

Where do our obligations to animals come from, and how are they changing? Ethics meets the law

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Our moral sentiments often find expression in the law

(Scruton, R. 1998. *Animal Rights and Wrongs*).

Many of us in our working lives are largely unaware of many of the laws that could affect the professional judgments we make. Nor do we fully understand the complexity of moral sentiments that have in many cases led to the laws being implemented. Veterinary work is no exception.

There are so many laws affecting people who work with animals that university courses in animal law are growing rapidly. There are now 92 law schools in the United States teaching courses in animal law. In Australia the first specific course in animal law began at the UNSW in 2005 and in 2008 there will be new courses in animal law at more than half a dozen universities in Australia.

These courses are run as part of law degrees, but there is a serious need for those who work with animals to understand the law as it relates to their business or profession. How many veterinarians, for example, understand all of the law as it applies to them?

The law, however, lags behind changes in community ethical understanding and expectations. We have seen this in many fields – such as the rise in environmental consciousness – and we are seeing it how we regard animals. If community moral sentiments find expression in the law and there is a change in community moral sentiment, then eventually there will be changes in the law. Animal care professionals need to understand what is happening in the current discourse surrounding animal ethics to understand better the moral expectations of their communities, to understand the pressures on the law and be aware in advance of possible changes in the law as it affects their professional lives.

But what do we mean by ethical understanding, what is the relation between ethics and the law, and why should we bother with either? It is easier to explain why we need to know the law, but not so clear why we need to understand things from an ethical perspective.

Ethics

Ethics is the glue that holds society together. We need basic agreement on what is right and wrong on all manner of things just to get along. Unfortunately the glue can look different in different cultures and situations and we need to think about things carefully to understand what ethics is really about. There are many concepts in ethics, concepts such as fairness, rights, consequences, virtues, friendship, loyalties, charity, responsibility and care. And they all have an impact on our personal, family, social, professional and business lives (Millett 2008).

Ethics is the heart of our relationship with others, which might be seen firstly as an I-Thou relationship (Buber 1996), that is the relationship between me and an “other” where I recognise in the other something worth taking into account when I do something that affects it. This other is usually another human, but increasingly there is acceptance that a whole range of animals – and even ecosystems – lay claim to our moral consideration. They are seen to deserve moral consideration because they have interests that can be harmed or benefited.

Ethics gets us to ask the question: Why should I? or Why should I not? instead of merely asking How can I? Professionals need to ask both types of question. But when we ask “Why should I?” we are not merely asking ourselves in some sort of individual dialogue. We are also in effect engaging in a professional conversation with our peers because these questions go to the heart of professionalism and the answers the profession arrives at are normative – they guide the actions of all members of the profession.

Why bother with ethics?

The first answer to this has nothing much to do with ethics at all. Being ethical is in your own self-interest: behaving in a way that your peers regard as ethical is going to keep you out of trouble. But simply behaving so that you appear to be acting ethically is not enough – it is like saying doing wrong is right as long as you don’t get caught. Ethics is much more than merely obeying the law. And ethics is also more than merely following a code. We need to take intention into account, and the fact that we are autonomous being who can choose what to do. This autonomy, or freedom to choose, can be a quite radical freedom, but we are all responsible for the choices we make (or don’t make). For example, sometimes we might need to consider breaking the law to do the right thing.

Case: a good client running a big stable of show horses wants injectable sedation on hand when the strappers need to clip the horses. The drug is a Schedule 4 drug that requires those prescribing it to be treating the animal. The client will not pay for a visit for this purpose, but does not hesitate to call if an animal is sick. The client knows how to administer the drug and is generally careful. She says that if the stable is forced to use a lesser drug which wears off quickly both the strappers and the horses are in danger. What do you do?

Rights and Obligations

The key question in ethics is “What ought I do?”: a question that to be answered adequately must take into account our obligations. And to understand our obligations we need also to understand what rights might be in play in any given situation, because rights and obligations operate as pairs: If you have a right, someone or some institution has an obligation to you.

Rights and obligations are terms in common use, but terms that many people do not adequately understand. So, what are they?

A right is, roughly, an entitlement that constrains behaviour (Mackie 1985). If I have a right (or entitlement) to X then you have a corresponding obligation to behave toward me in a certain way. The most common way of understanding this is that my right places you under an obligation and so constrains the way you should behave toward me.

An obligation is “a moral or legal constraint...The action of constraining oneself by oath, promise, or contract to a particular course of action” (OED). The term comes from the Latin *obligare*, from *ob* ‘to’ and *ligare* ‘to bind’ so an obligation is literally a ‘binding to’. But it is in the nature of obligations that we have a choice as to what extent we are bound and whether to meet the obligation or not. We *ought* to meet the obligation if we can, but we all have the choice not to if we are willing to accept the consequences.

Rights and the relationships based on them are often complex. Some of the characteristics of rights that add to the complexity include the following:

Rights have normative force. That is, rights guide us in how we should behave. Recognising that something has – or even may have – a right of some sort changes the way we regard that thing and how we think we should behave toward it. If animals have certain classes of rights then we have an obligation to treat them in prescribed ways. The rights most commonly held to belong to animals are negative rights that take the form of: freedom from hunger and thirst; freedom from discomfort; freedom from pain, injury or disease - by prevention or rapid diagnosis and treatment; freedom to express normal behaviour; and freedom from fear and distress (Robertson 2007, May).

Moral rights differ from legal rights. The paradigms of moral rights and legal rights are not aligned. For example, I may have legal rights that infringe others’ moral rights and vice versa. Also, types of rights may be incommensurable so that getting legal redress for infringement of some moral rights may not be possible.

Moral rights are generally thought to be inalienable. That is, they cannot be traded or given away. If I choose to waive a particular right I am not saying I do not have the right, merely that I will not exercise it.

Rights may conflict. For example, a miner’s right to extract minerals may conflict with an indigenous group’s cultural rights to protect ancient rock art.

Rights may be implied or stated. Some rights may be presumed as a consequence of belonging to a group or they may be granted explicitly (such as legal rights). And some rights are commonly considered natural rights: we are considered to have them simply because we are human. In effect, we are born with them.

The reciprocal relationship between rights and obligations is not straightforward. There are two schools of thought. The Control Theory holds that my right exists because you have an obligation. The Interests Theory holds that your obligation exists because of my right.

Rights may be active or passive. An *active right* takes the form: ‘A’ has the right to ϕ (where ϕ is an active verb). E.g. A football coach (A) has an active right to move (ϕ) players to and from his bench. A *passive right* takes the form: ‘A’ has the right that P ϕ . E.g. A University academic (A) has a passive right that the University (P) not fire (ϕ) her for publishing unpopular views.

Rights may be negative or positive. E.g. The right to be left alone (negative) vs. the right to get help when you need it (positive).

Rights have complex structures. They comprise four ‘incidents’ (Hohfeld 1919 in Wenar 2007) *the privilege, the claim, the power and the immunity.*

- I have a privilege to [do] 'x' if I have no duty to [do] 'x'.
- I have a claim that P does 'q' if and only if P has a duty to me to do 'q'.
- I have a power if and only if I have the ability to change my or another's 'incidents'.
- I have immunity if and only if P does not have the ability to alter my 'incidents'.

I may also have a right to do wrong. The right to free speech, for example, may entail a right to do wrong in that I have the right to speak even if some of what I say has the capacity to cause harm.

Humans may waive exercising their moral rights. This does not remove their right, because moral rights are presumed to be inalienable: they cannot be given away or taken away. Forcing people to forego exercising their moral rights fails at least the core principles that underpin the treatment of humans. The core principles (Beauchamp & Childress 1989) are:

- respect for autonomy, which is the most significant value underpinning a liberal society;
- justice, a difficult to define concept that is generally agreed (after Rawls) to be at least partly explicable in terms of fairness;
- beneficence, or trying to bring a benefit. Non-maleficence, or trying actively not to do harm.

But waiving rights requires fully-informed consent. It is not possible for non-competent humans to waive their rights. Likewise it is not possible for sentient animals to waive any rights they might have. Their capacity to exercise their moral rights (see the five freedoms, below) can only be taken away.

At this point, it is worth noting the distinction between a moral agent and a moral patient. A moral agent can choose to act and is able to make decisions knowing them to be moral or not. A moral patient is something or someone whose interests can be affected by the actions of a moral agent. Non-competent humans (such as newborns) are moral patients whose interests moral agents have a moral duty to protect. Non-human sentient animals (i.e. those aware of pleasure and pain) are not generally regarded as moral agents, but there has been a significant shift over several centuries to the point where there is a general acceptance that sentient animals are moral patients. Their capacity to suffer and the correlated right not to suffer unnecessarily places an obligation on moral agents.

Changing obligations

Our obligations are both legal and moral and the nature of those obligations has continued to change over time. So where do our obligations to animals come from? There is a long history of this going back to at least the time of Aristotle. And one of the key elements of that history is that important questions of ethics start out on the margins of community discussion and gradually move into the centre (Millett 1992). That means that some of what we might think of as fringe activity in animal rights will almost certainly make its way into common understanding and become part of our legal framework.

Much has already come in from the margins, as we can see in a short walk through the history of animal ethics.

The work of Aristotle (384-322BCE) figures prominently in the history of animal ethics. As well as being one of the great philosophers, Aristotle was the first systematic biologist. In his *History of Animals*, he said creatures were part of a *scala naturae* or Great Chain of Being that progressed from the least to the most developed. In this Chain humans were the most developed because they combined flesh and spirit. But this was not wholly unproblematic because the presence of both flesh and spirit creates a moral struggle within each human that is not present in other beings. Aristotle's work has been used since the Middle Ages to justify what today would be considered cruel treatment of animals, but it is not at all clear that Aristotle would have agreed.

The first recorded mention of some sort of rights for animals was in third Century Rome. For the Romans, the *jus naturale* or natural law spelled out the principles of survival for living things and was the presumed ground on which all laws were made. The Romans developed the concept of the *jus commune* to describe the sorts of laws that humans overlaid on the *jus naturale*. They also assumed the existence of a *jus animalium* which implied that animals possessed what would be later known as natural or inherent rights (Nash 17).

Religious traditions have had a significant impact on how we treat animals. The Hindu and Buddhist traditions, for example, place particular emphasis on the way animals should be treated. And Jains are urged to look down to the ground so they do not inadvertently step on any organism. However, the tradition with the greatest influence on the way the Western world treats animals is Christianity.

There is a theology underpinning the Christian church's view of our relations to animals but that theology is open to interpretation. The dominant model has come into modern theology through Thomas Aquinas and his interpretation and extension of Aristotle's philosophy. This relationship hinges on kindness and cruelty, but only in that it is a reflection of a person's character. In virtue ethics, which began with Aristotle, what people do determines their character. So, a person who is cruel or unkind to animals effectively builds that cruelty into their character. They become cruel or unkind and are more likely to show cruelty or unkindness to humans. The problem from the virtue ethics point of view is not the maltreatment of animals as such, but the damage such cruelty does to the person's character. The early understanding of rights for animals that arose in Roman law was overtaken in the Western world by an interpretation of the Book of Genesis that gave humans "dominion over the fish of the sea and over the birds of the air and over every living thing that moves upon the earth", a view that influenced many thinkers throughout the middle ages, into the Enlightenment and beyond.

Arguably the most influential of the European philosophers on the issue of animal sentience and their consequent moral status was Rene Descartes' (1596 –1650) who argued that animals do not experience pain because they cannot reason. On his view non-human animals were like mechanical things: reactions were instinctual and any appearance of pain was just a wrong interpretation by humans. This view has subsequently influenced many scientists, particularly vivisectionists.

The first recorded law respecting the rights of animals was in the north American colony of Massachusetts Bay in 1641. The laws of the colony were codified by Nathaniel Ward (1578-1652). The 92nd and 93rd laws respectively prevented cruelty to and required owners to ensure the welfare of domestic animals (Nash, 19). The most significant rights given to animals from around this time are because they are

considered the property or chattels of men and so there were property rights that could be protected. In 1693 philosopher John Locke reasoned that animals could suffer and that harming them was morally wrong. He considered it wrong, however, not in itself but because people who hurt animals would damage their own character and lead to them harming people.

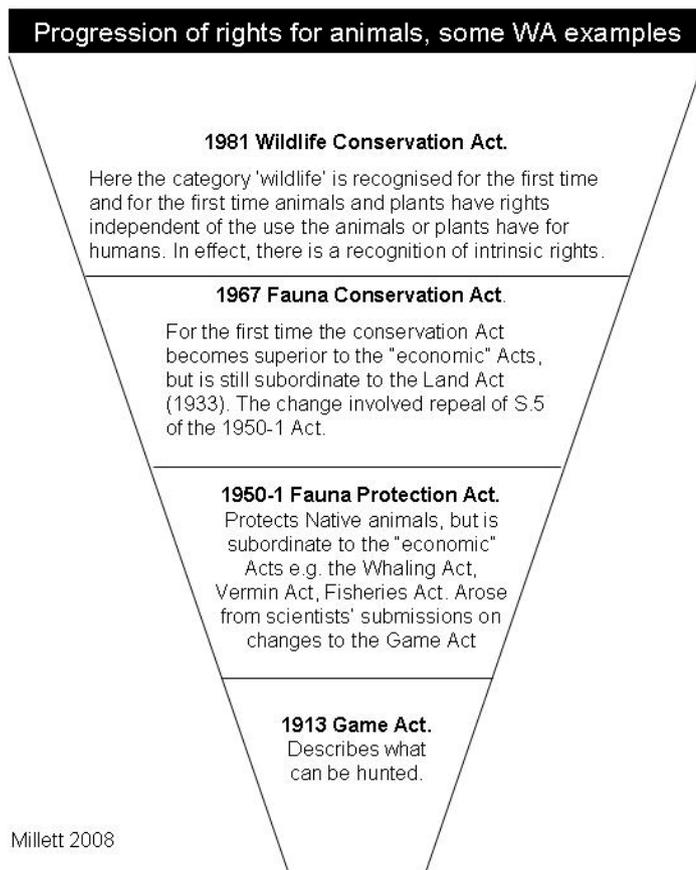
The history of the changing perception of our obligations to animals entered a period of rapid change with the emergence of science. The culmination of this in the 19th Century was with the publication of Charles Darwin's *On The Origin of Species by Means of Natural Selection* which argued that humans had evolved from other primates in a process of natural selection. Humans were animals: higher animals, to be sure, but animals just the same. From this point on, if humans were part of the animal world, then it could be argued that giving moral status to animals was a matter of where to draw the line.

Roderick Nash (1990) argues that there has been a continuing expansion of the notion of rights. That is, there has been a change in the classes of things to which we ascribe moral and legal rights. He claims humans began recognizing rights in our relations with other members of our family and tribe. We then recognized rights in other groups in our region, before extending the recognition to nations, then to races and all humans. Rights were then recognised for certain categories of animals (such as domesticated species) and now there are rights for new categories of plants and animals. There are even rights acknowledged for whole ecosystems, as seen in such things as World Heritage listing. But not only are there more categories to which we give rights, the types of rights are also changing.

Change from 'protection' to 'welfare'

One of the significant changes across Australasian jurisdictions has been a paradigm shift from legislation that protects animals to legislation that requires humans to ensure the welfare of animals. This is a move that replaces the negative right not to be harmed with a positive right to be cared for. That is, the move puts a positive obligation – sometimes seen as a duty of care – on to owners. In New Zealand, for example, in 1999 the Animal Welfare Act replaced the *Animals Protection Act 1960*, thus changing the focus there. In Australia legislation to protect animals is the responsibility of State and Territory governments – and in some states and territories the titles reflect the change in emphasis that has been occurring. In Western Australia the *Animal Welfare Act 2002* replaced the *Prevention of Cruelty to Animals Act 1920-1976*. Similar changes have been implemented in other states (See Appendix 1)

A clear example of the progression of rights for animals can be seen in changes to various Acts in Western Australia over the past 90 years.



Progression of rights in some Western Australian Acts

The Western Australian Game Act of 1912-13 is a good place to start. This Act sought to bring some control over the hunting of wild animals by limiting the numbers of animals that could be killed for sport or food. In this Act there is an underlying assumption that animals are only to be considered in relation to their economic value. In 1944 the Minister controlling the Game Act set up an advisory group to investigate changes. That group included University of Western Australia ornithologist Dr Dominic Serventy and the curator of the Perth Museum, Ludwig Glauert. Both were very active in the early conservation movement and were able to argue for a new Act that gave some protection to native animals. The ideas they brought to bear had been gaining currency on the fringes of WA's science community in such places as the Gould League and the WA Naturalists' Club for a number of years. The 1950-1 Fauna Protection Act gave specific protection to classes of wild life, but the 'economic' Acts (the Game Act, the Whaling Act, the Vermin Act and the Fisheries Act) were still superior: that is, if there was a conflict between the Acts, the economic Acts would be overrule the Fauna Protection Act.

The Parliamentary debate on the proposed Act, is instructive as to the reasons for its introduction. In introducing the Bill, the Attorney General Arthur Abbott said the proposed Act was:

“...designed for the conservation and protection of fauna. The Game Act was based upon old English statutes... passed with a view to preserving wild life,

or game, so that certain persons could enjoy hunting. I feel, and I know members do too, that the main theme of any Act in connection with native fauna should be changed, because times have changed. The basis of this measure is not to preserve wild life to enable it to be shot or otherwise hunted, but the value and interest it has, and will have to the people of Western Australia..." (*Western Australian Parliamentary Debates*, vol. 127, 1950: 796)

A major change occurred in 1967 with the amendment of the Fauna Protection Act to create the Fauna Conservation Act 1950-1967. This Act became the superior Act over the so-called economic Acts and animals were no longer seen only as a resource. The Act also created the Western Australian Wild Life Authority and included marine fauna (such as whales) for the first time. When the Works Minister Ross Hutchinson introduced the second reading of the Bill he noted that

"...times have changed and the great need now is to protect fauna in its own right if we are, in fact, going to save it at all... From time to time the criticism is raised that Western Australia regards its fauna as something to be conserved only after all other interests have been satisfied. This amendment will remove the cause of that criticism, at least in part" (*Western Australian Parliamentary Debates* (Hansard 1967) Vol. 177, 1562)

In the 1981 Wildlife Conservation Act Hutchinson's recognition of the need to protect fauna *in its own right* is finally given legislative teeth. In this Act, not only is the category of "wildlife" recognised for the first time, but there is also a very clear recognition of intrinsic rights for animals and some plants.

From these examples, we can see that the net has widened to recognise that new classes of animals have rights, but there is also a change in the sorts of rights that are recognised. There is a move from recognising rights for animals in order to protect the economic interests of humans to a recognition of some sort of intrinsic right. Similar changes can be seen in other areas around the world.

In this regard, the Great Ape Project is a useful example to follow over the next few years. This project aims to have the United Nations endorse a Declaration on Great Apes that would extend what the project calls the 'community of equals' to gorillas, chimpanzees, bonobos and orangutans. "The community of equals is the moral community within which we accept certain basic moral principles or rights as governing our relations with each other and enforceable at law. Among these principles or rights are: The Right to Life, The Protection of Individual Liberty, and The Prohibition of Torture". (<http://www.greatapeproject.org/declaration.php> accessed 14 Feb 2008)

Community attitudes are in flux, and laws will continue to change. The process involves some of what has been on the margins being appropriated into the centre. What now may be considered strange, unusual or weird could well find its way into the statute books and we will live with it.

Standing and persons

One of the key issues with legal rights and obligations involving animals is the question of standing. Since the earliest times the law has been seen as something only concerning humans. And not much has changed as far as the law is concerned, as noted by Steven Wise in his argument for legal rights for animals:

"Ancient philosophers claimed that all nonhuman animals had been designed and placed on this earth just for human beings. Ancient jurists declared that

law had been created just for human beings. Although philosophy and science have long since recanted, the law has not. (Wise 2000, p.4)

The law in Western jurisdictions generally differentiates between the law affecting owned animals and that affecting “wild” animals. The law effectively sees non-wild animals only as chattels, the personal property of a person, and any rights and obligations are the rights of the owners. Animals have no standing at law. That is, a complaint can not be made by or on behalf of animals because the law does not recognise an animal – in effect the law does not ‘see’ the animal. In the United States a series of decisions in a long-running controversy surrounding the experimental use of a group of macaques known now as “the Silver Spring monkeys” has highlighted the law on the standing of animals. As Francione notes, “those decisions establish that no one who has a mere interest in the welfare of these animals has standing to sue because the animals are the private property of others. That is, the law of standing assumes that humans cannot have legally significant relationships with animals owned by others.” (p.66) In essence, the US courts “have recognised that people may have standing to litigate issues involving non-owned, or “wild,” animals, but do not have standing to litigate cases involving animals owned by others.” (p.66)

Francione argues that the law has not taken seriously the interests of animals in their own right and “through the doctrine of standing has done everything possible to ensure that matters involving animal interests are never brought into the courtroom.” (1995, p.65) In general the issue of legal standing in cases involving animals “has tended to focus on ownership status and to reinforce property rights in animals...” (p.65).

But property rights are not the only matters of interest because animal law issues cross into most areas of the law, including torts, criminal law and constitutional law. In Australia, laws specific to animals are covered in “the agricultural use of animals such as live exports and rearing of livestock...[and] the law relating to wildlife, cruelty to animals, the regulation of companion animals (aka pets), animal experimentation, veterinary science and practitioners, and the use of animals for entertainment and exhibition in places like zoos, circuses and hunting.” (Bloom, 2008)

Wise (2000) argues that legal rights and legal standing should be given to animals on the basis that they should be considered “persons”. (The term “person” in this case arises from the field of philosophy called metaphysics, not merely from the common understanding that all and only humans are persons.) Wise argues that at least some animals, specifically the great Apes, should be considered persons because they meet a range of cognitive and other criteria for personhood. But this is an area of significant contention. Wise bases his position on argument from analogy: the great Apes have so many characteristics in common with humans that they should be considered in the same way as human persons. But there are some properties that opponents of this view claim are relevant and not considered (..... in Animal Ethics..... Contra Wise) Neo-Cartesians, for example, “found their flat rejection of the moral considerability of ‘animals’ on their ‘not having language’. Because they cannot talk (it is said), they cannot think; because they cannot think, they cannot wish or feel...” (Clark 1997, p. 2) The question of the capacity to use language is itself a complex one. The chimpanzee Washoe, for example, was taught the American signing language Ameslan and could communicate quite complex ideas with her keepers. At the age of five Washoe could sign 132 different words including nouns and verbs and was able to combine them in a basic syntax to give instructions to her keepers such as

“you tickle me” (Pearce 1997, p.260). Washoe later had a baby which died and when told (in Ameslan) that “baby gone” “baby finished” she showed all the signs of grief and depression. She subsequently was able to foster the baby Loulis which had been rescued from an experimental site. Washoe taught Ameslan to Loulis who then used it to communicate with humans as well as with Washoe.

So, do the chimpanzees Washoe and her adopted son Loulis count as persons? The idea that the concept “person” can refer to more than humans goes back at least to 1690 and the publication of English philosopher John Locke’s *Essay concerning Human Understanding* in which he suggests that defines persons is the possession of reason and self-consciousness. Since then persons have also been viewed as being capable of language, that they are social creatures and are capable of reciprocal social relations (Shoemaker 1995, pp.380-1). If chimpanzees and the other great apes have the capacity to learn and use language, and they meet other criteria for personhood should they have legal standing?

In thinking about this question, remember that to be considered a person at law and to have standing before the law it not necessary to have the ability to assert one’s own rights. For example children and non-competent adults such as those with mental disabilities have “legal rights and legal standing, but their interests are often articulated by court-appointed guardians.” (Francione 1995, p.65)

Conclusion

In the eyes of the law, non-wild animals are recognised as the property of humans. They have no legal standing. But the law has had a history of changing to reflect changes in public moral sentiment. Once, slaves and wives were considered mere chattels, but the law has changed. And public moral sentiment toward animals is in flux, with widespread changes in our perceived moral obligations to animals and the natural world. Increasingly animals are being viewed in terms of their own interests rather than merely as resources or things over which humans have Bible-inspired “dominion”. It may seem strange to think of animals having legal rights in and for themselves and therefore having the right to bring cases before a court, but community attitudes are in flux, and laws will continue to change. The process involves what is on the margins being appropriated into the centre. What now may be considered strange, unusual or weird could well find its way into the statute books or case law and we will live with it.

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Appendix 1: Some relevant State and Federal Acts governing treatment of animals

Wildlife Protection (Regulation of Export and Import) Act 1982

Environment Protection and Biodiversity Conservation Act 1999

Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Act, 2001

Gene Technology Act 2000.

Australian Quarantine Act 1908.

The Prohibition of Human Cloning Act 2002

Australian Capital Territory

Animal Welfare Act 1992 (ACT) Part 4

New South Wales

Animal Research Act 1985

Northern Territory

Animal Welfare Act 1999

Queensland

Animal Care and Protection Act 2001

South Australia

Prevention of Cruelty to Animals Act 1985

Tasmania

Animal Welfare Act 1993

Victoria

Prevention of Cruelty to Animals Act 1986, Part 3

Western Australia

Animal Welfare Act 2002