

Beyond *Charlotte's Web* – the blight of factory farming **An argument for law reform**

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Introduction

1. Several years ago a barrister friend and his partner took pity on a lonely-looking German Shepherd in their neighbourhood. They asked her owner for permission to take her for daily walks. Then, whenever they went overseas they hired a student to walk her. As they explained, somewhat sheepishly, "we are paying someone to walk someone else's dog". Another colleague confided that her partner had grumbled that she lavished more affection on her West Highland terrier than on him. She added, "I think he may be right".
2. The strong bond that many New Zealanders share with domestic animals has led to significantly improved welfare laws, and frequent calls for heavier penalties when those laws are broken. We have a real connection with our pets. Even Cameron Slater is known to be fond of cute cat videos. Gareth Morgan perhaps less so.
3. However, the animals we use in farming enjoy much less legal protection, and evoke much less compassion. Especially horrible is factory farming, a relatively recent phenomenon. Somehow, over the last four decades, the intensive production line has replaced the pasture for millions of animals. Somehow, this has become acceptable. Most of us have heard of sow stalls and battery cages. But apart from the occasional disturbing expose on *Campbell Live*, we can organise our lives so that we are insulated from too much knowledge. We are not confronted with the real suffering of these animals. We can ignore it and shrug, "what can we do?"
4. There is a lot we can do to promote incremental change. New Zealand's economy is heavily dependent on farm animals. That is not going to change any time soon. Nor are New Zealanders likely to give up their coveted roast lamb and convert en masse to vegetarianism. But we can work for improvements in the way farm animals are treated. At the very least our laws should ensure that they live in humane conditions. Eventually, future generations will be aghast that we ever countenanced factory farming of sentient creatures who can feel, fear, and grieve.
5. I am going to talk about:
 - how I became interested in animal welfare law reform;
 - the kind of voluntary work I have been doing – the focus being legal submissions and advocacy;
 - some of the striking inadequacies of the current law relating to factory farming; and
 - how you can contribute to change.

How did I become involved?

6. Five years ago, in early April 2010, I was jolted out of my comfortable state of apathy. I received a flyer advertising a lecture at Auckland University and decided to go along. Two prominent animal welfare advocates spoke. Then graphic footage was shown of a New Zealand pig farm. It was very confronting. There, in the darkness of a filthy, dank shed, in a haze of ammonia, in rows of cages, squealing piteously, were 50 or 60 pregnant sows. Lying on concrete, confined by solid bars, and unable even to turn around. It was a pitiful sight. The video commentator, Mike King, a former celebrity champion of the pork industry, described it as “absolutely harrowing”.
7. Could this bleak scene be dismissed as just a rogue farm breaking the rules? Unfortunately, no. I went back to my office and read the Pig Code of Welfare¹, made under the Animal Welfare Act 1999 (Act). I discovered that most of what I had seen was perfectly lawful. Yes, sows could be kept permanently in tiny, cramped cages -- a lifetime of rotation from mating stall to sow stall to farrowing crate. Yes, the shed was allowed to be in total darkness for 15 hours a day. For the remaining 9 hours the recommended minimum artificial light was only 20 lux, far gloomier than a dimly lit living room.² Yes, ammonia (from animal effluent) is allowed to reach a level (25ppm) that causes eye and respiratory irritation. And for good measure, piglets can have their tails cut off and their front teeth clipped or ground, without pain relief. These procedures are only “necessary” because of the cramped conditions in which the animals live. If you want some really grim reading, if you want to be upset, read the Pig Code of Welfare.
8. What also jarred was the extent to which the Code, which is only delegated legislation, undermined the central provisions of the Act. The Act imposes important obligations, including to ensure (within limits) that animals have the opportunity to display normal patterns of behaviour, and to ensure that they are not subject to ill-treatment.³ However, welfare codes may, in “exceptional circumstances”, specify minimum standards that do not fully comply with those obligations.⁴ Whilst “exceptional circumstances” is meant to be a stringent test, it seems to have been applied rather freely by the regulators. And the pork industry has been allowed too much influence over the content of the Code.
9. I felt compelled to do something. The National Animal Welfare Advisory Committee (NAWAC)⁵ was calling for public submissions on the latest review of the Code. I spent much of the following long weekend writing a submission. I approached it in the same way as a court submission – logical, factual, and forceful. Not an impassioned harangue. The facts, when clearly presented, seemed to me to be indefensible.

¹ At that stage, in April 2010, the draft Animal Welfare (Pigs) Code of Welfare 2010 (which was to replace the 2005 Code) was open for public submissions. The final version of the 2010 Code came into force on 3 December 2010.

² By way of comparison, bright sunlight is 32,000 -100,000 lux. An overcast day is 1,000 – 2,000 lux.

³ Sections 4, 10, 11, 12, 28, 28A, and 29 of the Act.

⁴ Sections 73(3) and (4) of the Act. The Animal Welfare Amendment Bill currently before the House (discussed below) will amend these provisions and instead will empower the Minister to make non-complying regulations. The codes will continue in force once the Bill is enacted, and will continue to be amended and reviewed under the Act (clause 60).

⁵ NAWAC has the function under the Act of making recommendations to the Minister about the issue, amendment and review of codes of welfare. When the current Bill is passed the Minister will also have power to make regulations specifying welfare standards.

10. Subsequently I sent a copy of my submission to Hans Kriek, one of the speakers at the lecture I had attended. I then met with Hans and others, and that kick-started my work in this area.

The kind of voluntary work I have undertaken

11. This work is not part of my day job. Animal welfare does not crop up in commercial litigation. It is voluntary work undertaken in my spare time, as and when I can -- my way of making a small contribution. It is not front line, more 'behind the scenes'. Experience in public and regulatory law readily lends itself to submission-writing and advocacy on law reform. And regulators and law-makers take some notice of arguments formulated by someone with legal expertise. Over the past five years this work has included, for example:

- writing submissions on the Pig Code of Welfare, the Layer Hen Code of Welfare⁶, and, more recently, addressing a proposal to amend the Dairy Cattle Code of Welfare.⁷ The proposed changes to the latter Code would, if adopted, encourage the intensification of the dairy industry, including year-round indoor confinement of dairy cows;
- drafting Official Information Act requests and providing legal advice for animal welfare groups;
- participating (with Hans Kriek) in the MPI consultation process on proposals to reform the Act. This process preceded the introduction of the current Animal Welfare Amendment Bill (**Bill**). It involved attending meetings held by MPI officials, writing a detailed preliminary submission to MPI highlighting aspects of the Act needing change, and then final submissions on specific proposals tabled by MPI;
- writing a submission on the Bill, focusing especially on deficiencies in the proposed new s 183A. This provision will replace the current "exceptional circumstances" exemption and empower the Minister to make regulations that do not fully comply with the obligations of the Act. I also appeared before the select committee, the Primary Production Committee;
- assisting animal welfare groups with drafting of a provision (for inclusion in their submissions on the Psychoactive Substances Bill) banning animal testing of "party pills". More recently I have given Mojo Mathers some help with the drafting of her SOP to ban cosmetic testing on animals. It will be considered by the House any day now.⁸

12. I do this work because the more I learn about the horrors of factory farming, and other uncomfortable facts, the more I am compelled to speak up. It can be challenging work. It is a bleak, not especially popular, topic. However, it is a way of using my legal skills for

⁶ The Animal Welfare (Layer Hens) Code of Welfare 2012. This was further amended in 2013.

⁷ The Animal Welfare (Dairy Cattle) Code of Welfare 2010. These proposed changes have not yet been implemented, and do not appear in the new 2014 Dairy Cattle Code of Welfare. However, the existing indoor housing Minimum Standards (8 and 9) lack restrictions that would actually stop the factory farming of dairy cows.

⁸ The Bill is at the Committee stage, and is currently no 8 on the Order Paper. Mojo also agreed to promote as an SOP a further amendment to clause 56 of the Bill, relating to the new s 183(4A), in order to close a potential loophole.

a worthwhile cause. I have also been fortunate to meet some dedicated and inspirational people.

What still needs to change?

13. Opponents of factory farming have in recent years achieved some important reforms, and the practices of these industries are increasingly being challenged by the public. However, significant change is still needed. Here are just a few examples:

(a) Since 3 December 2012 the use of sow stalls has been limited to the first four weeks of a sow's pregnancy.⁹ Currently the total period of cage confinement (including in mating stalls and farrowing crates) is still almost 24 weeks a year.

Sow stalls will be banned from 3 December this year, 16 years after the coming into force of the Act.¹⁰ But this measure is by no means enough. What the public do not realise is that sows will still be able to be kept permanently indoors in individual pens with only enough room to turn around.¹¹ The stocking densities for indoor group housing, if that option is used, also remain intense.¹² And for nearly 14 weeks a year¹³ sows will continue to be tightly confined in mating stalls and farrowing crates. Farrowing crates (or "harrowing" crates as they are called) barely allow sows to move. The sow cannot turn around, and the bars greatly restrict her contact with her piglets. The crates are plainly non-compliant with the Act, but there is no date in the Code for phasing them out. They are still used for over 60% of sows.¹⁴ So even after sow stalls are gone the majority of sows will still endure a wretched life of confinement. The inadequate lighting and ventilation standards remain.

(b) Battery cages are also being phased out, and will be banned as from 31 December 2022. That is still nearly eight years away, and will be 22 years after the Act came into force. In the meantime 2.586 million layer hens – 71% of the total commercial flock – remain in battery cages.¹⁵ And even after battery cages are gone they will be able to be replaced with "colony" cages. These are just slightly larger battery cages -- a 'premium economy' version. Instead of living life within an area not much bigger than an A4 piece of paper (550 sq cm), hens will have an extra 200 sq cm – a paltry 10 cm x 20 cm. Hens may be stocked at one hen per 750 sq cm or 13 hens per sq m.¹⁶ The suggestion that this is a real improvement is nonsense. In some countries colony cages have already been banned.¹⁷

⁹ Animal Welfare (Pigs) Code of Welfare 2010, Minimum Standard 11(e). Based on an average 2.4 pregnancies a year, confinement in sow stalls is 9.6 weeks a year. Mating stalls and farrowing crates add another 13.7 weeks of cramped confinement (see n 13 below), a total of 23.3 weeks per year. Currently 15% of sows are still kept in sow stalls. Another 45% are confined indoors, so 60% are still factory-farmed: New Zealand Pork Board website.

¹⁰ Minimum Standard 11(f). The Act came into force on 1 January 2000, just over 15 years ago.

¹¹ Minimum Standard 11(f). Boars fare no better: Minimum Standard 12.

¹² Minimum Standard 6(a).

¹³ Again, based on an average of 2.4 pregnancies per year. A sow can be confined in a farrowing crate for up to 5 days before farrowing, and up to 4 weeks after farrowing: Minimum Standards 10(e) & (f). Sows can be confined in a mating stall for one week (Minimum Standard 11(a)). A total of 40 days x 2.4 = 96 days or 13.7 weeks.

¹⁴ New Zealand Pork Board website.

¹⁵ Letter from Egg Producers Federation to Minister for Primary Industries dated 23 November 2014. The figures given are as at December 2014. The 71% of hens are located in only 38 of the total 130 commercial egg farms, which indicates the vast, industrial, size of some farms.

¹⁶ 2012 Layer Hens Code, as amended by Amendment Notice 2013, Minimum Standard 6(i).

¹⁷ Colony cages are already banned in Switzerland, Austria has imposed a ban as from 2020, and Belgium from 2024: <http://safenewzealand.org/2014/10/07/colony-cage-con/>

- (c) Littered throughout the many codes of welfare are numerous other minimum standards that also, on any common sense view, breach the Act. NAWAC has not even sought to invoke the exemption powers in s 73(3), let alone specify a phase-out period. The Meat Chickens Code of Welfare, for example, makes particularly grim reading.¹⁸
- (d) Some codes, such as the Dairy Cattle Code of Welfare 2014, contain minimum standards relating to housing that fail to place restrictions on the duration of indoor confinement. This may, by default, permit the spread of factory farming in New Zealand into new sectors like dairying.
- (e) The Bill contains a number of changes designed to enhance the robustness of the Act – such as increased protection for wild animals and a greater range of enforcement tools. That is all good. However, as mentioned above, there is also a new exemption in s 183A¹⁹, a regulation-making power that replaces, and broadens, the current “exceptional circumstances” exemption in s 73(3). Its enactment will be a backward step. A non-complying practice will be permitted to continue for up to another 10, possibly 15, years from the date of the new regulation. With its increased focus on economic impact and “practicability”, s 183A will also make it easier for MPI to depart from the Act in setting welfare standards.
- (f) Animal welfare is inadequately funded and resourced. There are only 11 full-time dedicated MPI animal welfare inspectors to oversee all New Zealand farms.²⁰ So the reality is that many abuses will go undetected or unenforced. For example, who will monitor how many layer hens are actually being housed in the colony cages in the top back row of the dark shed? Who will monitor how long a sow spends in a sow stall or in a farrowing crate?

“Around 50%”, over \$20.5 billion, of our annual export earnings are derived from animals.²¹ And yet, in the current Budget only \$3.941 million has been allocated to animal welfare education and enforcement.²² A miniscule investment, both in economic and welfare terms. But the Government is considering again subsidizing Team New Zealand in its dogged pursuit of the America’s Cup. (Although “Barkergate” may yet stymie that.)

14. The offending minimum standards in the codes of welfare have long been vulnerable to a potential judicial review challenge. But factory-farmed animals have lacked a protector with sufficient resources and motivation to mount an effective legal challenge. Deterrents have included the cost of expert evidence (including economic evidence), possible

¹⁸ Animal Welfare (Meat Chickens) Code of Welfare 2012. Although group housed, the stocking densities are very high. On the First Reading of the Bill, 27 August 2013, Mr Phil Twyford stated that it allows, in effect, “19 birds per sq m”.

¹⁹ Clause 56 of the Bill.

²⁰ Letter from MPI to Primary Production Committee dated 2 October 2013 (Parliament website). A further 35 fisheries officers are now cross-trained in animal welfare, but they are not dedicated welfare officers. The enforcement of the law relating to domestic animals has largely been ‘outsourced’ to the SPCA.

²¹ The Hon Nathan Guy, Minister for Primary Industries, First Reading of the Bill, 27 August 2013. See also Cabinet Paper 2 (Final policy approvals for the New Zealand Animal Welfare Strategy and the Animal Welfare Amendment Bill) January 2013, para 13.

²² 2014 Budget, estimates of appropriations for year ending 30 June 2015, Vote Primary Industries. The SPCA is largely self-funded through donations, bequests and street appeals. MPI also provides a grant of \$375,000 pa to the SPCA from its Crown funding.

adverse costs awards²³, and the risk, if a challenge were successful, that remedial legislation would be enacted. Efforts have so far focused on pushing for effective law reform.

How can you contribute to animal welfare law reform?

15. Factory farming is, on any rational view, ill-treatment of animals on a grand scale. Ill-treatment that our law, made in our name, condones. We lawyers, who have long neglected this cause, are well-placed to donate our time to argue for the necessary law changes. Opportunities arise all the time – when welfare codes are reviewed, when new regulations are made, when select committees call for submissions on Bills, when policy change is consulted on, and so on.
16. Animal welfare was once regarded as a fringe cause, for angry, obsessed extremists, but it is now more mainstream, especially among younger people. It will be a big social and ethical issue in the decades ahead. We saw a glimpse of this new sensibility when New Zealanders loudly denounced the proposed testing of party pills on animals. The public outcry forced the Government to back down. And even 5 or 6 years ago our seminar here today would probably not have drawn an audience. But here you all are.
17. The Hon. Michael Kirby AC CMG, former Judge of the High Court of Australia, had a late-life epiphany, in his 70s, after launching a book on animal law.²⁴ Very few book launches, he said, have had such a lasting effect on the launcher. He has become a strong advocate for change. As he has observed “there is nothing so powerful in the world as an idea whose time has come, and animal protection is just such an idea”.²⁵
18. Some of you may already have had your own epiphany. That may be why you are here this evening. I hope that our discussion will encourage you to use your time, skill and compassion to promote the ongoing reform of our animal welfare law. It is you the younger generation in particular who will drive the sea change yet to come.

²³ The fact that a litigant represents the public interest is a factor relevant to the court’s discretion to award costs. The court also has power, in exceptional cases, to make “protective” or “maximum” costs orders, which give public interest litigants security from the fear of an adverse costs orders: *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 167.

²⁴ The Hon Michael Kirby, 2009 Animal Law Lecture Series, an initiative by Voiceless, the animal protection institute in Australia. The book launched was Australia’s first animal law textbook, *Animal Law in Australasia*, edited by Peter Sankoff and Steven White.

²⁵ “A late-life epiphany for Michael Kirby”, *Sydney Morning Herald*, online, 17 December 2011.