the minimum necessary to ensure the purposes of the Act will be met. In not providing for minimum standards in respect of the opportunity to display normal patterns of behaviour, the codes are failing to provide for the recognition of sentience in farmed animals.

V Issues for the recognition of animal sentience in the codes

A Summary of issues raised above

In summary, the following issues are of concern for the recognition of sentience in the implementation of the Act:

- Minimum standards for opportunities to display normal patterns of behaviour are not included in the codes
- Good practice is not adequately taken into account in the codes
- Scientific knowledge is not adequately taken into account in the codes
- The codes are not consistent across animal species
- The codes do not accurately reflect international obligations associated with the recognition of sentience.

processing” 2016 states that calves are legally required to be given at least one feed and must be at least four days old when they are sent for slaughter.

¹⁰⁵ Ministry for Primary Industries “Caring for bobby calves being transported for processing” 2016 <www.mpi.govt.nz/document-vault/1188>.

¹⁰⁶ Animal Welfare (Calves) Regulations 2016: <www.mpi.govt.nz/law-and-policy/legal-overviews/animal-welfare/animal-welfare-regulations/> and explained at <[Bobby-calf-regulations-now-in-place-flyer.pdf](#)>.

B Other issues

1 Codes are anthropocentric

As noted above, the codes are not consistent in the provision of opportunities to display normal patterns of behaviour. The codes reflect New Zealand's current approach to animals in that they are markedly different in their approaches to different species of animals, and even the same species, depending on the primary human-animal relationship for that species:¹⁰⁷

Companion animal Codes stand in stark contrast to their agricultural counterparts. ... The protections required ... for dogs are a far cry from what is currently permitted for pigs, chickens, and cows.

The basis for this statement is that pigs, for example, may be kept in farrowing crates for up to four weeks without exercise, whereas this would not be permitted for dogs.¹⁰⁸ It is common knowledge that some farming practices require restrictions on animal movement and behaviours that would not be considered acceptable for companion animals.

A further illustration of the significance placed on the human-animal relationship in the codes is in the Animal Welfare (Companion Cats) Code of Welfare 2007, which distinguishes between companion, stray and feral cats as follows:¹⁰⁹

This code applies to all persons responsible for the welfare of companion cats, including cats in breeding establishments, boarding catteries, animal welfare shelters and pet shops. There is a separate section ... providing information on stray cats (i.e. lost or abandoned companion cats) and cats living in colonies. Feral cats are not included under the provisions of this code [and] may be defined as pests under the Biosecurity Act 1993 and ... subject to control under a pest management strategy.

¹⁰⁷ Above n 16 at 315.

¹⁰⁸ Above n 16 at 320. However, it is noted that the Animal Welfare (Dogs) Code of Welfare 2010 does not contain any minimum standards relating to the opportunity to display normal patterns of behaviour, and the Animal Welfare (Companion Cats) Code of Welfare 2007 contains only the following (at 17):

“Minimum Standard No. 4 – Caged Cats (Other Than for Transport) (a) Caged cats must have sufficient room to enable them to stretch and move around freely, and must be provided with appropriate areas for feeding and toileting. (b) Caged cats must be provided with the opportunity to engage in play and exercise daily.

¹⁰⁹ National Animal Welfare Committee “Animal Welfare (Companion Cats) Code of Welfare 2007” 2 March 2007, Wellington.

This reflects that the codes cover animals owned by or in control of people. However, the approach has been criticised on the basis that cats “may move readily between different classifications”¹¹⁰ and be “more likely [than other companion animals] to revert to a ‘wild type’” because they are “behaviourally ... less domesticated”, with a cat cared for by human companions and then abandoned able to give birth to entirely feral kittens.¹¹¹ A cat is a cat, whether it is feral, stray or companion.

That animals might have varying degrees of sentience was specifically discussed by MPI in their report to the Select Committee:¹¹²

Although scientists no longer debate whether animals in general are sentient, there remains some uncertainty about how sentient some animals are. This uncertainty applies to fish and some invertebrates such as crustaceans, octopus and squid.

In accordance with the above, MPI did not distinguish between mammals, or indeed any other animals besides fish and some invertebrates, when acknowledging sentience, and the Act now requires recognition that all animals, including those fish and invertebrates, be recognised as sentient. The current distinction between species of animals based on anthropocentrism is untenable if sentience is to be adequately recognised.

2 Scientific knowledge is not applied consistently

In addition to the failure to incorporate up-to-date scientific evidence in the codes, scientific knowledge also provides an argument for consistency across the codes. When assessing intelligence and cognitive abilities of animals, people are often drawn to human comparisons. For example, pigs “are smarter than 3-year-olds,”¹¹³ and research indicates that “many people who eat meat are ... concerned [about] the level of intelligence of the animals [they eat].”¹¹⁴ However, scientific evidence does not indicate that “dogs, for example, are emotionally more complex than pigs or other food

¹¹⁰ Mark J. Farnsworth, Nicholson G. Dye and Natasha Keown “The Legal Status of Cats in New Zealand: A Perspective on the Welfare of Companion, Stray, and Feral Domestic Cats (*Felis Catus*)” (2010) 13:2 *Journal of Applied Animal Welfare Science* 180 at 182.

¹¹¹ Above n 109 at 183.

¹¹² Ministry for Primary Industries “Animal Welfare Amendment Bill: Report of the Ministry for Primary Industries” (2014) at 69. This quote was made in the context of recommending that sentience not be included in the definition of animal in the Act.

¹¹³ <modernfarmer.com/2014/03/pigheaded-smart-swine/>.

¹¹⁴ Marc Bekoff “Pigs are Intelligent, Emotional and Cognitively Complex” at <www.psychologytoday.com/blog/animal-emotions/201506/pigs-are-intelligent-emotional-and-cognitively-complex>.

animals,”¹¹⁵ meaning that a claim that dogs would suffer more than pigs would fail because:

All ... mammals, are sentient beings who share the same neural architecture underlying their emotional lives and who experience a wide spectrum of emotions including the capacity to feel pain and to suffer. All one has to do is look at available scientific literature to see that millions upon millions of mice and other rodents are used in a whole host of studies the point of which is to learn more about pain in humans.

It has been suggested that the codes should “focus on equality between animals”¹¹⁶ as there is no scientific basis for distinguishing between species. This would remove the current subjective basis in the codes of the human-animal relationship, and the artificial distinction made between animals most commonly eaten by people as opposed to animals most commonly kept as companions, as this distinction does not take into account scientific knowledge on animal sentience.

VI Problems identified by the Ministry for Primary Industries and proposals for change

A The Regulatory Impact Statement

Turning to the recent amendments to the animal welfare provisions in the Act, in May 2013, MPI prepared a Regulatory Impact Statement (RIS) on options to amend the Act.¹¹⁷ The RIS identified eleven problems and options for addressing them. The following problems relate to the welfare of farmed animals as discussed in this paper:¹¹⁸

- Codes of welfare are not directly enforceable
- Enforcement tools are limited
- Lack of transparency in criteria for developing animal welfare standards.

The problems and options for addressing them as stated in the RIS are set out below.

¹¹⁵ Marc Bekoff “Are Pigs as Smart as Dogs and Does It Really Matter?” at <www.psychologytoday.com/blog/animal-emotions/201307/are-pigs-smart-dogs-and-does-it-really-matter>.

¹¹⁶ Above n 16 at 314, quoting Professor Siobhan O’Sullivan from the University of Melbourne.

¹¹⁷ Above n 20.

¹¹⁸ Above n 20. The other problems related to animal export, surgical procedures, ill-treatment of animals in the wild, defendants who are unfit to stand trial, lack of transparency for exceptional circumstances, ethical oversight of animals killed for research, testing, or teaching purposes, research involving animals with compromised welfare, and exporting livestock for slaughter.

B Codes of welfare are not directly enforceable

As noted above, the codes of welfare are not directly enforceable. The RIS noted that the codes of welfare “do not have the status of traditional regulations”¹¹⁹ and have no offences attached to them, further stating that while prosecution for failure to meet a minimum standard is possible via a prosecution for an offence under the Act, it is resource-intensive and may not be an appropriate response.¹²⁰ Rather, a breach of a minimum standard generally results in “verbal advice, the provision of educational information, or a warning”.¹²¹ An example is given of the identification of 820 cases of non-compliance with minimum standards for animal transport,¹²² of which 78 were deemed serious and “a few” were dealt with via a warning, with the rest addressed via verbal advice and/or educational material and letters.¹²³ Further issues identified included “little motivation for animal owners to abide by minimum standards that involve some investment in time or cost, if there is no risk of penalty or prosecution”¹²⁴ (indicating that education is not currently effective) and limited data on compliance levels.¹²⁵

Introduction of the ability of MPI to make regulations¹²⁶ was perceived to retain the value of the codes (collaboration and content), while enhancing the ability to change behaviour with regulations.¹²⁷ The other options considered were to make the minimum standards in the codes directly enforceable, or to replace the codes with a mix of regulations and guidelines.¹²⁸ These options were identified as carrying risks around making tertiary instruments directly enforceable, and that not all minimum standards could appropriately become regulations¹²⁹ and were not actioned.

MPI has already consulted on 91 regulations it intends to introduce¹³⁰ and has issued regulations covering the welfare of calves and the export of live animals.¹³¹ Regulations

¹¹⁹ Above n 20 at 15.

¹²⁰ Above n 20 at 15.

¹²¹ Above n 20 at 15.

¹²² National Animal Welfare Advisory Committee “The Animal Welfare (Transport within New Zealand) Code of Welfare 2011”.

¹²³ Above n 20 at 15.

¹²⁴ Above n 20 at 15.

¹²⁵ Above n 20 at 15.

¹²⁶ <www.mpi.govt.nz/news-and-resources/consultations/consultation-on-proposed-animal-welfare-regulations/>.

¹²⁷ Above n 20 at 17-18.

¹²⁸ Above n 20 at 17-18.

¹²⁹ Above n 20 at 17-18.

¹³⁰ <www.mpi.govt.nz/law-and-policy/legal-overviews/animal-welfare/animal-welfare-regulations/>.

¹³¹ Above n 130.

will strengthen MPI's ability to act in cases of ill treatment. However, the regulations developed so far do not cover the opportunity for animals to display normal patterns of behaviour, and as such will not address any deficiencies in recognising animal sentience.

C Enforcement tools are limited

In relation to enforcement tools, the RIS specifically identified issues with providing for animals' physical, health or behavioural needs, stating:¹³²

...the enforcement tools available in the Act are not suitable for the majority [of] cases where people fail to meet their obligations under the Act. Most offending is of a medium to lower level, and is around not meeting the duty of care in the Act to provide for an animal's physical, health or behavioural needs. The existing enforcement tools are too harsh or focused on ill-treatment offending to be used in many cases.

However, MPI focused on examples of physical and health needs rather than behavioural needs, citing:¹³³

...low body condition, lack of feeding, poor hygiene, lack of containment and shelter, injury, painful training methods, transportation issues, and problems with methods of euthanasia.

MPI's preferred option was new compliance and enforcement tools, with "a tiered scheme of offences, penalties and infringements in regulations"¹³⁴ and compliance orders able to be issued for breaches of the Act, regulations, or minimum standards in codes of welfare.¹³⁵ New requirements for compliance notices have been introduced at ss 156A to 156I and will enhance MPI's ability to enforce the regulations. This is unlikely to affect the recognition of sentience as the regulations are not likely to include reference to behavioural needs.

D Lack of transparency in criteria for developing animal welfare standards

The RIS identified this issue as being that "[i]t is not explicit in the Act that the practicality and economic impact need to be taken into account [by NAWAC when developing minimum standards]" and that if NAWAC chose not to consider these

¹³² Above n 20 at 13.

¹³³ Above n 20 at 13.

¹³⁴ Above n 20 at 21.

¹³⁵ Above n 20 at 21.

aspects, this could affect the viability of recommended standards.¹³⁶ This reflected that economic considerations do not form part of NAWAC's functions as outlined in the Act.¹³⁷ However, such considerations have demonstrably been a part of NAWAC's processes. In regard to layer hens, NAWAC has stated:¹³⁸

In every commercial system, the benefits of providing an environment in which the birds can perform their normal behaviours has to be assessed against the associated costs and likely affects [sic] on the bird's productivity, health and well-being. The role of NAWAC is to ensure that this balance is acceptable in terms of the welfare of the hen in each system.

MPI's preferred response to this issue was to include practicality and economic impact as second-tier considerations.¹³⁹ They are now included in s 73(3) as matters to be considered by NAWAC if relevant.¹⁴⁰ NAWAC supported this change, submitting to the Primary Production Committee:¹⁴¹

Our society is heavily dependent on animal use for economic and social purposes as long as that use does not result in "unreasonable or unnecessary pain or distress". This test is enshrined in the Act and is the central consideration for [the Committee] as it develops advice for the Minister. ... [P]ain or distress experienced by animals is considered necessary ... as a consequence of the way we use animals... [The Committee] is ... required to consider the needs of society as well as those of animals... [The Committee] first determines the degree of pain and distress ... and then determines whether, for reasons of practicality or economics, that level of suffering is acceptable or not.

NAWAC submitted that rather than changing its approach, the change would make its decision-making process more transparent.¹⁴²

¹³⁶ Above n 20 at 29.

¹³⁷ Animal Welfare Act 1999, s 56.

¹³⁸ Above n 76 at 10.

¹³⁹ Above n 20 at 34.

¹⁴⁰ Section 73(3) now reads: "In carrying out its functions under subsection (1), the National Animal Welfare Advisory Committee may take into account practicality and economic impact, if relevant."

¹⁴¹ Above n 26 at 1-2.

¹⁴² Above n 26 at 2.

Of significant concern is one of the risks identified by MPI in the RIS, which stated that the introduction of economic and practicality considerations:¹⁴³

[m]ay raise questions about other criteria that could be considered by the decisionmaker, e.g. how animals' lives can be enriched...

Environmental enrichment has been defined as:¹⁴⁴

[a]n animal husbandry principle that seeks to enhance the quality of captive animal care by identifying and providing the environmental stimuli necessary for optimal psychological and physiological well-being.

Environmental and behavioural enrichment¹⁴⁵ are the very considerations that should be taken into account by NAWAC when determining minimum standards for the opportunity to display normal patterns of behaviour, and should be mandatory.

VII Solutions

A An opportunity for change

The current provisions in the regulatory framework do not adequately provide for the recognition of sentience in farmed animals, and the recent amendments outlined above will not rectify this situation. Further, it is questionable whether the codes are consistent with the Act given that they do not provide minimum standards for the opportunity to display normal patterns of behaviour. However, the introduction of regulations and the subsequent indication by MPI that this will lead to a change in the codes of welfare provides an opportunity to identify ways that the codes could change to recognise animal sentience.

B Inclusion of minimum standards for opportunities to display normal patterns of behaviour in the codes of welfare

While the codes are not enforceable in their own right, they are guided by industry practice and have significant input from industry in their development. Including minimum standards for the opportunity to display normal patterns of behaviour in every

¹⁴³ Above n 20 at 34.

¹⁴⁴ D.J. Shepherdson "Tracing the path of environmental enrichment in zoos" in Shepherdson, D.J. Mellen, J.D. and Hutchins, M. (1998) *Second Nature – Environmental Enrichment for Captive Animals*, 1st Edition, Smithsonian Institution Press, London, UK, 1-12.

¹⁴⁵ Behavioural enrichment and environmental enrichment are often used interchangeably in the literature; generally, the process of enriching the environment will enrich behaviour.

code would enable these standards to be developed alongside industry practice and reflect what is achievable in the current environment. The balancing of welfare with economic considerations will continue to be a challenge, but the key issue at present is that these behavioural opportunities are not properly addressed *at all* despite being required by the Act. Recognising animal sentience means it is now imperative that this be rectified to protect New Zealand's international reputation and to align with social expectations for animal welfare. The codes would provide a good starting point whereby opportunities for normal patterns of behaviour could be recognised and incorporated.

C Consistency across codes of welfare

The codes should be consistent. There is no justification in law or in science for affording some farmed animals a greater opportunity to display normal patterns of behaviour than others. A template should be developed for the codes, providing a standard format to be populated that includes the same requirements for each species of animal, to assist in working with the differing expectations of sectors of the industry and ensure consistency across the codes.

D Outcome-based codes

The concept of outcome-based codes was proposed as a way forward in a joint paper by the Ministry of Agriculture and Forestry (when that Ministry was responsible for administering the Act) and the NAWAC chair.¹⁴⁶ This proposed:¹⁴⁷

...employing outcome-based statements of expected animal welfare with each outcome accompanied by one or more indicators by which achievement of the outcome [could] be measured or objectively assessed.

In relation to the opportunity to display normal patterns of behaviour, outcome-based codes could allow for more flexibility in how minimum standards could be met. This would assist in addressing the issue of bringing in more minimum standards, which is likely to be considered by the industry to be difficult to implement. It would also allow a focus on the experience of the animal, as opposed to the current input-based standards which are more prescriptive.

E Better implementation and education

As noted above, there are only eleven full-time and five part-time animal welfare inspectors to respond to farmed animal welfare issues in New Zealand, with many more resources available for complaints regarding companion animals. Recent media reports

¹⁴⁶ Above n 92.

¹⁴⁷ Above n 92 at 4.

involve animal welfare issues being brought directly to the media by animal advocacy organisations,¹⁴⁸ indicating a lack of confidence in MPI to respond effectively to complaints. While detailed comment on the workforce is outside the scope of this paper, it would appear that providing the opportunity to proactively inspect farms for compliance with animal welfare requirements could lead to better outcomes. Increasing the number of inspectors could also assist in responding to complaints about ill treatment. This could help to ‘raise the bar’ by improving basic conditions for animals, thus providing a better platform to enhance animal welfare.

It is noted that MPI currently provides education and information to owners or people in charge of animals in response to complaints, and a joint government and industry voluntary compliance programme, *Safeguarding our Animals, Safeguarding our Reputation*¹⁴⁹ is intended to improve voluntary compliance of animal welfare laws. Proactive education on recent developments in scientific knowledge and good practice about animal behaviour could also assist with the implementation of minimum standards for opportunities to display normal patterns of behaviour.

F Continuing public involvement

As noted above, public consultation has been identified as a crucial contributor to New Zealand’s animal welfare standards and international reputation. However, the 2015 amendment to the Act removed the requirement that NAWAC review each code at least every ten years. NAWAC may now review any code at any time, or if requested to do so by the Minister.¹⁵⁰ Presumably, NAWAC may also not review any code if it does not consider it necessary. In supporting the amendment, NAWAC submitted that the number of codes was becoming unwieldy and the requirement to review every ten years meant that “it is very hard to work on priority welfare areas.”¹⁵¹ This change may potentially undermine the benefit of the rolling review of the codes which keeps animal welfare in the public eye and enables the minimum standards to keep pace with evolving social norms. Retaining public involvement in the code development process is critical to maintaining animal welfare standards, and this should continue to be enabled.

¹⁴⁸ For example, on 26 October 2016 MPI announced that it would launch an investigation into footage by Farmwatch (an advocacy group for investigating and exposing animal cruelty: <www.farmwatch.org.nz/>) of bobby calves being dropped, dragged and thrown: <mpigovtnz.cwp.govt.nz/news-and-resources/media-releases/mpi-to-launch-investigation-into-farmwatch-footage-2/>.

¹⁴⁹ <www.mpi.govt.nz/protection-and-response/animal-welfare/safeguarding-programme/>.

¹⁵⁰ Animal Welfare Act 1999, s 78.

¹⁵¹ Above n 26 at 4.

VIII Conclusion

While animal sentience has been recognised in the Act, it is not yet recognised in the codes of welfare developed under the Act, as minimum standards for the opportunity to display normal patterns of behaviour are not included in the codes. New Zealand has previously taken an innovative and bold approach to animal welfare, and needs to continue in this direction to maintain its international reputation for high animal welfare standards and protect the economic value of the primary sector. The current regulatory framework provides the tools for recognising animal sentience, but it needs to be implemented more effectively to achieve this.

While addressing ill treatment of animals is a significant concern, this should not detract from the implementation of recognition of sentience, as the emotional pain and suffering of animals may be as significant as physical pain and distress.

Amendments to the Act enabling MPI to issue regulations will not assist with the implementation of recognition of sentience, but may afford the opportunity to redevelop the codes of welfare to reflect desired outcomes for animals. This opportunity should be taken and used to ensure that minimum standards for opportunities to display normal patterns of behaviour are included in the codes, to allow recognition of sentience to be implemented. Public involvement and the reflection of social expectations in this process is crucial to New Zealand's ability to continue to evolve its expectations around animal welfare and meet international expectations.

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