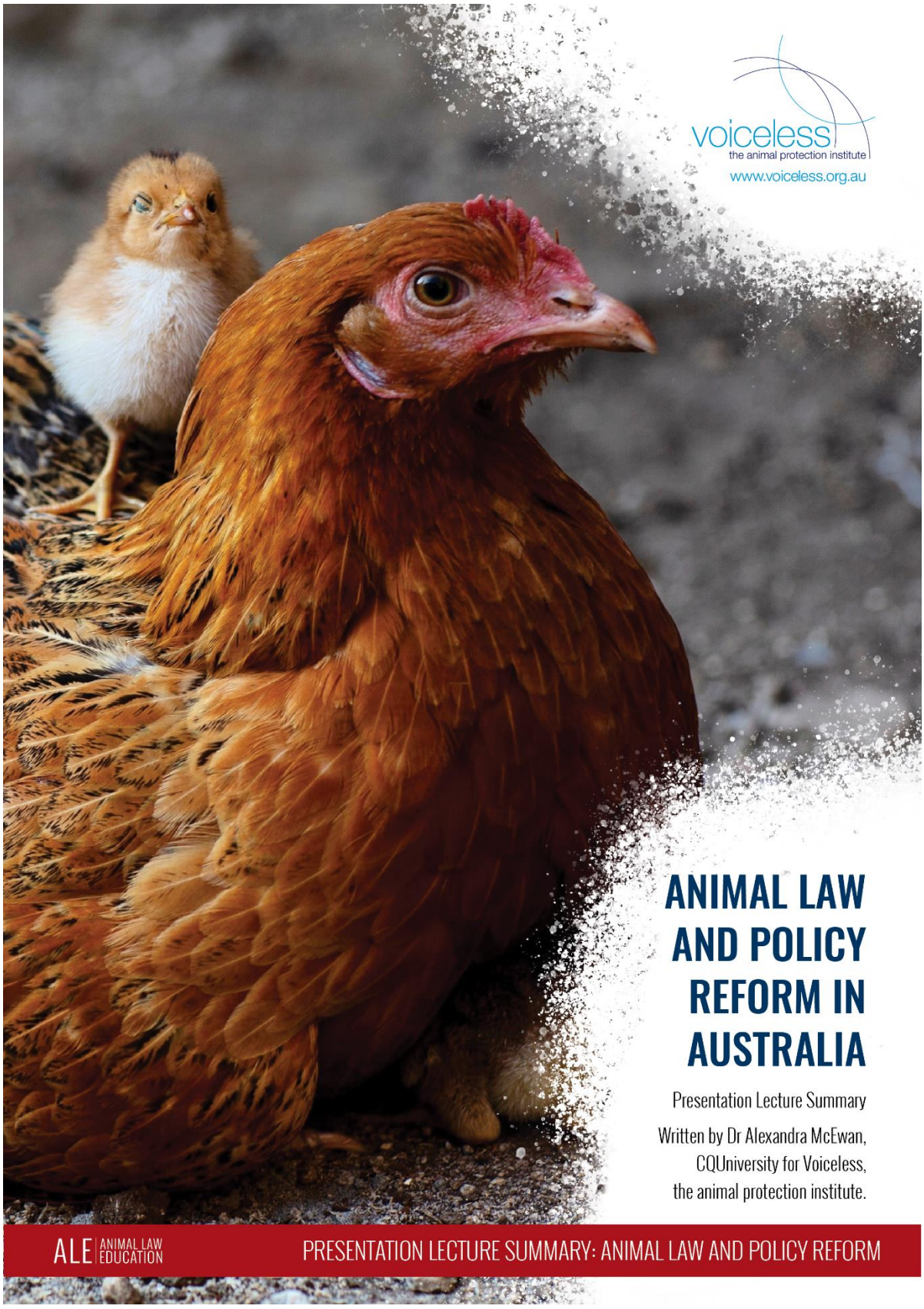

ANIMAL LAW AND POLICY REFORM IN AUSTRALIA

Presentation Lecture Summary

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ALE | ANIMAL LAW EDUCATION

PRESENTATION LECTURE SUMMARY: ANIMAL LAW AND POLICY REFORM

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Voiceless, the animal protection institute, is an independent non-profit think tank working to promote respect and compassion for animals. By encouraging critical-thinking on animal protection issues and growing the field of animal law, Voiceless is equipping today's youth to become tomorrow's change makers.

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Table of Contents

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Overview

In this presentation, we explore animal law and policy reform in the Australian setting. We examine a range of different political perspectives, and learn about the representation of animal interests in politics, government and industry, conflicts of interest, and the process of reforming animal law. As part of this, we consider examples of recent reform initiatives and events in Australia.

What do we mean by animal law and policy reform?

Before we consider animal law and policy reform processes and principles, it is important to spend some time exploring the meaning of the phrase 'law and policy reform'. Key to this phrase is the word 'reform'. In a general sense, 'reform' refers to processes by which something (in this case law and policy) is changed with the aim of improvement. It follows that the overall aim of law and policy reform is to improve the conditions in which we live and conduct our day to day affairs; to create a social framework that more clearly reflects contemporary understandings of the world and our place in it. Presumably, as we live in a liberal democracy, these improvements are based on fairness, equity, tolerance, liberty, and other ideas that underpin civil society.

Law and policy reform may improve society in many ways, for example, legislative amendments may provide certainty for businesses, introduce measures to protect health and safety, or deem a particular behaviour as requiring criminal sanction. Legislative reform may also create rights or obligations, such as those articulated in international treaties. However, we cannot assume law and policy reform will improve everyone's circumstances in equal ways. In reality, law and policy reform impacts differently on different individuals and groups and may favour the interests of one group over others.

Contemporary Australian society is a complex, diverse collective. It is from this starting point that we explore processes of social change, especially those that fall within the purview of law and policy. It is also useful to develop a perspective informed by history. What society deems to be in the interests of the collective 'social good' changes over time, and is a topic of ongoing debate.

Changes in law and policy may reflect changes in moral understandings, or emerging scientific evidence. Financial interests also play a significant role in driving reform. Debates leading to change may, and often do, involve all of these considerations. Therefore, law and policy reform sits at the interface of technical, legal and regulatory expertise and coordination, emerging evidence related to various policy topics, and politics (politics often entails money and/or morality). Although government authorities, or statutory bodies such as the Australian Law Reform Commission, may facilitate and coordinate law and policy reform, the substantive outcomes are informed by participation and (coordinated) contestation amongst various stakeholders.

Who are the stakeholders?

Stakeholders include individuals, organisations, or other entities that have an interest in an issue. For example, individuals who are likely to be affected by changes to particular policies or laws are stakeholders.

Stakeholders may proactively advocate for change towards what in their view is a 'better' society. Participation in law and policy reform will be the outcome of a range of concerns and capabilities. As we have noted, concerns include differing financial or ethical interests. Capabilities include our social capital, our capacity to articulate our perspective, and to ensure our voice is heard and considered in the process. We also need opportunities to participate in reform processes.

Are animals stakeholders?

Before we go any further, we need to acknowledge that the law does not recognise animals as having a direct interest in the impact of law and policy change. In Australia, animals have the status of property at law. However, taking a moral or normative approach, it is well-accepted that, as sentient beings, animals do have interests. Policy documents often recognise sentience and the types of interests that flow from sentience. For example, the ACT Government's *Animal Welfare and Management Strategy 2017-2022* recognises that 'animal welfare' includes an animal's mental and physical wellbeing, and 'aspects of naturalness', emphasising 'that animals should be able to lead reasonably natural lives'.

Changes to animal law and policy reform are debated and developed by human stakeholders. Some stakeholders will advocate on behalf of animal interests, whilst other stakeholders will advocate on behalf of their own interests in using animals. Often these latter stakeholders are concerned with increasing the profit they derive from the use of animals and with optimising business efficiency. Chen (2016, pp. 334-5) identifies the primary policy goals of animal use industries as being economic efficiency and productivity.

What we have discussed so far, represents the essential nature of the animal law and policy field in contemporary Australia. Animal protection is a deeply contested issue. In fact, this fundamental contest is evident and embedded in legislative regimes. For example, if we look at the *Animal Care and Protection Act 2001* (Qld) s 3, the purposes of the Act include providing for the 'standards for the care and use of animals that… achieve a reasonable balance between the welfare of animals and the interests of persons whose livelihood is dependent on animals'.

In summary, in the field of animal law, we have sometimes conflicting policy objectives: the use of animals as property, and the protection of animals, based on their sentience (see: Goodfellow, 2013, pp. 200-2). With these thoughts in mind, let's turn to consider the processes in place for animal law and policy reform.

Processes for animal welfare law and policy reform

Animal management and welfare regulation is subject to the same law and policy reform processes as other areas of law. In this part of the lecture, we will develop an overview of law and policy reform processes, and consider these processes with examples related to animal law.

Law and policy reform can occur as a result of legislative change (amendment, repeal, etc), judicial decision making (judge-made law), or through regulatory review processes. These avenues of reform reflect our constitutional arms of governance. The legislature is responsible for enacting legislation and the judiciary for developing case precedents. Changes to regulation are undertaken by government departments on behalf of the executive. Within each arm of governance, reform occurs according to different processes.

Judge-made law

We do not need to go into too much detail regarding how judges make decisions, such as the process of reasoning and the methods of analysis applied. What is of note is that there is very little case law of precedent value in relation to animal law. Most animal cruelty prosecutions are heard and finalised in the Magistrates Court. The role of the courts in this area also comes into play as a result of advocacy that occurs outside institutional law reform processes, for example on the basis of evidence gathered and reported by whistleblowers. In this presentation however, we will focus on legislative and regulatory reform.

Changes to legislation and regulations

Changes to legislation and regulations may be achieved by formal routine processes, such as periodic reviews. However, the passage of enactment for regulations and legislation is different. Legislation is subject to more scrutiny by parliament than regulations. Legislation is subject to debate in parliament in both houses of parliament (one in Queensland!). By contrast, regulations are tabled in parliament, but they may not be subject to debate and are not required to be scrutinised.

The differences noted above are important in animal law, because much of animal welfare law is contained in regulatory instruments, such as Codes of Practice establishing minimum standards for the welfare of animals (currently being converted into Animal Welfare Standards and Guidelines). Therefore, reviews of Standards or Codes of Practice in many animal use settings do not go through the same processes of scrutiny as those applied to legislation.

Critical thinking point: What do you think are the implications of these different processes for animal welfare?

The role of law reform commissions

Law reform commissions are statutory bodies that have responsibilities for coordinating and facilitating legislative reviews and reform. Each state has a law reform commission (advisory committees in the Northern Territory and the Australian Capital Territory). Where the Commonwealth Government identifies an area of law that requires updating, revision, or reform, the Australian Law Reform Commission researches the relevant area, and provides recommendations for reform. As explained by the Commission, 'ALRC recommendations do not automatically become law, however over 85 per cent of ALRC reports have been either substantially or partially implemented - making the ALRC one of the most effective and influential agents for legal reform in Australia'.

Critical thinking point: Has animal law ever been the topic of an ALRC inquiry? Should animal law be a topic of inquiry? What do you think and for what reasons? Whichever way you decide, it is important to clearly express your rationale to support your perspective.

Animal law has not been the topic of an ALRC inquiry. In fact, in 2019, the ALRC undertook a consultation process asking the public 'what should be the priorities for law reform over the next three to five years'. Animal law or animal welfare did not appear on the short list. However, animal law did feature in the ALRC's erstwhile journal Reform Summer 2007-2008 edition (available on the AustLII website).

Policy Reform

There are different theories about how policy is developed. One theory posits that policy reform occurs according to a policy cycle or a policy window (Althaus, Bridgman and Davis, 2018, p. 47). Animal welfare policy development is generally coordinated by the Department of Primary Industries (or equivalent) in each jurisdiction. However, this is not always the case. For example, the ACT *Animal Welfare Strategy* was published by the Transport Canberra and City Services Directorate of the ACT Government.

1. The Policy Cycle

The policy cycle begins with identifying an issue, which then progresses through policy analysis, and identification of policy instruments (Althaus, Bridgman and Davis, 2018, p. 49). Resolving a policy issue may require legislative reform or changes in the way government agencies operate (Althaus, Bridgman and Davis, 2018, pp. 49-50).

The next step is consultation. During this stage, the coordinating government department will have discussions with other related government agencies and 'proactive interactions with non-government interests' (Althaus, Bridgman and Davis, 2018, p. 50). For animal welfare, this will generally include a variety of stakeholders, such as the RSPCA and industry representatives. After consultation, the policy will be put before cabinet and a decision made about whether and how to implement the policy.

While what has been described is the general policy cycle, it is also the case that different interest groups may be consulted at different points of the policy development process. Arguably, this will have an impact on policy outcomes.

2. Policy Windows

Some commentators explain policy formation using the metaphor of streams. Kingdon (2003, cited in Althus et al, 2018, p 47) talks about policy development in terms of three streams: the problem stream, the policy stream, and the politics stream. Guldbrandsson and Fossum (2009, pp. 434-5) explain that the problem stream relates to public matters requiring attention, the policy stream concerns proposals for change, and the politics stream relates to political issues, such as 'election results, changes of administration, interest group campaigns or changes in public opinions'.

When two or more of these streams come together, a policy window may open. Guldbrandsson and Fossum (2009, pp. 434-435) describe the policy window in the following way:

> … when simultaneously a problem is recognized, a solution is available, and the political climate is positive for change, a window of opportunity, *a policy window*, opens which facilitates policy change. The process is very dynamic with several solutions floating around, ready to couple with problems appearing in any moment.

In summary, a policy window refers to 'unpredictable openings in the policy process that create the possibility for influence over the direction and outcome of that process'.

Critical thinking point: Do you think the following reform successes may be due to the formation of policy windows?

(1) The national ban on cosmetic testing on animals.
(2) The ban on greyhound racing in the Australian Capital Territory.

3. Reactive Processes

Law and policy reform may also be prompted by incidents, disasters, or major advocacy campaigns. This is the space in which we have seen a lot of animal law and policy reform action over the last decade. Increasing numbers of exposés of animal cruelty in animal use industries have led to a variety of government law and policy reform processes.

Most of these exposés have been based on evidence of animal cruelty gathered by whistleblowers. Whistleblowers have included industry employees, animal protection activists, animal protection organisations, and independent investigators.

Recall, for example, the *Four Corners* episode 'A Bloody Business', which aired on the ABC in May 2011. The program exposed significant animal cruelty towards Australian cattle in numerous Indonesian abbatoirs. The event prompted a large public outcry, leading to the creation of the 'ban live export' campaign, which has continued ever since. In its initial response, the Federal Government suspended the live export of Australian cattle to Indonesia (subsequently resumed one month later).

A new regulatory regime, the Exporter Supply Chain Assurance System ('ESCAS') was then developed and commenced operation in 2012. The system requires that exporters report various details of the export supply chain, with penalties for breaches, including revocation of export permits. However, despite the introduction of ESCAS, incidents of animal cruelty in the context of live animal exports have continued. Hatten argues that although there is 'ample evidence' of ESCAS' limitations, the system provides animal advocates with the opportunity to hold the Commonwealth Government to account (Hatten, 2013, p. 306).

Let's move on to consider a more recent example - the Awassi Express incident. In this case, 2,400 sheep died of heat stress on board the Awassi Express voyage in August 2017 en route to the Middle East. Distressing footage of the incident was captured by a navigation officer on-board the vessel.

In terms of reactive policy and law reform processes, the event triggered various government reviews and reforms, including a review of the live export heat stress guidelines, and a ban on live sheep export during some of the hottest months of the year in the northern hemisphere. When the ban was extended, RSPCA Senior Policy Officer, Dr Jed Goodfellow, commented that this was 'an important step forward for the regulator, in acknowledging scientific evidence...'. We see here the important role of evidence in law and policy reform.

For a useful chronology of live export regulation to date, see: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1920/Chronologies/LiveExport

In outlining these examples, we should not conclude that the live export industry is the *only* animal use industry plagued by animal welfare problems. Unfortunately, there are plenty of

other examples of industries breaching animal welfare laws and falling below community expectations regarding how the animals in their care ought to be treated.

Animal welfare law and policy reform challenges in Australia

So far, we have identified that existing animal welfare law and policy is the result of government and stakeholder exchanges relating to two sometimes conflicting objectives. The first relates to the rights people have to use animals for human purposes. The other is the norm that we ought to treat animals humanely, and avoid treating them in ways that cause suffering or pain whenever possible.

We have also examined the processes by which law and policy is developed or reformed. While the processes related to routine reviews look like business-as-usual, the disaster incidents discussed above in the live export context alert us to the idea that regulatory systems can fail.

Reflecting on the Awassi Express incident, we can reasonably conclude that the Australian live export industry presents a clear example of what is known as 'regulatory failure'. Regulatory failure refers to government regulation that fails to achieve its objectives – in this case, improved animal welfare, and citizen and consumer confidence in the regulatory process.

Firstly, the system has failed to protect those it purports to protect (animals). It has also impacted negatively on the trade itself, and its reputation. The circumstances reveal a substantial gap between what the public might think or expect of animal welfare regulation in this area and the reality. These types of failures also call the competence of government into question and undermine its legitimacy as a regulator.

Following the Awassi Express incident, the Australian Government commissioned a review of the culture and capability of the Department of Agriculture in regulating the live export trade - the Moss Review (Moss, 2018). The Moss Review identified fundamental failings in the Department's approach to regulating the trade and found that its focus on trade facilitation had negatively impacted its culture as a regulator of animal welfare standards.

While regulatory failure may be made visible to the public by disasters or exposés, failure may be a symptom of an underlying chronic condition known as 'regulatory capture'. Regulatory capture 'refers to circumstances in which an interest group holding disproportionate economic or other forms of power manipulates regulation and the regulatory field to serve its own objectives...' (Chen, 2016: 241).

With regard to the agricultural industry, regulatory capture can be understood as the outcome of what has been described as the 'iron triangle' of agricultural interests (Goodfellow, 2018). Within this triangle, Ministers for Agriculture, Departments of Agriculture, and peak livestock representative bodies create a closed, exclusive agricultural policy community that wields significant control over animal welfare policy.

Critical thinking point: What types of issues are likely to emerge where there is a closed regulatory community, and members of that community hold disproportionate economic or other forms of power in comparison to other interest groups?

Conflicts of interest

Several scholars have identified conflicts of interest built into Australia's animal law framework (see for example: Ellis, 2013, p. 41; Bruce, 2018, pp. 83-5). A conflict of interest refers to situations in which a person or entity has conflicting loyalties that are likely to influence decision making or actions taken. Conflicts of interest introduce bias into decision making, such that one party's interest will be favoured over others based on unfair criteria.

It appears that conflicts of interest are built into the structure of the animal law field, and generally reflect the issue of 'regulatory capture' mentioned previously. As Bruce (2018, p. 84) notes, conflicts of interest are evident in the process by which Codes of Practice for the welfare of animals and Standards and Guidelines are developed. According to Bruce (2018, p. 84), these conflicts have been evident since Codes and Standards began to be developed in the late 1970s.

These conflicts arise because animal use industries and government departments enjoy heavy representation in the development of animal welfare standards, and these departments are required to pursue the sometimes conflicting objectives of promoting agribusiness and protecting animal welfare. Even at this basic level, it is easy to see why standards developed in this way often disproportionately favour industry interests.

These problems were acknowledged by the Productivity Commission (2016, p. 22) in an Inquiry Report exploring the regulation of Australian Agriculture. The Commission recommended that 'there should be more independence in the standards development process so that outcomes are not overly influenced by the views of any one group'.

Future reform options

There is a plethora of options for reform in animal law and policy in Australia. Some reform proposals and campaigns relate to specific animal protection issues (such as banning live export or phasing out battery cages used for egg production), whilst others address broader institutional issues relating to the structure of the regulatory system. We'll consider one example of the latter – the campaign to introduce independent offices of animal welfare at the state/territory and Commonwealth levels.

Independent offices of animal welfare

Calls for the introduction of independent regulatory bodies in this space have been made by various animal law commentators (see for example, Goodfellow 2015). Support for this reform at the Commonwealth level has also been expressed by a number of political parties, including the Labor party, the Greens, and the Animal Justice Party.

Although each party has different views on the appropriate power, role and responsibility of a national independent authority, all models involve introducing greater independence, transparency and accountability into the animal welfare standard setting and monitoring process.

In 2016, the Productivity Commission (p. 38) recommended the introduction of a new federal statutory organisation, called the 'Australian Commission for Animal Welfare'. The Commission suggested that this body should have various functions, including setting new

animal welfare standards and assessing the efficiency and effectiveness of implementation and enforcement of both those standards and the live export regulatory system.

Goodfellow (2015, pp. 277-278) has also proposed the establishment of independent animal welfare authorities at the state/territory level to oversee the administration of state animal welfare law.

Critical thinking point: Do you think Australia needs independent offices of animal welfare?

Conclusion

As our discussion has demonstrated, achieving animal welfare law and policy reform in Australia is challenging, as various factors operate as bulwarks against change. These include, but are not limited to, the impacts of regulatory capture and the operation of conflicts of interest.

Critical thinking point: What should be the role of animal lawyers in this process?

a) To develop understanding, and participate in debate and law and policy reform?
b) Hold current processes/decision-makers to account?
c) Advocate for governance and institutional reform?
d) Advocate for more inclusive/democratic law and policy review processes?
e) Get involved in community education on these issues?

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