

**Animal Welfare and The Law: Towards Legal Regulation of
the welfare of Laboratory Animals in South Africa**

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DEDICATION

Dedicated to each animal that lived and died in a research laboratory and my own, Duchess and Duke.



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Summary

The current legal framework pertaining to animals does not sufficiently address the welfare of animals. The *Animal Protection Act 71* of 1962 does not specifically regulate the welfare of animals contained in research laboratories. Animals utilized for experimental research purposes endure tremendous “unnecessary suffering” due to legislative inaptitude. Experimental animals suffer inherent abuses associated with experimental research because of the methods, procedures and processes relevant to the experiments. The most controversial method of experimental research is vivisection. The method of vivisection is not only invasive but also causes “unnecessary suffering” to animals. The non-inherent abuses animals suffer during confinement in a laboratory solely relates to uncontrolled and unregulated conduct of staff.

Continuing the application of the current legislative framework may also be detrimental to the health and well-being of humans. Animals are specifically utilized as objects of science in research laboratories. The data obtained from research experiments conducted on animals are for the benefit of humankind rather than the animals. Scientific research concluded that not only are invasive methods of research conducted on live animals generally regarded as useless but extrapolating data from animals to humans can also be misleading, unnecessary and dangerous. False results and questionable methodologies are some of the other problems that seem to require urgent attention. Ethically, neither human nor animal should be utilized at the expense of the other and therefore it would be reasonable to recommend that legislative reform takes place.

The human perception of animals in terms of the relationship we have with them is the reason why legislative inaptitude in terms of animal welfare exists. The current approach followed is the philosophy of Utilitarianism. Utilitarians believe that neither humans nor animals have rights but interests. Utilitarianism focuses on the permissibility of an act

(the use of animals) by weighing the benefits of such an act to the costs suffered because of such act. If the benefits outweigh the costs suffered, the act is permissible. The application of Utilitarianism seems to be the crux of our legislative inaptitude. The human perception and view of animals must therefore be re-directed to develop a sufficient legal framework in terms of animal welfare. A solution offered is to apply an alternative interpretation to the concept of “dignity” (capabilities approach) and progressive realisation. In terms of this solution a species capabilities in terms of its value, capabilities and worth are considered. Inherent to its value, capabilities and worth, is its “dignity”. Once the alternative interpretation of “dignity” is acknowledged, the progressive realisation of its interests can be achieved.

Key words:

Animal welfare – normative legal framework – vivisection – animal(s) – experimental research – research laboratory – dignity – reform – *Animal Protection Act 71 of 1962*

Diere Welsyn en Die Wet: Die weg vorentoe om Wetlike Regulاسie toe te pas vir die welsyn van diere in Navorsings Laboratoriums in Suid-Afrika

Opsomming

Die huidige Suid-Afrikaanse regsraamwerk rakende diere is tans nie voldoende om dierewelsyn te reguleer nie. Die *Diere Beskermings Wet* 71 van 1962, reguleer ook huidiglik nie die welsyn van diere wat in navorsings laboratoriums aangehou word nie. Diere wat aangewend word vir eksperimentele navorsings doeleindes word onderwerp aan uiterste “onnodige leiding” as gevolg van onvoldoende statutêre regulering. Eksperimentele diere lei as gevolg van inherente mishandeling wat geassosieer word met eksperimentele metodes, prosedure en prosesesse wat relevant is tot die betrokke eksperimente wat uitgevoer word. Die mees omstrede metode wat nie net indringend van aard is nie maar oor die oorsaak van “onnodige leiding” voortbring vir diere is die metode bekend as *vivisection*. Die nie-inherente mishandeling wat diere aan onderwerp word tydens hulle aanhouding in navorsings laboratoriums word slegs gekenmerk aan onbeheerde en ongereguleerde aksies van werknemers.

Die voortdurende toepassing van die huidige regsraamwerk kan ook baie skadelik wees vir die gesondheid en welstand van mense. Diere word spesifiek aangewend as voorwerpe van navorsing in navorsings laboratoriums. Die inligting wat verkry word deur navorsings eksperimente wat op diere uitgevoer word is veel eerder ook bestem om die mens te help as die diere. Wetenskaplike navorsing het ondermeer bevestig dat indringende metodes van navorsing wat op lewendige diere toegepas word, nie net nutteloos is nie maar dat die kruisuitruiling van inligting bekom vanaf diere wat direk oorgeplaas word na die mens, misleidend, onnodige en gevaarlike uitslae lewer. Valse resultate en bevraagde metodieke is van die ander probleme wat huidiglik aandag verg. Eties kan dit nie van mens of dier verwag word om aangewend te

word ten koste van die sodanige party nie, en word dit dus voorgestel dat statutêre hervorming moet plaasvind.

Die menslike persepsie wat bestaan ten aansien van die verhouding wat ons met diere deel is die rede hoekom statutêre ongeskiktheid in terme van dierewelsyn bestaan. Die huidige benadering wat toegepas word is die filosofie bekend as Utilitarisme. Utilitariste is van mening dat nie mens of dier regte as sulks het nie maar eerder belange. Utilitarisme fokus dus op die toelaatbaarheid van 'n aksie (die gebruik van diere), deur die voordele van sodanige aksie op te weeg teenoor die skade wat gelei word as gevolg van so aksie. Indien die voordele van sodanige aksie die skade oorskry wat gelei word, dan sal so aksie toelaatbaar wees. Dit wil voorkom of die toepassing van Utilitarisme die kern van ons statutêre ongeskiktheid is. Die menslike persepsie van ons beskouing van diere moet derhalwe geheradresseer word om 'n toepaslike regsraamwerk in terme van dierewelsyn te ontwikkel. 'n Toepaslike voorstel is om die alternatiewe interpretasie van die konsep waardigheid (*capabilities approach*) en progressiewe realisasie toe te pas. In terme van die voorstel word 'n spesie se bekwaamheid in terme van daardie spesie se kosbaarheid, bekwaamheid en waarde in ag geneem. Inherent tot so 'n spesie se kosbaarheid, bekwaamheid en waarde, is sodanige spesie se waardigheid. Sodra die alternatiewe interpretasie van waardigheid aanvaar is, kan die progressiewe realisasie van waardigheid se belange bereik word.

Abbreviations

<i>AEC</i>	:	Animal Ethics Committee
<i>AWA (a)</i>	:	Animal Welfare Act (United States of America)
<i>AWA (b)</i>	:	Animal Welfare Act (United Kingdom)
<i>Am. B.F. Res. J</i>	:	American Bar Foundation Research Journal
<i>Am. J. Intl. L.</i>	:	American Journal of International Law
<i>AVMA</i>	:	American Veterinary Medical Association
<i>APA</i>	:	Animal Protection Act (South Africa)
<i>APC</i>	:	Animal Procedures Committee
<i>ATA</i>	:	Antarctic Treaty Act
<i>ASPA</i>	:	Animals (Scientific Procedures) Act
<i>Colum. Hum. Rts. L. Rev.</i>	:	Columbia Human Rights Law Review
<i>B.C. Env'tl. Aff. L. Rev.</i>	:	Boston College Environmental Affairs Law Review
<i>CESCR</i>	:	International Covenant on Economic, Social and Cultural Rights
<i>DoH</i>	:	Department of Agriculture
<i>DoH</i>	:	Department of Health
<i>DST</i>	:	Department of Science and Technology
<i>EU</i>	:	European Union
<i>IACUC</i>	:	Institutional Animal Care and Use Committee
<i>J. Animal L. & Ethics</i>	:	Journal of Animal Law & Ethics
<i>J.L. & Soc'y</i>	:	Journal of Law & Society
<i>MqJICEL</i>	:	Macquarie Journal of International and Comparative Environmental Law
<i>MRC</i>	:	Medical Research Council of South Africa
<i>NCOH</i>	:	National Centre for Occupational Health
<i>NDoH</i>	:	National Department of Health
<i>NGO</i>	:	Non-Governmental Organization
<i>NIH</i>	:	National Institute of Health
<i>OBP</i>	:	Onderstepoort Biological Products
<i>PAIA</i>	:	Promotion of Access to Information Act
<i>PAPA</i>	:	Performing Animals Protection Act
<i>PETA</i>	:	People for the Ethical Treatment of Animals
<i>PHS</i>	:	Public Health Service (funding policy)
<i>RCC</i>	:	Roman Catholic Church
<i>RSPCA</i>	:	Royal Society for the Prevention of Animal Cruelty
<i>Rutgers L. Rev.</i>	:	Rutgers Law Review
<i>SAIFAC</i>	:	South African Institute for Advanced

	:	Constitutional, Public, Human Rights and International Law
<i>SAVC</i>	:	South African Veterinary Council
<i>SAVF</i>	:	South African Veterinary Foundation
<i>SPCA</i>	:	Society for the Prevention of Cruelty to Animals
<i>SPCA Act</i>	:	Society for the Prevention of Cruelty to Animals Act
<i>St. Louis U.L.J</i>	:	St. Louis University Law Journal
<i>Va. J. Soc. Pol’y & L</i>	:	Virginia Journal of Social Policy & the Law
<i>UK</i>	:	United Kingdom
<i>UK FAWC</i>	:	United Kingdom Farm Animal Welfare Council
<i>UPBRC</i>	:	University of Pretoria Biomedical Research Centre
<i>USA</i>	:	United States of America
<i>USDA</i>	:	United States Department of Agriculture

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There is no doubt that the best test species for man is man. This is based on the fact that it is not possible to extrapolate animal data directly to man, due to interspecies variation in anatomy, physiology and biochemistry.¹

1 Introduction

1.1 Background

The pharmaceutical, cosmetics, and chemical industries are some of the most financially lucrative enterprises in the world.² Experimental research on the composition of these products is vital to these enterprises to ensure that defects and imperfections are eliminated in order to avoid human suffering or death. Various methods are used during experimental research. One of the most controversial methods is the use of live animals, a practice known as “vivisection”.³ Scientific procedures on animals include the LD50 test by which toxicity in substances is judged, the Draize Test which tests the irritant qualities of substances, as well as carcinogen testing (cancer-causing substances, mutagen testing (mutation-causing substances) and teratogen testing (embryo development and malformation).⁴

The current legislative framework in South Africa relating to animals appears not to be sufficiently addressing the welfare of animals in general, but more specifically animals held in research laboratories. The *Animal Protection Act 71 of 1962*⁵ which functions as the main source of statutory protection to animals, merely addresses general welfare needs of animals, has not been amended since its inception and is rather focused on addressing human aspirations than ensuring sufficient protection, care and welfare of animals. Other statutes that form part of the framework also do not seem to promote the welfare of animals in

1 Dr. MacLennan & Dr. Amos, Clinical Sciences Research Ltd., UK, *Cosmetics and Toiletries Manufacturers and Suppliers*, 1990.

2 Greek & Greek *Sacred Cows and Golden Geese* 89-96.

3 Vivisection is defined as a method by which experimentation is done on living animals, whether human or other animals, supposedly for the benefit of beings other than the individual being experimented upon.

4 Rollin *Animal Rights and Human Morality* 185-196.

5 Hereinafter referred to as the “APA”.

conjunction with the APA. The problem associated with generalising different circumstances in which animals may be kept (as currently done by the APA) creates more uncontrolled circumstances within our legal framework. Animal welfare in relation to research laboratories stretches beyond that which the APA provides for, as the welfare needs of animals contained in research laboratories are species-specific.⁶ Thus, the current legislative framework is neither adequate nor sufficient to regulate the welfare of animals held in research laboratories. Currently the APA also does not differentiate between the various circumstances under which animals are kept, and therefore does not seem to provide the necessary overall welfare protection. A fifty-year application of the APA without review or amendment is a definite indication that the APA requires serious attention and proper assessment. In essence, the APA as main source of statutory protection to animals must at all times address, ensure and regulate the various circumstances applicable to animal welfare and care.

Continuing the application of the current legislative framework may also be detrimental to the health and well-being of humans. Animals are specifically utilized as objects of science in research laboratories. The data obtained from research experiments conducted on animals are used for the benefit of humankind rather than that of animals. Scientific research has concluded that not only are invasive methods of research conducted on live animals generally regarded as useless but extrapolating data from animals to humans can also be misleading, unnecessary and dangerous.⁷ False results and questionable methodologies are some of the other problems that seem to require urgent attention. Ethically, neither human nor animal must be utilized at

6 "The pervading theme of the book is that animal welfare can be enhanced by giving the animals safe living environments which fulfils such species specific needs. The living environment should be without stress though the environment should be variable enough to help the animals cope with different challenges when they are taken into an experiment procedure. Indeed, the welfare of laboratory animals should be under continuous evaluation, and the one goal should be its improvement as far as possible. See E Kaliste *"The Welfare of Laboratory Animals"* Preface x.

7 Greek & Greek *Sacred Cows and Golden Geese* 17.

the expense of the other and therefore it would be reasonable to recommend that legislative reform take place.

1.2 Addressing legislative inaptitude

Effecting change is the primary purpose of this study. Thus, the author shall briefly discuss the notion of vivisection in chapter 1 and in chapter 2 background information will be provided on the viability of animals held in research, laboratories. The objective of the study is, firstly, to investigate the current legislative framework pertaining to the welfare of animals. A brief discussion of the relationship between humans and animals will provide background to and an understanding of the current normative legal framework pertaining to animals in South Africa. The current relationship shared between humans and animals has to be analysed to establish whether the proposal of legislative reform of the current legal framework pertaining to animals is possible and viable. Thus, in chapter 3, the author intends to dissect the APA to provide an analysis of the current provisions regulating welfare and care protection of animals. The investigation mainly focuses on the welfare of animals used in research laboratories but will also be relevant to matters concerning the general welfare of animals. The shortcomings of other legislation which also deals with welfare and care of animals will also be analysed. Finally, chapter 3 also focuses on the *Promotion of Access to Information Act 2 of 2003*⁸ and the problems associated with obtaining sufficient and relevant information in terms of the method of vivisection.

It will be indicated that reform can possibly be effected by way of following a different approach, and applying such an approach and implementing other alternative options. This process of reforming the current legislative framework in South Africa also takes cognisance of foreign jurisdictions, such as the United States of America⁹ and the United Kingdom.¹⁰ Chapter 4 focuses on providing an analysis of

8 Hereinafter referred to as the "PAIA".

9 Hereinafter referred to as the "USA".

10 Hereinafter referred to as the "UK".

specific statutes, policies and Regulations of the USA and UK. Federal legislation of the United States of America that may possibly provide feasible examples to reform our legislation includes the *Animal Welfare Act*¹¹ and the Public Health Service Funding Policy. Examples of legislation from the UK that may provide assistance to reform our legislation include the *Animal Welfare Act* of 2006 and the *Animals (Scientific Procedures) Act* of 1986.

The legal framework of the USA and the UK introduced animal welfare laws in an attempt to support the welfare of animals in general as well as of animals held in laboratories. The statutes, among other things, regulate the conduct of humans towards animals in general, the conduct of research technicians, the conduct of research laboratories, individual people responsible for animals, the promotion of welfare, treatment, care and regulation of scientific procedures as well as the types of experiments which may be conducted on animals. Federal laws of the USA and general laws of the UK have largely proved to be successful, therefore the assumption exists that the USA and UK laws may provide valuable information and serve as guidelines and examples which the South African government may take cognisance of during the process of legal reform.

The dissertation will be concluded with recommendations and proposals created by means of incorporating available resource examples from foreign jurisdictions. The proposals and recommendations posed by the author mainly require of the South African government to assess and use laws, regulations and policies from the two foreign jurisdictions to amend, develop and implement suitable provisions and statutes for the welfare and care of animals in South Africa. The proposals recommended by the author consist of different phases suitable for implementation. The most suitable phase, Phase One, shall commence the reform process. Phase One will address the most critical changes needed to address current legislative inaptitude. The second phase will

11 7 U.S.C. §§ 2131-2157.

require the drafting of new legislation and incorporation of various foreign principles. Phase Three relates to “progressive realisation” and the final phase to the “alternative interpretation of the concept of dignity” for future development of our legislative framework as it pertains to animals.

If I have any beliefs about immortality, it is that certain dogs I have known will go to heaven and very, very few persons.¹²

2 The human-animal relationship

2.1 Background on research laboratories

Scientists have advanced the argument that making use of “animal data” extracted during research cannot provide adequate information in terms of human safety. The pharmaceutical drug Celebrex, for example, was linked to ten deaths and eleven cases of GI haemorrhage in the first three months after it was released on the market in the United States of America. Suprophen, an arthritis drug, was withdrawn from the market when patients suffered kidney toxicity and Domperidone, designed for nausea and vomiting, caused the heartbeat of humans to be irregular while scientists were unable to induce this in dogs even with seventy times the normal dose.¹³ This is typical of the type of medication differences between humans and animals and incidents like these are what induced scientists to state:

“Every species has its own metabolic pattern, and no two species are likely to metabolize a drug identically”.¹⁴

Utilizing animals for experimental research and specifically using the method of vivisection have proved to be the least favourable ways of ensuring constant and consistent animal well-being.¹⁵ The controversy surrounding experimental research and the method of vivisection relates to the “unnecessary suffering” of the animals used in the process. The animals suffer inherent as well as non-inherent abuses associated with experimental research and the method of vivisection. The use of animals for research purposes is not likely to stop in the near future – humans want to test. In most instances, legislation demands that animals be utilized prior to conducting human trials and it admits that

12 James Thurber (1894-1961).

13 Greek & Greek *Sacred Cows and Golden Geese* 62-64.

14 Weatherall 1982 *Nature* 387-390.

15 Monamy *Animal Experimentation* 8-14.

applying data to humans is a “leap of faith”.¹⁶ Animals held in research laboratories suffer tremendously due to the inherent abuses associated with experiments as well as non-inherent abuses suffered at the hands of the research technicians. Inherent abuses suffered by experimental animals directly concern the procedures, methods and techniques applied during experiments. In most cases the procedures, methods and techniques are invasive and cause severe pain, distress and discomfort not inherent to the normal living conditions of the species of animals used for experimental research.¹⁷ The non-inherent abuses include abuses suffered by animals due to inappropriate, unethical and intentional harm caused by research technicians. Animals are mentally and physically abused resulting from inadequate monitoring or unsupervised conduct of research technicians.

2.1.1 Inherent abuses suffered by animals held in research laboratories

2.1.1.1 Biomedical research

This research focuses on the formulation and testing of hypotheses about diseases, dysfunctions and genetic defects. Animals are used to test new therapies such as surgical, gene therapy and radiation treatment.¹⁸ Through biomedical research, scientists strive to achieve a better understanding of the causes of diseases, to develop new drugs, vaccines and procedures to prevent or treat diseases and to test the safety of products we use every day of our lives. Animals are used because they have similar organs and body systems to humans and other animals. The types of animals used are armadillos, cats, chinchillas, dogs, ferrets, fish, guinea pigs, lobsters, mice, non-human primates, pigeons, pigs, rabbits, sheep, slugs and woodchucks.¹⁹

16 Greek & Greek *Sacred Cows and Golden Geese* 58.

17 Pickover *Vivisection* 50-51.

18 Rollin *Animal Rights and Human Morality* 178.

19 See www.aalas.org.

The inherent abuses suffered by the experiments conducted on animals depend on the type of experiment and the procedure followed during the experiment. Information may, however, not always be made available due to legislative inaptitude but procedures and experiments may include that animals should be left without any anaesthetics or pain medication to conduct research in terms of pain,²⁰ strokes artificially modelled in primates,²¹ heart attacks induced by narrowing arteries²² and animals placed on a “research diet” to test acute toxicity involving the consumption of various extracts not inherent to their species diet.²³ Implantation through surgery of capsules as well as the application of noxious stimuli to conscious animals from which the animal cannot escape is also used.²⁴

2.1.1.2 Military research

Militaries around the globe make use of hundreds of thousands of animals to test the effects of biological, nuclear and chemical weapons, as well as conventional warfare, combat trauma, infectious diseases and more. Researchers from this category subject animals to gunshots, burns, radiation, blasts, corrosive materials, diseases, decompression chambers and flight simulators which fall within the inherent abuses of research suffered by animals. The aims and objectives behind achieving results through military research would be the enhancement of military combat and its procedures for warfare and protection of humans.²⁵

2.1.1.3 Genetic research

Transforming genetics and cloning form part of this category. During experimental research, genetic material from a particular species is inserted into the body of another species by transplanting cells or

20 See www.cflegacy.research.umn.edu.

21 Pickover *Vivisection* 51.

22 Pickover *Vivisection* 73.

23 Pickover *Vivisection* 86.

24 Pickover *Vivisection* 89.

25 See <http://www.peta.org>.

tissue.²⁶ The aim of the transplant is to make specific genes functional or non-functional within the body of another species. Animals used during this procedure of transformation may suffer heart problems,²⁷ immune system failure and various forms of paralysis.

Cloning research methods aim at removing a nucleus from body tissue cells of a species of animal and replacing the nucleus of an enucleated egg cell. The modified cell is implanted into the uterus of a surrogate mother and pregnancy ensues, resulting in the birth of a near copy of the original donor animal. Animals born with a successful genetic modification often show phenotype changes producing an altered physiology and anatomy, with either intended or unintended welfare consequences.²⁸

2.1.1.4 The development of drugs and therapeutic materials

Research in this category is guided not so much by well-formulated theories that suggest that a certain compound might have a certain effect but, rather, by hit-and-miss, exploratory, inductive “shooting in the dark” methods. Here one is aiming at discovering specific substances for specific purposes rather than at knowledge *per se*. Animals utilized for experiments are often injected or force-fed with newly-developed chemicals intended for human consumption, not knowing what effects these chemical tests will have on animals. Animals are also only monitored by laboratory staff.²⁹ During the period of experimental research, the dosage of chemicals is either increased or decreased and the animals are not treated for any side effects the chemicals may have on them. Animals must endure suffering caused by the chemicals in order to provide the researchers with the necessary statistics unknown prior to the experiment. The inherent abuses suffered by animals during the procedures and methods applied are assumed to be the most grave.

26 Pickover *Animal Rights* 124.

27 Pickover *Vivisection* 73.

28 Monamy *Animal Experimentation* 60.

29 Rollin *Animal Rights and Human Morality* 179.

2.1.1.5 Medical research

Animals utilized for this category are subjected to a wide range of studies. The most significant research conducted on animals in this category is experimental physiology.³⁰ Animals are subjects in projects that cover such topics as depression, obesity, cigarette smoking, anxiety, social isolation, pain, bulimia and hallucinations. These studies are often particularly invasive, sometimes involving surgically manipulating the brain in order to gauge behavioural changes to assess what the animal will do in its environment.³¹

2.1.1.6 Testing of consumer goods for safety of humans and animals

The most common form of consumer goods testing relates to chemicals, pharmaceuticals and cosmetics. Although the testing of pharmaceuticals in this category may seem similar to the tests conducted under the category listed in 2.1.1.4, they are not. This category mainly distinguishes itself from the category listed in 2.1.1.4 in that it relates to the testing of drugs and therapeutic chemicals rather than the development of new drugs and therapeutic chemicals. The tests include *inter alia* (but are not limited to) testing of food additives, herbicides, pesticides, industrial chemicals and so forth, as well as the testing of drugs for toxicity,³² irritation,³³ carcinogenesis (production of cancer), mutagenesis (production of mutations in living bodies) and teratogenesis (production of samples and abnormalities in embryo development).³⁴ The unnecessary suffering animals endure during

30 See <http://www.science.education.nih.gov> & www.peta.org.

31 Williams & Demello *Animals Matter* 196-199.

32 The LD50 Test indicates the amount of substance that, when administered in a single dose to a group of animals, will result in the death of 50 percent of the group within fourteen days. Unfortunately, by the time the LD50 is determined, sixty to one hundred animals will have been poisoned.

33 The Draize Test is most common for testing irritations of the skin and eyes and mostly applied by cosmetic industries. Rabbits are caged and restrained while the cosmetic compound is dropped into their eyes. The eye of a rabbit is more sensitive than that of a human, whether a mild eye irritation or severe eye irritation created, the animal will suffer, but will the human suffer?

34 Rollin *Animal Rights and Human Morality* 179.

these tests is horrendous. Animals are set alight, burned, injected with chemicals, sprayed with chemicals, washed with chemicals, caged and forced to inhale chemicals, and fed rotten foodstuffs.³⁵

2.1.1.7 Education and training

Students of the medical, allied health professions and “research orientated” professions are exposed to animals utilized as tools to conduct demonstrations, dissections, surgery practices, induction of diseases and so forth. Although it may seem that the animals utilized in this category may not be exposed to the extreme suffering as animals in other categories, the reality is that students who have no former training practise these animals on. Most of the animals used during education and training for students most definitely perish.³⁶

2.1.2 Non-inherent abuses suffered by animals held in research laboratories

Animals subjected to various experimental research programmes do not only suffer from the inherent abuses associated with research, but are also subjected to non-inherent abuse suffered by the hands of research technicians and laboratory staff. Information relating to non-inherent abuses suffered by animals in research laboratories is not obtained by means of formal or written requests but rather by means of clandestine investigations.³⁷

2.2 Introduction

The application of different philosophies to human action and the perception humans have of animals is the foundation upon which the human-animal relationship exists. The promulgation and implementation of statutes as they relate to animals can thus be understood to be influenced by perceptions and views humans have of animals.

35 See <http://www.mercyforanimals.org>.

36 Rollin *Animal Rights and Human morality* 204.

37 Pickover *Vivisection* 42.

The fundamental change to the human-animal relationship first came about when humans decided to domesticate animals for food and labour, approximately ten thousand years ago. The belief that animals are mere objects or property became more widespread, creating a relationship marked by dominance and control. It was not, however, until the nineteenth and twentieth centuries, with the introduction of industrial methods of animal husbandry that the relationship between humans and animals became as intensely exploitative as it is today.³⁸ The irony is that while humans once needed animals as a source of food and clothing, we no longer need to use animals to satisfy our basic needs. Technological advancements have provided us with a wide range of foods, apparel, household products, and entertainment that does not make use of animals. While we no longer need animals' we continue to raise them in more factory-like conditions and use them in far greater numbers than ever before.³⁹

The human-animal relationship has radically changed over the past couple of hundred years. The shaping of the moral line between humans and animals continues due to individual attitudes towards animals being diverse, shifting and with societal interchanges between humans and animals being complex.⁴⁰ The relationships that humans and animals share today can also be attributed to the various philosophical approaches humans have subscribed to over the years. Philosophy is rooted in the different approaches followed by each discipline. Shared concepts of mutual interest are, however, embraced. These concepts - ethics, values, interests, status and morals - are at the crux when interpreting each philosophy. It is therefore of fundamental importance when attempting to understand each philosophy and the human-animal relationship to interpret key concepts adequately. The regard humans have for animals in terms of morality is also the very reason why fundamental differences between these approaches should be discussed in detail. This discussion will therefore focus on the

38 Williams & Domello *Why Animals Matter* 12.

39 Williams & Domello *Why Animals Matter* 16-18.

40 Monamy *Animal Experimentation* 37.

philosophical approaches that are applied to regulate the relationship between humans and animals. This will provide the contextual background to the legal analysis of the normative framework and assist in identifying a philosophical focal point from which possible reform can commence.

2.3 *Ancient Christian thought to modern day Utilitarianism*

2.3.1 Christianity and Cartesian philosophy

Christianity from the second-century Rome and 17th century Cartesian philosophy are based on the same principles. The only difference between the two philosophies are found in terms of the era to which they applied and the people who communicated them to society. Christianity from second-century Rome was dominated by the Roman Catholic Church⁴¹ and the writings of Galen. Galen, physician to the gladiators and son of Marcus Aurelius, became the father of vivisection.⁴² The RCC prohibited autopsies on humans and Galen therefore started to cut up goats and pigs. He combined vivisection and physiological data from animals with personal observation of humans to forge his theories of physiology. Christians, firmly obeying the edicts the RCC, believed that humans were blessed with the divine gift of reason and did not share a common evolutionary lineage with other animals. Humans were thought to be unique and all other animals were regarded as being incapable of possessing rationality because they possessed no intellect. Humans possessed a mind, soul and ability to reason. Animals were merely viewed as objects that did not possess any of the qualities which humans were created with. Animals were believed only to exist for human needs and Christians did not see the infliction of pain on animals as objectionable in itself if it should be an unintended consequence of some “higher” purpose. Only unnecessary infliction of pain was seen as

41 Hereinafter referred to as the “RCC”.

42 Literally means the cutting up of the living, but it refers to experiments conducted on animals.

being morally reprehensible cruelty.⁴³ Therefore, no objections were made to Galen's vivisection methods as the RCC and its followers viewed vivisection as an unintended consequence of a "higher" purpose. The consequence of Christians religiously believing that such a point of view of vivisection was correct resulted in the RCC and Galen suffocating medical science for over fourteen centuries.⁴⁴

The views of René Descartes were based on the same principles as those of the RCC and Galen. Descartes described humans and other animals as mere complex machines: their bodies would obey known laws of mechanics. To him, animals were incapable of thinking, thus he excluded them from being able to feel or reason. Animal reactions were seen as mere reflexes, responses of automata unlike humans who were conscious and capable of acts of free will. The concept of "beast-machines" provided a convenient ideology for vivisectionists at the time: How could animals suffer real pain if none had a soul? Like the RCC, Descartes believed that only humans possessed a soul through which an omnipotent and omniscient God produced interaction between human mental and physical events as well as the human ability to use language.⁴⁵ Cartesian philosophy, in line with the Christianity of second-century Rome, therefore did not extend the scope of morality beyond humanity because animals did not possess a soul, could not talk⁴⁶ or reason.⁴⁷

Although modern Christian views have radically changed from those of second-century Rome and Cartesian thought, Christianity as such is

43 Monamy *Animal Experimentation* 9-10.

44 Greek & Greek *Sacred Cows & Golden Geese* 22-25.

45 Dresser 1984 AM.B.F. Res. J 833.

46 Descartes believed that animals were mere automatons, essentially natural machines incapable of feeling pain or of suffering, much like a clock. Because animals cannot reason, the argument goes, they have an inferior consciousness rendering them incapable of feeling pain (s e.g. Anthony D'Amato & Sudhir K. Copra, Whales: Their Emerging Right to Life, 85 Am. J. Intl. L. 1991 25-26)(pointing out that the Cartesian thesis is over-inclusive since the only way we know that other humans feel pain is via others' external actions, and it is under-inclusive since "[o]ur failure to converse with whales could well be a matter more of our own limitation than of theirs").

47 Rollin *Animal Rights and Human Morality* 49.

divided with regards to animals. Many Christians believe that animals were created for our consumption and use⁴⁸ whilst others believe that animals have souls and should be treated with compassion, respect and dignity. One of these Christians is Gary Kowalski, a parish priest by vocation. In his book⁴⁹ Kowalski explains from a theological point of view the similarities humans and animals share. He also points out the fact that not only have we been taught by animals in the past, but that the possibility still exists for us to learn from them for future purposes.⁵⁰

He states the following:

“Nature worship may be the oldest form of human religious expression. Reverence for other living things is deep-seated in our hearts. Yet today more species than ever before are endangered and at risk of extinction. Perhaps animals can confer the wisdom required to save us from our current ecological crisis. If we can recover the knowledge that every life is sacred, we may all have a future”.⁵¹

Christian humility is central to recognising a place in God’s creation. Christian humility asks knowingly: What are we to Him but what animals are to us?⁵² If Christians neglect the significance and place of other creatures within God’s creation, Christian theology fundamentally weakens itself and its claim to be God-centred.⁵³

2.3.2 Humanism

Humanism at first seems easy to understand, but it is quite the contrary. Humanism is the naturalistic philosophy or way of life centred on human concerns and values and asserts the dignity and worth of humans and their capacity for self-actualization through the use of reason and scientific inquiry.⁵⁴ Different forms of Humanism have developed over

48 Shaw 1998 <http://www.all-creatures.org/care.html>.

49 Kowalski *The Souls of Animals*.

50 Kowalski *The Souls of Animals* 147-158.

51 Kowalski *The Souls of Animals* 146.

52 Scully *Dominion: The Power of Man* 35. See Kemmerer 2008 <http://www.theandros.com/ethicsanimals.html>.

53 Linzey & Cohen-Sherbok *After Noah* 119.

54 Schafersman 1995 <http://www.freeinquiry.com/humanism-uu.html>.

the centuries, each with its own ideal within the philosophy of Humanism. The forms of Humanism that exist are Literary Humanism,⁵⁵ Renaissance Humanism,⁵⁶ Cultural Humanism,⁵⁷ Philosophical Humanism,⁵⁸ Christian Humanism,⁵⁹ Modern Humanism,⁶⁰ Secular Humanism⁶¹ and Religious Humanism.⁶²

It is clear from the different forms of Humanism that exist that the basic thought or ideal of the philosophy of Humanism centres around the fact that human values only make sense in the context of human life. Humanists are realistic, in tune with technology and science of the here and now as well as enlightened social thought.⁶³ Humanists would overall prefer not to cause unnecessary suffering to sentient beings. However, the sharpest division of opinion among Humanists (and others) occurs over the use of animals in experiments. The majority of Humanists believe that medical research should be treated differently from other types of research as most humans would not want to use untested medicine. They hold the opinion that many effective treatments and medicines have been discovered and refined in tests on animals

55 Is a devotion to humanities or literary culture.

56 Is the spirit of learning that developed at the end of the middle ages with the revival of classical letters and a renewed confidence in the ability of human beings to determine for themselves truth and falsehood.

57 Is the rational and empirical tradition that originated largely in ancient Greece and Rome, and evolved throughout European history, and not constitutes a basic part of the Western approach to science, political theory, ethics and the law.

58 Is any outlook or way of life centred on human need and interest? Sub-categories of this type include Christian Humanism and Modern Humanism.

59 Is a Christian philosophy advocating the self fulfilment of man within the framework of Christian principles? It utilizes a biblical vocabulary, but is built on the sociological myth that man is autonomous and possesses free will. See With Christ Homepage 2010 <http://www.withchrist.org>.

60 Also called Naturalistic Humanism, Scientific Humanism, Ethical Humanism and Democratic Humanism, defined by one of its leading proponents Corliss Lamont, as a “naturalistic philosophy that rejects all supernaturalism and relies primarily upon reason and science, democracy and human compassion”. Modern Humanism has a dual origin, both secular and religious, and these constitute its sub-categories.

61 Is an outgrowth of 18th century enlightenment rationalism and 19th century free thought. Many secular groups such as the Council for Democratic and Secular Humanism and the American Rationalist Federation, and many otherwise affiliated academic philosophers and scientists, advocate this philosophy.

62 Emerged out of Ethical Culture, Unitarianism and Universalism. Today many Unitarian – Universalist congregations and all Ethical Cultural societies describe themselves as humanist in the modern sense.

63 See Edwards 1989 <http://www.americanhumanist.org>.

and it should be remembered that many tests involving animals are intended to improve human welfare.⁶⁴ Humanists are thus of the opinion that non-human animals are without self-consciousness. If one were to argue that humans differ from non-humans because of our level of consciousness or self-consciousness, we must see that the difference is one only of degree, not of kind. If some primates other than us are capable of some form of consciousness, what then of others? If we are arguing over degrees of consciousness, has not the demarcation between humans and non-humans become just a little fuzzy?⁶⁵ Humanists do not find that the human perception of animals is a primary cause of social and environmental problems. The point of view held by humans with regard to the role and place of animals within our society is thus not perceived by Humanists as a focal point which may cause social concerns amongst other humans.

2.3.3 *Speciesism*

The philosopher Richard Ryder⁶⁶ said:

“To discriminate against beings solely because of their species is a form of prejudice”.⁶⁷

This form of discrimination is called Speciesism. Speciesism is used to describe the prejudice of humans treating other animals differently from the way they treat other humans. Speciesism, as argued by Peter Singer, is a form of species bias that results in a systematic devaluation of animal interests in relation to human interests.⁶⁸ Singer claims that Speciesism is no more defensible than racism, sexism, or other forms of discrimination that arbitrarily exclude animals from the scope of moral concern.⁶⁹

Marc Bekoff also states:

64 See British Humanist Association 2007 <http://www.humanismforschools.org.uk>.

65 Monamy *Animal Experimentation* 40-41.

66 The term Speciesism was first coined by Richard Ryder.

67 James *Animal Rights* 11.

68 Francione 1997 *Journal of Animal Law* 77-78.

69 Singer *Animal Liberation* 1-23.

“We must make all our moral decisions based on an individual’s own characteristics and not on the species to which it belongs”.⁷⁰

Speciesism has the direct result that humans continuously want to try and explain why they have the so-called “right” to use animals rather than their own kind or species. What the explanations have in common is the claim that other animals either lack or are deficient in qualities for which humans claim pride; for example, human reason, language, and use of symbols, humour, reflective capacity, and self-awareness.⁷¹ The human response to other species is marked by a grandiose belief that the human species is special and exalted, devoutly believed to comprise a unique and exclusionary source of moral value. At the species level, mankind’s unilateral psychological framework reserves compassion for application only to members of his own species and is wilfully blind to the existence of animal suffering.⁷² Singer raises a compelling argument in regard to the aforementioned when stating that animals should be morally considered and that humans should ethically meet the responsibilities they have towards animals if we are to continue using animals in research laboratories.⁷³

2.3.4 *The Contractarian view*

John Rawls noted that “[d]uring much of modern moral philosophy the predominant systematic theory has been some form of utilitarianism,” and he offered a worthy competitor in “the traditional theory of the social contract”.⁷⁴

70 Bekoff *Animals Matter* 82-83.

71 Ash 2005 *Animal Law* 197.

72 Bartlett 2002 *Animal Law* 165.

73 Carbone *What Animals Want* 45.

74 According to Rawls “[o]ur social situation is just if it is such that by a sequence of hypothetical agreements we *would* have contracted into the general system of rules which defines it”. In reality, men cannot enter voluntarily into a scheme of social co-operation because the accident of birth can place a man in circumstances which will help or hinder his future in society. However, a society which subscribes to the principle of “justice as fairness” would draw very close to realising the ideal of a voluntary scheme because it lives up to the principles that free and equal persons would assent to under circumstances that are fair”. See Rawls *A Theory of Justice* 15-19.

In a nutshell, Rawls argued that the just rules for a given real-world society are those that would rationally be chosen behind an imaginary “veil of ignorance,” where the deciding parties are placed in an “original position” in which they have no idea of their strengths and weaknesses (or, indeed, any of their personal qualities) or of the positions they will ultimately occupy in a real-world society.⁷⁵ A potential shortcoming of Rawls’s theory is that Rawls himself did not intend for the application of his Contractarian theory to grant justice to animals. The application of Rawls’s Contractarian theory in modern times may, however, extend the scope of how humans perceive animal interests. Applying Rawls’s Contractarian theory may therefore provide a balance between human-animal interests and rights as all parties to the “grand agreement” will be placed in an original position in a real-world society.

The ideal of Contractarianism is thus that the principles of morals are a kind of grand agreement. Each of us is to treat each of the others in certain ways, provided they do likewise. If they do not there is no agreement and the idea is that we are both in a worse-off position than we would have been had we made an agreement. Mutually, reciprocity is the byword.⁷⁶ Rawls’s theory therefore suggests that when deciding upon the just rules for a society in a given real world, humans should take into account the contingency that parties would not only be humans, but non-human animals. In this instance parties will metaphorically “insure against” contingencies of being in a lesser position by arranging society and its rules to offer a social safety net.⁷⁷

The crux of Rawls’s theory is thus based on an imaginary concept by which humans ought to withdraw from current reality in order to apply an imaginary concept from which just rules for society should be chosen. Human perceptions, however, will prevent society from incorporating animals as part of the Contractarian philosophy, thus making it nearly

75 Hilden 2007-2008 *Animal Law* 6.

76 Narveson 2010 <http://www.depressedmetabolism.com/the-contractarian-theory-of-morals-faq.html>.

77 Hilden 2007-2008 *Animal Law* 5.

impossible to apply such a philosophy in modern times. Secondly, Rawls's theory is based on the concept of reciprocity. Reciprocity is a natural obligation which flows from the conclusion of a contract. Animals are incapable of concluding contracts due to their lack of reasoning ability. The obligation of reciprocity would therefore also oust the idea of applying a Contractarian philosophy in our times to include animal rights.⁷⁸ The question thus remains how it would be possible to include the interests of other species in the pursuit of principles of justice in a particular situation of animal welfare.

2.3.5 *Utilitarianism*

Those who consider animals to be of use to humans are termed utilitarian and they practise the philosophy of Utilitarianism. The application of Utilitarianism as philosophy in application to animals in contemporary times is very similar to welfarism. Welfarism is the position concerning the well-being of animals without providing them with particular rights. Welfarists believe that it is acceptable to use animals for human benefit as long as humane safeguards are applied to ensure that the animals are protected from unnecessary suffering.⁷⁹ Welfarists thus accept the use of animals for experimentation and slaughtering purposes if done in a humane manner. Utilitarianism is a philosophy that is premised on the same basics. The principal rule in Utilitarianism is that making use of animals will be acceptable or fair if the relationship between the costs suffered by animals and the benefits received by humans is such that the costs suffered by animals are less than the benefits received by humans.⁸⁰ The philosophy is therefore based on the principle that weighs up the permissibility of an act in relation to its contribution to the greatest happiness overall.⁸¹

The modern forefather of Utilitarianism is Jeremy Bentham (1748-1832). According to Bentham our lives are governed by two principles, the

78 Rollin *Animal Rights and Human Morality* 52-56.

79 Bekoff *Animals Matter* 186-187.

80 Bekoff *Animals Matter* 76-77.

81 Nordenfelt *Animal and Human Health and Welfare* 28-29.

principle of pleasure and the principle of pain. Everyone has a natural tendency to aim for pleasure and avoid pain. Bentham says that all our voluntary actions are ultimately motivated by our desire to seek pleasure and avoid pain. In a chain of causes that result in actions there must either be a desire for pleasure or a desire to avoid pain. As humans we ought to follow our psychological inclination and let it constitute the foundation of our morals - in this manner we will ensure that our biological natural tendency will be the morally correct one.⁸²

Bentham, being very interested in animals, wanted them to be included in the moral decisions humans make. Bentham therefore incorporated the essential basis of moral equality into his utilitarian system of ethics in the formula: "Each to count for one and non for more than one". What this implies is that the interests of every being affected by an action are to be taken into account and given the same weight as the like interests of any other being. Bentham was one of the few philosophers who realized that the principle of equal consideration does not only apply to members of our own species but also to that of others, Bentham wrote:

"The day *may* come when the rest of the animal creation may acquire those rights which never could have witholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may one day come to be recognized that the number of the legs, the villosity of the skin, or the termination of the *os sacrum*, are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? It is the faculty of reason, or perhaps the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even a month, old. But suppose they were otherwise, what would it avail? The question is not, Can they *reason*? nor Can they *talk*? but, Can they *suffer*?"⁸³

82 Nordenfelt *Animals and Human Health and Welfare* 28-29.

83 Singer *Applied Ethics* 220-221.

From the above Bentham clearly points out that all sentient beings are capable of suffering which is a vital characteristic that gives a being the right to equal consideration. Singer argues that Utilitarianism does not start with rules but with goals and thus has greater normative specificity because actions are prescribed or proscribed based on “the extent to which they further these goals”.⁸⁴

Peter Singer, an active utilitarian, is of the opinion that neither humans nor animals have rights but rather interests which should be equally considered in any moral calculation, hence contributing to the greatest happiness overall. Singer maintains that since animals are capable of feeling pain and being able to suffer humans must morally consider their interests. In his view, humans do not take animal interests seriously due to their species bias (*Speciesism*) which results in the devaluation of animal interests. Therefore an ethical stance is taken by Singer by which he questions moral judgments humans make in relation to vivisection.⁸⁵ Although Singer argues for animal liberation in his book he cannot and does not oppose all animal experimentation. He does support the idea that human beings are entitled to a specific preference for continued existence because they have a combination of intellect, self-awareness and future plans.⁸⁶ Supporting the idea that humans are entitled to a specific preference for continued existence is problematic for Singer and utilitarians. Humans are the ones doing the evaluation and decision-making. Humans are currently not prepared to sacrifice the benefits of research in order to limit the suffering of animals. Humans will continue to increase the good of a harmful act in order to protect their own interests that can lead to anthropocentricity.⁸⁷ An anthropocentric approach places the needs and well-being of humans above all other sentient beings. Many humans may therefore regard themselves as being superior to other sentient beings and the environment. Humans therefore enforce legislation to protect what they regard as beneficial not

84 Francione 1997 *Journal of Animal Law* 75.

85 Francione 1997 *Journal of Animal Law* 75-79.

86 Monamy *Animal Experimentation* 43-45.

87 Rollin *Animal Rights and Human Morality* 180-184.

for the survival of other sentient beings or the environment itself but rather to ensure what they perceive as their own present and future survival.⁸⁸

Singer firmly believes that the best course of action is the one that has the best consequences, on balance, for the interests of all those who are affected by a particular decision to do something or not to do something. In determining the consequences of actions, Singer argues that we must accord equal consideration to equal interests. Singer's notion of equal consideration does not mean that animals receive equal treatment, and it does not preclude the morality of a decision to exploit a human or non-human. As long as an animal's interests receive equitable consideration (consideration untainted by the Speciesism that discounts animal interests simply because they are the interests of a supposed "inferior"), Singer's equality principle is satisfied.⁸⁹ For Singer, just as it was for Bentham, the importance of animals within our moral consideration lies with the fact that the interests of animals must be given equal consideration with those of humans, and both species have an interest in avoiding suffering.⁹⁰

A major problem with Utilitarianism, however, is the fact that humans make the decisions and as we are anthropocentric in nature, we will always find a way to make the equation out in our favour and in most instances ignore animal interests. Therefore animals will most likely always be the ones to suffer (bear the costs) for human benefit. A second problem with Utilitarianism is how we calculate costs and benefits.⁹¹ It is sometimes said that research on animals benefits animals as well as humans so that the net benefit outweighs the net cost.⁹² From this it can be said that although Utilitarianism provides a

88 Principle 1 of the Rio Declaration on Environment and Development (Rio Declaration) clearly reflects this by stating that human beings are at the centre of concerns for sustainable development.

89 See Gary L Francione "Animal Rights Theory & Utilitarianism: Relative Normative Guidance 1997 *Animal Law* 75-101.

90 Bekoff *Animals Matter* 77.

91 Monamy *Animal Experimentation* 47.

92 Rollin *Animal Rights* 182.

flexible philosophy it also implies that utilitarians do things that are at odds with accepted morality.⁹³ Morally, certain aspects of the animal's nature are sacred and need to be protected against total submersion by utilitarian considerations. We must avoid encroaching on the animal's fundamental interests and nature which Utilitarianism does not seem to do as humans are the ones making the decisions.⁹⁴

By definition, Utilitarianism assesses the costs and benefits, pleasures and pains, goods and harms associated with any act in deciding its morality.⁹⁵ Utilitarianism therefore focuses on providing answers to questions that directly relate to human actions and how these actions affect human morality and the effect such actions have on the interests of animals.

2.4 Conclusion

This chapter briefly illuminated a few philosophical approaches followed and applied by humans in relation to the human-animal relationship. It is evident from the aforementioned that utilitarianism dominates the relationship we share with animals. Human interests are regarded as the benchmark against which the interests of other sentient beings will be compared. Utilitarianism therefore focuses solely on the benefits that the use of animals will bring to humans as opposed to incorporating the interests of animals as a non-human species into our arena of moral consideration. Concern for the welfare of animals and questions relating to animal ethics, however, only emerged in the late 19th century, in particular when Bentham's principles of Utilitarianism were more readily applied to circumstances involving the use of animals.

The application of Utilitarianism in circumstances involving the use of animals has not been without criticism. The foundations for the philosophy are aimed at weighing up the permissibility of an act in

93 Bekoff *Animals Matter* 78.

94 Rollin *Animal Rights* 183.

95 Carbone *What Animals Want* 55.

relation to its contribution to the greatest happiness overall.⁹⁶ The application of Utilitarianism in terms of circumstances involving animals, more specifically animal welfare and care, seems to be at the heart of current animal welfare and care problems. The approach continues to remain supportive of the idea that humans are entitled to a specific preference for continued existence because they have a combination of intellect, self-awareness and future plans.⁹⁷ Utilitarianism implies that humans are the ones doing the evaluation and decision-making regarding experimental research and the method of vivisection. Humans for the most part will not sacrifice the benefits of research in order to limit animal suffering.⁹⁸

Humans and animals have similar health, mental and physical needs which are important aspects in fulfilling everyday living conditions. The well-being of animals must be considered and ensured. Ensuring animal well-being is possible, if at all levels within society an understanding of their inherent value, species interest, instinctual and natural behaviour is effected. Human morality shall furthermore benefit from such accomplishment if accompanied by a concomitant awareness that animals are living, sentient beings created with a different purpose, rather than objects not worthy of moral concern that may be utilized by humans as they see fit.⁹⁹ It is against this background that it is necessary to analyse the current normative legislative framework as it pertains to animals to ensure that animal welfare and care in research laboratories is adequately addressed.

96 Nordenfelt *Animal and Human health and Welfare* 28-29.

97 Monamy *Animal Experimentation* 43-45.

98 Rollin *Animal Rights and Human Morality* 180-184.

99 Bekoff *Animals Matter* 82-89.

If you pick up a starving dog and make him prosperous, he will not bite you; that is the principal difference between a dog and a man.¹⁰⁰

3 South African legal framework: Animal welfare & vivisection

3.1 Introduction

The different philosophical approaches humans have followed over the years have greatly influenced our current views and perceptions and ultimately the relationship humans share with animals today. The belief that animals are to be regarded as property rather than objects of moral concern has resulted in humans exploiting animals as they do today, merely to protect the interests of humans. The application of Utilitarianism in circumstances relating to animal welfare also does not seem to assist the struggle in having animal interests taken into regard. It therefore seems that current legal frameworks are influenced by the belief that animals should be regarded as property. South Africa is an example of such a country.

In South African law, animals do not possess legal subjectivity¹⁰¹ and are not regarded as legal subjects. The only two classes of legal subjects (*personae*) that exist in South African law are natural persons and juristic persons. The law in South Africa, however, primarily focuses on natural personhood. People owe legal duties under the law and conversely people are the ones afforded the protection of legal rights under the law.

Boberg states:

100 Mark Twain (1835-1910).

101 Legal subjectivity of a legal subject can be circumscribed on the ground of being a bearer of subjective rights and obligations. The characteristic of legal subjectivity is called legal personality. The contents of legal subjectivity however are found in capacities. Legal capacity points to the ability to be a subject in legal interaction that is to be the bearer of rights (among which subjective rights) and obligations and to hold certain legal offices. The capacity to perform legal acts are, contractual capacity which indicates the ability to perform legal acts, capacity to litigate which indicates the ability to act as a plaintiff or defendant in legal interaction and accountability/criminal responsibility which indicates the ability to perform unlawful acts. See Pienaar *Legal Subjectivity and the Juristic Person* 5-6.

“that things, on the other hand, neither have, nor are they capable of having, rights and duties: they are the objects of the rights and duties of persons”.¹⁰²

The meaning of the concept of natural personhood in South African law is, however, muddled. It commonly refers to a being or entity capable of having legal rights or duties. Whether such a being or entity must be capable of having both legal rights and duties or only legal rights or duties is unclear. Natural persons who can act out of a sense of moral obligation are referred to as moral agents. Natural persons who lack the ability to deliberate and make choices according to their deliberation are referred to as moral patients. South African law as it currently stands recognises moral agents and moral patients as persons in our law. This implies that the concept of person refers to an entity capable of possessing either legal rights or duties and such an entity need not possess both.

Humans are legal subjects¹⁰³ and possess legal subjectivity. Human interests are considered and rights imposed to protect such interests. Although animals are sentient beings that feel pain, are able to suffer and experience discomfort, they remain objects of property in terms of law. Being characterised as property may therefore be a reason why animals are continuously denied the basic interest of being free from cruelty and suffering.¹⁰⁴ The fact that animals are characterised as property in law also stipulates that the owner of the animal may exercise the right of ownership. Animals may therefore be used, exploited or killed at the sole discretion of the owner, provided that the killing of the animal is not cruel or inhumane.¹⁰⁵ In *Rex v Moato*¹⁰⁶ Van den Heever J also stated that the object of legislation is not to confer legal rights upon animals and the prohibition of unnecessary pain is not intended to provide them with protection. Karstaedt, citing various cases heard in

102 Boberg *The Law of Persons* 3.

103 “A legal subject can be defined as the bearer of judicial capacities, subjective rights (including the appropriate entitlements) and legal duties”. See Jordaan & Davel *Law of Persons* 3.

104 Hopkins 2003 *OBITER* 431.

105 Youens *Animal Rights* 23.

106 *Rex v Moato* 1947 1 SA 490 (O).

South African courts, says something similar: “[A]ccording to our case law, it [animal anti-cruelty legislation] was not even intended to protect animals”.¹⁰⁷ The aim is obviously to prohibit a person from being cruel to an animal as to not offend the finer feelings and sensibilities of other persons.

Schwartz also confirms this when he says:

“it is not the mistreated dog who is the ultimate object of concern... our concern is for the feelings of other human beings, a large proportion of whom although accustomed to the slaughter of animals for food, readily identify themselves with a tortured dog or horse and respond with great sensitivity to its feelings”.¹⁰⁸

The fact that animals in South African law currently have no legal rights is trite.¹⁰⁹ Animals are therefore protected for the sake of legal subjects (humans) and not for their own sake. The protection offered to animals is limited to cruel or inhumane treatment as principally governed by the *Animal Protection Act 71 of 1962* and the *Performing Animals Act 23 of 1935*. Although the statutes have recognised and consequently prohibited such treatment of animals, both statutes have remained unchanged since the promulgation of the final Constitution in 1996. Despite having animal welfare and care nationally governed and regulated South Africans have remained ignorant of the interests of animals, a factor which may be regarded as one of the reasons why legislation has not been amended or transformed sufficiently. The APA, *Animal Health Act 7 of 2002*, *Antarctic Treaties Act 60 of 1996* and *Veterinary and Para-Veterinary Professions Act 19 of 1982* provides some measure of legislative control for the use of animals in science. The legislative control is, however, of an overall general nature and not specific with regard to different environments and circumstances. Although members of the Society for the Prevention of Cruelty to Animals have made numerous requests to government to have

107 Karstaedt 1982 *THRHR* 349-351.

108 Schwartz 1963 *Columbia Law Review* 676.

109 Hopkins 2003 *OBITER* 432.

legislation amended such amendments have yet to occur. Thus the legal framework will be investigated as it pertains to animal welfare in South Africa to ascertain the quandary of animal welfare and provide recommendations for the improvement of animal welfare and care within our legislative framework.

3.2 *The Animal Protection Act 71 of 1962*

The object of the APA was to restrict humans from treating animals in a cruel and inhumane manner. In general, the APA was enacted to consolidate and amend laws relating to the cruelty to animals as stated in the preamble:

“To consolidate and amend the laws relating to the prevention of cruelty to animals”.

The APA therefore functions as the primary legislative document that governs and regulates animal welfare and care in South Africa. Although the APA recognises the rights owners have in terms of their animals,¹¹⁰ it does prohibit the infliction of unnecessary or unreasonable pain and suffering caused to the animal at the hands of the owner.¹¹¹

Animals¹¹² that are protected under the act are equine,¹¹³ bovine,¹¹⁴ sheep, goats, pigs, fowls,¹¹⁵ ostriches, dogs, cats or other domestic animal or bird, or any wild animal,¹¹⁶ wild bird or reptile kept in captivity or under the control of any person. The description offered for the protection of animals clearly reflects that not all animals are protected under the APA. Wild animals, wild birds and reptiles that are not kept in captivity are not afforded protection under the APA neither is protection offered to rats, mice, rabbits or guinea pigs that are commonly the

110 S 1 defines that an “owner” in relation to an animal, includes any person having the possession, charge, custody or control of that animal.

111 S 2(a), (b), (d), (e), (f), (m) and (p).

112 S 1 – definition of “animal” in terms of the Act.

113 Horses or horse like.

114 Cows.

115 Chickens, ducks and turkeys.

116 Wild animals which are kept in captivity or under the control of a person have protection under the Act, while animals, birds and reptiles that are wild have no protection under the APA.

animal species held in research laboratories or specifically bred for research purposes. Animals not afforded protection under the APA may find protection under other legislation.

3.2.1 Offences listed under the Act

Offences listed under the APA mostly relate to circumstances during which animals are subjected to unnecessary suffering. Section 1 of the APA does not define the meaning of the words “unnecessary” or “suffering”. On what grounds does the court decide whether an act has caused unnecessary suffering to an animal if the APA does not provide guidelines in terms of such definitions? Is restraining an animal in a metal device for five hours to perform some kind of research permissible and thus not seen as an offence in terms of the APA? These questions emerge when interpretation of the APA and its provisions is called for by a court of law. It seems that South African courts have not yet dealt with a case in relation to animals in which the definitions of the words “unnecessary” or “suffering” have specifically been investigated.

The implications that emerge when applying and invoking the provisions of the APA relate to two facts. One, in its interpretation, the definitions of words such as “unnecessary” and “suffering”, are not defined in terms of Section 1 of the APA. During the interpretation of the APA, courts interpret the meaning of such words by applying the ordinary and the grammatical meaning. This application does not provide the overall protection the legislature may have intended in matters specifically relating to animals held in research laboratories. It seems that the words “unnecessary” and “suffering” may be interpreted in a much wider sense and context to provide the scope of protection the legislature may have intended. Sometimes the wider interpretation offered to the context may even be more important than the legislative context.¹¹⁷ “Unnecessary” must be defined in the APA in relation to the general environment in which the various species of animals will be housed and be cared for. A

117 Botha *Statutory Interpretation* 51.

general definition of what would constitute “unnecessary” action towards animals may be inserted. Each environment (home pets, agricultural animals, zoo animals, etc.) should, however, include relevant words for such specific environment. The same will apply to “suffering”. Separate definitions must, however, be drafted for animals contained in research laboratories, as these animals live under exceptional circumstances. A general definition in the APA for “unnecessary” may, for example, state more or less the following: “Where such animal is required to endure a situation, which the reasonable person comprehends or foresees that such endurance is in opposition of the normal behaviour of such specie of animal, and places an expectation upon such animal, for which the animal must adapt in order to survive”. An example for “suffering” may state: “An animal shall be deemed to “suffer” if any human action or inaction places an expectation upon such animal to, whether voluntarily or involuntarily, submit to any mental or physical degree of inhumane treatment not required by such specie of animal in order to survive”. The most simplistic manner to avoid the misinterpretation of words would be to amend the APA as it currently stands by including proper descriptions (as proposed above) of what the legislature intended these words to mean, with specific reference to professions that involve science, agriculture, entertainment and medicine as well as ordinary homeowners who keep pets.

The second implication relates to that of work force. Work force is crucial in terms of securing proper convictions of accused persons. If a person who causes the animal to suffer unnecessarily is not caught in the act of doing so, how will such a person be identified and held accountable? Members who belong to non-profit organisations such as The Society for the Prevention of Cruelty to Animals is currently the only work force South Africans have that monitor animal welfare on a day-to-day basis. Our authorities do not have the necessary manpower to invoke the provisions of the APA by requesting members from the South African Police Services to assist the work force of non-profit

organisations. Authorities will rather employ more officers to combat crimes than employ officers to protect animals.

Further offences listed under the APA include “any person, who overloads, overdrives, overrides, ill-treats, neglects, infuriates, tortures or maims¹¹⁸ or cruelly¹¹⁹ beats, kicks, goads or terrifies any animal,¹²⁰ as well as any person who confines, chains, tethers or secures any animal unnecessarily or under such conditions or in such a manner or position as to cause that animal unnecessary suffering or in any place which affords inadequate space, ventilation, light, protection or shelter from heat, cold or weather”.¹²¹ The APA further states that animals may not unnecessarily be starved, underfed, denied water¹²² or exposed to poison unless the exposure to poison is for the destruction of vermin or marauding of domestic animals.¹²³

Sections 2(e), (f), (m) and (p) have proved to be the most controversial provisions of the APA in relation to vivisection. These provisions prohibit owners from deliberately or negligently keeping, confining or restraining animals under such conditions or to use and attach any equipment or appliance to such animal which may cause unnecessary suffering for the animal. Abandonment¹²⁴ of animals is also prohibited. Although very little statistical information is provided by research technicians concerning animal numbers, animal species, environments and so forth,

118 The words “torture” and “maim” are dealt with in the case *S v Gerwe* 1977 (3) SA 1078 (T). The words torture and maim are not defined and should be given their ordinary meaning. Torture would mean the “infliction or bodily pain as punishment, or as a means of persuasion, whilst maim would mean, “To mutilate”. The court further held that the stabbing of a dog did not qualify as a form of torture or maiming.

119 Cruelty in context of the Act refers to conduct which unreasonably or unnecessarily inflicts pain. However, the mere infliction of pain alone is not a contravention of the prohibition as stated in *R v Helderberg* 1993 NPD 507.

120 S 2(a).

121 S 2(b).

122 S 2(c).

123 S 2(d).

124 Abandoning an animal in terms of the Act should be interpreted to mean that an owner either deliberately or without reasonable cause or excuse, leaves an animal for a definite or indefinite period of time where such an animal does not enjoy living conditions which include medical care, attention (to be played with and loved), social interaction with other animals or adequate supply of food, water and shelter.

animal activists, environmentalists and researchers are well aware that vivisection methods entail exactly what is prohibited under Sections 2(e), (f), (m) and (p). The words “unnecessary suffering” incorporated in these provisions are the crux of the controversy in relation to the Act and the main problem in terms of animal welfare. Animals subjected to vivisection are deliberately and intentionally seriously injured due to procedures and tests conducted, as well as kept alive even when the animals require serious medical treatment or euthanasia.¹²⁵ The consequence is that the life of the animal is prolonged, which causes the animal unnecessary suffering – Section 2(e) forbids such treatment. Section 2(f) forbids that equipment be used on or attached to animals in such a manner as to cause injury or make them suffer unnecessarily. During the method employed by means of vivisection, animals are repeatedly subjected to inescapable electrical shocks,¹²⁶ electrodes are implanted into the brains of monkeys to which harnesses are attached and the monkeys are left with these attachments for up to a week before the actual experiment starts.¹²⁷ In some experiments rings anchor Rhesus monkeys at the skull by means of steel screws before they are restrained, nose-down to a stereotaxic apparatus¹²⁸ shaken and spun in the dark.¹²⁹

The Act furthermore states in Section 2(m) that: any person who conveys, carries, confines, secures, restrains or tethers any animal –

- (i) under such conditions or in such a manner or position or for such a period of time or over such a

125 Kerr 2011 <http://www.news.scotsman.com> & Linzey 2008 www.all-creatures.org.

126 Monamy *Animal Experimentation* 61.

127 Carbone *What Animals Want* 31-33.

128 “A stereotaxic apparatus comprises a ring with head clamps and an arch-shaped plate adapted to carry a stereotaxic instrument and movably joined to a bushing by means of a guide member attached to the bushing. The bushing is mounted on a bar to be movable along the bar and routable thereabout. With the bar being disposed radically relative to the arch defining the shape of the plate, and being joined to the ring by means of a spatial hinge having two degrees of freedom and mounted on the ring so as to be movable there along. The extremity of the stereotaxic instrument is positioned at a point being the projection of the curvature centre of the arch defining the shape of the plate on the axis of the bar”. See <http://www.freepatentsonline.com>.

129 Singer *In Defence of Animals* 91.

- distance as to cause that animal unnecessary suffering; or
- (ii) in conditions affording inadequate shelter, light or ventilation or in which such animal is excessively exposed to heat, cold, weather, sun, rain, dust, exhaust gases or noxious fumes; or...

Section 2(m) is undoubtedly a provision, which raises serious concern and controversy regarding animal welfare, particularly in relation to the practice of vivisection. The reasons here fore are:

- 1) Primates and baboons are confined to cages that restrict movement and deny them interaction with their own kind of species which causes physical pain and mental distress;¹³⁰
- 2) rabbits are restrained in stocks¹³¹ to conduct a skin irritancy test¹³² during which substances are dropped into their eyes causing severe pain and unnecessary suffering;¹³³
- 3) the spinal cords of cats are severed, their eyes sutured and they are forced to endure lengthy sleep deprivation while being secured in small cages, which causes severe stress, physical pain and trauma;¹³⁴
- 4) During certain weapons and warfare tests, experimental pigs are strapped to trolleys, shot at close range in order to test body armour, and monkeys confined to chambers while being gassed by nerve poisons. These tests cause immense suffering and unnecessary deaths;¹³⁵
- 5) Dogs restrained during multiple recovery surgeries are denied mercy death by anaesthesia and left to recover from as many as two to three different procedures performed in the course of one session. These dogs are sometimes denied water, blankets and

130 Pickover *Animal Rights* 113-117.

131 Steel or wooden crib-like object in which animals are placed.

132 This test is commonly referred to as the "Draize test".

133 Rollin *Animal Rights and Human Morality* 190-191.

134 Williams & Demello *Animals Matter* 185.

135 James *Animal Rights* 32.

adequate heat, causing the dogs to suffer tremendously from pain, distress and shock;¹³⁶

By applying the usual meaning to the words used in Section 2(m), it becomes evident that vivisection will most probably not be able to take place without having to restrain, secure or confine animals. Animals are sentient beings and just like humans possess the necessary consciousness to avoid pain.¹³⁷ In order to avoid the pain and suffering caused by technicians, animals are most likely to attack technicians by means of biting or scratching if they are not restrained, secured or confined during experiments, tests and procedures. The weight of the controversy therefore lies with two facts. One, animals are deliberately denied the only means they know how to protect themselves to ensure the safety of humans who intentionally cause them suffering and pain. In his article *Progress without Pain*,¹³⁸ Regan states the following with regard to the duty imposed against the action of harm:

“There is no rationally defensible basis for viewing the moral status of mammalian animals any differently. Just as a young child (or an adult human being for that matter) can be, and often is, directly harmed or benefited by what we do, and just as the notions of harm and benefit are here to be understood, respectively, in terms of the negative or positive contributions made to the quality of the experimental life of the individual in question, so must every rational, informed person accept that the same is true of mammalian animals – at least. Moreover for these animals clearly are not alive, they live their life in a sense that is fundamentally analogous to the sense in which we live ours...”

Two, although Section 2(m) forbids these types of actions towards animals, vivisection and the welfare problems associated with it continue to exist. Research laboratories have been found to be guilty of abandoning animals, an act clearly prohibited in terms of Section 2(p).¹³⁹

136 Rollin *Animal Rights and Human Morality* 199-200.

137 Carbone *What Animals Want* 141-150.

138 Regan “Progress without Pain: The Argument for Humane Treatment of Research Animals” 1986-1987 *St. Louis U.L.* 516.

139 See Williams and Demello *Animals Matter* 183.

These animals are either physically too injured to live a normal life and need to be euthanized or they have to be rehabilitated which may last for months and not be successful which ultimately leads to the animals being euthanized.¹⁴⁰

Section 2 (n) is a highly debatable provision, which reads as follows:

“Without reasonable cause administers to any animal any poisonous or injurious drug or substance, or....”

Scientific and medical researchers argue that research is a “reasonable cause” in itself to administer a poisonous or injurious drug or substance to an animal. Animal activists, however, argue that administering poisonous or injurious drugs or substances to animals not only violates our moral convictions of animal ethics but is also cruel, inhumane and causes unnecessary suffering. Section 2(n) is problematic for three reasons. Firstly, how does the court determine that the process or procedure of action applicable to a certain experiment conducted on animals constitute a “reasonable cause” if research laboratories do not provide necessary statistics and other information about the research experiment?

The LD50 and Draize tests are examples of tests that can be judged under the rubric of whether they provide a “reasonable cause” - this does not make any sense that may justify the continuance thereof as they give humans false information. Legal prohibitions of these tests were recommended in the USA because evidence proves that they do not serve a real purpose to humans. The experimental process of the LD50 and Draize tests find application for testing the toxicity of a particular product. The species of animals commonly used to conduct these tests are rabbits, dogs, mice and rats. During the performance of the LD50 and Draize tests, sixty to one hundred animals were poisoned and more than half of the animals died at the completion of the tests. The procedure applied for the tests take place by dripping a 50% (fifty per

140 Perreira 2011 <http://www.icare-worldwide.org>.

cent) dosage of drops of a particular product into an eye of a particular species of animal while it is confined in a small wooden box. The animals suffer inherent abuses associated with these tests (the pain in their eyes from the level of toxicity of the product and the confined to a small space), as well as non-inherent abuse (this can be judged in light of the welfare care provided to the animals). The fact that these tests do not serve a real purpose for humans, continued use of these tests that, produce insufficient and already known answers, may be regarded as not being a “reasonable cause” to continue with such tests.¹⁴¹

Should research laboratories continue withholding statistics and other information about the types of experiments and the animal figures relating to experiments, will members of Parliament not be placed in a favourable position to evaluate whether such experimental procedures should continue? It is, however, interesting to note that members of Parliament have never evaluated any formal research conducted on the efficacy of animal experiments in South Africa, a matter that urgently needs attention. Members of Parliament have also never requested research to be conducted in order to evaluate whether animal experiments benefit human medicine, despite scientific doubts over their applicability and thousands of human deaths caused by unforeseen drug side effects.¹⁴²

Secondly, what is regarded as a “reasonable cause” in terms of the APA when the Act does not provide guidelines as to what may constitute a “reasonable cause” in terms of a research experiment? Humans are fully aware that smoking causes lung and mouth cancer but continue to smoke. A monkey forced to smoke before being given water to drink is subjected to unnecessary suffering (inherent and non-inherent abuse) because monkeys in the wild do not smoke cigarettes. Categorising such an experiment as “a cancer experiment” can surely not comply with

141 Rollin *Animal Rights and Human Morality* 185-193.

142 Pickover *Vivisection in South Africa* 38.

what is expected to be a “reasonable cause” for which monkeys should suffer the consequences.¹⁴³

Thirdly, how does the court judge the “lawfulness” of actions taken during a research experiment if these actions are judged by means of applying the same criteria (provisions) that regulate the treatment of domestic pets, agricultural animals and so forth?¹⁴⁴ Human action in terms of the APA should be punishable by applying the principles and requirements as set out under criminal law. The APA specifically contains criminal norms¹⁴⁵ and criminal sanctions.¹⁴⁶ The APA under Section 2(1) states as follows:

“Any person who.... shall, subject to the provisions of this Act and any other law, be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding twelve months or to such imprisonment without the option of a fine”.

Once established that certain forms of human action under the APA fulfil the principles and requirements of “conduct” as set out in criminal law, such action must be justifiable (lawful).¹⁴⁷ The criteria suggested by which the lawfulness of actions under criminal law are judged, include whether actions violate certain legally protected interests, values and conduct which is:

- (i) Not in accordance with good morals (*contra boni mores*);
- (ii) violating a community’s perception of justice and equity;
- (iii) at variance with public or legal policy;
- (iv) contrary to legal notions and legal convictions of a society;
- (v) contrary to the requirement of objective reasonableness;
- (vi) more harmful than beneficial; and

143 James *Animal Rights* 26.

144 Youens *Animal Rights* 27.

145 A provision in an Act stating clearly that certain conduct shall constitute a crime.

146 A provision in an Act prescribing the parameters of the punishment a court must impose once a person has been found guilty of the particular crime.

147 Snyman *Criminal Law* 95.

(vii) Not socially adequate.¹⁴⁸

It is a necessity and appropriate to euthanize a dog severely injured in an illegal dogfight. Such an act is not only regarded as merciful but also lawful as it will be cruel to keep such an animal alive. However, actions involving vivisection may not necessarily be “lawful” if judged in accordance with the criteria applicable to “lawful actions” in terms of criminal law. It is therefore of utmost importance that each case before a court of law be judged on its own merits and circumstances, particularly in cases where human actions towards animals require judgement to be given. Actions towards animals contained in research laboratories should, however, be regulated in terms of more rigid and stringent criteria. The inherent abuses suffered by animals due to research results in the welfare needs of such animals to be far greater than those not kept for research purposes. Vivisection methods are inconsistent with Sections 2(e), (f), (m), (p) and (n). These sections form part of the welfare structure incorporated in the APA. However, vivisection currently condemns animals to unnecessary suffering because of the sections being poorly drafted and incorrectly construed in the APA.

The APA also does not prevent the killing of an animal. The only prohibition lies in the manner of killing – the unnecessary infliction of pain and suffering must be avoided. The APA entitles the Minister of Justice in terms of Section 2(3) to prohibit the killing of animals if such killing is for commercial purposes. In other words, the skins, meat or other body parts of such animals may not be utilized as trade goods. Although Section 2 lists offences that may be committed under the APA, it is interesting to find that there are no deeming provisions in relation to such offences.

3.2.2 Penalties in terms of the Act

Section 3(1) specifically regulates additional sanctions that may be imposed on a person who has been convicted of an offence. Section

¹⁴⁸ Snyman *Criminal Law* 98.

3(1)(a) states that the animal may be destroyed due to the inappropriate and unlawful conduct of a human. Although seeing that such an extreme method is necessary to protect the animal from further “unnecessary suffering” could the preceding provisions of the APA not have prevented it? The same applies to Section 3(1)(b) and (d). Section 3(1)(b) deprives the owner of ownership. This means that such animals can be temporarily placed under the care of the Society for the Prevention of Cruelty to Animals.¹⁴⁹ If a suitable home is not found for the animal in question, the SPCA shelter has no choice but to euthanize the animal. Once more, the life of the animal may be destroyed. Section 3(1)(d) states that “any order may be made which the court deems fit with regard to an animal”. Is it reasonable to allow that animals be destroyed or treated by a court as it deems fit purely because humans regard animals as property and not as sentient beings?

Section 4 provides for the recovery of damages not exceeding an amount of R5000 by any person who provided necessary medical treatment, food or accommodation for an animal when a person is convicted of an offence under the Act. The damages awarded when proved may be for loss caused or expenses incurred. This amount does not seem to be sufficient, and legislative transformation can serve to have such an amount substantially increased in order to determine whether a diminution of offences committed against animals takes effect, resulting from the increased penalty amounts. Section 4, however, does not contain any subsection providing for other financial penalties which may be imposed upon offenders. This shortcoming may very well be the reason why offences committed under the APA in terms of negligence or intent are also not distinguished. Section 4 also does not make a distinction between financial penalties which may be applicable to individual persons and entities. The exclusion of other financial penalties may be an indirect reason why courts find it difficult to financially penalise individuals and entities.

149 Hereinafter referred to as the “SPCA”.

3.2.3 Regulations

The Minister is entitled in terms of Section 10 of the APA to make regulations regarding confinement, accommodation, prevention of cruelty, suffering, seizure, impounding, custody, disposal and the destruction of animals. A regulation may also include the recovery of expenses incurred in connection with the animal from the owner. A major setback for the APA is that nothing has been promulgated.

3.2.4 Case law: Bearing witness to the insufficiency of the APA

In order to understand the interpretation and application of the APA it is necessary to reflect on relevant case law.

3.2.4.1 *R&I Laboratories (Pty) Ltd v Beauty Without Cruelty International (South African Branch)*¹⁵⁰

3.2.4.2 The facts

The Applicant sought an interdict based on injurious falsehood by the Respondent to cause patrimonial loss to the Applicant. The Respondent published information in relation to whether products developed by cosmetic companies are tested or untested on animals. The information about the products manufactured by the cosmetic companies is obtained when representatives of such company complete a standard questionnaire supplied by the Respondent.

3.2.4.1.1 The legal question

Whether the Respondent published false information about the products manufactured by the Applicant and subsequently excluded the Applicant's name and/or products from advertisements.

3.2.4.1.2 The Arguments

150 *R&I Laboratories (Pty) Ltd v Beauty Without Cruelty International (South African Branch)* [1990] 4 All SA 804 (C).

The Applicant held that the Respondent had no right to publish information stating that the Applicant is a company that is “not cruelty free” since the Applicant has (since it filed an Answering Affidavit) ensured to be “cruelty free” in the manufacture of its products. The Respondent contended that neither the pamphlet nor the advertisement is reasonably capable of referring to the Applicant.

3.2.4.1.3 *Ratio decidendi*

The court held that the requirements to grant an interdict were fulfilled by the Applicant. The court based its decision on the course of action applied by Steyn CJ in the case of *Geary & Son (Pty) Ltd v Gove*.¹⁵¹ Steyn CJ stated:

“The plaintiff does not base its case upon misrepresentation negligently made, but upon wilful falsehood, i.e. an intentional wrongful act on the part of the defendant. What it has to allege and prove, therefore, is that the defendant has, by word or conduct or both, made a false representation, that it knew the representation to be false, that the plaintiff has lost or will lose customers, that the false representation is the cause thereof, and that the defendant intended to cause the plaintiff that loss by the false representation”.¹⁵²

3.2.4.1.4 The decision

The court ruled in favour of the Applicant. The Respondent was ordered to refrain from publishing false information about the products of the Applicant.

The present author does not dispute the ruling made in favour of the Applicant for the interdict but does question whether the court could have found itself in a more favourable position to investigate the circumstances relating to the interests and welfare of the animals had it not been for the current insufficient legal framework pertaining to animals. The Respondent is concerned with facts relating to whether

151 *Geary & Son (Pty) Ltd v Gove* 1964 1 SA 434 (A).

152 At 441 C-D Ibid.

products manufactured involve cruelty or exploitation of living creatures. Author is of the opinion that it would have been relevant if the court could have addressed the issue of “whether animal testing had indeed been stopped by the Applicant” by means of a comprehensive investigation if the APA provided sufficient regulation of procedures and conduct of research laboratories.

In essence, the Applicant would have been required to submit relevant documents such as permits, testing authorisations, licences and so forth in its application to the court to substantiate its relief sought. In this regard, the court would have been able to “assess” whether all relevant documentation required by the Applicant had indeed been obtained and authorized prior to continuing the manufacture of the cosmetic products, which, the Applicant previously tested on animals before submitting an Affidavit stating otherwise.

3.4.2.2 *S v P & Others*¹⁵³

3.4.2.2.1 The facts

Three juvenile offenders were charged with *crimen injuria*. The Regional magistrates’ court was the court *a quo*. The three juvenile offenders had assaulted a fourteen-year-old boy whom they accused of stealing their dance kit. Whilst the accused were assaulting the complainant with green tree branches on his back, the first accused whistled for his female dog. The first accused held the dog by the head, the second by the hind legs and the third by the body, while at the same time forcing the complainant to have sexual intercourse with the animal.¹⁵⁴ No medical report was produced stating the injuries the complainant sustained, neither was evidence provided in terms of the injuries the animal had sustained.

3.4.2.2.1 The legal question

153 *S v P & Others* [1999] JOL 5214 (ZH).

154 At 2 para 2.

Whether the charge of *crimen injuria* was correct and whether the sentence passed in respect of the charge of *crimen injuria* was adequate.

3.4.2.2.2 The arguments

The offenders raised no arguments, they pleaded guilty on the charge of *crimen injuria*.

3.4.2.2.3 *Ratio decidendi*

The court based its decision on the facts relevant to the use of corporal punishment, considering that such punishment “be used sparingly and reserved for only serious offences committed by juveniles”. The court addressed the issue as to whether the charge of *crimen injuria* was correct by applying Beadle CJ’s remark in *S v Brereton*¹⁵⁵ that reads as follows:

“It must now be accepted that the crime of criminal *injuria* does not include those injuries which are known and can be charged as offences under distinct and appropriate names, and that when an injury can more appropriately be charged under its own distinctive name, it is not competent to charge that injury as criminal *injuria*”.

3.4.2.2.4 The decision

The court held that the sentence passed was inadequate and that the three juveniles should have been charged with the crime of indecent assault rather than the crime of *crimen injuria*. The court furthermore held that charges of bestiality “could still” be brought against the accused due to their conduct of forcing the complainant to have sexual intercourse with the female dog.

The insufficiency of the APA to bring to justice the “owners” of animals who intentionally cause harm, unnecessary pain or trauma to an animal and persons (such as the three accused) who gave evidence in an open

155 *S v Brereton* 1971 1 SA 489 RAD 489 at 490H.

court about their intentional and harmful actions against an animal (whether such evidence is “self-incriminating” or not) is irrespective – substantial evidence of harmful action suffices, speaking for itself in this case. The courts’ reference to further charges that “could still” be brought is evidentiary that our prosecuting authority does not seem to take the interests of animals seriously enough to simultaneously charge the three accused with bestiality. In essence, the actions of the three accused (their means of restraining the female dog), the unnecessary pain, suffering, trauma and injuries the female dog sustained were not investigated nor regarded as critically serious in this case, the emphasis of the case merely being concerned with the physical and emotional trauma of the complainant.

Author does not agree with the manner of approach followed in this case by either the prosecuting authority or the court. Should the APA have provided more stringent provisions in terms of the “owner” of an animal, the penalties imposed for an offence in terms of the APA and provisions, specifically relating to the conduct of bestiality the prosecuting authority and the court would have taken the interests of the animal more seriously. Both the prosecuting authority and the court would have been in a more suitable position to investigate all relevant circumstances in relation to the unnecessary suffering, pain, trauma and injuries sustained by the female dog.

3.3 *Animal Health Act 7 of 2002*

The *Animal Health Act 7 of 2002* replaced the *Animal Diseases Act 35 of 1984*. The main objective of the Act is to promote animal health and to control animal diseases. The Act regulates the importation and exportation of “animals and things” and to establish animal health schemes and matters connected therewith. In essence, the Act is intended to provide for measures to control indigenous animal diseases as well as animal diseases that are not indigenous or native to the Republic. Certain provisions (to be discussed) do, however, state that certain procedures require animals to be subjected to pain and

discomfort that would require the welfare of such animals to be taken into consideration.

Section 16(1) grants authority to the Minister of Agriculture to establish animal health schemes for the improvement of animal health and controlled purposes. The Government Gazette notice must *inter alia* define the kind of animal to which the scheme applies,¹⁵⁶ specify the kind of animal that is susceptible to the animal disease or parasite,¹⁵⁷ define the kind of animal in respect of which controlled veterinary procedures, tests, examinations, treatments or disposals must be done.¹⁵⁸ Describing the manner in which any animal referred to in subsection (d) may become infected with the animal disease or parasite and the characteristics of such infection in each such kind of animal¹⁵⁹ indicates the tests to which the animals in question must be subjected in order to ascertain whether the animals are infected with the disease in question.¹⁶⁰ To determine the methods, according to which tests must be carried out, and the remedy, substance or equipment to be used for such tests,¹⁶¹ determine the manner in which animals that are infected with the animal disease concerned, must be treated, kept, cared for or otherwise disposed of is crucial.¹⁶² By determining the manner in which and the period during which animals to which the scheme applies, must be kept, cared for and treated, and the control to which such animals must be subjected guidance is obtained.¹⁶³ Such notice must also specify the information to be recorded by persons participating in the scheme,¹⁶⁴ determine the facilities to be provided by a person participating in the scheme for the purpose of performing controlled

156 S 3(3)(b).

157 S 3(3)(c).

158 S 3(3)(d).

159 S 3(3)(e).

160 S 3(3)(f).

161 S 3(3)(g).

162 S 3(3)(h).

163 S 3(3)(m).

164 S 3(3)(n).

veterinary procedures or tests,¹⁶⁵ and specify the marks with which and the manner in which the animals must be marked.¹⁶⁶

Although animal health schemes focus exclusively on animal disease and health issues, the animals used for the scheme objectives remain subjected to vivisection procedures. Section 1 of the Act defines “controlled veterinary procedures” as follows:

In relation to any animal or thing, means:

- a) the isolation, detention, inspection, counting, examination, testing, immunisation, disinfection, dipping, observation, sampling, marking, movement, treatment, care, destruction or any other disposal thereof;
- b) the carrying out of any intervention or of any post-mortem or other examination thereon ...

When reading the provisions of Section 16 in conjunction with the definition given for “controlled veterinary procedures” it becomes clear that animals are still regarded as property. Making use of words “testing”, “marking” and, the “carrying out of any intervention” poses a problematic issue for the following reasons. Firstly, on what grounds can members of society be satisfied that the examinations and tests conducted in terms of Section 16 are “controlled veterinary procedures” if there are no provisions that allow for investigations or inquiries to take place? Secondly, scientific examinations and tests are most likely to be conducted by research laboratories. In most instances, research laboratories fail to provide any information in terms of their procedures, methods and statistics. How will the Minister obtain relevant information as required by Sections 16(3)(c) - (h), (m) and (p) to establish a scheme if research laboratories are entitled to withhold such information as a result of categorizing requests thereof as “exceptions”?

165 S 3(3)(o).
166 S 3(3)(p).

Thirdly, Section 25 pertains to the confidentiality of information that relates to the business or affairs conducted in terms of the Act. Section 25(1) and (e) states:

- 1) No person may disclose any information that relates to the business or affairs of any person, acquired by him or her through the exercise of his or her powers or performance of his or her duties in terms of this Act, except –
 - (e) to the extent necessary in order to comply with a law dealing with access to information.

Section 25(e) confirms that information may be released to comply with the law dealing with access to information but requests to obtain relevant information made by the general public are not released, not even when requests are made in terms of the right of have access to information. The withholding of relevant information as requested can thus have an influence on the welfare of animals in an indirect manner and be assumed to constitute a direct breach of the right of access to information as contained in Section 32 of the Constitution, which states¹⁶⁷ and Section 6 of PAIA. Section 6 of PAIA states:

Nothing in this Act prevents the giving of access to-

- (a) a record of a public body in terms of legislation referred to in Part 1 of the Schedule; or
- (b) a record of a private body in terms of any legislation referred to in Part 2 of the Schedule.

Although information may be refused under various other provisions of the PAIA, the reasons and subsequent provisions regulating refusal of information are discussed at a later stage in chapter 3.

167 (1) Everyone has the right of access to any information held by the state; and any information that is held by another person and that is required for the exercise or protection of any rights. (2) National legislation must be enacted to give effect to the right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

3.4 *Antarctic Treaties Act 60 of 1996*¹⁶⁸

On 23 June 1961, South Africa became one of the 12 signatory states to the *Antarctic Treaty* of 1959. While South Africa has made no territorial claim to any part of Antarctica, it maintains a number of bases in Antarctica for the purposes of scientific research. On the 24th October 1996, the President assented to the *Antarctic Treaties Act 60 of 1996*, which incorporates the *Protocol on Environmental Protection to the Antarctic Treaty* (1991), the *Convention for the Conservation of Antarctic Seals* (1972) and the *Convention on the Conservation of Antarctic Marine Living Resources* (1980) into South African law.¹⁶⁹ The scope of the ATA is to ensure that levels of pain and suffering are regulated in terms of scientific procedures conducted on animals. Although the scientific procedures are limited to very specific cases (Antarctica), the ATA does, however, form part of our legislative framework in relation to animals.

The ATA prohibits the taking of, or the harmful interference of Antarctic fauna and flora, except in accordance with a permit, which is found in Annex II of the *Protocol on Environmental Protection to the Antarctic Treaty* (1991). In terms of Annex II, the permits will only be issued for specific authorised activities, which include the providing of providing specimens for scientific research,¹⁷⁰ museums, herbaria, zoological, botanical gardens or other educational or cultural institutions or uses.¹⁷¹ The issue of such permits shall also be limited so as to ensure that no more native mammals, birds and plants are taken than strictly necessary¹⁷² and a permit shall not be issued to take a Specially Protected Species unless such species being taken is for compelling scientific research¹⁷³ and such taking was done with non-lethal

168 Hereafter referred to as the "ATA".

169 Dugard International Law 146-147.

170 Art 3(2)(a).

171 Art 3(2)(b).

172 Art 3(3)(a).

173 Art 5(a).

techniques.¹⁷⁴ Article 6, however, is the most compelling, as it requires that the taking of mammals and birds shall be done in a manner which involves the least degree of pain and suffering practicable. Although vivisection is not regulated, the Act does form part of our legislative framework relating to animals and Annex II does provide a measure of regulation in terms of human conduct towards animals. The only problem to arise from the Annex is that no schedule is included by which degrees of pain and suffering for different species of animals and birds may be measured. Therefore, human action under this particular Act may be applied at own discretion that may cause the welfare of animals to not be sufficiently addressed.

3.5 Veterinary and Para-Veterinary Professions Act 19 of 1982

Para-Veterinary profession rules are promulgated by means of two Regulations. GN R1445 in Government Gazette 18313 of 03 October 1997 regulates conduct of Animal Technologists and Regulation GN R770 in Government Gazette 30184 of 24 August 2007 regulates conduct of Animal Health Technicians.

3.5.1 GN R1445: Rules relating to the practising of the Para-Veterinary Profession of Laboratory Animal Technologist

The Regulation focuses on the general services, specialised services and conduct provided for and applicable to Laboratory Animal Technologists. The Regulation requires that all general services performed by Laboratory Animal Technologists be carried out under the supervision of a veterinary or medical practitioner.¹⁷⁵ These services shall include *inter alia* the care of experimental animals,¹⁷⁶ oral administration and administration of inhalation of “scheduled” and

174 Art 5(c).

175 Regulation 3.1.

176 Regulation 2.1.

“experimental substances”¹⁷⁷ and transportation of experimental animals.¹⁷⁸

Regulation 2.1 refers to “care of experimental animals”. Regulation 1, however, only defines animal experiments¹⁷⁹ and experimental animals.¹⁸⁰ No definition is provided for what may constitute the requirement of “care”. “Care” as such may consist of a variety of methods employed to ensure the health of another. Methods employed in terms of “general care” in relation to methods employed in terms of “exceptional care” differ dramatically. What standard of care does Regulation 2.1 require of a Laboratory Animal Technologist? Is it a standard of reasonable care, general care, sufficient care or exceptional care? The lack of defining the term “care” under the above circumstances causes ambiguity and may therefore make the application of Regulation 2.1 difficult, causing unnecessary animal suffering, discomfort, pain and distress which ultimately contributes to insufficient laboratory animal welfare.

Regulation 2.2 constitutes a direct contravention of specific provisions of the APA. Regulation 2.2 states that an experimental animal may be subjected to “oral administration of scheduled and experimental substances as well as administration by inhalation of scheduled and experimental substances”. Sections 2(m)(ii) and (n) are listed as offences that may not be committed by humans in respect of animals in terms of the APA. Whether scheduled or experimental substances are administered orally or by inhalation, the suffering that may be endured by animals in both instances is unacceptable. Although it may seem harmless for an animal to inhale or orally consume a scheduled¹⁸¹

177 Regulation 2.2.

178 Regulation 2.12.

179 Regulation 1 – means any procedure whereby an animal is used in experiments for the purposes contemplated in Regulation 4.11.

180 Regulation 1 – means non-human vertebrates and non-human vertebrate foetuses which are bred or acquired for the sole purpose of using it as an animal experiment.

181 The scheduled or scheduling status of a substance finds its application in terms of the *Medicines and Related Substances Act* 101 of 1965. Substances are provided

substance, such substance is more likely to be an “unapproved pharmaceutical” substance manufactured for human or animal consumption that has not been sufficiently tested, than being a tested and approved substance that is safe for human or animal consumption. The oral administration of an experimental substance “without reasonable cause” is an offence in terms of Section 2(n) of the APA. However, the shortcomings of the APA in providing definitions of words contained in its provisions in combination with shortcomings of other statutes or Regulations such as the current Regulation weaken the comprehensive authority these laws intended to offer society. The consequences of weakened authority are visible in South Africa. The weakened authority due to legislative shortcomings has directly influenced our entire legal framework causing a substantial diminution of animal protection, welfare and care.

The offence of subjecting an animal to the inhalation of experimental substances is governed by Section 2(m)(ii) of the APA. The APA states that a person may not secure, restrain or confine any animal under such conditions as to cause such animal to be excessively exposed to exhaust gases or noxious fumes. Regulation 2.2 does not provide any additional information from which a “reasonable inference” may be drawn that experimental animals should not suffer unnecessarily during the procedure of administering experimental substances by means of inhalation. Author is therefore of the opinion that Regulation 2.2 lacks substantial criteria in terms of the following:

1. The time needed to expose animals to inhalation of experimental substances before the Laboratory Animal Technologist is satisfied that the animal has inhaled the required volume of gas or fumes before unnecessary suffering takes place.
2. What are the acceptable procedures or methods that may be used by the Laboratory Animal Technologists to “confine”,

with a schedule status according to their pharmacological actions or chemical structure.

“secure” or “restrain” animals without causing them unnecessary suffering?

3. What is the applicable standard from which adequate conditions are determined for experimental animals before excessive exposure to exhaust gases or noxious fumes occurs?
4. Which guidelines do Laboratory Animal Technologists follow to fairly and reasonably “judge” when an animal is suffering unnecessarily, experiencing pain, discomfort or distress during inhalation procedures?
5. How do the Laboratory Animal Technologists determine proper volumes of gas or fume inhalation by animals before unnecessary suffering takes place if the substances used during these administration procedures are “experimental”?

Is it not reasonable to assume that animals may in terms of Regulation 2.2 be “excessively exposed” to exhaust gases or noxious fumes without the Laboratory Animal Technologist being aware that such exposure is excessive and causing the animal to suffer unnecessarily. Although the APA strictly refers to “exhaust gases” and noxious fumes, experimental substances that require inhalation methods also include biohazard, medical and pharmaceutical gases to be administered to experimental animals. In 1996, six hundred and twenty-four baboons were killed during an “asbestos-inhalation” experiment conducted at the National Centre for Occupational Health.¹⁸² Baboons rescued unfortunately had already been maimed because of huge numbers that had been tattooed across their chests.¹⁸³

Transportation of experimental animals is authorised by Regulation 2.12. The Regulation provides no clear indication of the means of transport that may be used, conditions under which experimental animals may be transported, required procedures that need to be followed when transportation takes place or the measures the Laboratory Animal

182 Hereinafter referred to as the “NCOH”.

183 Pickover *Animal Rights* 113.

Technologist needs to employ to ensure that the transported experimental animals are not subjected to unnecessary stress, discomfort or pain.

Regulation 4 regulates “special services” which pertain to the profession of Laboratory Animal Technologists. Regulation 4.1 requires of a Laboratory Animal Technologist to attend to the “daily general care of laboratory animals”. It is regarded in terms of the Regulation as “daily general care”. No definitions are provided under Regulation 1 of the Regulation. Does “daily general care” refer to the feeding of the animals, cleaning of animal cages and the exercising of animals, or may it be assumed that more specific care and welfare requirements have to be addressed during “daily general care routines”? Regulations 4.11(b)-(e), (g) and (h) raise particular concerns. These subsections may serve as an admission that experimental animals are deliberately subjected to potentially harmful, painful and stressful experiments that may or may not cause animals contained in research laboratories to suffer unnecessarily. These subsections also carry the weight of potential criminal prosecution. The person or people regarded as the owner or owners or those exercising reasonable care and supervision in respect of these animals may be liable in terms of Sections 2(d)-(e) and 2(q)-(s) of the APA for the commission or omission of their actions.

Special services performed by Laboratory Animal Technologists include conducting of experiments with experimental animals for any of the following purposes as set out under Regulation 4.11:

- a) The advancement of knowledge;
- b) to test a hypothesis;
- c) to supply a product;
- d) to provide organs, tissues or sera;
- e) to act as a host;
- f) to impart or demonstrate existing knowledge;
- g) to learn or teach surgical and other techniques;
- h) to comply with statutory requirements for testing or collecting data on any substance or product; and
- i) to make audio-visual recordings of any of the above.

A person may not in terms of Section 2(d) of the APA expose an animal to infectious agents without taking precautions to prevent injury or disease to such an animal. An owner of an animal is forbidden by Section 2(e) of the APA to deliberately or negligently allow such an animal to become infested with external parasites. The remaining applicable provisions of the APA state as follows, Section 2(q):

“causes, procures, or assists in the commission or omission of any of the aforesaid acts or, being the owner of any animal, permits the commission or omission of any such act; or

- (r) by wantonly or unreasonably or negligently doing or omitting to do any act or causing or procuring the commission or omission of any act, causes any unnecessary suffering to any animal; or
- (s) shall, subject to the provisions of this Act and any other law, be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding twelve months or to such imprisonment without the option of a fine”.

Taking into consideration the three above provisions of the APA in comparison to the subsections of Regulation 4.11, the conduct of the Laboratory Animal Technologists is in direct contravention of the above three sections of the APA. Particular attention is drawn to Regulation 4.11(b) that authorises testing of hypotheses. Untested hypotheses and methodologies are currently not critically reviewed by Animal Ethics Committees¹⁸⁴ in South Africa before research is conducted, resulting in inadequate protection being offered to laboratory animals in terms of acceptable research methods.¹⁸⁵ Regulation 4.11(c), intended to supply a product in terms of experimental research, relates to cosmetic and household product testing which may be regarded as the cruellest, most trivial and discredited experiments conducted on animals. Animals continue to die in trivial tests such as the Draize eye test and the LD50 type tests.¹⁸⁶ The Draize eye test and LD50 type tests have been

184 Hereinafter referred to as the “AEC”.

185 Pickover *Vivisection in South Africa* 30.

186 Pickover *Vivisection in South Africa* 123.

discussed and this discussion clearly reflects that rabbits are restrained and confined for up to eight hours in small wooden boxes in order to conduct these experiments.¹⁸⁷ Restraining these animals for such long periods does result in unnecessary suffering apart from the inherent abuse of the experiment procedure. Regulation 4.11(d) requires that Laboratory Animal Technologists “harvest” organs, tissues or sera from experimental animals. Various different species of animals are utilized for harvesting organs but mostly the animals used are pigs, primates and baboons. During experiments baboons are subjected to major transplant surgery. Pig organs are sewn either into or outside the baboon’s bodies. In some experiments organs from transgenic pigs (the gene pool of the pigs contain human DNA) are inserted to other species of animals.¹⁸⁸

Under Regulation 4.11(e) and (g) Laboratory Technicians conduct research experiments by utilizing the experimental animals as a host (4.11(e)), or as an “object or tool” to learn or teach surgical and other techniques. Animals used as “hosts” are deliberately inoculated or injected with parasites, pesticides, viruses and other infectious agents in order to act as “surrogate humans”. Section 2(e) of the APA prohibits “deliberate actions” by which animals are allowed to become infested with parasites. The subjection of animals to procedures during which students learn surgical and other techniques is probably the most painful and distressing “experiments” animals may be subjected too.

Legislative requirements for testing of substances or products are generally not problematic. The problem manifests in the actions of humans when continuously conducting tests to comply with statutory requirements on living animals as opposed to implementing the principles of the “three “Rs”. The first R refers to the *reduction* in numbers of animals used during research, the second to the *refinement* of experimental methods used during research and the last to the *replacement* of animals with non-animal techniques. The “three Rs” not

187 Carbone *What Animals Want* 23-25.

188 Pickover *Animal Rights* 124.

only provide valuable guidance for the use of animals in science but also ensure sufficient scientific assessment of animal welfare involved. Diverse elements that require consideration as a whole are selected and weighed, resulting in value-based judgments being taken as opposed to mere value-based assumptions. It has become a necessity for regulators and politicians in South Africa to realise that animal testing will not protect citizens from harmful chemicals, substances or other consumer products.¹⁸⁹

In general, the code of conduct expected of Laboratory Animal Technologists contained in this Regulation is by definition a problematic document. The conduct expected may be in conflict with the actual services practically required by the profession. The Regulation stipulates that Technologists “are members of learned and honourable professions and that they are required to act at all times in such a manner that shall not disgrace the profession and shall not permit themselves to be exploited in a manner which may be detrimental to an animal ...” The question arises as to how a Laboratory Animal Technologist can provide such services “at all times” if one has regard to the conduct required during “animal experiments”?¹⁹⁰

3.5.2 GN R770: Rules relating to the practising of the Para-Veterinary Profession of Animal Health Technician

In terms of the Regulation only certain procedures¹⁹¹ may be performed without Veterinary supervision, while other procedures¹⁹² must be performed under the supervision of a Veterinary surgeon during the course of the animal health technician’s employment. The Regulation further also states that animal health technicians may render other services which fall within the scope of training and experience of an Animal Health Technician and which are essential to save lives or relieve

189 Pickover *Vivisection in South Africa* 123-124.

190 Pickover *Vivisection in South Africa* 114-115.

191 Castration of cattle, sheep, goats and pigs under a certain age, tail docking, feet trimming and branding.

192 Lancing of abscesses, treatment of septic wounds and administration of injections and medicines.

suffering in animals on condition that a report thereon is made to a Veterinary surgeon.¹⁹³ The Regulation, however, does not define what “suffering” would constitute or what measure of “relief” may be used to assist the animal. The Regulation also does not define what circumstances in terms of animal health will constitute an “emergency” that will render it necessary for a Technician under training to make a decision pertaining to such animals’ welfare without the necessary supervision of a qualified Veterinarian. Is it satisfactory that an Animal Health Technician may “relieve” an animal from “suffering” in terms of an “emergency situation” when most of the criteria on the basis of which the Technician has to make a decision are not defined in terms of the Regulation?

Animal Health Technicians employed do not only render services to registered private Veterinary surgeons but also to university research laboratories and private research laboratories. In terms of the Regulation, “primary animal health care” means general care, disease prevention, parasite control, husbandry, housing and feeding of animals. Regulation 6.1(b) states that the Animal Health Technician is morally obliged to maintain, at all times, the “highest standard” of animal health care and professional conduct. The physical as well as mental needs of animals in a particular environment need to be taken into account before decisions are made.¹⁹⁴ Animal health care may thus in terms of the Regulation be interpreted to require that the animal experience a high quality of life concerning the animals’ environment and overall health. Quality of life is described as the experiences humans and animals encounter throughout their existence that contributes to either pleasantness or unpleasantness on a continual basis from their immediate surroundings and circumstances.¹⁹⁵ It is therefore true that animal health care encompasses the coping, natural living, and absence of suffering, whilst animal welfare is interpreted as describing overall

193 Regulation 5.

194 Kaliste *Animal Welfare* 4.

195 Nordenfelt *Animal and Human Health* 98-99

well-being.¹⁹⁶ The keeping of animals in small ill-ventilated cages without adequate food and water in a research laboratory does not constitute a high standard of animal health care. A high standard of care in terms of the above definition given would require that the coping (mental needs), natural living and absence of suffering of laboratory animals in conjunction with the overall well-being of such animals be addressed to deliver the “high standard of care” required by Regulation 6.1(b).

Furthermore, Regulation 6.4 states that a person practising as an Animal Health Technician shall comply with the standards as set out in the “Good Laboratory Practice Code”. Research institutions in South Africa are currently authorised to write their own rules and codes of conduct. Research institutions are not only responsible for drafting their own rules but also to ensure that such rules are complied with.¹⁹⁷ The major issue with the “Good Laboratory Practice Codes” lies in two facts. One, the chain of command in relation to decision-making is muddled. The South African Veterinary Council¹⁹⁸ has the authority in terms of section 30 of the *Veterinary and Para-Veterinary Professions Act* 19 of 1982 to draft, implement and monitor the “Rules” or “Codes” relating to conduct followed under the profession. However, Animal Ethics Committees established under the first National Code in 1990¹⁹⁹ control the use and care of experimental animals in research laboratories. Although Veterinarians may have a conflict of interest in terms of certain “Codes” of conduct, members of the Animal Ethics Committee make the final decision in relation to such “Codes” and the decisions taken are not made public, not even to Veterinarians. Members of these committees are also subject to institutional secrecy. Two, in relation to the secrecy involving decisions taken, effective control or monitoring of decisions taken concerning “Codes of Practice” is not possible. Not only do

196 Nordenfelt *Animal and Human Health* 98.

197 See www.animalrightsafrika.org/VivisectionEthicsCommittees.php

198 Hereinafter referred to as the “SAVC”.

199 National Code for Animal use in Research, Education, Diagnosis and Testing of Drugs and Related Substances, 1990.

research institutions withhold such information, the standards according to which members of Animal Ethics Committees decide upon these guidelines or “Codes” are not open to veterinary or public scrutiny. Veterinary and public participation in the decision-making process of “Codes of Practice” is thus denied.²⁰⁰ Participation by qualified Veterinarians is of the utmost importance. Qualified Veterinarians are skilled medical professionals who have acquired the necessary experience in a variety of fields relating to animals. The contribution Veterinarians can make in terms of “Codes of Practice” is vital and critical, as they are well aware of the environments and circumstances the animals are exposed to. Public scrutiny is also not without value. Although members of society are not medically qualified, the legal conviction of the community to be supportive or unsupportive of certain “Codes of Practice” does have a bearing in terms of the action taken in terms of animals.

3.6 Review of animal care and use in South Africa

The South African Veterinary Foundation²⁰¹ opted to initiate a project and undertook to work closely with the National Department of Agriculture in reviewing current policies, procedures and legislation and to develop a comprehensive Animal Care and Use Manual.²⁰²

According to the Animal Care Policy of the Department of Agriculture,²⁰³ the “Codes of Conduct” and Procedures involving animals will be incorporated in the Regulations. Due to the drafting of legislation being a lengthy process, a decision was made by the SAVF to make use of current Regulations whereby the Minister of Agriculture may implement new Regulations referring to specific codes, which could regulate specific sectors and activities.

200 See www.animalrightsafrica.org/VivisectionEthicsCommittees.php.

201 Hereinafter referred to as the “SAVF”.

202 South African Veterinary Foundation Homepage 2012
<http://www.savf.org.za/Documents/AnimalCareLegislationReview.pdf>.

203 Hereinafter referred to as the “DoA”.

An important element of incorporation into the Animal Care and Use Manual is that of the internationally recognized “three Rs”. The SAVF took the initiative and drafted proposals; the Department of Agriculture. However, has not come to a feasible conclusion on the matter. The proposals, among others, include; revising and redrafting the APA, revising and redrafting “Codes of Conduct”, incorporation of the “three Rs” into “Codes of Conduct” manuals and the revision of other applicable legislation to name a few. This may, however, be a contributing element in the question as to why current Regulations have not been developed and implemented and why new policies or “Codes of Conduct” have not been implemented either.²⁰⁴

3.7 Funding of research experiments and laboratories

Varieties of stakes are lodged in animal experimentation throughout South Africa. Breeders supply animals for research and dissection while researchers receive generous grants from pharmaceutical companies, government departments and private companies. Chemical and pharmaceutical companies, universities, universities of technology, government agencies, the military and manufacturers of cosmetic and household products are those who have the largest stakes in the use of animals for research purposes.²⁰⁵

Funding of programmes and projects undertaken in terms of research seems to be somewhat of a sensitive matter in South Africa. Research facilities and institutions do not only receive funds from international trust fund organisations but also from South African governmental departments and private companies on whose behalf such research is conducted.

The Department of Science and Technology²⁰⁶ is the lead department with respect to biotechnology²⁰⁷ and is responsible for its administration.

204 See www.animalrightsafrica.org/VivisectionEthicsCommitte.php.

205 Pickover *Animal Rights* 120.

206 Hereinafter referred to as the “DST”.

207 Use of living organisms and species by humans to develop other products.

Biotechnology encompasses the methods and techniques employed by scientists to develop tissue samples, culture tissue cells, genetic engineering, recombinant DNA techniques, and development of drugs, antibiotics and so forth. Together the DST and the Department of Trade and Industry established the first dedicated biotechnology venture capital fund in South Africa, named Bio-ventures. Bio-ventures provide seed funding and funding for start-up biotechnology companies.²⁰⁸

The Medical Research Council of South Africa²⁰⁹ formed the South African Aids Vaccine Initiative in 1999. Primary funding was received from the Department of Health,²¹⁰ the DST and Eskom, while secondary funding was received from the European Union²¹¹, Transnet and Impala Platinum mine.²¹² The MRC has as its principal stakeholder the National Department of Health,²¹³ as it provides the MRC with its baseline budget.²¹⁴ The MRC also contributed to the University of Cape Town²¹⁵ during 2006 an astonishing amount of R2.4 million for its Institute of Infectious Disease and Molecular Medicine.²¹⁶ The UCT furthermore received R8 million from the United Kingdom's Wellcome Trust for the new Research Animal Facility established by the UCT and the MRC.²¹⁷

One of the most controversial issues of funding stems from funds received by Onderstepoort Biological Products.²¹⁸ OBP is a public company with the State being the only shareholder.²¹⁹ In a report to Parliament in October 2005, it was stated that a R15 million "state-of-the-art experimental animal facility" had been constructed. In 2007, however, a member of the public (whistle-blower) informed NGO's that OBP was sending healthy horses to the slaughter auctions or abattoirs

208 Pickover *Vivisection* 62.

209 Hereinafter referred to as the "MRC".

210 Hereinafter referred to as the "DoH".

211 Hereinafter referred as the "EU".

212 Pickover *Vivisection* 64.

213 Hereinafter referred to as the "NDoH".

214 Pickover *Vivisection* 65.

215 Hereinafter referred to as the "UCT".

216 Pickover *Vivisection* 66.

217 Pickover *Vivisection* 74.

218 Hereinafter referred to as the "OBP".

219 Hereinafter referred to as the "UPBRC".

and once OBP had finished testing horses for a new African horse sickness vaccine, the horses were sent to cattle slaughter auctions rather than being properly cared for.²²⁰

The major concern raised from the above directly relates to government funds. The protection of animals is currently monitored by non-governmental organisations, as the DOA does not have a sufficient workforce to control enforcement of the APA. It is problematic that the South African government provides funding to departments such as the NDoH, DoH and DST to continue with animal research but does not assist other departments such as the DOA to provide enforcement and protection to animals held in research laboratories. The funding of research institutions by pharmaceutical companies and foreign trust funds also seems to be a major concern. Receiving funds from pharmaceutical companies and foreign trust funds provides research institutions with “adequate reasons” to continuously withhold vital information and statistics from public scrutiny as the research institutions will hide behind the “exception” that the release of information may be prejudicial to their client and investors. Thus funding is a direct link to what is mostly referred to as an “incentive”. These “incentives” are one of the major problems associated with research experiments, specifically funding (incentives) received from private investors as opposed to governmental funding. The author proposes that private funding (funding not associated with any government research) be prohibited to ensure that non-governmental research laboratories are curtailed. This prohibition possesses the ability to impede the current state of affairs inherent to animal experimental research, because the research laboratories will be financially constrained. Such financial constraints may thus cause an inability to purchase, breed and house research animals. In effect, the financial constraint will adequately reduce animal experimental research. The reduction of animal experimental research in hindsight will thus prevent research laboratories from continuing to conduct unregulated experimental procedures, confinement of animals

220 Pickover *Vivisection* 102.

to research laboratories and potentially limit animal abuse at the hands of laboratory staff. Without sufficient funds, research laboratories will not be able to house animals or employ staff who may abuse the animals during confinement.

The prohibition of private funding may be addressed by revising or amending a current Regulation or by means of drafting a government Funding Policy that solely regulates the funding of research laboratories and animal experiments.

3.8 Transparency and promotion of access to information

The new Constitutional order made way for an open and democratic society with a supreme constitution in which the fundamental rights and freedoms of all citizens are protected. Government is now accountable to society for their actions and citizens are entitled to participate in law-making processes. The Bill of Rights, contained in Chapter Two of the current Constitution is the backbone and the foundation upon which citizens are entitled to enforce their democratic and fundamental rights.²²¹ Public access to information is not only fundamental to encouraging transparency and accountability in the way government and public authorities operate, it is also an important weapon in the fight against corruption and arbitrariness. Freedom of information therefore contributes to an open and democratic society, in which power is exercised rationally and with due deliberation. Section 32 of the Constitution states that:

- (1) Everyone has the right of access to
 - (a) any information held by the state; and
 - (b) any information that is held by another person and that is required for the exercise of any rights.
- (2) National legislation must be enacted to give effect to the right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

221 Currie & de Waal *Bill of Rights* 2-8.

The implementation of the *Promotion of Access to Information Act*²²² ensures that South African citizens now have comprehensive access to information legislation, which gives effect to Section 32 of the Constitution. The main purpose of the PAIA is to elaborate on the constitutional right (Section 32), the limitation thereof and to provide mechanisms for its protection and enforcement.²²³ The constitutional right of access to information may, however, only be relied on directly²²⁴ in exceptional cases where a provision of the PAIA, other legislation²²⁵ or conduct that is beyond the reach of the PAIA is challenged as an infringement of Section 32. Remedies must be found in common law or legislation before resorting to the direct constitutional remedy.²²⁶ This implies that since the enactment of the PAIA, the principal rule of the constitutional right is indirect²²⁷ and can only be relied on in support of the PAIA or other legislation.²²⁸

3.8.1 *General application of the Act*

Sections 3 and 4 stipulate that a record held by a public or private body as well as an independent contractor engaged by such bodies

222 *Promotion of Access to Information Act* 2 of 2003.

223 Currie & de Waal *Bill of Rights* 683-687.

224 "In disputes, in which the Bill of Rights applies as directly applicable law, it overrides ordinary law and any conduct that is inconsistent with it and, to the extent that ordinary legal remedies are inadequate or do not give proper effect to the fundamental rights, the Bill of Rights generates its own remedies". See Currie & de Waal *Bill of Rights* 32.

225 The scope for direct constitutional challenges to legislation is reduced by the fact that the PAIA applies to the exclusion of all prior contrary original delegated legislation and all contrary subsequent delegated legislation: Section 5.

226 In *Ingladew v Financial Services Board: In re Financial Services Board v Van der Merwe* 2003 (4) SA (CC) para 24 the Constitutional Court expressed doubt that a litigant could rely directly on the constitutional right of access to information where a statutory provision (in the case, the discovery laws) dealt with the matter unless the constitutionality of that statutory provision was challenged.

227 "The Constitution and the Bill of Rights establish an 'objective normative value system', a set of values that must be respected whenever the common law or legislation is interpreted, developed or applied. This form of application is termed the 'direct' application of the Bill of Rights. When indirectly applied, the Bill of Rights does not override ordinary law or generate its own remedies, rather, the Bill of Rights respects the rules and remedies of ordinary law, but demands furtherance of its values mediated through the operation of ordinary law". See Currie & de Waal *Bill of Rights* 32.

228 Currie & de Waal *Bill of Rights* 689.

regardless of when such record came into existence shall be subject to the provisions of the PAIA.

Sections 5 and 6 furthermore state that “nothing” in the Act prevents giving access to a record in terms of other legislation, including legislation restricting the disclosure of a record held by a public or private body.

3.8.2 Objects of the Act

In terms of Section 9, the objects of the PAIA are to give effect to the constitutional right of access to “any” information held by the State or another person which is required for the exercise or protection of “any rights”. The provisions of the Act are construed to give effect to such a right, subject to justifiable limitations and in a manner that balances that right with any other rights and to give effect to the constitutional obligations of the State. Section 9(e)(i)-(iii) particularly includes as objects of the Act, the promotion of transparency, accountability and effective governance of all public and private bodies, as well as to ensure effective scrutiny of the functions and operations of “public bodies” which provide citizens with the opportunity to participate in the decision-making process that affects their rights.

3.8.3 Access to records of public bodies

In terms of Section 11(1)(a), a requester²²⁹ must be given access to a record of a public body if such a requester complies with the procedural requirements of the Act. According to Section 11(3)(a)-(b) a request is also not affected by reasons given for requesting access or an information officer’s belief of what such request for access is for.

Section 14(1)(a) also requires that, a public body must within six months after the commencement of this section compile a manual containing

²²⁹ S 1 defines a requester as any person who requests access to a record from a public or private body, or any person acting on behalf of another person whom requests access to a record from a public or private body.

various forms of general information of such a public body, but more specifically under subsection (c) a guide as referred to in Section 10. In terms of Section 10(d), the guide must stipulate the manner and form of a request for access to a record of a public body as set out in Section 11 and access to a record of a private body as contemplated in Section 50.

Section 14(1)(d) furthermore requires the facilitation of sufficient detail to be contained in such manual in relation to a request for access, the description of the subjects on which the body holds records and the categories of records held on each subject.

3.8.3.1 Manner of access

A request for access must be made on the prescribed form to an information officer of the public body concerned as set out in terms of Section 18(1). Information to be submitted by the requester concerned must include *inter alia*: which record or records are requested, an indication which applicable form of access as referred to in Section 29(2) is required and to state whether the record concerned is preferred in a specific language. The requester should then also submit a suitable address to which the information can be faxed, mailed or posted and whether the requester wishes to be informed of the decision made in terms of the submitted request. The information officer must decide within a period of 30 days of receipt of the request, in accordance with Section 25(1), whether to grant or deny the request. Once notice of access has been given to the requester as stated in Section 29(1), the requester must pay an access fee (if and when applicable) and immediately be given access in the applicable form as the requester indicated. The forms of access that may be granted to a record are: a copy of a written or printed record, by viewing images or making transcripts of visual images or printed transcripts, by listening to recorded sounds or by receiving a copy of recordings that have been transcribed if such recorded sound cannot be copied.

3.8.3.2 Grounds for refusal of access to records

Taking into consideration that the release of certain information contained in records held by a public body may result in the infringement of other rights, the PAIA provides public bodies with authority to deny the release of such records. Sections 33 to 46 of the Act specifically deal with these grounds. Protection offered to public bodies under Sections 34-40, 43 and 46 is mandatory. Section 33(1)(a) furthermore states that an information officer “must” refuse to grant access to a record when such record is protected under Section 34(1), access would involve the unreasonable disclosure of personal information about a third party, unless such third party consents thereto in terms of Section 34(2). Section 35(1), enforces legislation concerning the collection of revenue as defined in Section 1 of the *South African Revenue Service Act 34 of 1997*, unless the information concerns the requester personally (Section 35(2)). Section 36(1), if such record contains (a) trade secrets of a third party, (b) financial, commercial, scientific or technical information of a third party and would be likely to cause harm to such third party, unless such record is already publicly available and the third party has consented to such access (Section 36(2)). Section 37(1)(a) deals with a breach of a duty of confidence owed to a third party in terms of an agreement will take place, unless such record is already publicly available and the third party has consented to such access (Section 37(2)). Section 38(a) concerns whether a life or physical safety of an individual will be endangered. Section 39(1)(a) deals with whether such a record is prohibited in terms of Section 60(14) of the *Criminal Procedures Act 51 of 1977*. Section 40 is pertinent when the record is privileged from production in legal proceedings unless the person entitled to the privilege has waived the privilege. Section 43(1) has to do with information about research being or to be carried out by or on behalf of a third party and disclosure of such information would be likely to expose the third party concerned, a person that is or will be carrying out the research on behalf of the third party or the subject matter of the research.

Access to a record “may” be refused by an information officer if access to such record falls under Sections 37(1)(b), 38(b), 39(1)(b), 41(1)(a) or (b), 42(1) or (3), 43(2), 44(1) or (2) and 45, unless the provisions of Section 46 are applicable.

Section 46 reads as follows:

“Despite any other provision in this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34(1), 36(1), 37(1)(a) or (b), 38(a) or (b), 39(1)(a) or (b), 40, 41(1)(a) or (b), 42(1) or (3), 43(1) or (2), 44(1) or (2) or 45, if-

(a) the disclosure of the record would reveal evidence of-

- (i) a substantial contravention of, or failure to comply with, the law; or
- (ii) an imminent and serious public safety or environmental risk; and

(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question”.

3.8.4 Access to records of private bodies

Section 50 states that a requester must be given access to “any” record held by a private body if such a record is required to protect any other rights, subject to the person complying with the procedural requirements. The requirements to produce a manual follow the same principles under Section 51 as that of a public body under Section 14 of the Act.

3.8.4.1 Manner of access

Information submitted by a requester to a private body in order to obtain access to a record under Section 53 is similar to the information required under Section 18 with regard to public bodies. An additional requirement is, however, contained under Section 53(2)(d) that requires the requester to identify the right the requester seeks to exercise or protect and provide an explanatory reason why the record is needed for the exercise

or protection of the particular right in question. Fees payable by the requester are dealt with under Section 54. Once access to a record has been granted, the head of the private body concerned “must” provide access in such form as the requester reasonably requires (Section 60(a)), or if no specific form of access is required by the requester, such form as the head reasonably determines (Section 60(b)).

3.8.4.2 Grounds for refusal of access to records

Mandatory provisions in terms of refusal are also applicable to records of private bodies. The head of a private body is also required in terms of the provisions of the PAIA to refuse a request for access to a record. Refusal is authorised in terms of Section 63(1) – involving the unreasonable disclosure of personal information about a third party or a deceased individual, unless consent is given in terms of Section 63(2) or such information is already publicly available. Section 64 deals with disclosure of trade secrets, financial, commercial, scientific or technical information which would be likely to cause harm to such third party, or confidential information supplied to a third party, if a third party should be disadvantaged in negotiations or a contractual relation or if a third party should be prejudiced in commercial competition. Section 65 has to do with whether disclosure would constitute an action for breach of confidence owed to a third party. Sections 66, 67 and 69 draw on the exact same principles as Sections 38, 40 and 43.

Mandatory disclosure in public interest is regulated in terms of Section 70. Except for the provisions to which Section 70 is applicable, the requirements of this section do not vary from that of Section 46.

3.8.5 Appeals

A requester may lodge an internal appeal against the decision taken by an information officer in terms of Section 74 if a request for access to a record held by a public body is denied.

Section 78 furthermore provides authority to a requester to approach a court of law in terms of Section 82 if such requester has exhausted the internal appeal procedures against a decision taken by an information officer of a public body or the head of a private body.

3.8.6 Vivisection and the problems with gaining access to information

Gaining access to information about vivisection from the public bodies (State) or private bodies in South Africa has not been successful in the past.²³⁰ Various Non-Governmental Organisations,²³¹ in particular animal protection and welfare organisations, have been frustrated when trying to utilise the PAIA.²³² Requests made to research laboratories in accordance with the procedural requirements as set out in the PAIA have not resulted in any information being released or provided by research laboratories to the particular requesters concerned.²³³ Standard responses to the PAIA requests in relation to information about animals contained in research laboratories whether by private and public bodies or universities have not generated any positive responses and in most instances no responses are received at all.²³⁴ Once all internal procedures for appeal against the decisions made to deny access to records are exhausted, the requesters have no other option than to approach the High Court at huge expense to enforce compliance with the PAIA. Shortcomings of this nature in terms of the PAIA frustrate the process of gaining access to information and place an unnecessary financial burden on requesters. The process of Constitutional litigation commences at the High Court, followed by an appearance in the Supreme Court of Appeal, and finally the Constitutional Court is addressed. In most instances, litigation specialists (Advocates) represent the parties concerned. The expenses involved during Constitutional litigation are not affordable for the majority of South African citizens. The shortcomings of the PAIA process of gaining

230 Pickover *Animal Rights* 121.

231 Hereinafter referred to as "NGO" or "NGO's".

232 Pickover *Vivisection in South Africa* 36.

233 Pickover *Vivisection in South Africa* 36.

234 Pickover *Vivisection in South Africa* 36.

access to information do not serve the greater good of citizens as proposed by the Act.

Placing requests has also proved to be a major problem. Although research laboratories (in most cases) have PAIA manuals, they seem unable or unwilling to implement the provisions of the manuals when NGO's place a request.²³⁵ The purpose of the obligation to compile a manual is to ensure that private and public bodies provide basic organisational and archival information. The facilitation of the information request process and empowerment of individuals to exercise their right of access to information is the purpose of this reference tool. The implementation of the *Judicial Matters Second Amendment Act*²³⁶ places public body information officers and heads of private bodies who fail to comply with the manual-related duties under exposure to criminal sanctions. Sections 24(2) and (3) of the *Judicial Matters Second Amendment Act* state that information officers or heads of private bodies who wilfully or in a grossly negligent manner do not comply with their duties in terms of Section 14 of the PAIA (public body) and Section 51 of the PAIA (private body) commits an offence and is liable on conviction. Sections 14 and 51 of the PAIA mandate compliance to compile and update manuals containing sufficient detail to facilitate a request for access to information held.²³⁷ Thus, the standard of liability imposed upon heads of private bodies and information officers of public bodies as it currently stands is inappropriate and a preferable solution would be to take into account the differences between private and public bodies. Implementing strict liability standards is practical for private and public bodies.²³⁸

NGO's also find it exceptionally difficult and frustrating to ascertain who the responsible information officer (public bodies) or head (private body or university) is. It is assumed that confusion in this regard directly

235 Pickover *Vivisection in South Africa* 36.

236 *Judicial Matters Second Amendment Act* 55 of 2003.

237 Wood 2011 *SAJHR* 559.

238 Wood 2011 *SAJHR* 558-565.

relates to the delegation of powers provided for in terms of Section 17, the transfer of requests in terms of Section 20, the deferral of access under Section 24 and the extension of the period to deal with the request in terms of Section 57. Requesters are also dealt with in an *ad hoc* fashion – answering requests is not a priority.²³⁹ The complete and utter silence in response to submitted requests by NGO's to research laboratories amounts to maladministration and contravention of the provisions of the PAIA.²⁴⁰ The contravention of the provisions is effectively denying South Africans a fundamental human right in terms of Section 32 of the Constitution, including a useful mechanism needed to empower citizens.²⁴¹ Research laboratories commonly categorise requests as “exceptions” to deny the release of such particular information. The “exceptions” that are used as to why information cannot be released are, *inter alia*, that access would infringe the constitutional right to privacy, expose trade secrets, endanger the lives of researchers, threaten national security or reveal patent information.²⁴² The word “exception” or “exceptions” is not, however, defined under Section 1 in the PAIA. No provisions in the Act either list or refer to “exceptions” that may be applicable and subsequently used to deny requests. Section 43 in the case of public bodies and Section 69 in the case of private bodies is exceptionally important with regard to the above. Both sections provide mandatory protection of research information of third parties, and protection of research information as such. Sections 43(1)(a)-(c) (public body) and Sections 69(1)(a)-(c) (private body) state that access requested to records subject to these provisions “must” be refused. However, Sections 43(2)(a)-(c) and Sections 69(1)(a)-(c) contain the exact same words as the above two sections with the difference that access requested to records subject to latter provisions “may” be refused. In both instances it would seem that granting or denying access to records are based on discretion by the relevant person granting or denying access, unless Section 46 in terms

239 Pickover *Vivisection in South Africa* 36.

240 Pickover *Vivisection in South Africa* 36.

241 Pickover *Vivisection in South Africa* 37.

242 Pickover *Vivisection in South Africa* 36.

of public bodies is applicable. In the recent case *President of the Republic of South Africa and Others v M & G Media Ltd*,²⁴³ the Supreme Court highlighted that there exists a need for public bodies from whom information is requested in terms of the PAIA to foster “a culture of justification”. Once the matter was heard by the Constitutional Court,²⁴⁴ the court found and pointed out the exact same as the Supreme Court of Appeal, that, “the holder of information bears the onus of establishing that the refusal of access to the record is justified under the PAIA.”²⁴⁵

Furthermore, Sections 11(3)(a) and (b) (applicable to public bodies) strictly state that a requester’s right of access is not affected by “any reasons the requester gives for requesting access; or the information officer’s belief as to what the requester’s reasons are for requesting access”. May it therefore be assumed that access to records held by public and private bodies as well as universities is deliberately being denied to NGO’s at the expense of animals for reasons only known by information officers? Can it furthermore also be possible that the refusal of information by those responsible is done at the expense of citizens by encroaching upon their fundamental right to have access to information in terms of Section 32 of the Constitution?

South African citizens have a right to share in the interests and decision-making process that affect their daily lives as stated under Section 9(i)(iii) of the PAIA. Being denied access to information held by research laboratories has the direct result that citizens are not able to further their interests or the interests of the animals contained in these laboratories. It is imperative that animal protection organisations know:

1. what type of experiments are being approved by government;
2. who the responsibility of approving experiments lies with;

243 *President of the Republic of South Africa and Others v M & G Media Ltd*. [2011] 3 All SA 56 (SCA).

244 *President of the Republic of South Africa and Others v M & G Media Ltd*. 2012 2 BCLR 181 (CC).

245 Murcott & McLeish 2012 *Without Prejudice* 42-43.

3. what the reason is for approving, conducting and making use of a specific experiment;
4. why scientists believe that the research should be conducted;
5. which species of animals will be used during the experimental procedure;
6. how many animals from a particular species will be used;
7. the effect the experiments will have on the welfare of the animals;
8. how the animals will be treated during their confinement; and
9. what will happen to the animals once the protocol is complete?²⁴⁶

Obtaining relevant information is important for transparency and accountability. Mandatory protection offered by the provisions of the PAIA cannot ensure that adequate information be released to further develop legislation to avoid maltreatment of animals in research laboratories. The release of information can, however, assist citizens in proposing new legislation that may restrict the maltreatment of animals sufficiently. Essentially, the PAIA cannot and should not contain mandatory protection provisions. Mandatory protection provisions deny access to information held by public and private bodies. These provisions are therefore impeding transparency and accountability, which can assist citizens in protecting fundamentally entrenched rights and that, may offer the necessary relief sought by NGO's to protect the interests of animals contained in research laboratories.

3.9 The Constitutional imperative

In terms of Section 39(2) of the Bill of Rights, the Constitution²⁴⁷ requires that courts develop common law in order to harmonise it with the constitutional norm.²⁴⁸ Although the Constitution currently does not provide an obligation on people to treat animals without cruelty and in a humane manner, our Constitution does have the resources for it to be

246 Pickover *Vivisection in South Africa* 37.

247 The Constitution of the Republic of South Africa, 1996.

248 Currie & de Waal *Bill of Rights* 67-68.

interpreted to recognise the dignity and interests of animals.²⁴⁹ The recognition of animal dignity and interests may very well be an answer to developing common law and legislation to ensure sufficient welfare for animals contained in research laboratories. The recognition of animal dignity by means of interpretation is briefly discussed to provide some clarity.

3.9.1 *The capabilities approach and dignity*

The alternative concept of dignity is known as the capabilities approach. This approach is rooted in the theory of value. The capabilities approach requires that the value of an individual life is rather to be understood in view of such individuals' functioning and capabilities within a society rather than its special value in terms of its complex characteristics.²⁵⁰

Martha Nussbaum is one of the famous proponents of the capabilities approach as discussed in her book *Frontiers of Justice*.²⁵¹ According to Nussbaum the capabilities approach concerns the following:

“... [T]he dignity of form of life that possesses possibilities and deep needs, its basic goal is to address the need for a rich plurality of life activities”.²⁵²

For Nussbaum value lies in the capabilities of a species as opposed to only human capabilities. She also contends that not only humans as sentient beings are entitled to be regarded as subjects of justice but rather that many other sentient beings may be so regarded that will include 'each life with its dignity'.²⁵³ The value of functioning and capabilities of a sentient being is thus determined according to what enables individual creatures to flourish in the realm of being that it inhabits. Flourishing takes different forms and so do different sentient beings. Thus, the core of the capabilities approach will be based upon the notion that:

249 Bilchitz 2009 *SAJHR* 62-68.

250 Bilchitz 2009 *SAJHR* 62.

251 Nussbaum *Frontiers of Justice* 2006.

252 Nussbaum *Frontiers of Justice* 346.

253 Nussbaum *Frontiers of Justice* 356.

“... [A]nimals are entitled to a wide range of capabilities to function, those that are most essential to a flourishing life, a life worthy of the dignity of each creature”.²⁵⁴

The only pre-condition for attributing the capabilities approach to other ‘beings’ is that such ‘being(s)’ must have a subjective consciousness - in other words, the ‘being’ must be “sentient”. Sentience, according to Nussbaum, cannot be reduced to one type of mental state and is accordingly plural and diverse. Animals, just like humans, pursue a plurality of diverse goods, which include friendship, happiness and sadness as well as freedom from pain, mobility and many other emotional states. Value therefore rests in many varied capabilities and functions of sentient beings. This expansion of the concept of dignity in terms of the capabilities approach may therefore confer worth on all creatures, which are capable of leading a good life, and requires that all sentient beings be treated in a similar fashion in accordance with such worth. This implies that humans may be required to provide duties of justice that include respect, protection, promotion and fulfilment of their entitlements and interests when such sentient beings possess the capability to flourish.²⁵⁵

3.9.2 *Progressive realisation*

Recognising the moral standing of animals may very well serve the human society in transforming our current legislative framework in relation to animal welfare. Bilchitz argues that, since the South African Constitution fails to protect animals, he suggests the provision of protection ‘through drawing out the implied meaning of the provisions that already exist’. This implies that the capabilities approach (concept of dignity) be applied. The solution favoured by Bilchitz is to recognise animals as ‘natural persons’ (as opposed to mere ‘things’) and to establish a first measure towards the ‘progressive realisation’ of their

254 Bilchitz 2009 SAJHR 62.

255 Bilchitz 2009 SAJHR 63.

entitlements ‘something like the five freedoms developed by the UK Farm Animal Welfare Council.²⁵⁶ The UK FAWC states:

“freedom from thirst and hunger, freedom from discomfort, freedom from pain, injury and disease, freedom to express normal behaviour, [and] freedom from fear and distress”.

Although it may not be possible to enforce full constitutional protection for animals at present in South Africa,²⁵⁷ the provisions of the Constitution do offer scope to recognise animals as natural persons by applying the solution as offered by Bilchitz. The development and application of a document that draws on principles or similar principles as the one used by the UK FAWC can possibly ensure the recognition of animal interests in South Africa.

The concept of progressive realisation is thus possible. Entitlements and interests of other sentient beings should be recognised and taken into consideration by means of applying this concept. Bilchitz states:

“Law is evolutionary and the great social justice movements have taken time to achieve just laws”.²⁵⁸

Similar to the process applied in the fight for lesbian and gay equality, Bilchitz holds the view that a similar approach by means of the progressive realisation of animal interests may hold the key for transformation of the current legislative framework by which the interests of other sentient beings may be recognised and legislatively protected. The concept of progressive realisation was introduced in the context of socio-economic rights²⁵⁹ and is contained in the International Covenant

256 Here in after referred to as “UK FAWC”.

257 Horsthemke *Moral Status & Rights of Animals* 132-133.

258 Bilchitz 2009 *SAJHR* 69 at note 152 “The dismantling of apartheid took 45 years since its inception as a formal system in law in 1948 though of course the fight against segregation and racism took hundreds of years...”.

259 Ss 26 and 27 of the Constitution of the Republic of South Africa, 1996.

on Economic, Social and Cultural Rights.²⁶⁰ The Constitutional Court in the *Soobramoney*²⁶¹ case interpreted progressive realisation as follows:

“What is apparent from these provisions is that the obligation imposed on the state by ss 26 and 27 in regard to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled”.²⁶²

Progressive realisation therefore places an obligation on the state to move as expeditiously and effectively as possible towards the fulfilment of a right as well as a minimum core obligation²⁶³ to, at the very least, ensure the satisfaction of minimum essential levels of each right. Although it may not be possible to immediately provide every person with a house, the state must at least ensure that humans have some form of shelter from inherent elements.²⁶⁴

Thus, in the context of animal entitlements and interests, the court may not be able to recognise the full implications afforded to animals by banning all forms of the use of animals for experimentation purposes,²⁶⁵ but it does not mean that the recognition of animal entitlements and interests would be meaningless. Animals suffer various inherent and non-inherent abuses associated with vivisection and containment in research laboratories. If the transformation of the legal framework requires that welfare legislation be imposed on research laboratories, the initial stage of protecting animal entitlements and interests should involve

260 The *International Covenant on Economic, Social and Cultural Rights* of 1996, hereinafter referred to as “CESCR”.

261 *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC).

262 *Soobramoney* at para 11.

263 The concept was developed by the Committee on Economic, Social and Cultural Rights which states: ‘A state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the CESCR.’

264 Bilchitz 2009 SAJHR 70.

265 S 36 of the Bill of Rights – Limitation of rights clause can be applied to restrict the scope of animal entitlements or interests.

the banning of the worst forms of inherent and non-inherent abuses associated with vivisection and laboratory confinement. However, the first step to progressive realisation of animal entitlements and interests would be to recognise the arbitrariness and unjustifiable legal framework as it currently stands in relation to animals.²⁶⁶ Thus, this may be the spark for the expansion of legislation in this regard.

3.10 Conclusion

Although the South African governmental system has taken a major leap from the previous political dispensation, it is evident from the current legal framework pertaining to animals that the legislature must reform and in addition implement appropriate statutes to regulate the welfare of animals. Although the APA addresses some welfare and care needs of animals housed on farms, kept in homes, zoos, pounds and aquariums it does not seem to make essential provision for animals held in research laboratories. Other statutes and Regulations that regulate the conduct of professions associated with animals and animal welfare currently seem to be in direct conflict with the protection offered under the APA. The inadequacies of the APA combined with the poorly drafted Regulations and other statutes that regulate “the conduct” of certain professions seem to be the major shortcoming of our insufficient legal framework regarding animal welfare and care.

Research laboratories hide behind poorly drafted legislation, inadequate enforcement of such legislation, lack of public awareness and insufficient co-operation between NGO's, Animal Ethics Committees and the Council members of professionals associated with animal welfare. The aforementioned does not only impact negatively upon sufficient interest to be shown by members of society but also aids the already insufficient legal framework as there is no accountability to the public either by the government or research laboratories that utilize animals.²⁶⁷

266 Bilchitz 2009 SAJHR 71.

267 Pickover *Vivisection in South Africa* 20.

It is therefore crucial that the “reasons” furnished by public and private bodies for denying access to information be firmly dealt with and scrutinized when an internal or court appeal is brought against such a decision. It seems that public and private bodies are currently abusing the mandatory protection offered in terms of the PAIA to the detriment of citizens and animals. The continuous denial of substantially relevant information held by public and private bodies circumvents the efforts of NGO’s to raise public awareness, encroaches upon fundamentally entrenched rights and seems to aid in condemning animals to a life of unnecessary pain and suffering during containment in research laboratories. Exposure of the vivisection industry to the public will ensure transparency, accountability, public scrutiny and an elevated level of interest, elements that are relevant and needed to assist in reforming our current legal framework in terms of animal welfare.

The progressive realisation of the alternative concept of dignity offered by Bilchitz may serve as a means to further the interests and welfare of animals held in research laboratories. The interpretation of the alternative meaning ascribed to “dignity” as discussed by Bilchitz can serve as a constitutional imperative for legislative reform to include the capabilities approach (dignity) of animals. Although humans and animals do not belong to the same species, it does not indicate that animals have no interests or do not possess “dignity” in terms of the species they belong too. Recognition of other species as fellow sentient beings that also possess capabilities and functions in terms of their specie would provide the platform for transition to commence. Thus, it may very well be that the answer to addressing our insufficient legal framework pertaining to animals lies in offering protection via Section 10 of our Constitution by means of interpreting the alternative meaning ascribed to “dignity”, acknowledging the moral standing of animals and progressive realisation.

The human perception of animals and the value they have to further our interests is based on humans regarding animals as property and “tools”

that may be used at the sole discretion of an owner, supervisor or caretaker. The inherent abuses as well as the non-inherent abuses suffered by animals during their containment in research laboratories are also strengthened by insufficient co-operation among the organizations and other interested parties who possess the ability to afford protection to animals. The relevant animal experiments and the abuses associated with such animal experiments provide a moderately comprehensive background to the treatment animals endure in research laboratories. The legislature may furthermore also take notice of foreign law which is relevant in assisting our government with the reform process. Chapter 4 will discuss two possible examples of foreign jurisdictions, which may provide viable examples and principles from which our government may commence the reform process in South Africa.

Animal liberation is also human liberation. Animal liberationists care about the quality of life for all. We recognise our kinship with all feeling beings. We identify with the powerless and the vulnerable – the victims, all those dominated, oppressed and exploited. And it is the nonhuman animals whose suffering is the most intense, widespread, expanding, systematic, and socially sanctioned of all. What can be done? What are the patterns underlying effective social struggles?²⁶⁸

4 Foreign law comparison

4.1 Introduction

In chapter 3 the analysis of and investigation into the shortcomings of the South African legal framework was conducted in terms of animal welfare, specifically highlighting the various shortcomings of the *Animal Protection Act 71 of 1962*. Consequences of these shortcomings with specific reference to animals contained in research laboratories were highlighted as it is evident that “experimental animals” are subjected to daily pain, suffering and discomfort. Although the APA may offer protection of animal interests, such protection does not include specific provisions dealing with the welfare needs and protection of animals held in research laboratories. Vagueness of provisions and lack of including specific regulating provisions combined with ineffective enforcement of legislation seem to be the major shortcomings of our current legislative framework. Incentives for reform of our current legislative framework are addressed in chapter four to ascertain whether foreign jurisdictions may provide our legislature with useful examples.

The United States of America²⁶⁹ and the United Kingdom²⁷⁰ are examples of two countries that have developed legislation to the extent that animal care and welfare needs and interests of animals contained in research laboratories are specifically regulated by legislation in an attempt to provide effective regulation and enforcement of animal welfare. The United States Congress gave serious thought to the plight of having more rigorous welfare policies and legislative measures

268 Henry Spira (1927-1998).

269 Hereinafter referred to as “USA”.

270 Hereinafter referred to as the “UK”.

imposed during 1985 after the use of animals in research laboratories came under federal scrutiny. Although the USA at the time possessed a federal Animal Welfare Act,²⁷¹ adaptation of the Act to include measures regulation scientific research of animals became a necessity. Currently, the AWA (a) and the PHS Funding Policy are the two major federal regulatory systems governing scientific use of animals in research in the USA.²⁷²

The Protection of Animals Act of 1911 was in place before the UK passed new legislation in 2006. The Animal Welfare Act of 2006 was introduced in early 2007 in England and Wales, and represents the most significant changes to animal welfare law in nearly a century. The most significant is that for the first time the Animal Welfare Act²⁷³ introduced legislation for pet owners, giving them a legal duty of care to meet the five welfare needs of their pets. The law also applies to those who are responsible for animals, such as those who breed animals or keep working animals.²⁷⁴ The federal legal framework and policy structure of the USA as well as the legal framework of UK provide general welfare laws for animals and for animals contained in research laboratories.

The South African government may very well make use of the statutes and policies of the USA and UK as examples to reform our own legislative framework. The statutes and policy of the USA and UK include specific measures of protecting the welfare of animals contained in research laboratories whereas our current legislation does not. A legal analysis will follow to assess whether these two countries may present practical and useful examples from which our legislature may obtain insights to enable us to address our current legislative inaptitude. It is therefore imperative to present a normative analysis of laws and policies applicable to these two countries to ascertain whether these laws and policies are viable and feasible examples, which may assist in

271 7 U.S.C. §§ 2131 – 2157.

272 Dresser 1987-1988 *Rutgers L. Rev.* 724-728.

273 Hereinafter referred to as the “AWA (b)”.

274 See www.rspca.org.uk.

reforming our current legislative framework pertaining to the welfare of animals, with specific reference to animals held in research laboratories.

4.2 United States of America

4.2.1 Animal Welfare Act²⁷⁵

Federal statutes are the primary legal source and authority for regulating circumstances involving animals. Although State Law contains a branch of criminal law, the criminal laws are ineffective in many circumstances and are often difficult to prosecute in specific areas such as research facilities.²⁷⁶ Federal Law was sought to provide sufficient protection of animals for a limited number of topics, more specifically research laboratories.²⁷⁷ The initial AWA (a) was amended in 1985 with the sole purpose to include more stringent and regulative provisions, specifically regulating animal experimental research. The expansion of the AWA (a) now provides for a regulatory structure with Federal rules, inspections and reports. The main objective of the AWA (a) is to function as a regulatory law seeking to control who may possess or sell certain animals and the living conditions under which the animals should be kept.²⁷⁸ In addition thereto, the law also provides for criminal and civil penalties and the revocation of permits that enable a person to be a dealer of animals, exhibitor of animals or to buy and sell animals should such person violate the AWA (a) as a whole or its provisions.²⁷⁹

The pursuit of science has long been one of the areas where the interests of animals have been set aside in favour of the needs of science.²⁸⁰ The newly-amended AWA (a) incorporates a more protective attitude at a federal level in the increasingly detailed focus regarding the actions of science when animals are used. The lessons learned over the past twenty to thirty years is that a considerable reduction of animal pain,

275 7 U.S.C. §§ 2131 – 2157.

276 Favre 2002 *Michigan State University College of Law 2*.

277 Favre 2002 *Michigan State University College of Law 2*.

278 Favre 2002 *Michigan State University College of Law 2*.

279 Favre 2002 *Michigan State University College of Law 2*.

280 Favre 2002 *Michigan State University College of Law 2*.

suffering and distress has occurred without having a direct impact on the ability of science to proceed and enhance. From the inception of the newly-amended AWA (a), the law has made a significant impact on controlling the living conditions of animals before and after their use in experiments. The law is more intrusive, regulating acts of experimentation, prescribing certain rules about animal conditions during experimentation and overall ensuring that a balance exists between science and animal interests.²⁸¹

The amendments in relation to research laboratories and the animals so kept are contained under Section 13 of the AWA (a). The animals listed for protection under the AWA (a) are those falling under the definition of “animal” as listed under Section 2 which states:

“The term “animal” means any live or dead dog, cat, monkey (nonhuman primate animal), guinea pig, hamster, rabbit, or such other warm-blooded animals, as the Secretary may determine is used, or is intended for use, for research, testing, experimentation, or exhibition purposes. A pet but such term excludes horses not used for research purposes and other farm animals such as, but not limited to livestock or poultry, used or intended for use as food, fibre, or livestock. Poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fibre. With respect to a dog, the term means all dogs including those used for hunting, security, or breeding purposes”²⁸².

Section 13 of the AWA (a) furthermore contains all the requirements to be satisfied for the humane care of animals at research facilities. The first section of the law is generally applicable to dealers, exhibitors and research facilities containing a list of care categories in relation to housing, feeding, watering, ventilation and shelter.²⁸³ The following section specifically focuses on animals used for research purposes in which the law requires regulation to assure certain outcomes. Section 13(a)(3) reads as follows:

281 Favre 2002 *Michigan State University College of Law* 8-9.

282 § 2132 (2)(g).

283 § 2143 13(a)(2)(A) & (B).

“In addition to the requirements under paragraph (2), the standards described in paragraph (1) shall, with respect to animals in research facilities, include requirements-

- (A) for animal care, treatment, and practices in experimental procedures to ensure that animal pain and distress are minimized, including adequate veterinary care with the appropriate use of aesthetic, analgesic, tranquilizing drugs, or euthanasia;
- (B) that the principal investigator considers alternatives to any procedure likely to produce pain to or distress in an experimental animal;
- (C) in any practice which could cause pain to animals –
 - (i) that a doctor of veterinary medicine is consulted in the planning of such procedures;
 - (ii) for the use of tranquilizers, analgesics, and aesthetics;
 - (iii) for pre-surgical and post-surgical care by laboratory workers, in accordance with established veterinary medical and nursing procedures;
 - (iv) against the use of paralytics without anaesthesia; and;
 - (v) that the withholding of tranquilizers, aesthesia, analgesia, or euthanasia when scientifically necessary shall continue for only the necessary period of time;
- (D) that no animal is used in more than one major operative experiment from which it is allowed to recover except in cases of—
 - (i) scientific necessity; or
 - (ii) other special circumstances as determined by the Secretary; and
- (E) that exceptions to such standards may be made only when specified by research protocol and that any such exception shall be detailed and explained in a report outlined under paragraph (7) and filed with the Institutional Animal Committee”.

The requirements referred to under paragraph (2) and standards in paragraph (1) are minimum standards and requirements that have to be promulgated by the Secretary²⁸⁴ that governs the humane treatment, care, handling and transportation of animals by dealers, exhibitors and research facilities. Although paragraphs (1) and (2) do not reflect what the “minimum” standards shall be, extensive definitions are contained in

284 The Secretary or his representative of the Department of Agriculture of the United States of America.

Regulation 9 CFR § 1.1 of 2009 that includes the definition of “standards”. The notion “Standards” encompasses the requirements listed under the Regulation with particular reference to dealers, exhibitors and research facilities. Section 13(3), however, does not state that “minimum requirements” have to be promulgated. Section 13(3) merely states that “requirements” be promulgated and such requirements are specifically depicted under sections 13(3)(A)-(E) in relation to research facilities.

In terms of Section 13(3)(B), the principal investigator is obliged to consider alternative procedures which are “likely” to produce pain²⁸⁵ or distress to experimental animals. The alleviation of pain and distress of experimental animals must therefore be taken into cognisance when decisions are made in relation to the methods of research employed. When planning any procedure investigators must first and foremost consider which alternatives may be available before commencing with the initial procedure. If no alternative is suitable or available, the scientist must consult with a laboratory animal veterinarian and ensure that appropriate medication or a humane method of disposing of the animal is made to minimize animal pain and distress.²⁸⁶ Section 13(3)(D) furthermore states that no animal may be used in more than one major operative experiment²⁸⁷ from which it is allowed to recover except in cases of (i) scientific necessity or (ii) other special circumstances as determined by the Secretary. “Scientific necessity” and “other special circumstances” are not explained and regulated under Regulation 9 CFR. It is therefore assumed that these “cases” are exceptions to the rule of standards and have to be sufficiently explained. The exceptions to the above standards may also only be made when the

285 Regulation 9 CFR § 1.1 describes a painful procedure as applied to any animal means any procedure that would reasonably be expected to cause more than slight or momentary pain or distress in a human being to which that procedure was applied, that is, pain in excess of that caused by injections or other minor procedures.

286 § 2143 13(3)(C)(i) & (ii).

287 Means any surgical intervention that penetrates and exposes a body cavity or any procedure which produces permanent impairment of physical or physiological functions as defined by Regulation 9 CFR § 1.1.

reasons for such exceptions are specified in terms of research protocols. These exceptions must be detailed and explained in a report to be submitted to the Institutional Animal Committee. The Institutional Animal Committee is a board of members selected by each research facility in accordance with its own in-house rules and standards. The members of the board function to assess whether conduct towards animals by the institutional staff are in accordance with law and standards applicable. The members therefore also have as a function to determine certain rules and standards and provide them to the Secretary for assessment.

The general amendments that furthermore relate to the minimum requirements, which have to be satisfied by research facilities include the following:

- 1) Institutional animal committees must be established,²⁸⁸ and the participation by a community member must be facilitated.²⁸⁹
- 2) Research facilities must train scientists and staff in research that reduces pain and distress experienced by the research subjects.²⁹⁰
- 3) Institutional committees must review all “painful procedures” conducted by research.
- 4) Annual reviews of researchers must be conducted by committees.²⁹¹

In addition to the above, the AWA (a) also requires that research facilities provide adequate exercise to dogs and an adequate environment to primates to promote psychological well-being, in accordance with general standards promulgated by the Secretary.²⁹² One of the more important aspects also relating to the new amended AWA (a) is that no research facility may purchase animals from any person if such a person is not a registered and licensed dealer and

288 § 2143 13(3)(C)(i) & (ii).

289 § 2143 13(b)(1)(B)(iii).

290 § 2143 13(b)(5)(d)(1)-(4).

291 Dresser 1987-1988 *Rutgers L. Rev.* 730.

292 § 2143 13(a)(2)(B).

should an animal or animals be purchased such an animal must fall under the listed category provided by the AWA (a).

The language used from the 1985 amendments clearly depicts that Congress has chosen to concern itself with how experiments are carried out, how researchers and staff should act towards animals under their care and while leaving the decision of what issues should be researched to the scientific community, providing for regulation of specific animal interests through the Secretary of Agriculture.

Section 13(b) of the AWA (a) is of particular importance. This section now places an obligation on all research facilities to create an Institutional Animal Care Committee that can oversee all the actions and procedures taken during experiments by researchers and staff. The Committee by its very nature will be a local focal point for most research of animal care and welfare issues.²⁹³ This Committee in hindsight will serve as the federal government's watchdog in laboratories by conducting a minimum of two inspections annually, with reports made available to the federal government. Section 13(b) of the AWA (a) states:

- (1) "Each committee shall be appointed by the chief executive officer of each such research facility and shall be composed of not fewer than three members. Such members shall possess sufficient ability to assess animal care, treatment, and practices in experimental research as determined by the needs of the research facility and shall represent society's concerns regarding the welfare of animal subjects used at such facility".²⁹⁴

Two important parameters within which the appointments have to be made are identified. First, the people so appointed from society must have knowledge of animal care and secondly, it is mandated that the committee members "shall represent society's concerns regarding the welfare of animals used at such facility". The power to appoint the

293 Favre 2002 *Michigan State University College of Law* 11.
294 Ibid.

members of the Committee rests with the chief executive officer of such a research facility. It is obvious that Congress seeks to obtain some level of balance of views from society and researchers by incorporating these words within the provision. It is furthermore evident from the specific wording of Section 13(b) that Congress aimed at ensuring that the creation of a committee, the duties of such committee and the responses required to produce reports to federal government are dealt within the section itself, rather than cluttering the AWA (a) with further provision dealing with the topic of such a committee separately.²⁹⁵

Section 13(b) also deals with the aspect of funding and the authorization of the Secretary to perform his duties. The National Institute of Health²⁹⁶ is a government-funded institution that provides the necessary funds for research purposes. The Secretary, acting through the Director of NIH, shall establish guidelines in terms of proper care of animals, proper treatment of animals, organization and the operation of animal care committees. It is required by Section 13(b) that should a research facility require necessary funds from the NIH, such a research facility must have an animal care committee. Research facilities are thus restricted by Section 13(b) from obtaining funds if such research is not inspected annually. In terms of the duties imposed upon the Secretary, Section 13(b)(5) states that not only is the Secretary authorized to consult experts and outside consultants, the Secretary is also directed to do so when promulgating and enforcing standards.

The use of clear definitions by Regulation 9 in support of the AWA (a) provides the necessary and useful means to address the welfare of animals held in research laboratories. The use of definitions in relation to specific procedures, duties and obligations eliminates any ambiguities that might result from misinterpretation. The amendments to the AWA (a) to address the welfare needs of animals contained in research laboratories in conjunction with the duties imposed upon the Secretary

295 Favre 2002 *Michigan State University College of Law* 11.

296 Hereinafter referred to as the "NIH".

ensure that national regulation is addressed and enforced. Section 13 of the AWA (a), more specifically subsection 3(A)-(B) place a specific requirement of standards upon persons responsible for animals in research laboratories. The formulation of Section 13 is furthermore construed in such a manner that the reader thereof interprets the exact meaning of the provisions with clarity. The requirements of the AWA (a) imposed upon research facilities to establish a committee to inspect, investigate and report on the procedures, actions and duties of research facilities also effectively ensure community participation. The AWA (a) and Section 13 in particular thus provide a more suitable and effective manner of regulation than which is currently found under the South African legal framework.

4.2.2 Public Health Service Policy on Humane Care and Use of Laboratory Animals²⁹⁷

The PHS Funding Policy endorses the “U.S. Government Principles for the Utilization and Care of Vertebrate Animals Used in Testing, Research, and Training” developed by the Interagency Research Animal Committee, as well as the *Health Research Extension Act* of 1985, which provides the statutory mandate for the PHS Funding Policy. This Policy intends to implement and supplement all the Principles contained within the U.S. Government Principles. The U.S. Government Principles are used to prescribe the requirements for transportation, care and use of animals in accordance with the AWA (a). The procedures performed on animals and animals selected for a procedure should be of an appropriate type for a particular species. Pain, distress and discomfort should be minimized in all procedures and the painless methods to euthanize animals as well as the appropriate living conditions for animals and qualification of investigators should be ensured. The PHS Funding Policy thus serves as a secondary legislative instrument apart from the AWA (a) that has a substantial effect on the scientific use of animals in

²⁹⁷ Hereinafter referred to as the “PHS” Funding Policy.

the USA.²⁹⁸ The Policy ensures that all individuals and institutions adhere to the AWA (a) and other Federal legislation. It is impossible for an individual or research laboratory to conduct federally funded “legal research” on animals if not provided with the necessary authority to do so by the provisions of the PHS Funding Policy.

The PHS Funding Policy implicitly governs all Public Health Service supported research by the NIH as well as several other funding entities which include the National Institute of Health; Alcohol, Drug Abuse, and Mental Health Administration, Centres for Disease Control; Health Resources and Services Administration; and Food and Drug Administration. The PHS Funding Policy does not only control federally funded research of governmental agencies; other institutions that receive federal funding support will also be regulated by the provisions of the PHS Funding Policy under their auspices. The main objective of the PHS Funding Policy provisions is to minimize pain, distress and discomfort experienced by laboratory animals. Two other significant purposes of the PHS Funding Policy are that it also requires of institutions to adhere to the recommendations of the NIH Guide for the Care and Use Laboratory Animals and to address the justification for making use of animals in research laboratories. The NIA Guide specifically states:

“Procedures involving animals should be designed and performed with due consideration of their relevance to human or animal health, the advancement of knowledge, or the good of society”.²⁹⁹

In essence the PHS Funding Policy will not support the acts of individuals involving animals unless that individual is affiliated with or sponsored by an institution. Such institution is also subsequently required to assume responsibility for compliance with this Policy. Should an individual not be affiliated or sponsored by an institution such an individual must make alternative arrangements with Public Health

298 See <http://grants.nih.gov/grants/olaw/olaw.htm>.

299 National Research Council Guide 4.

Services. The PHS Funding Policy also does not affect applicable state laws, local laws or regulations that impose more stringent standards of care and use of laboratory animals. The Policy is therefore a legislative mechanism that ensures that all institutions and individuals associated with such institutions comply with the AWA (a) and Federal laws. Although the PHS Funding Policy does not affect applicable state laws, local laws or regulations, the US government expects that “All” institutions comply, as applicable, with the AWA (a), and with all other Federal statutes and regulations relating to the use of animals in research laboratories.³⁰⁰

The various elements covered under the PHS Funding Policy are divided under applicable headings similar to sections reflected in a statute. Section II of the policy reflects its applicability in relation to activities involving animals. Section II states that PHS-conducted or supported activities performed at a PHS agency, an awardee institution, or any other institution and conducted in the United States of America, the Commonwealth of Puerto Rico, or any territory or possession of the United States of America will be regulated by the PHS Funding Policy. This section furthermore states that no support will be provided to an individual if such individual is not supported, affiliated or sponsored by an institution that assumes responsibility for compliance with this Policy. In the instance where such an individual has no support, affiliation or sponsorship from an institution, such an individual is required to make alternative arrangements with the Administrators of the Public Health Service.

Section III provides a list of applicable definitions relating to certain words and names referred to by the Policy. Section IV heads the implementation by Institutions under the Policy and is divided into subsections. Section “A” deals with Animal Welfare Assurance, which is sub-divided into various categories applicable in terms of the PHS Funding Policy. The most prominent feature of Section “A” states that no

300 Section (II) PHS Policy.

activity involving animals may be conducted or supported by the PHS Funding Policy until such time as the relevant institution conducting the activity has provided a written Assurance acceptable to the PHS Funding Policy committee. Such Assurance must include a proper and detailed undertaking setting forth compliance with the PHS Funding Policy and its principles. Subsection (1) of Section IV (A) furthermore requires that the Assurance shall fully describe the institution's programme for the care and use of animals in PHS-conducted or supported activities and that such institution must make use of the Guide for the Care and Use of Laboratory Animals.

Subsection (2) of Section IV (A) requires that each institution must ensure that its programmes and facilities are in line with either Category 1 – Accreditation by the Association for Assessment and Accreditation of Laboratory Animal Care International or Category 2 – Evaluation by the Institution itself. All of the institution's programmes and facilities (including satellite facilities) for activities involving animals must have been evaluated by the Institutional Animal Care and Use Committee³⁰¹ and will be re-evaluated by the IACUC³⁰² at least once every six months in relation to reports submitted to the Committee by the institutions. Subsection (3) of Section IV (A) lists the requirements and obligations imposed by the Policy to establish an IACUC. The appointment of a Chief Executive Officer to act as Head and Official of the IACUC is regulated in terms of the *Health Research Extension Act of 1985*. The PHS is therefore prevented from appointing at its sole discretion the Chief Executive Officer from a list of suitable candidates.

Section (B) of Section IV lists the necessary functions and duties of the IACUC. The members of the IACUC when conducting evaluations and reviews or when it is necessary to make any recommendations regarding

301 Hereinafter referred to as "IACUC".

302 The name Institutional Animal Care and Use Committee as used in the PHS Funding Policy is intended as a generic term for a committee whose function is to ensure that the care and use of animals in PHS-conducted or supported activities is appropriate and humane in accordance with the PHS Funding Policy. However, each institution may identify the committee by whatever name it chooses.

animal programmes, facilities or personnel training must use the NIA Guide in combination with any applicable relevant statutes.

Section (C) of Section IV stipulates the procedures to follow in terms of any PHS-conducted or supported research projects. Specific information concerning research projects must be provided to the IACUC by institutions to enable the IACUC to conduct a thorough review of the research project and to ensure that such a project conforms to the institution's Assurance requirements. The most important information to be submitted in terms of research projects is that institutions will avoid or minimize pain, distress and discomfort to animals and that appropriate medication will be used when slight pain or distress is present. Information submitted to the IACUC must include medical care for animals being available and provided by a qualified veterinarian and that methods of euthanasia used will be consistent with the recommendations of the American Veterinary Association Panel on Euthanasia. Section (D) of Section IV lists the requirements applicable for an institution to apply for an award to be granted to conduct research. Among the requirements listed are the identification of the species and approximate number of animals to be used, the rationale for involving animals and the appropriateness of the species and numbers to be used. A complete description has to be provided of the proposed use of the animals and a description of procedures designed to ensure that discomfort and injury to animals will be limited, and assurances have to be given that analgesic, aesthetic, and tranquilizing drugs will be used where indicated and appropriate to minimize discomfort and pain to animals. Verification and approval from the PHS committee must be lodged and records must be kept by the institution and awarding units may not make use of an award before such award has been approved by other participating institutions. Sections (E) and (F) stipulate requirements for record-keeping and reporting.

Section V concerns the implementation of the PHS Funding Policy. Section (A) therefore focuses on the responsibilities of the Office of

Laboratory Animal Welfare³⁰³ and Section (B) on the responsibilities of the PHS Awarding Units. Section B clearly states that awarding units may not make an award for any activity involving animals unless the prospective awardee institution and all other participating institutions have approved Assurances on file with the OLAW. Section (C) deals with special reviews and finally section (D) which deals with waivers requests made by an institution to waiver a provision or provisions of the PHS Funding Policy.

4.2.3 Critique of AWA (a) and PHS Funding Policy

In the USA the newly-drafted AWA (a) has come under scrutiny for two reasons. First, it currently exempts rats and mice from its provisions and secondly, the statute is limited in its application due to inadequate enforcement. Rats and mice comprise approximately eighty-five per cent of the majority of all species of animals used in research laboratories and their exclusion from protection under the AWA (a) greatly diminishes the overall application of the law in terms of its federal application. In order to overcome limitations Congress has opted to impose stricter regulation of animal welfare by means of the PHS Funding Policy that has proved to have a material impact on the treatment of laboratory animals since 1985. The second limitation of the AWA (a) in terms of adequate enforcement has also been “rescued” by the PHS Funding Policy. The U.S.A. Department of Agriculture³⁰⁴ is under-funded and the department’s inspectors unfortunately lack the expertise required in terms of knowledge of animal welfare.³⁰⁵ The PHS Funding Policy came to the rescue by requiring that institutions be required to establish institutional committees which must have members who are chosen from the immediate community. This requirement assists the USDA in that these community members chosen to assist with annual inspections and oversight of welfare issues in research

303 Hereinafter referred to as “OLAW”.

304 Hereinafter referred to as the “USDA”.

305 Dresser 1987-1988 *Rutgers L. Rev.* 731-732.

institutions are not remunerated by the USDA and are mostly employed as volunteers.³⁰⁶

Implicit in the revised AWA (a) and the PHS Funding Policy is that both documents reflect recent developments in both philosophical and scientific theory - firstly, the recognition of the existence and moral significance of laboratory animals and secondly, the judgment that imposing harm on laboratory animals must be scientifically necessary and "relevant" to the development and advancement of knowledge or the health and welfare of others (humans and other species not used during experimental research). Despite some ambiguity on some issues, the newly-imposed Federal Law and Policy establishes a definite mandate to understand and improve the welfare of animals confined to research laboratories. Current efforts to comply with such mandate centres on the following four tasks:

- a) defining the relevant mental states of the animals used from a specific species;
- b) recognizing these mental states in different laboratory species used during research;
- c) classifying common experimental procedures according to their severity and the impact these experimental procedures have on animals and on different species, and
- d) Refining animal care and treatment to reduce the animals' negative experiences and enhance their well-being.³⁰⁷

The incorporation of institutional programmes and the necessary protocol review process on defining and assessing animal pain, distress and well-being ensure that scientists and review committee members are able to attain substantial compliance with the new federal law and policy. In many instances, despite incorporating stringent measures, animals will still experience pain, distress and deprivation, a situation unavoidable in the realm of animal experimentation. The implementation

306 See <http://grants.nih.gov/grants/olaw/olaw.htm>.

307 Dresser 1987-1988 *Rutgers L. Rev.* 744.

of the new AWA (a) and the PHS Funding Policy does, however, seem to provide a more stringent and improved legal framework than that which existed in the USA prior to 1985.

4.2.4 American Veterinary Medical Association³⁰⁸

The AVMA has also defined its commitment to animal welfare through the adoption of the following Animal Welfare Principles that serve as major guidance when the Association develops policies and takes action to ensure the welfare of animals in line with the AWA (a). The AVMA has as its main functions the co-ordination and facilitation of the code of conduct relevant to the industry and profession of veterinary medicine. The AVMA also functions as the regulative body of the profession of animal medical care and professions alike. Animal medical professionals cannot practise legally as a veterinarian without being certified by the Executive Board of the AVMA. Principles, policies and codes of practice as implemented by the AVMA are therefore binding legal documents.

The AVMA also provides “expert” opinions and services to the Secretary of Agriculture³⁰⁹ and relevant institutions³¹⁰ in terms of animal care and welfare. The role of the AVMA is to ensure that institutions and professions alike provide good animal welfare.³¹¹ As medical authority for health and welfare of animals, the AVMA developed eight principles that serve to guide, assist, develop and evaluate animal welfare policies, resolutions and actions in the USA veterinary medical realm. The eight principles state the following:

- 1) The responsible use of animals for human purposes, such as companionship, food, fibre, recreation, work, education, exhibition, and research conducted for the

308 Hereinafter referred to as “AVMA”.

309 Section 13(b)(5) of the AWA(a).

310 Section (C) of section IV of the PHS Funding Policy.

311 Good animal welfare in terms of the AVMA constitutes disease prevention and veterinary treatment, appropriate shelter, management, nutrition, humane handling and humane slaughter.

benefit of both humans and animals, is consistent with the Veterinarian's Oath.

- 2) Decisions regarding animal care, use, and welfare shall be made by balancing scientific knowledge and professional judgment with consideration of ethical and societal values.
- 3) Animals must be provided with water; food, proper handling, health care, and an environment appropriate to their care and use, with thoughtful consideration for their species-typical biology and behaviour.
- 4) Animals should be cared for in ways that minimize fear, pain, stress and suffering.
- 5) Procedures related to animal housing, management, care and use should be continuously evaluated, and when indicated, refined or replaced.
- 6) Conservation and management of animal populations should be humane, socially responsible, and scientifically prudent.
- 7) Animals shall be treated with respect and dignity throughout their lives and, when necessary provided a humane death.
- 8) The veterinary profession shall continually strive to improve animal health and welfare through scientific research, education, collaboration, advocacy and the development of legislation and regulations.³¹²

The incorporation of these Animal Welfare Principles into the realm of the veterinary association's mandate provides a strengthened and more stringent approach to the care and welfare of all animals used by the AVMA as no specific species of animals is included or excluded from the wording of the mandate. This approach in itself ensures that all animal species will benefit at the same level and that no species of animal will take preference over another whether such species is warm-blooded, cold-blooded, vertebrate or invertebrate. The effectiveness of the incorporation of these principles is also not hindered by the enforcement thereof by the USDA as the AVMA is not funded by the USDA. The AVMA is a self-sufficient entity, funded by its own members, thus ensuring effective implementation and oversight of its principles and practices in relation to the AWA (a). Although the veterinary industry is self regulating, the AWA (a) is a federal statute and the industry itself remains subject to regulation by federal laws.

312 See www.avma.org/issues/animal-welfare/default.asp.

4.3 United Kingdom

4.3.1 Animal Welfare Act³¹³

The *Animal Welfare Act*³¹⁴ received Royal Assent on 8 November 2006, and was introduced into England and Wales as representing the most significant changes to animal welfare law in nearly a century. The preceding legislation, the *Protection of Animals Act*, 1911, was seriously outdated and revision of the law brought about some significant changes with regard to cruelty and fighting of animals as well as offences listed under the new AWA (b).

The AWA (b) covers various aspects of animal welfare and sections are grouped under 11 headings such as Sections 1-3 setting out the scope of the Act and defines the different categories of animals to which the Act applies, Sections 4-8 set out the offences applicable to cruelty and fighting of animals, Sections 9-12 set out specific offences relating to animal welfare, Section 13 specifies licensing and registration of animals, Sections 14-17 set out the Codes of Practice applicable, Sections 18-21 describe the powers an inspector has in relation to animals in distress, Sections 22-29 set out the enforcement powers contained in the Act, Sections 30 and 31 deal with prosecutions in terms of the Act, Sections 32-45 set out the penalties available for convictions under the Act, Sections 46-50 relate to Scotland and make provision for a disqualification order under the Act to apply across Great Britain and for powers of the Scottish courts in relation to breaches in Scotland of disqualification orders under the Act, and finally Sections 51-69 relate to general provisions.

Section 1(1)-(3) of the AWA (b) states as follows:

- (1) “In this Act, except subsections (4) and (5), “animal” means a vertebrate other than man.

313 *Animal Welfare Act*, 2006.

314 Hereinafter referred to as “AWA (b)”.

- (2) Nothing in this Act applies to an animal while it is in its foetal or embryonic form.
- (3) The appropriate national authority may by regulations for all or any of the purposes of this Act—
 - (a) Extend the definition of “animal” so as to include invertebrates of any description;
 - (b) Make provision in lieu of subsection (2) as respects any invertebrates included in the definition of “animal”;
 - (c) Amend subsection (2) to extend the application of this Act to an animal from such earlier stage of its development as may be specified in the regulations”.

Section 1(1) defines the meaning of “animal”. In terms of Section 1(1), vertebrates other than man are protected under the AWA (b), thus also mice and rats. Rats and mice are commonly referred to as rodents and rodents in turn are commonly classified as vermin. In this regard, research laboratories blatantly abuse the situation and act in direct contravention of Section 1(1) of the AWA (b). Rodents are the most commonly found species housed and bred for research purposes. The fact that rodents are classified as vermin provides research laboratories with a substantive level of leverage to utilize these species of animals for scientific research purposes. In most instances members of society do not question whether the AWA (b) provides protection to rodents due to the lack of knowledge and the general assumption that rodents are vermin and should be destroyed.

Sections 1(2)-(3) provide for secondary legislative power to employ if and when necessary. Section 2 provides a sufficient definition under the Act for the meaning of “protected animal”. A “protected animal” will be any animal which is commonly domesticated in the British Islands, under the control of man whether permanent or temporary and which is not living in a wild state. Sections 4(2), 5(2), 6(2), 7(2) and 9 will only apply to persons who are “responsible for an animal”. Responsibility for

an animal is intended to arise where a person(s) is said to have assumed responsibility for an animal's day-to-day care whether for a specific period of time or by virtue of being the owner of such an animal. Such responsibility also includes being "temporarily responsible" for the animal as is the case with veterinary surgeons – taking the animal for surgery overnight, staff at boarding premises and staff at animal sanctuaries. Section 9 is, however, not applicable to animals held in research laboratories. The section stipulates when conduct of a person responsible for an animal will be deemed to be an offence in relation to the needs of animals that have to be met.³¹⁵ The needs of animals which need to be met in accordance of the Act are stipulated under subsection 2 and subsection 3 provides for the circumstances under which subsection 1 has to be applied.

Animals held in research laboratories are regulated by Section 58 of the Act. Section 58(1) states that nothing in the AWA (b) applies to a matter which is lawfully done under the *Animals (Scientific Procedures) Act* of 1986. Section 58(2) also states that no entry, search or inspection under the AWA (b) may occur in relation to a "place" referred to under Sections 6 and 7 of the *Animals (Scientific Procedures) Act* 1986. An analysis of the *Animals (Scientific Procedures) Act* 1986 will follow to provide clarity on the relevant matter of animals contained in research facilities.

Sections 5 and 7 of the AWA (b) raise a serious matter of concern. Mutilation is regarded as a "prohibited procedure" under the Act and an offence.³¹⁶ The administration of poisons or injurious drugs to an animal is an offence under the AWA (b), if such administration occurs without lawful authority or reasonable excuse.³¹⁷ The person or persons responsible for such an animal or who is the owner of the animal shall be liable for conviction in terms of the AWA (b). The Act does not provide the necessary background, information or definition of actions that are regarded as "prohibited procedures" or what a "reasonable cause" for

315 Section 9(1).

316 Section 5.

317 Section 7.

administration of poisons or injurious drugs to an animal may be. Section 58 also does not reflect that Sections 5 or 7 are not applicable to animals contained in research laboratories.

The measure of ensuring that owners and people responsible for animals address the needs of animals is regulated by Sections 10, 13 and 18-21. Inspectors are empowered in terms of Section 10 to enter premises and inspect whether the activities for which the animals have been licensed and registered are indeed the activities that take place and to ensure that animals in distress are either treated, released, sold or disposed of in a humane manner either by means of euthanasia or else. Section 13 confers the necessary power upon inspectors to make regulations that require people conducting certain activities involving animals to register or hold a license for such animal and the activity as such. Animals in distress are regulated by Section 18 and the powers to enforce the regulation made under Section 18 are regulated under Section 19.

Sections 30 of the AWA (b) relate to prosecutions but more importantly, Section 31 establishes that certain time limits will be applicable for such prosecutions to take place. Section 31 reads as follows:

- (1) Notwithstanding anything in Section 127(1) of the Magistrates' Courts Act 1980 (c. 43), a magistrates' court may try an information relating to an offence under this Act if the information is laid—
 - (a) Before the end of the period of three years beginning with the date of the commission of the offence, and
 - (b) Before the end of the period of six months beginning with the date on which evidence which the prosecutor thinks is sufficient to justify the proceedings comes to his knowledge.
- (2) For the purposes of subsection (1)(b)—

- (a) A certificate signed by or on behalf of the prosecutor and stating the date on which such evidence came to his knowledge shall be conclusive evidence of that fact, and
- (b) A certificate stating that matter and purporting to be so signed shall be treated as so signed unless the contrary is proved.³¹⁸

In terms of Section 31, the courts are obliged to ensure that all cases reported have to be dealt with as effectively and adequately as possible within a specific period of time. The inclusion of this provision therefore does not only ensure that a responsibility is placed on the judiciary system of the UK but indirectly also ensures that government is held accountable to society for its actions through the judiciary. Members of society and other regulative bodies created by statute are given the opportunity to scrutinize the judiciary in terms of whether they adhered to the provisions of Section 31 thus providing the opportunity to scrutinize any inconsistencies within the judiciary.

The most significant introduction for the first time in UK legislation is the inclusion of the five welfare freedoms developed by the UK Farm Animal Welfare Council. Section 9(2) of the AWA (b) specifically encompasses the five welfare freedoms into the relevant sentences. The inclusion of the five welfare freedoms in legislation provides each person responsible for an animal with a yardstick from which such a person can measure whether the welfare needs of the animal under their care are addressed. The five freedoms are (1) Freedom from hunger and thirst, (2) Freedom from discomfort, (3) Freedom from pain, injury or disease, (4) Freedom to express normal behaviour and (5) Freedom from fear and distress. Although the five freedoms are incorporated into the AWA (b) which merely serves as a guide in terms of general welfare issues, such inclusion has brought about a formidable change to the manner in which animals are treated, as inspectors can advise and educate society. Should the inspector's advice not be followed, and the animal were to suffer if left in that situation, the support of the law providing the

318 Ibid.

inspector with the necessary authority to take action before the animal suffers can be reverted to.³¹⁹ Provisions of the AWA (b) grant specific powers of enforcement to inspectors working under the guidance of the Royal Society for the Prevention of Cruelty to Animals. Inspectors may enter premises, search, evaluate or seize animals from those responsible for them. The regulation of animal welfare in the UK proposes a more stringent approach than the current legislative framework applicable in South Africa. The regulation of animal welfare in the UK is adequately regulated due to the AWA (b) granting the necessary enforcement powers required to inspectors. Legislation regulating welfare in South Africa does not grant authority to “volunteers” to sufficiently address animal welfare and care in South Africa. Furthermore, the AWA (b) also contains specific sections, Sections 9-12, requiring the promotion of animal welfare, which is a section that is not contained in the APA.

4.3.2 *Animals (Scientific Procedures) Act 1986*³²⁰

The purpose of the ASPA is to make new provisions for the protection of animals used for experimental or other scientific purposes. The ASPA is applicable to England, Wales and Northern Ireland. The applicability to Northern Ireland does, however, contain specific modifications. Section 1(1) of the Act states that a “protected animal” shall for the purpose of the ASPA mean any living vertebrate animal other than man. Section 1(2) further reads as follows:

“Any such vertebrate in its foetal, larval or embryonic form is a protected animal only from the stage of its development when-

- (a) in the case of a mammal, bird or reptile, half the gestation or incubation period for the relevant species has elapsed; and
- (b) in any other case, it becomes capable of independent feeding”.

319 See www.rspca.org.uk.

320 Hereinafter referred to as the “ASPA”.

Section 2(1) defines what a “regulated procedure” is in terms of the ASPA. The section states that any experimental procedure or other scientific procedure applied to a protected animal which may have the effect of causing that animal pain, suffering, distress or lasting harm shall constitute a “regulated procedure”. An experimental or other scientific procedure shall also be regarded as a “regulated procedure” if it is part of a series or combination of such procedure, that may have the effect mentioned in subsection (1) and the animal is a protected animal throughout the series or combination.³²¹ Section 2(6) in conjunction with Section 32 of the *Medicines Act 1968* regulates conduct in terms of administration of substances or articles to an animal by way of medicinal tests. Section 2(6) states that such action as described under Section 32 of the *Medicines Act 1968* is not a regulated procedure if the substance or article is administered in accordance with the provisions of subsection (4) of that section or of an order under Section 35(8)(b) of the *Medicines Act 1968*.

In terms of Section 3, no person shall apply a regulated procedure to an animal unless such person holds a personal licence qualifying him to apply a regulated procedure, or the procedure applied forms part of a programme of work specified in a project licence.³²² The place where the procedure is conducted must also be specified in the licence and the project licence.³²³ Project licences may only be granted in terms of Section 5(1) by the Secretary of State. Such granting of the licence will only take place once the Secretary of State is satisfied that a person undertakes overall responsibility for the programme specified in the licence. Section 5(3)(a)-(g) lists the purposes in terms for which an undertaking by a person involved in a programme is required. The most important aspects are the prevention of diagnosis, treatment; disease, ill-health, abnormality or effects tests may have in man, animal and plants.³²⁴ The assessment, detection and regulation or modification of

321 Section 2(2)(a)-(c).

322 Section 3(a)-(b).

323 Section 3(c).

324 Section 5(3)(a).

physiological conditions in man, animal and plants³²⁵ and the protection of natural environments on behalf of the interests of man and animals are pertinent here.³²⁶ The Secretary of State is also directed in terms of Section 5(4) to weigh the likely adverse effects on the animals concerned against the benefit likely to accrue as result of the programme to be specified in the licence. All “places” must be specified in a project licence where programmes involving animal experiments will be conducted unless such place is a designated place in terms of a certificate issued by the Secretary of State in terms of Section 6(1). Section 6(2) states that Section 6(1) shall not apply in any case in which it appears that the Secretary of State requested from a person to specify a different place in terms of a programme or procedure so authorised.

The breeding and supply of animals for regulated procedures and establishments are authorized, regulated and controlled under Section 7 and Schedule 2 of the ASPA. The provisions regulating such conduct are, however, stringent in order to ensure that no “protected animal” under the ASPA shall be bred or supplied unless the Secretary of State authorises a certificate in respect of such action once the necessary requirements have been satisfied by the person applying for the issue of the certificate. Schedule 2 of the Act stipulates which animals may be obtained from designated breeding places and supply establishments.

4.3.2.1 Licences and Designation Certificates: General provisions

The Secretary of State may not grant or issue a certificate in terms of the ASPA before a consultation with one of the inspectors appointed under the Act has taken place. The Secretary of State may also consult with an independent assessor or the Animal Procedures Committee³²⁷ appointed under this Act.³²⁸ The Secretary of State may also include in a certificate specific conditions that have to be adhered to

325 Section 5(3)(b).

326 Section 5(3)(c).

327 Hereinafter referred as the “APC”.

328 Section 9(1).

by the person requesting a personal licence.³²⁹ Such conditions may include precautions to prevent or reduce to the minimum pain, distress or discomfort of the animals.³³⁰ An inviolable termination condition may also be included in terms of which a protected animal which has been used in regulated procedure be killed in an appropriate humane manner.³³¹ Although the Act does not prohibit the killing of protected animals, the Act does clearly state that such killing be done in a humane manner and in accordance with Schedule 1 of this Act. Schedule 1 of this Act sets forth the methods of humane killing and the animals to which such methods shall be appropriate.

Conditions in terms of project licences shall, unless the Secretary of State considers that an exception is justified, include a condition to the effect-

- (a) "that no cat or dog shall be used under the licence unless it has been bred at and obtained from a designated breeding establishment and;
- (b) that no other protected animal of a description specified in Schedule 2 to this Act shall be used under the license unless it has been bred at a designated breeding establishment or obtained from a designated supplying establishment".³³²

Certificates issued under Sections 6 and 7 shall at all times include a condition requiring the holder of such certificate to ensure that a person competent to kill animals in the specified manner shall be available at all times.³³³ The keeping of records in respect of animals so kept at the establishment for experimental or other scientific purposes must also be included as a condition.³³⁴ A licence or certificate issued under the ASPA may be varied or revoked by the Secretary of State in case of breach of the conditions of thereof by its holder or at the request of such

329 Section 10(1)

330 Section 10(2)(a).

331 Section 10(2)(b).

332 Section 10(3).

333 Section 10(6)(a).

334 Section 10(6)(b).

a holder.³³⁵ Section 13 regulates matters of suspension in cases of urgency. The Secretary of State may also, when urgently necessary for the protection of welfare of any protected animals, serve a notice to the holder of a certificate that such certificate ceases to have effect and suspend operations there under for a period not exceeding three months.

4.3.2.2 Additional controls

The Additional controls for “protected animals” are found under Sections 14-17 of the ASPA. The additional controls serve to ensure that animals that are subjected to a series of regulated procedures³³⁶ and that are given a general anaesthetic for such a procedure from which it has been allowed to recover may not be subjected to further regulated procedures.³³⁷ In the event of an animal being likely to suffer or has suffered adverse effects at the conclusion of a series of regulated procedures, such an animal must in terms of Section 15(1)(b) be immediately killed by a method appropriate to the animal under Schedule 1 to this Act. In any other circumstances where a “protected animal” has been subject to regulated procedures and has not been given an anaesthetic, such an animal shall not be used except with the consent of the Secretary of State.³³⁸ The additional controls provide a stringent manner of control to ensure that the welfare needs of “protected animals” are sufficiently addressed by research institutions. It is vital to the overall care and treatment of such animals that they are not continuously subjected to any “regulated procedures” which may result in any unnecessary suffering and the regulation of such unnecessary infliction of pain, distress or discomfort is clearly prohibited under Sections 14-17 unless authorized by the Secretary of State under exceptional circumstances.

335 Section 11(a)-(c).

336 Section 14(1)(a).

337 Section 14(1)(b).

338 Section 14(3)(a)-(b).

Section 16 furthermore prohibits any person from carrying out any regulated procedure as an exhibition to the general public or to show a live broadcast thereof on television for general reception by the public.³³⁹ Notices or advertisements announcing the carrying out of a regulated procedure for public attendance³⁴⁰ would constitute a contravention of subsection (1) of Section 16. In terms of Section 17, no person shall in the course of a regulated procedure be entitled to make use of any neuromuscular blocking agent unless authorised to do so or use any such agent instead of an anaesthetic.³⁴¹

4.3.2.3 The inspectorate and the committee

Inspectors appointed under the ASPA are so appointed by the Secretary of State after consent has been given by the Treasury as to the numbers and remuneration of the inspectors to be appointed.³⁴² The duties of the inspectors include advising the Secretary of State on applications for personal and project licences³⁴³ as well as applications for certificates.³⁴⁴ One of the main functions and duties of the inspectors is to carry out visits to places where regulated procedures are conducted and to determine whether those procedures are authorised.³⁴⁵ Visiting of designation establishments must also be conducted³⁴⁶ and reports must be submitted to the Secretary of State in any case where a provision of this Act has not been complied with.³⁴⁷ Although the appointments of inspectors are done at the sole discretion of the Secretary of State, no inspector may be appointed unless such person is the holder of a medical or veterinary qualification.³⁴⁸ Section 18 thus ensures that all inspectors are medically qualified to conduct their duties adequately and effectively in terms of assessments, inspections and reporting on any

339 Section 16(1).

340 Section 16(2).

341 Section 17(a)-(b).

342 Section 18(1).

343 Section 18(2)(a).

344 Section 18(2)(b).

345 Section 18(2)(c).

346 Section 18(2)(d).

347 Section 18(2)(e).

348 Section 18(1).

circumstance relating to the appropriate welfare and care of “protected animals” under the Act.

The establishment of an APC and the duties allocated to the members of the committee are regulated under Sections 19 and 20 of the ASPA. The Secretary of State must in terms of Section 19(2) appoint a chairman and a minimum of twelve members to function as the committee. Two of the main functions of the APC are to advise the Secretary of State on matters concerned with the ASPA³⁴⁹ and most importantly, to consider and have regard to both legitimate requirements of science and the industry and the protection of animals against avoidable suffering and unnecessary use in scientific procedures.³⁵⁰ The APC is required in terms of Section 20(5) to annually provide a report to the Secretary of State, who in turn shall lay copies of the report before Parliament. The importance of Section 20(5) is that not only will the Secretary of State have the power to scrutinize the report provided but members of parliament also have the opportunity to inquire about certain aspects relating to the functions of the APC should any discrepancies regarding the submitted report arise. The duty imposed under Section 20(2) upon each member of the APC has a dual effect. Firstly, the members must ensure protection of “protected animals” at all times and secondly, all relevant standards of treatment and care of “protected animals” are routinely assessed and monitored by inspectors. Whether “protected animals” are subjected to “regulated procedures” or prohibited procedures is irrelevant in terms of Section 20(2). The focus and aim of this section are solely based on the “protection of animals”, and provide a broader scope and enforcement power to the members of the APC.

4.3.2.4 Miscellaneous and supplementary

Section 21(1) grants the Secretary of State the authority to publish information to serve as a guide with respect to whom he proposes to exercise his powers, duties and grants of licences and certificates.

349 Section 20(1).

350 Section 20(2).

Under Section 21(2) the Secretary of State shall issue guidance codes of practice as to the care of “protected animals” and their use for regulated procedures. Failure by any person to comply with any provision of a code issued or approved under Section 21(2) shall render such person guilty of a criminal offence or civil proceedings.³⁵¹ The penalties for contravention of Section 21(3) are explained under Section 22. These contraventions shall include either imprisonment for a term not exceeding two years if found guilty or a fine or both for conviction following indictment.³⁵² A summary conviction shall bear the penalty of imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both.³⁵³ Persons being holders of project licences shall be criminally liable and penalties therefore shall be the same as those listed under Section 22(1)(a).

The giving of false statements by any person to assist another in obtaining a licence or certificate is regulated under Section 23 of the ASPA. False statements are an offence and under Section 23(2) and carry the weight of being liable for a summary conviction sanctioning a person to imprisonment, or a fine or both. Sections 21-23 are exceptionally valuable provisions. These provisions have been specifically designed for the ASPA to provide the necessary, relevant and sufficient protection of animals used during “regulated procedures” or those subjected to illegal procedures. The protection offered under the AWA (b) and the sanctions imposed there under rather provide assistance of a more general nature in terms of welfare to animals, more specifically animals privately owned and domesticated animals.

4.3.2.5 Schedules to the ASPA

As discussed previously Schedules 1 and 2 provide an effective guidance to inspectors, the Secretary of State and all relevant people who are obliged to ensure the necessary, effective and sufficient

351 Section 21(3).

352 Section 22(1)(a).

353 Section 22(1)(b).

protection of “protected animals” under the ASPA that are subjected to “regulated procedures”. The APC are also instructed in terms of their duties to ensure that all actions taken by holders of certificates and licences adhere to the standards imposed under Schedule 1 and inspectors must ensure that animals obtained for and by people to conduct “regulated procedures” are such animals as stipulated under Schedule 2.

4.3.2.5.1 Schedule 1

A. Animals other than foetal, larval and embryonic forms	
<u>Method</u>	<u>Animals for which appropriate</u>
<p>1. Overdose of anaesthetic suitable for the species-</p> <p>(i) by injection; (ii) by inhalation; (iii) by immersion</p> <p>Followed by destruction of the brain in cold-blooded vertebrates and by exsanguinations or by dislocations of the neck in warm-blooded, vertebrates except where <i>rigor mortis</i> has been confirmed.</p>	<p>(i) All animals (ii) All animals up to 1 kg bodyweight except reptiles, diving birds and diving mammals. (iii) Fishes, Amphibian up to 250g bodyweight</p>
<p>2. Dislocation of the neck</p> <p>Followed by destruction of the brain in fishes</p>	<p>Rodents up to 500g bodyweight other than guinea-pigs.</p> <p>Guinea-pigs and lagomorphs up to 1 kg bodyweight.</p> <p>Birds up to 3 kg bodyweight.</p> <p>Fishes up to 250g bodyweight.</p>
<p>3. Concussion by striking the back of the head.</p> <p>Followed by exsanguinations or dislocations of the neck in rodents and birds and destruction of the</p>	<p>Rodents up to 1 kg bodyweight.</p> <p>Birds up to 250g bodyweight.</p> <p>Fishes.</p>

brain in fishes.	
4. Decapitation followed by destruction of the brain	Cold-blooded vertebrates.
5. Exposure to carbon dioxide in a rising concentration using a suitable technique followed by exsanguinations of by dislocation of the neck except where <i>rigor mortis</i> has been confirmed.	Rodents over 10 days of age up to 1½ kg bodyweight. Birds over 1 week of age up to 3 kg bodyweight.

B. Foetal, larval and embryonic forms	
6. Overdose of anaesthetic suitable for the species- (iv) by injection; (v) by inhalation	(iv) All animals (v) Fishes and Amphibians
7. Decapitation	Mammals

4.3.2.5.2 Schedule 2

<i>Animals to be obtained only from designated breeding or supplying establishments</i>
Mouse
Rat
Guinea-pig
Hamster
Rabbit
Dog
Cat
Primate

4.3.3 Enforcement of the AWA (b) and the ASPA

The Royal Society for the Prevention of Cruelty to Animals³⁵⁴ is one of the largest privately funded charity trusts known world-wide. Inspectors and constables who receive enforcement powers granted under the AWA (b) are either employed by the RSPCA or work as volunteers. Unlike the USDA, the RSPCA is not under-funded. In 2008, the total income received from charity donations was a staggering £119,926.000 of which £114,090.000 was for expenditures and £70,656.000 was reserved. In 2011 the RSPCA investigated more than 159,759 cases of cruelty and rescued 119,126 animals. Enforcement of the AWA (b) is thus more effective in the UK than the enforcement of the AWA (a) in the USA or the APA in South Africa, as the UK is not short of funds to employ or provide training to staff.³⁵⁵

The Treasury of the United Kingdom is responsible for the remuneration of the inspectors appointed by the Secretary of State under the ASPA. The Treasury ascertains the number of inspectors needed from the annual reports provided to Parliament by the APC. Enforcement of the provisions of the AWA (b) and the ASPA is consequently more effective as two separate entities are responsible for the remuneration of the staff employed to ensure effective enforcement. The obligation to ensure that sufficient funds are available does not burden a single governmental department as is the case in South Africa.

The AWA (b) functions as a statute to provide the necessary general animal welfare of animals and to ensure that members of society are given the opportunity to be educated if and when the welfare needs of animals not contained in research laboratories are at risk. Although the AWA (b) does not address the issues of welfare, treatment and care of animals held in research laboratories, and bred and supplied to research institutions, it does serve to provide more stringent provisions to protect and promote overall animal welfare. The ASPA does not serve as a

³⁵⁴ Hereinafter referred to as "RSPCA".
³⁵⁵ See <http://www.rspca.org.uk>.

secondary legislative measure to promote or protect animal welfare in the mentioned UK regions. The ASPA is a statute that functions independently from the AWA (b). Its main function is to ensure that “protected animals” used in research institutions are protected against illegal procedures, are protected under “regulated procedures” and that the actions authorised by the Secretary of State in terms of certificates and licenses are inspected, assessed and reported on by inspectors and members of Animal Procedures Committees.

4.4 Conclusion

The 1985 amendments of the AWA (a) and the PHS Funding Policy in the USA have brought about significant changes within the realm of the welfare of animals held in research laboratories. Not only has the USA ensured through its Federal Welfare Act that the welfare needs of animals contained in research laboratories will be more stringently observed but Congress has also ensured through the adopted of the PHS Funding Policy that any inconsistencies with the current AWA (a) will be covered by the PHS Funding Policy. Both legislative documents ensure that the provisions of each will federally regulate any person or institute within the borders of the USA. Therefore the USA legal framework is not only optimal in terms of its application but also effective in relation to its enforcement.

The UK AWA (b) is very similar to the APA of South Africa in terms of its substantive provisions. The AWA (b) and the APA both do not contain specific provisions regulating the use, care, treatment and containment of animals in research laboratories. However, the AWA (b) is more rigorous in its application and enforcement than the APA due to the availability of constables and inspectors appointed under the RSPCA and the available of necessary funds. The inclusion of the five welfare needs of animals in the provisions of the AWA (b) enhances its enforcement in that the people who are responsible for animals are provided with a yardstick from which they are able to assess whether the welfare needs of animals under their care are addressed.

As mentioned in chapter 3, the APA does not sufficiently describe how people should interpret the words “unnecessary suffering” and “reasonable cause”, two phrases that have a significant impact on the welfare needs of animals contained in research laboratories. In the USA, for example, the welfare needs of animals contained in research laboratories have specifically been addressed in lieu of the demand from welfare organizations and society that pressured Congress to bring about formidable changes. Not only does the newly-imposed AWA (a) incorporate regulations under Regulation 9 CFR to provide guidance to measure the levels of pain and distress experienced by animals but also incorporates other regulative measures in terms of the PHS Funding Policy. The ASPA of the UK serves as one of the most suitable statutes from which South African legislation may learn. The ASPA ensures that all words used are clearly defined and that all procedures conducted on experimental animals shall be regulated, monitored and assessed by medical graduates and members of animal committees. The Schedules forming part of the ASPA provide all designated establishments and breeding and supplying facilities with the proper humane methods of ending an animals’ life. The ASPA together with the AWA (b) and the five welfare needs can definitely shed new light on the treatment animals received in research laboratories in South Africa. Using these provisions to enhance our own legislative framework does provide an adequate way to offer protection to animals. The South African government can therefore only benefit from the provisions of the federal statutes imposed in the USA and the legal framework of the UK in that they serve as examples according to which our own legislative framework could be reformed, developed or enhanced to ensure secure protection at a more stringent level for animals contained in our research laboratories.

Animal experimentation is not necessary. It is expensive. It is inaccurate. It is misleading. It consumes limited resources. And further, it is detrimental to the very species it professes to be working to help – humankind.³⁵⁶

5 Conclusion

5.1 Introduction

It was the primary aim of this dissertation to investigate the current inadequate legal framework as it pertains to animal welfare and care in South Africa. The investigation also concentrated on establishing whether reform of the current legal framework is possible and attempted to establish a viable solution through which reform might be conducted. Chapter 1 briefly discussed the notion of an experimental research method known as vivisection.

In chapter 2 a brief background to the viability of animals held in research laboratories was provided. The inherent and non-inherent abuses suffered by animals during the procedures conducted in research experiments were highlighted to provide background information and clarity in terms of the viability of animals held in research laboratories. The background information furthermore provides a distinction between the inherent and non-inherent abuses suffered by animals during the process of experimental research. The inherent abuses suffered by animals furthermore assisted in providing a reasonable understanding of the method of vivisection. The remainder of chapter 2 focused on discussing the relationship humans and animals currently share. It was discovered and highlighted that the application of the Utilitarian approach characterises the relationship humans share with animals. Therefore, animals continue to be regarded as objects of property rather than a species different from ours possessing their own inherent interests.

Peter Singer first introduced this philosophical approach in 1975. Applying Utilitarianism to circumstances involving animals is not wrong

356 Greek & Greek *Sacred Cows and Golden Geese* 222.

per se. However, humans remain the ones making decisions that affect their everyday lives. Humans are not prepared to sacrifice their own interests in terms of survival in order to protect the interests of animals in the pursuit of science. The application of the philosophy of Utilitarianism to all circumstances concerning animals and science does not seem to afford the necessary protection animals deserve, specifically in relation to their overall welfare needs. It has for these very reasons become a necessity that South African society should re-direct the current perceptions and views held about animals to bring forth substantially needed change. The application by means of interpretation of a different approach does pose a solution to ensure the future survival of animals and humans alike.

In chapter 3, the APA was investigated and analysed and it was concluded that the APA as primary regulative source of animal welfare and care in South Africa is currently not addressing matters concerning the welfare and care of animals contained in research laboratories in a satisfactory manner. Protection under the APA is neither comprehensive nor specific. Various words and provisions contained in the APA are vague and do not seem to provide the reader thereof with the clear intention the legislature may have intended. Other statutes and Regulations which also deal with welfare and care of animals also do not seem to strengthen the current normative framework. The PAIA for example contains various provisions which research laboratories abuse in order to further their research objectives without hindrance. Questions posed to research laboratories in relation to animal numbers utilized for experiments, the types of animal species used as well as other necessary and vital information are continuously refused based on “exceptions” contained within the PAIA.

A further discovery of the investigation in chapter 3 relates to the ineffective enforcement of legislation. The Department of Agriculture is currently under-funded and cannot provide the necessary funds to ensure optimal protection through enforcement of legislation. The only

means offered to inspect, evaluate and regulate animal welfare is at the hands of members and volunteers working for non-governmentally funded organisations. These members and volunteers also face extreme difficulties as they are not imbued with adequate authority to conduct their services due to legislative inaptitude. Two foreign jurisdictions were discussed as examples (in chapter 4) which may assist our government during the process of reform. The federal legislative framework of the USA as well as the legislative framework of the UK proved to provide vital differences from our own legislative framework in relation to the welfare and interests of animals. In the USA legislation took a dramatic turn in 1985 when Congress opted to introduce more stringent welfare measures and policies. After the introduction of the new AWA (a) the PHS Funding Policy was also introduced. Federal Law and Federal Policy regulate animal welfare and specifically animal welfare in research laboratories. In order to ensure optimal protection to animals a Regulation was promulgated to provide necessary and useful definitions when interpreting the words used in Federal law and Policy. The Regulation serves to assist the reader of Federal Law and Policy to comprehend the intention and purpose that these documents serve to reflect.

The UK AWA (b) regulates general welfare of animals. The provisions of the AWA (b) are construed by placing emphasis on the welfare of animals. Sections 9-12 specifically relate to the promotion of welfare and Sections 18-21 to circumstances whereby animals are found to be in distress. Enforcement powers are set out under Sections 22-29 of the Act, and ensure effective regulation of circumstances relating to the welfare and care needs of animals.

Although the UK AWA (b) does not contain provisions relating to animals contained in research laboratories it does contain the five welfare needs as developed by the UK Animal Farm Council. A second statute, the ASPA, was also introduced which specifically regulates all aspects regarding the containment and use of animals in research laboratories.

The ASPA contains various adequate provisions which, among others, include the idea that all research laboratories are obligated to obtain licences, authorisation certificates and so forth in order to conduct research during which animals are utilized for such purposes. These provisions may be regarded as the backbone of the ASPA. Section 1 of the ASPA provides a sufficient definition of the species of animals which are protected under the Act and Section 2 stipulates which procedures are regarded as “regulated procedures” which may be conducted by research laboratories. Provisions to regulate breeding facilities are included under Section 7 of the Act. The accountability of staff is furthermore under constant supervision conducted by an “Inspectorate and an Animal Procedures Committee” found under Sections 18-20. The inclusion of schedules in terms of standard procedures for humane killing and breeding by an establishment’s staff during the performance of their duties is important, and contributes to ensuring that animals are constantly treated in a humane manner.

The enforcement of the AWA (b) is conducted by means of financial assistance provided by the RSPCA. Unlike South Africa, the RSPCA is not under-funded and effective enforcement of the AWA (b) is not at risk. The Treasury of the United Kingdom is furthermore the responsible entity to provide remuneration to inspectors appointed by the Secretary of State under the ASPA. The effect of dividing the responsibility of finances between two separate entities has proved to be a useful mechanism to ensure effective enforcement. In order to reform our current legislation and to ensure that legislative inaptitude is addressed, the South African government may make use of examples from both foreign jurisdictions. Certain aspects such as proper definitions of words, a secondary regulative statute (such as the ASPA) for animals held in research laboratories, proper funding mechanisms and enforcement provisions may be implemented in our country. Making use of examples offered by these two jurisdictions may very well serve as good examples when the process of reform takes effect.

The redrafting of current legislation, amendment thereof or imposition of new legislation ensuring the promotion and protection of animal welfare in South Africa are necessary and important actions. Acknowledging the principles upon which the USA and UK have formulated and developed welfare laws, policies and regulations is a viable option. Incorporating animal welfare principles already employed by the USA and UK into our own legislative framework is also not impossible. A final solution may also be to address the issue of animal welfare in laboratories first. In this instance, the critically relevant and applicable provisions of the USA and UK welfare Acts and ASPA may be employed; thereupon a more comprehensive process of review may be initiated.

However, no legal framework consistently functions without deficiencies. Legislation from the USA and the UK also possesses minor weaknesses. The US AWA (a), for example, excludes rats and mice from protection and enforcement of the AWA (a) is to some extent not sufficient. The only shortcoming that the PHS Funding Policy may have is related to enforcement. Inspectors appointed under the Policy are volunteers. In the event of shortage of volunteers, effective enforcement of the Policy may become problematic.

The UK AWA (b) does not specifically contain provisions in relation to animals contained in research laboratories. Minor ambiguities also exist in relation to definitions of words for interpretation purposes. The APA is under-developed in its formulation and is a statute only having general application in terms of welfare. The APA furthermore does not provide proper definitions of words for interpretation purposes and its enforcement is inadequate. The fact of not containing specific provisions for the protection of animals contained in research laboratories is also a major problem. Regulations stipulating the course of action and conduct expected from Veterinary, Para-Veterinary staff and Animal Health Technicians furthermore do not provide the necessary assistance to the APA. The Regulations generally do not provide sufficient definitions relating to the manner of actions or conduct expected and

seems to lack enforcement of its provisions as well. Remaining statutes enacted for the purpose of assistance, promotion and protection of legal entitlements also seem to contribute to the process of weakening our legal framework instead of strengthening it.

5.2 *Relation of foreign jurisdictions*

5.2.1 Recommendations of the USA and UK

5.2.1.1 The USA

The AWA (a) includes provisions that specifically deal with animals held in research laboratories. Section 13(2) describes the necessary “minimum standards” required in terms of humane handling, care, treatment, transportation of animals by dealers, research facilities and exhibitors. Section 13(3)(A)-(E) specifically regulates the standards in research laboratories. The most significant is Section 13(3)(A) which specifically relates to the treatment, care and practices in terms of experimental procedures. This section provides a detailed definition of what is to be expected of the staff and veterinarians responsible for the animals. The PHS Funding Policy has a binding effect and assists in the provisions of Federal law by addressing welfare, care and treatment of animals contained in research laboratories. Regulation 9 CFR also contains more than eighty definitions to ensure that any ambiguities are eliminated during the interpretation of the AWA (a) and the PHS Funding Policy. The development and implementation of the eight welfare principles by the AVMA serve to guide, assist and develop animal welfare within the veterinary profession.

Proper definitions of words as offered by the AVMA guide must be used. Examples include but are not limited to the various animal species used in the research laboratories, animal, dealer, exotic animal, farm animal, housing facility, major operative procedure, isolation, intermediate handler, interactive area, non-conditioned animals, non-human primate, painful procedure, research facility, scientific procedure, regulated

procedure, outdoor facility, experiment, experimental process, vivisection, standard(s), care, welfare, human, inhumane and so forth. Various circumstances are highlighted under Subsection 13(2) from which the people responsible for the animals under these circumstances are required to act in dealing with animals. The circumstances include the humane handling, care and treatment, transportation of animals by dealers, research facilities and exhibitors. Subsection 13(2) specifically states what the minimum requirements for the circumstances listed shall entail. Subsection 13(3)(A)-(E) of the AWA (a) provides a comprehensive description of standards by which animals must be cared for and that are contained in research facilities. These sections can furthermore assist as guidance from which comprehensive provisions may be construed to ensure similar conditions for animals contained in research laboratories in South Africa.

5.2.1.2 The UK

The inclusion of the five welfare principles within the AWA (b) serves to promote the treatment, care and welfare of all animals. The powers and authority granted under the Act to inspectors and constables to conduct inspections and seize animals in distress regulate effective enforcement of the AWA (b). Regulation of scientific procedures conducted on animals by the ASPA assists and provides the most stringent protection to animals contained in research laboratories. The ASPA clearly defines which procedures will be regarded as “regulated procedures” and which will constitute an offence under the Act. Furthermore, the ASPA states that no person or establishment shall conduct any “regulated procedures” unless so authorised by the Secretary of State. Inspectors and members of the APC must be medically qualified and any person or establishment conducting “regulated procedures” must be in possession of a legal licence or certificate granting the necessary authority to do so. Funding received by the RSPCA enables the RSPCA to adequately train inspectors, supply the necessary medication and vital equipment as well as provide members of society with necessities for their animals if they

cannot afford such. Although the RSPCA is a non-governmental organization, all funds received are solely allocated to ensure that optimal enforcement and regulation of animal welfare takes place.

The principles upon which Sections 4-8 (prevention of harm), 9-12 (promotion of welfare), 14-17 (codes of practice), 18-21 (animals in distress) and Sections 18-21 (enforcement powers) of the AWA (b) rest can serve as exceptionally good guidance methods. The South African legislature may follow such principles in developing and reforming our own current provisions contained in the APA.

The most important provisions of the ASPA which may be used as a guide by our government to address welfare and care of animals contained in research laboratories are Section 1 (protected animals), Section 2 (regulated procedure), Sections 3-5 (personal and project licences), Sections 6-7 (designated establishments), Sections 10, 11-12 (general provisions – licences and designation certificates), Sections 14-16 (additional controls) and Sections 21-24 (supplementary provisions). The aforementioned provisions specifically regulate all circumstances relating to animals and the conditions under which they may be contained, utilized and cared for by research laboratory staff. A variety of options are available for government to reform the current legal framework pertaining to animal welfare in South Africa.

5.3 South Africa

Although the legal framework in South Africa does not seem to sufficiently address the welfare needs of animals, the framework does provide scope for reform. The framework as it currently stands can be reviewed or repealed. Drafting of new legislation is a further option available to our legislature. The APA does, however, provide some form of animal protection as it does not distinguish between warm-blooded, cold-blooded, vertebrate or invertebrate animals like the USA or UK legislation.

Six major problems regarding our current legislative framework as it pertains to animals can be identified.

- One, words used in statutes are not clearly defined to ensure that interpretation thereof is consistent with that which the legislature intended it to mean.
- Two, the PAIA does not seem to provide the necessary assistance to non-governmental organisations and members of society to obtain relevant and sufficient statistics from research laboratories.
- Three, current statutes, in particular the APA, does not contain provisions that specifically promote, protect or ensure the welfare of animals contained in research laboratories.
- Four, government funds are not sensibly distributed amongst various departments, having the effect that those departments in need of funds cannot maintain a suitable standard of proficiency.
- Five, enforcement of the protection provisions of various statutes is not effective due to a shortage of manpower.
- Six, the current philosophical approach followed by humans to regard animals as mere objects or property rather than fellow sentient beings with equal species interest obstructs legislative reform.

Immediate and effective changes of the APA are clearly necessary. Enactment of subsequent legislation in the form of a statute regulating actions, welfare, care and treatment of animals contained in research laboratories is trite. The well-being, welfare needs and interests of animals contained in research laboratories in South Africa are not adequately addressed due to legislative inaptitude. The South African legislature may use as examples and take cognisance of legislation in countries such as the USA and the UK to assist during the process of reform.

In order to ensure effective reform it is recommended that the process be divided into different phases. The most vital recommendations must be applied as soon as possible, followed by the more advanced and difficult options in a later phase. The vital recommendations will also provide the necessary future assistance to impose later or final stage reform. The following phases serve as recommendations for reform:

5.3.1 Phase One

Amendment of the APA is the most critical. During this phase comprehensive definitions for words used in the Act must be incorporated, such as unnecessary suffering, negligent (negligence, negligently), reasonable cause, reasonable care, welfare, scientific research, animal, experimental animal, euthanasia, cruelty and owner. More stringent penalties and sanctions for offences committed under the Act must be instituted. Penalties and sanctions must also be differentiated. Intentional actions as opposed to negligent actions must impose a substantially heavier “punishment”. For intentional actions (by a person(s)) a maximum of ten years imprisonment with or without the option of a fine would suffice, while for negligent actions a maximum sentence of five years imprisonment with or without the option of a fine would suffice. Fine amounts payable for negligence to a minimum amount of Four Thousand Rand with a maximum amount of Ten Thousand Rand would be suitable, while fine amounts for intentional actions could be imposed to a minimum of Ten Thousand Rand and the maximum amount to be imposed at the sole discretion of the court. In the latter instance, the court must as with any other case, take into consideration the circumstances, seriousness, injury caused to the animal, veterinary expenses payable (if any) for treatment of the animal and emotional trauma (if any) suffered by the owners and their respective family members of such animal. In the case where an entity (research facility) is found guilty of an offence of negligence, a minimum fine amount of One Hundred Thousand Rand and a maximum of Two Hundred and Fifty Thousand Rand for each species of animal should

suffice. In a case involving intentional action, a minimum fine amount of Five Hundred Thousand Rand for each species of animal should suffice and when a single animal or specie of animal is involved the maximum amount should be determined at the sole discretion of the court. Cost orders granted for damages should be determined at the sole discretion of the court or where applicable in accordance with actual expenses incurred. The author determined the quantum of the various fine amounts by means of applying a reasonable person's perception of what would be regarded as fair and reasonable fines to pay for being found guilty of offences committed against animals. Due regard was also given to distinguishing between offences committed due to negligence and offences committed with intent as well as offences committed by a single person as opposed to an entity such as a research laboratory. Negligence by a normal citizen can also not carry the weight of negligence committed by an employee of a research facility as these employees have acquired training to conduct their duties at a research facility. The fine amounts are mere examples but serve a necessary purpose. The fine amounts payable by entities such as research laboratories have been construed as high amounts to serve as an indirect means to cause financial turmoil as well as to penalize the laboratories for having no regard for the basic laws which regulate their conduct and the protection of animals. Provisions providing authority and specific duties in relation to the Minister of Agriculture have to be updated in accordance with updated or subsequent provisions contained in the APA, Regulations and new legislation. Provisions concerning the promotion of animal care and treatment have to be incorporated into the APA. Additionally, provisions must also ensure that animal welfare is promoted by making use of the example offered by the AWA (b) – the five welfare freedoms. Proper definitions must be incorporated into existing Regulations and statutes regulating animal welfare and conduct towards animals. Finally, a new statute – *“Animal Scientific Procedures and Research Act”* has to be drafted. This Act must specifically contain provisions relating to the use, procedures and subsequent conduct relating to animals held in research laboratories. The necessary

examples offered by the AWA (a), AWA (b) and specifically the ASPA may be used by government to provide the most adequate statute for South Africa. This provision must reflect the idea that all conduct, procedures and actions in terms of animals held in research laboratories shall be regulated by the newly-drafted *“Animals Scientific Procedures and Research Act”*.

5.3.2 Phase Two

Drafting a new *“Animals Funding Scientific Procedures and Research Act”* statute through making use of the example as offered by the PHS Funding Policy of the USA would be useful and constructive. Provisions included in the Act must reflect the approach of the “three Rs” as well as the eight principles developed by the AVMA. The inclusion of the “three Rs” approach and eight principles will ensure that all aspects relating to animal welfare, care and treatment are sufficiently addressed before funding is provided for scientific and research programmes.

5.3.3 Phase Three

Apply the proposed approach offered by Bilchitz in terms of “progressive realisation”. During the phase of application the interests and well-being of animals suffering inherent and most non-inherent abuses may be recognised. The most painful and distressing procedures conducted on animals in terms of the *“Animal Scientific Procedures and Research Act”* may either be banned or more stringent measures for regulation and control may be implemented. Amendment of the *“Animal Scientific Procedures and Research Act”* to include “severe” criminal punishment for conduct reflecting non-inherent abuses suffered by animals is essential. All conduct relating to forms of non-inherent abuse may subsequently constitute liability for a “serious offence” committed and be punishable by the amended sanctions under the Act.

The PAIA provisions hindering the obtaining of relevant information have to be reviewed and amended. Access to relevant information held by

research laboratories must be made available. The control of listed “exceptions” granted under the PAIA has to be more stringently regulated by amended provisions.

5.3.4 Final phase

Apply the proposed approach offered by Bilchitz in terms of “the alternative interpretation of the concept of dignity”. This approach currently seems to be the most fitting and appropriate solution to develop and implement legislation in order to provide animals with rights in the future as merely opposed to welfare protection. Once the approach has impacted on the current human perception of an “animal’s status” the door to legislative change and future development of our legislative framework pertaining to animals is opened. A comprehensive analysis of the preceding three phases may thereupon be conducted in order to assess which Statutes, Regulations and policies have to be amended or entirely repealed in order to reflect the notion that animals have been granted rights in terms of our legal framework.

This comprehensive analysis could serve as the starting point from which rights of animals can be addressed, formulated and implemented. The initiation of the final phase is the most radical and difficult task but would surely serve our country as being the most liberating change initiated and employed for animals in South African history.

Changing our legislative framework as it pertains to animals may pose a daunting task but the advantages brought about through these significant changes may be the most suitable answer in successfully developing our legislation to ensure life for all sentient, living beings in the near future.

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