LEGISLATION NOTE

Three Strikes for New Zealand? Repeat Offenders and the Sentencing and Parole Reform Bill 2009

SOPHIE KLINGER*

I INTRODUCTION

On 18 February 2009, the Minister for Justice, the Honourable Simon Power, introduced the Sentencing and Parole Reform Bill 2009. The Bill contains provisions to amend the Sentencing Act 2002 and the Parole Act 2002 by introducing a "three stage regime of increasing consequences for the worst repeat violent offenders"[1] based on offenders' previous convictions, and culminating in a sentence of life imprisonment with a 25-year non-parole period. This note seeks to analyze the Bill's proposed sentencing scheme, purposes, justifications, and likely impact.

Over the last few decades, crime policy has become increasingly politicized and populist,[2] which has in turn led to more punitive sentences and longer penalties. Anxiety about sexual and violent criminals has increased, exacerbated by media accounts of particularly violent and heinous crimes.[3] This has been accompanied by an increasing focus on public protection and risk management.[4] The victim has assumed a more prominent role in discourse about crime.[5] Governments have enacted legislative and policy changes in response to these pressures; in the process, expertise in penal policy has been displaced from traditional sources such as academia, to extra-parliamentary lobby groups, especially victims' advocacy groups.[6]

One such lobby group, the Sensible Sentencing Trust, played a major role in promoting the idea of a "three strikes and you're out" sentencing law for New Zealand from as early as 2004,[7] based on those enacted in the

* BA/LLB(Hons), Judges' Clerk, High Court, Auckland.

1 Sentencing and Parole Reform Bill 2009 (No 17-1), Explanatory note, 1.

2 Garland, *The Culture of Control* (2001) 13 ["*Culture of Control*"].

3 Owens, "California's Three Strikes Law: Desperate Times Call for Desperate Measures — But Will it Work?" (1995) 26 Pac L J 881, 886; Vitiello, "A Proposal for a Wholesale Reform of California's Sentencing Practice and Policy" (2004) 38 Loy L A L Rev 903, 920–921.

4 Garland, *Culture of Control*, supra note 2, 12.

5 Garland, "Punishment, Social Control, and Late Modernity" (2006) 164 PSJ 13, 15.

6 See Pratt and Clark, "Penal Populism in New Zealand" (2005) 7 Punishment & Society 303.

7 Sensible Sentencing Trust, "Throw Away the Key Says Trust" (Media Release, 20 December 2004) <http://www.safe-nz.org.nz/Press/2004key.htm> (at 12 September 2009).

1990s across the United States, most notably in California in 1994. The ACT Party adopted the idea as part of their law and order policy for the 2008 General Election.[8] Following the election, ACT and the National Party entered into a confidence and supply agreement, a term of which was that National would support ACT's 'three strikes' Bill through to the Select Committee stage.[9] The Bill, when ultimately introduced, combined ACT's "three strikes and you're out" policy with National's primary law and order election policies: those of abolishing parole for repeat violent offenders ("Two Strikes, No Walking"),[10] and imprisonment without parole (for life, if a life sentence is imposed) for murderers who have previously been convicted of a violent crime and received a sentence of imprisonment of five years or more.[11] The Bill passed its first reading by 58 votes to 43 on 18 February 2009, and at the time of writing was before Parliament's Law and Order Select Committee.[12]

II THE SENTENCING AND PAROLE REFORM BILL 2009

The Bill proposes a three-stage scheme of escalating penalties for the worst repeat offenders.[13] An offender receives a first "qualifying sentence" for committing one of a list of specified serious violent offences[14] and a first warning.[15] In order for a sentence to be a "qualifying sentence", it must be five years or more in length, life imprisonment, or preventive detention.[16]

The second stage occurs when an offender commits a second serious violent offence after having received the first warning, and receives a qualifying sentence for that second offence. This constitutes a final warning for the offender.[17] At this stage, if the offender receives a determinate sentence, the offender must serve the term of that sentence without parole.[18]

---

8 ACT Party, *Law and Order Policy* (28 October 2008) <http://www.act.org.nz/_files/_plan/policy17_.pdf> (at 12 September 2009) 1. At the election, the ACT Party gained five seats in Parliament. One of its new MPs, ranked fifth on the party's list, is David Garrett, who was an active member of the Sensible Sentencing Trust and was its legal spokesperson.

9 National Party and ACT Party, *National–ACT Confidence and Supply Agreement* (16 November 2008) <http://www.national.org.nz/files/agreements/National-Act_Agreement.pdf> (at 12 September 2009) 4.

10 National Party, *Law and Order Policy: No Parole for the Worst Repeat Violent Offenders* (6 October 2008) <http://www.national.org.nz/files/2008/parole_policy_paper.pdf> (at 12 September 2009) 1.

11 Ibid 2.

12 (18 February 2009) 652 NZPD 1440.

13 Sentencing and Parole Reform Bill 2009 (No 17-1), Explanatory note, 1.

14 See ibid cl 5 (inserting Sentencing Act 2002, s 86A). Serious violent offences include offences in a number of provisions of the Crimes Act 1961, including sexual offences such as s 128B (sexual violation) and s 135 (indecent assault); offences to the person such as s 172 (murder) and s 188(1) (wounding with intent to cause grievous bodily harm); and some offences to property such as s 232(1) (aggravated burglary), s 234 (robbery), and s 235 (aggravated robbery).

15 Sentencing and Parole Reform Bill 2009 (No 17-1), cl 5 (inserting Sentencing Act 2002, s 86B).

16 Ibid (inserting Sentencing Act 2002, s 86A).

17 Ibid (inserting Sentencing Act 2002, s 86C).

18 Ibid (inserting Sentencing Act 2002, s 86C(2)).

The third stage is triggered when an offender commits a further serious violent offence and the court would otherwise have imposed another qualifying sentence.[19] When this situation arises, a court must impose a life sentence with a minimum non-parole period of 25 years, unless it would be manifestly unjust to do so (in which case, the court must impose a shorter non-parole period).[20] This is the severe third strike sentence, the basis of the "three strikes and you're out" slogan. An exception to this mandatory 25-to-life sentence is if the offender commits murder at the second or third stage. In that case, the court must order that the offender serve their sentence (presumptively life) without parole, unless it would be manifestly unjust to do so.[21] This is a limited safety valve that provides a small degree of discretion on the part of the sentencing judge.

In short, the proposed New Zealand scheme removes parole eligibility for the second serious violent offence, and imposes life imprisonment with a 25-year non-parole period for the third, provided that the offender would have received at least a 5-year sentence for that offence.

The Bill has a number of objectives, including to "increase public confidence in the criminal justice system", "enhance public safety", "increase certainty around release dates", and "encourage offenders to understand the consequences of repeat offending through increased certainty about these consequences".[22]

III RATIONALES FOR SENTENCING UNDER THE BILL

It is useful to consider the proposed three strikes sentencing scheme in light of the justifications for punishment, the traditional rationales being retribution, rehabilitation, deterrence, and incapacitation.[23] A common view is that three strikes rests upon the theories of incapacitation and deterrence, while rejecting those of retribution and rehabilitation.[24]

Incapacitation

Incapacitation is the main justification for the sentences proposed under the Bill. The explanatory note states that "[t]his regime is intended to improve public safety by incapacitating these offenders for longer periods."[25] While

19 Ibid (inserting Sentencing Act 2002, s 86D).

20 Ibid (inserting Sentencing Act 2002, s 86D(3)).

21 Ibid (inserting Sentencing Act 2002, s 86E(2)). The New Zealand Law Society argues that "[t]he term 'manifestly unjust' suggests that injustice will be tolerated if the high threshold of 'manifestly unjust' is not established." New Zealand Law Society, "Submission to the Law and Order Committee on the Sentencing and Parole Reform Bill" (2009) 2.

22 Sentencing and Parole Reform Bill 2009 (No 17-1), Explanatory note, 7.

23 Ashworth, *Sentencing and Criminal Justice* (4 ed, 2005) 74.

24 Luna, "Foreword: Three Strikes in a Nutshell" (1998) 20 T Jefferson L Rev 1, 8.

25 Sentencing and Parole Reform Bill 2009 (No 17-1), Explanatory note, 1.

in prison, offenders are prevented from committing further crimes; in this way, the public is protected from future crimes that would otherwise be committed by those particular offenders.[26] This rationale is undermined by the problem of false positives; that is, offenders who are incarcerated who, had they not been incarcerated, would not have gone on to commit any further offences.[27] Separating these offenders from society does not improve public safety, but instead carries both a financial cost to the state and a personal cost to the offender.[28]

Age Effects

In three strikes schemes, the method used to select which offenders to incapacitate gives rise to a practical limitation: "[r]etrospective identification results in an offender pool that is substantially older than is the average offender committed to prison."[29] Arguably, a three strikes scheme is flawed in its approach because, instead of capturing those most likely to engage in repeat violent offending, it captures older offenders who have passed the peak of their criminal careers. There is a well-documented relationship between age and crime — most serious and violent offending is committed by offenders in younger age groups.[30] Serious criminal activity tends to decline as offenders approach their mid- to late-twenties.[31]

From an incapacitation perspective, therefore, the relationship between age and offending means that the longer the sentence a third strike offender receives, the more likely it becomes that the individual would have ended his offending activity even if not imprisoned.[32] To the extent that this is the case, additional prison time is not worthwhile. This point is especially salient for New Zealand, given that offenders subject to the Bill's scheme will be older because of the requirement that before a third strike sentence is imposed, the offender must have previously been sentenced to two "qualifying sentences" of five years or more, the second of which at least will have been served without parole.

Deterrence

Deterrence is also used to justify the extended period of punishment featured in a three strikes sentence. Although not promoted explicitly as a purpose

---

26 Heglin, "A Flurry of Recidivist Legislation Means: 'Three Strikes and You're Out'" (1994) 20 J Legis 213, 218.

27 Burt et al, "Three Strikes and You're Out: An Investigation of False Positive Rates Using a Canadian Sample" (2000) 64 Fed Probation 3, 3.

28 Ibid.

29 Auerhahn, "Selective Incapacitation, Three Strikes, and the Problem of Aging Prison Populations: Using Simulation Modelling to See the Future" (2001) 1 Criminology & Pub Pol'y 353, 358–359.

30 Ibid 359.

31 Males and Macallair, "Striking Out: The Failure of California's 'Three Strikes and You're Out' Law" (1999) 11 Stan L & Pol'y Rev 65, 68.

32 Auerhahn, supra note 29, 360.

of the Bill, it is evident in the explanatory note, which states that the Bill is intended to "encourage offenders to understand the consequences of repeat offending *through increased certainty about these consequences*".[33] The concept of increased certainty about the consequences of repeat offending (in the form of guaranteed harsh punishment) implicitly appeals to deterrence, and is often cited as a purpose of three strikes schemes.[34]

However, a deterrent effect from a three strikes sentencing scheme is not borne out in empirical studies.[35] This is unsurprising: using sentencing policies to prevent reoffending and lower crime rates is generally a poor approach for a number of reasons. Increasing the likelihood of apprehension and conviction is more effective in deterring criminals than increasing the severity of the sentence.[36] Vitiello suggests that criminals use imperfect information in making choices regarding offending.[37] Offenders tend to deprioritize future consequences; for example, a prison term to be served in five years is perceived as less of a punishment than a lesser term served immediately.[38] At any rate, the serious and violent crimes targeted by three strikes sentencing laws are the least likely to be conducted through rational planning, and may be carried out in the context of provocation or otherwise heightened emotional states.[39] In addition, other factors may limit the violent offender's ability to undertake calculated, rational planning activity, such as intoxication by alcohol or drugs.[40]

The Problem of Proportionality

A significant criticism of three strikes sentencing schemes overseas has been their lack of proportionality. It is a basic principle of retributivism that the punishment must bear a reasonable relationship to the crime, to reflect the degree of blameworthiness of the conduct involved.[41] The third strike sentence of life imprisonment with 25 years of non-parole bears no relationship to the gravity of the underlying offence, and may double or triple the maximum penalty that would otherwise apply. Every third strike offender receives the same sentence, regardless of the type and circumstances of the triggering offence. Proportionality plays an important role in maintaining the credibility of the justice system. Accordingly,

33 Sentencing and Parole Reform Bill 2009 (No 17-1), Explanatory note, 7 (emphasis added).

34 Heglin, supra note 26, 218.

35 See eg Zimring et al, *Punishment and Democracy: Three Strikes and You're Out in California* (2001); Beres and Griffith, "Did 'Three Strikes' Cause the Recent Drop in California Crime? An Analysis of the California Attorney-General's Report" (1998) 32 Loy LA L Rev 101; cf Shepherd, "Fear of the First Strike: The Full Deterrent Effect of California's Two- and Three-Strikes Legislation" (2002) 31 J Legal Stud 159.

36 Beres and Griffith, "Habitual Offender Statutes and Criminal Deterrence" (2001) 34 Conn L Rev 55, 65–66.

37 Vitiello, "California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?" (2003) 37 UC Davis L Rev 1025, 1090 ["California's Three Strikes"].

38 Beres and Griffith, supra note 36, 63.

39 Vitiello, California's Three Strikes, supra note 37, 1091–1092.

40 Ibid 1092.

41 Bagaric, "Proportionality in Sentencing: Its Justification, Meaning and Role" (2000) 12 CICJ 143, 154.

violating proportionality may lead to dissatisfaction and mistrust of the sentencing system, bringing it into disrepute.[42]

An important consideration is section 9 of the New Zealand Bill of Rights Act 1990 ("NZBORA"), which provides that "[e]veryone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment." If the Bill were to pass in its current form, there is a concern that it would constitute a breach of this section. The Attorney-General has reported an apparent inconsistency with the NZBORA in respect of the three strikes scheme, since it "does not ensure a consistently rational connection between the offence and the penalty", and may lead to disparities between offenders (due to differences in criminal record) that are not rationally based.[43]

IV PREVENTIVE DETENTION AND THE BILL

The Sentencing and Parole Reform Bill claims to target "the worst repeat violent offenders".[44] This presupposes a gap in New Zealand's existing sentencing regime in respect of such offenders. However, the purpose of the sentence of preventive detention, as stated in section 87(1) of the Sentencing Act 2002, is "to protect the community from those who pose a significant and ongoing risk to the safety of its members". The list of triggering offences for preventive detention is very similar to "serious violent offences" as defined in the Bill.[45] Thus, the two schemes seem to be aimed at the same types of offenders.

Importantly, however, unlike the Bill, the sentence of preventive detention contains protections to ensure that it is not imposed on unsuitable offenders, and does not give rise to inappropriately lengthy sentences, while still adequately protecting the community.[46] Robinson argues that three strikes sentences cloak preventive detention as criminal justice, "obscuring the preventive nature of reforms with ambiguity as to their purpose", because this provides the opportunity to circumvent the restrictions that would normally arise with preventive detention.[47]

---

42 Ibid 156.

43 Attorney-General Finlayson, *Interim Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Sentencing and Parole Reform Bill* (2009) 5. It is beyond the scope of this note to go into further detail, but there are many interesting human rights issues raised by three strikes laws that have come before the courts in the United States, where the laws seem largely to have survived constitutional challenges. As well as questions of disproportionate punishment, three strikes schemes also engage questions of double jeopardy in whether the law constitutes double punishment.

44 Sentencing and Parole Reform Bill 2009 (No 17-1), Explanatory note, 1.

45 Indeed, side by side, the list is almost identical, except that the Bill's list of serious violent offences includes murder and aggravated burglary, which preventive detention does not; a small number of offences are covered by preventive detention only.

46 New Zealand Law Society, supra note 21, 7.

47 Robinson, "Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice" (2001) 114 Harv L Rev 1429, 1447.

New Zealand's preventive detention scheme includes a number of features that make it preferable to the scheme in the Bill. Under the Sentencing Act 2002, certain criteria must be met before a judge has the option of imposing preventive detention.[48] Notably, the court must be "satisfied that the person is likely to commit another qualifying sexual or violent offence if the person is released" after serving a finite sentence.[49] In addition, the sentence is discretionary, not mandatory.[50] The statutory scheme obliges the sentencing judge to consider a number of factors set out in section 87(4).[51] The requirement to consider any pattern of serious offending necessarily requires the judge to consider the detail of the offending history, rather than treating the mere fact of previous convictions as a proxy for the dangerousness of the offender, as three strikes promotes.[52]

Another prerequisite for preventive detention is that the court must consider reports from at least two health assessors, defined as psychologists or psychiatrists,[53] "about the likelihood of the offender committing a further qualifying sexual or violent offence".[54] Participation in the process by experts significantly enhances the judge's ability to assess future risk.

The Bill mandates an automatic non-parole period of 25 years for a third strike sentence,[55] whereas for preventive detention the judge sets a minimum period of imprisonment of 5 years or more, with no specified maximum period.[56] The preventive detention scheme allows the sentence to be, to some extent, proportionate to the seriousness of the current offending. The Bill's inability to respond at all in this respect is a serious deficiency; the non-parole period in the Bill cannot be tailored to the gravity of the current offending, nor to the risk that this particular offender poses. A lengthy finite sentence with no possibility of parole fails to provide the offender with the motivation to reform, which is present with preventive detention.[57] Parole eligibility also provides an opportunity for regular review of the offender's status, which is critical to ensuring that offenders are only incapacitated to the extent necessary for the risk they pose.

Preventive detention is far more useful and effective than the scheme proposed in the Bill, by virtue of its greater flexibility, procedural protections, and ability to incorporate a range of factors over and above the bare criminal record of the offender.

---

48 See Sentencing Act 2002, s 87.

49 Ibid s 87(2)(c).

50 *R v Leitch* [1998] 1 NZLR 420, 429 (CA).

51 These include: any pattern of serious offending; the seriousness of the harm to the community caused by the offending; anything indicating a tendency to commit serious offences in the future; efforts by the offender to address the causes of the offending; and whether a determinate sentence is preferable to preventive detention.

52 Robinson, supra note 47, 1450.

53 Sentencing Act 2002, s 4(1).

54 Ibid s 88(1)(b).

55 Sentencing and Parole Reform Bill 2009 (No 17-1), cl 5 (inserting Sentencing Act 2002, s 86D).

56 Sentencing Act 2002, s 89.

57 Hall, *Sentencing: 2007 Reforms in Context* (2007) 437.

V OTHER POLICY ISSUES

There are a number of negative consequences that are not directly intended by the Bill, but may result if it is passed in its current form. It could induce offenders eligible for severe sentences to take violent measures towards the police and others in order to avoid detection or arrest.[58] This could include steps such as murdering victims or witnesses to reduce the likelihood that the offender will be apprehended or overpowered at the scene.[59] Rates of murder and violent offences have in fact increased following the introduction of three strikes laws in other jurisdictions.[60]

Three strikes laws may also negatively impact on the victims of crime. Victims who know the perpetrator may avoid reporting the crime if they believe that a long prison sentence may result;[61] victims (or witnesses) may also be reluctant to give evidence against a defendant.[62]

Adverse effects on the court system are a serious possibility. There may be a rise in demand for jury trials by offenders facing a second or third strike sentence, since a trial may result in an acquittal, while pleading guilty will not lead to a reduction in sentence.[63] There is also the possibility of jury nullification.[64] As trial rates increase, so do appeals of conviction and sentence, which further increase the strain on the court system.[65]

As mentioned previously, the Bill proposes to remove parole eligibility for second strike offenders, require third strike offenders to serve a minimum of 25 years, and totally remove parole for those who commit murder with one previous serious violent offence. Long sentences and a lack of parole eligibility is likely to increase violence between prisoners and against prison personnel.[66] In addition, good conduct would have no influence on the possibility of parole in the short-term, so prison staff would not have the same leverage against anti-social behaviour by prisoners.[67] If the prison population continues to climb, this will increase overcrowding,

---

58 Heglin, supra note 26, 226–227.

59 Marvell and Moody, "The Lethal Effects of Three-Strikes Laws" (2001) 30 JLS 89, 91.

60 Ibid 96; Kovandzic, Sloan, and Vieraitis, "Unintended Consequences of Politically Popular Sentencing Policy: The Homicide Promoting Effects of 'Three Strikes' in US Cities (1980–1999)" (2002) 1 Criminology & Pub Pol'y 399, 409.

61 Rethinking Crime and Punishment, "Submission to the Law and Order Select Committee on the Sentencing and Parole Reform Bill" (2009) 22.

62 Bowers, "'The Integrity of the Game is Everything': The Problem of Geographic Disparity in Three Strikes" (2001) 76 NYU L Rev 1164, 1176.

63 Zimring et al, supra note 35, 219.

64 Instances of this have been observed in the United States: see Marder, "The Myth of the Nullifying Jury" (1999) 93 Nw U L Rev 877; Gordon, "California's Three Strikes Law: Tyranny of the Majority" (1999) 20 Whittier L Rev 577, 599.

65 LoGalbo, "California's 'Three Strikes and You're Out' Law: The War between the Legislature and the Judiciary" (1996) 23 W St U L Rev 477, 490.

66 Luna, supra note 24, 31.

67 Ibid.

which has also been connected to prison violence and psychological problems in prisoners.[68]

Another issue is the effect that three strikes laws may have on offenders from minority groups. Experience in the United States has shown that minority offenders are over-represented in three strikes statistics: "[w]hether due to greater involvement in crime or racial bias in the criminal justice system, the result is that minorities become more likely candidates for prosecution under habitual offender laws."[69] Accordingly, there is a concern that introducing a three strikes scheme into New Zealand could have a disproportionately harsh effect on offenders from minority groups in this country. Estimates indicate that the policies contained in the Bill will impact more severely on Maori than on other groups, since Maori are more likely than other ethnic groupings to be convicted of violent offences.[70] They are more likely to acquire the qualifying convictions that trigger the severe penalties in three strikes, and therefore will be subject to the law in disproportionate numbers. This outcome may further undermine the confidence of Maori in the justice system.[71]

VI CONCLUSION

This note has discussed the changes to New Zealand's current sentencing regime proposed in the Sentencing and Parole Reform Bill 2009. Rather than improving public safety and confidence in the justice system and encouraging offenders to understand the consequences of repeat offending, the Bill would be more likely to undermine confidence in the system through lack of proportionality and an inability to take into account the individual circumstances of the offender and offending.

The Bill is emblematic of a trend in criminal justice of moving away from punishing offenders for their past crimes, towards controlling and preventing future offending through incarceration. Such a drastic re-orientation should not be permitted to develop without adequate protections, to ensure that future risk is thoroughly and fairly assessed in accordance with the most relevant information and techniques available, and that any such incarceration is proportional to the risk posed and is subject to regular review. The proposed law is clearly an attempt to circumvent the current sentencing option of preventive detention, which is designed to address these issues.

---

68 Cowart, "Legislative Prerogative vs Judicial Discretion: California's Three Strikes Law Takes a Hit" (1998) 47 DePaul L Rev 615, 644; Kinkade et al, "The Consequences of Jail Crowding" (1995) 41 Crime and Delinquency 150, 150–161.

69 King and Mauer, "Aging Behind Bars: 'Three Strikes' Seven Years Later" (2001) The Sentencing Project <http://www.sentencingproject.org/doc/publications/inc_aging.pdf> (at 12 September 2009) 13.

70 Morrison, Soboleva, and Chong, *Conviction and Sentencing of Offenders in New Zealand: 1997 to 2006* (New Zealand Ministry of Justice, 2008) <http://www.justice.govt.nz/publications/global-publications/c/conviction-and-sentencing-of-offenders-in-new-zealand-1997-to-2006/publication> (at 12 September 2009) 54.

71 Sentencing and Parole Reform Bill 2009 (No 17-1), Explanatory note, 9.

Both offenders and the New Zealand public will suffer from enacting a three strikes law, even in the narrow form put forward in the Bill. It is a penal policy that had its heyday well over a decade ago, and has been widely discredited. It shifts the role of identification and management of dangerous offenders away from judicial and clinical experts to the legislature, to be guided by political anti-offender pressures and incorrect assumptions. The policy proposed in the Bill is a blunt instrument, and the criminal justice system would benefit from a far more nuanced approach to dealing with serious and violent offenders, insulated from popular punitivism.

BOOK REVIEWS

Animal Law in Australasia: A New Dialogue

Peter Sankoff and Steven White (eds)

VERNON TAVA*

Animal Law in Australasia: A New Dialogue, edited by Peter Sankoff and Steven White, and published by the Federation Press in 2009, is a broad survey of the law regarding the human treatment of non-human animals in Australia and New Zealand.

Remarkably, it is the first comprehensive book on the subject.[1] This is an area of law that not so long ago — like feminist theory and environmental law before it — was considered to be a fringe or radical pursuit, but has become a credible discipline worthy of respect in its own right.

A leitmotiv in the book is the legal conception of animals as property and the significant limitations that this places on assuring the well-being of non-human animals. At common law, the property rights of animal owners were absolute. They could treat their living property as they saw fit, extending even to torture. Originating in the 1800s, a 'welfare' approach limiting permissible cruelty has become the norm, although most animals remain a type of chattel and all are property in some sense.[2] There is considerable dissonance between the ideals of the legislation and the practice. As Sankoff puts it: "few laws in the world promise more and deliver less than those involving animal welfare".[3]

Animal Law in Australasia does not attempt to be an encyclopaedic legal text covering every possible aspect of the treatment of non-human animals, but is instead organized thematically into four parts. This is an intelligent approach, as it tailors the work to the particular interest of the reader and avoids a premature ossification of a still-developing legal specialty.

---

* LLB, Research Fellow at the New Zealand Centre for Environmental Law, Faculty of Law, University of Auckland. The author is currently undertaking an LLM (Envir) by thesis.

1 The last book to deal with animal law in New Zealand was published 42 years ago: Morgan, *The Law of Animals* (1967).

2 There was no absolute property in wild animals, nor were they goods or chattels. However, the owner of the land had a qualified property in them while they were alive, which became an absolute property upon the death of the animal: *Case of Swans* (1592) 7 Co Rep 15b, 17b; 77 ER 435, 438.

3 Sankoff and White (eds), *Animal Law in Australasia: A New Dialogue* (2009) 397.

I CORE CONCEPTS IN ANIMAL LAW

The first part of the book deals with some 'core concepts' of the law relating to animals. Sankoff analyzes the term "animal welfare" and concludes that although a normative framework is in place, the law in practice ends up dealing mostly with the egregious cases of neglect and sadism while leaving the institutionalized exploitation of the majority of animals aside. In tracing the development of the welfare paradigm, Sankoff highlights the adoption of a utilitarian calculus that allows cruel treatment for socially valued purposes but prevents it in a non-economic context. In legislating against "unreasonable and unnecessary" cruelty, the logical corollary is that we allow cruelty that is deemed "reasonable" and "necessary".

Katrina Sharman looks at the welfare model as it applies in the agricultural industry, where the vast majority of animals are kept. In a harrowing review of the practices of intensive pig and chicken farming — from the years of selective breeding, which have produced exceptionally fast-growing animals that can barely support their own weight, to the introduction of "industrial" farming post-World War II — Sharman highlights the "corporatization" and "veil of secrecy" that characterizes the commercial raising of livestock. The categorization of farmed animals as 'stock' and an almost exclusive focus on economic utility permits treatment that would in other contexts be considered cruelty. This relegates the welfare laws as they pertain to 'stock' animals to acting as "no more than basic husbandry statutes".[4]

Moving from the farm to the home, Lesley-Anne Petrie analyzes the paradoxical status of companion animals. Although there is a huge emotional investment (and associated industry) in pets, their status as "members of the family" is not recognized by the law, which continues to treat them as property. This treatment is reflected in the narrow circumstances in which damages are awarded. Reviewing case law, which accords animals an equivalence to "a table and lamp"[5] or, at best, "a motor vehicle on which an owner had lavished years of care and attention",[6] Petrie notes that damages have been awarded for emotional distress for the loss of a house to subsidence[7] or for a stolen stamp collection,[8] but never for a pet.

---

4 Ibid 53.

5 *DeSanctis v Pritchard* 803 A 2d 230 (Pa 2002), cited in Sankoff and White, supra note 3, 62.

6 *Crump v Equine Nutrition Systems Pty Ltd* [2006] NSWSC 512, cited in Sankoff and White, supra note 3, 64.

7 *Gabolinscy v Hamilton City Corporation* [1975] 1 NZLR 150 (HC).

8 *Graham v Voigt* (1989) 89 ACTR 11, cited in Sankoff and White, supra note 3, 66 n 50.

II JURISPRUDENTIAL CHALLENGES IN ANIMAL LAW

There are still many unresolved and confused debates in the philosophy of the law regarding animals. Controversy rages over the moral significance of animals: whether analogies can meaningfully be drawn with human life and even the very meaning of the words 'rights' and 'welfare' when applied to animals. This part offers a reasonably comprehensive introduction to the contemporary debates. White poses the fundamental question: how expansively should we define our understanding of the moral significance of animals?[9] In a discussion traversing Peter Singer's utilitarianism, Tom Regan's rights theory, and revised contractualism, White deconstructs their "rational, abstract, universal"[10] moral approaches by drawing on feminist theory and virtue ethics before finally coming to rest on the capabilities approach:[11]

> [T]he 'capabilities approach' ... seeks to transcend both the impersonal, abstract nature of rights and utilitarianism, and the 'vagueness' of relational accounts of the moral significance of animals. The capabilities approach incorporates a relationship between humans and animals which recognises the need for animal flourishing (in all its diversity), and 'does not operate with a fully comprehensive conception of the good, because of the respect it has for the diverse ways in which people choose to live their lives in a pluralistic society'.

White applies this treatment of the moral significance of animals to their legal significance. Examining perspectives from the outright abolition of property rights in non-human animals to incremental reform, he comes to the conclusion that it is difficult to defend only a limited extension to humane treatment and protection from cruelty. Furthermore, the law fails to give effect to even this limited understanding.

Siobhan O'Sullivan takes the fundamental liberal democratic principle of equal consideration as her starting point in highlighting the inconsistencies between the ways animals are treated in law: depending on whether they serve an economic or non-economic purpose. Within these broad categories, further distinctions are made according to the importance of public sentiment in policy formation. O'Sullivan attributes this uneven treatment to issues of "visibility" and also to the "popularity" of the animal with the public. Even if one accepts that there is a meaningful distinction between humans and non-humans, the dilemma is neatly posed: "[e]ven though a kitten may be unlike a human baby, why doesn't the law treat two

9 Sankoff and White, supra note 3, 82.

10 Ibid 94.

11 Ibid 96 (footnote omitted). This draws on the work of Martha Nussbaum.

kittens equally?"[12] The suffering of animals is qualified as 'necessary' for continued economic exploitation. An example of this 'necessary suffering' as a factor in differential treatment can be found in the incongruous nature of provisions that deem it cruelty to keep a pet bird in a cage that is too small for it to spread its wings, yet for a battery hen such close confinement is considered necessary on the grounds of economic viability.

The chapter by Deidre Bourke is particularly incisive in offering some definition to the vexed question of what exactly constitutes animal 'rights'. The common conception of this term encompasses and often conflates the three theoretically distinct approaches of welfare, rights, and utility. The limitations of the welfare and utility models are dealt with extensively in previous chapters, but Bourke's 'rights talk' goes significantly further. The mingling of these ideas has indeed become something of a strategic imperative, allowing advocates and activists to advance and retreat between the three positions according to political exigency. On the one hand, this convenient conceptual confusion has served to make rights claims appear less radical and more mainstream, but on the other hand it has carried the concomitant risks of co-option and worse, accusations of "hidden agendas". This is one of the more pressing issues within the movement, and Bourke's chapter is a valuable contribution to the debate.

III ANIMAL WELFARE IN AUSTRALASIA — SPECIFIC CHALLENGES FOR THE REGION

The third part of the book focuses on six studies of specific areas of animal law in Australasia. Malcolm Caulfield writes on the live export of animals, while Arnja Dale studies animal welfare codes and regulations that allow producers to circumvent the cruelty provisions contained in legislation. Paula Gerber examines scientific experimentation on animals, asking whether Australia and New Zealand are implementing the "three Rs" of reduction, replacement, and refinement. Annabel Markham discusses animal cruelty sentencing. Particularly compelling are the chapters by White on animals in the wild and Dominique Thiriet on recreational hunting. In these two chapters another of the divisions raised in O'Sullivan's chapter is further developed: that of 'wild' animals and, within this group, the differentiation between native and introduced species. Although native animals are protected primarily through conservation statutes — aimed at preserving ecosystems as a whole rather than individual animals — introduced wild or 'pest' animals appear to have no protection under the law whatsoever.

12 Ibid 109.

IV LOOKING ABROAD AND INTO THE FUTURE

In the final part, we see an extension of many of the same conflicts as above, but these are further complicated by the difficulties of integrating international and domestic law. Peter Stevenson is cautiously optimistic about European Union bans on veal crates, battery chicken cages, and sow gestation crates. However, he nominates the predominance of free trade considerations, manifested in the General Agreement on Tariffs and Trade rules and applied through the World Trade Organization, as militating against more significant advances being made in animal protection laws.

Alexander Gillespie focuses his inquiry on "the attempts that have been made to enhance the non-anthropocentric values of animals in international law".[13] Looking specifically at the "charismatic" (a category much like O'Sullivan's "popular" animals) great apes and whales, he finds that there is nonetheless little in the way of legal recognition of a "special relationship" with humans. Rather, the focus is on "sustainable use", an outgrowth of the conservation approach that aims only to save endangered animals from extinction. But change is coming, even if incrementally:[14]

> The development of humane standards, the refusal to accept sustainable use in all contexts, and the forthright drive to prevent species from becoming extinct are all examples that non-anthropocentric values are becoming particularly noticeable across a large range of topics in international law.... [I]n the space of 30 years, debates which were once the province of exclusive philosophy journals, have moved to the core of many of the most high [profile] international regimes....

Elizabeth Ellis contests the "competitive" advocacy typified by the common arguments that "advocacy on behalf of non-human animals is only appropriate after all action to ameliorate human suffering has been exhausted".[15] Instead, she proposes a "collaborative advocacy" for animals grounded in a commonality with traditional social justice concerns. Ellis questions the primacy of free trade and associated values, suggesting that advocacy may move "beyond competition" to an awareness of the interconnectedness of living beings. As a counterpoint, former Australian Senator Andrew Bartlett provides a more practical account of the challenges of working within a federal system.

In the final chapter, entitled "A Subject in Search of Scholarship", Sankoff traces the progression from awareness to legitimacy by way of courses in animal law at law schools and the resultant increase in the quantity and quality of research in the area. This is worthwhile not only

13 Ibid 334.
14 Ibid 352–353.
15 Ibid 355.

for the development of the specialty itself, but also because it prompts an examination of the larger questions that must be asked of the law and the relations of power therein.

V SUMMARY

Animal Law in Australasia is a comprehensive effort with 17 chapters by 15 contributors. Despite the number of authors there is a consistency of style throughout that is testimony to the efforts of the editors.

There is a curious circularity in animal law. Judges must interpret and apply the law within the parameters set by Parliament. Parliamentarians often claim that there is little demand from their constituents to make changes in the law. Public awareness is raised most conspicuously by the reporting of animal cruelty cases in the mainstream media; it is this reporting that is the catalyst for the formation of public opinion. But because of permissiveness or ambiguity in the law around many issues of animal welfare, prosecutions are brought only in the most sensational cases of sadistic human behaviour. Systemic abuses harming the greatest number of animals are not prosecuted and hence not reported. This leaves activism to groups working outside conventional legal avenues.

It is refreshing, then, to see a book such as this — scholarly in approach but accessible in style — refining the quality of discourse and framing, as the subtitle proposes, a new dialogue.