

“Consider whether animal welfare legislation should be extended to include decapods.”

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Introduction

At first glance, the word ‘decapod’ evokes little – if any – meaning for the uninformed, ordinary citizen. In fact, the lyricists for Disney’s most recent animation, *Moana*, presume a viewer would have to ‘look it up’.¹ Were the viewer to turn to the Animal Welfare Act (England and Wales) 2006 (‘AWA’) or its devolved iterations, though, the term could not be found. It is for this reason that decapods are the subject of a new law reform campaign launched by Crustacean Compassion, an animal welfare organisation dedicated to securing full legal protection for this order of crustacean.² The campaign raises important questions for the animal welfare regime, principally whether it ought to be updated and extended. Following an assessment of the current animal welfare regime, the nature and volume of relevant scientific data, and the approaches adopted in other jurisdictions, it will be submitted that the amendment of animal welfare legislation to protect decapod crustaceans in particular is certainly overdue.

Ethos of the AWA

To determine whether the scope of the AWA should be broadened, it is necessary to first understand the objectives and purpose of the statute. Taking the text

on face value, the first and second chapter designations indicate that the act serves to ‘prevent harm’³ and ‘promote welfare’⁴ of the animals to which the act applies.⁵ Having comprehensively combined over 20 pieces of legislation, the AWA built on the foundations of the post-war 1965 Bramble Inquiry into the welfare of farmed animals and reinvented animal welfare law to reflect modern social and moral values. To this end, the numerous protections accorded to the protected animals, and the various circumstances in which the AWA applies, capture the belief that animals deserve not only to be protected from cruelty, but also to have a high quality of life more generally. In terms of environmental ethics, the ethos of the AWA captures the zoocentric perspective that intrinsic value is attributable to any sentient animal that is the experiencing subject of a life, having an individual welfare of its own importance.⁶

Requirements of the AWA

It is with acute mindfulness of the legislative purpose underlying the animal welfare regime that the posited question of reforming the AWA to include decapods can then be addressed. Understood through a legal rather than ethical lens, this question can only be answered in the affirmative if the necessary statutory

¹ Through the song ‘Shiny’, the large crustacean Tamatoa makes reference to his decapod identity, anticipates the unfamiliarity of the term, and proceeds to break the fourth wall to bring the term to our attention. Lyrics available at <<https://genius.com/Jemaine-clement-shiny-lyrics>>.

² More details available at <<https://www.crustaceancompassion.org.uk>>.

³ Animal Welfare Act 2006, ss 4-8.

⁴ Animal Welfare Act 2006, ss 9-12.

⁵ Animal Welfare Act 2006, s1.

⁶ T Regan (2012), *Animal Rights and Environmental Ethics*, Springer Science+Business Media, Dordrecht, 87.



conditions are satisfied. Crustaceans are invertebrate animals⁷ within the meaning of s1(3)(a) AWA, such that they are not currently protected by the animal welfare regime established therein. However, the state explicitly recognises that there is scope to extend the scope of the AWA to certain invertebrate species if the appropriate national authority is satisfied, on the basis of scientific evidence, that the invertebrate species concerned is capable of experiencing pain or suffering.⁸

'Scientific Evidence'

Pursuant to s1(3)(a) AWA, it is essential to begin by identifying adequate scientific evidence that decapod crustaceans can experience pain or suffering. The challenge in satisfying this statutory standard is that it turns on subjective criteria: given animals cannot express pain in the way that humans can, an adapted

interpretation of pain must therefore be identified. To this end, Zimmerman has authoritatively defined pain in animals as 'an aversive sensory experience caused by actual or potential injury that elicits protective and vegetative reactions, results in learned behaviour, and may modify species specific behaviour'.⁹

Framed in these terms, scientists have been able to instigate a significant number of studies to ascertain whether decapod crustaceans – and crustaceans in general – reveal the cognitive biases that are indicative of pain. Diverse methodologies have been applied in order to source a comprehensive set of data, from monitoring hormone levels to observing physical reactions to controlled stimuli.¹⁰ Most recently, in 2013, research biologists at Queens University Belfast conducted a shock avoidance experiment on shore crabs to see whether they modified their behaviour

⁷ J Green and I Gordon, 'Crustacean', *Encyclopedia Britannica*. Accessible at <<https://www.britannica.com/animal/crustacean>>.

⁸ Animal Welfare Act 2006, s1(4).

⁹ M Zimmerman (1986), 'Physiological mechanisms of pain and its treatment', *Klinische Anasthesiologie Und Intensivtherapie*, Berlin, 32: 1-19.

¹⁰ See for example: S Barr et al (2008), 'Nociception or pain in a decapod crustacean?', *Animal Behaviour*, 75: 745-751; R Elwood et al (2009), 'Pain and stress in crustaceans?', *Applied Animal Behaviour Science*, 118: 128-136; and R Elwood and M Appel (2009), 'Pain in hermit crabs?', *Animal Behaviour*, 77: 1243-1246.

and sought shelter in response to shock.¹¹ The findings in the study, which broadly reflected those of previous experiments, were construed as consistent with the core criteria for experiencing pain.

'Satisfied'

Identifying scientific evidence, however, is not sufficient in and of itself. The terminology employed in s1(3)(a) AWA is more problematic insofar as the standard of scientific evidence is not specified; rather discretion rests with the appropriate national authority to interpret the evidence adduced. Thus, despite the wealth of scientific data indicating that decapods possess the capacity to experience pain, something additional is required to persuade the appropriate authority to instigate legal reform. In this respect, the extension of animal welfare regimes in other jurisdictions may be persuasive.

Although the United Kingdom (UK) has voted to withdraw from the European Union (EU), the approach to animal welfare fostered within the region remains influential in the debate on whether decapods ought to be protected by domestic law. One ground for this comparison is that the emphasis on scientific evidence in the AWA is a clear derivation from EU law. Indeed, scientific data is a core component of EU animal welfare and nature conservation policy.¹² In developing law and policy, the Treaty on the Functioning of the EU (TFEU) recognises a general duty on the EU and member states to pay full regard to the welfare of animals, since animals are sentient beings.¹³ At this juncture, it is conceded that nowhere in the EU animal

welfare regime is protection specifically afforded to crustaceans.¹⁴ Yet, given science is a cornerstone of EU legislation and jurisprudence in this area, 'sentient beings' impliedly acquires an evolutionary scientific definition. In this context, value must be accorded to the nexus between sentience and invertebrates that has been recognised by eminent scientists such as Broom.¹⁵ As a result, Austria is among an increasing number of member states to singularly identify decapods ('*Zehnfußkrebse*') as falling within the scope of its domestic welfare legislation.¹⁶

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Should EU law be deemed less persuasive, amid negotiations over the EU (Withdrawal) Bill 2017-19, the fact that other European and common law jurisdictions grant protection to decapods or crustaceans is similarly compelling. In explicit terminology, § 2 of the Norwegian Animal Welfare Act 2010¹⁷ delineates the scope of the regime and lists decapod crustaceans among the protected species. In general terminology, s2(1)(a)(vi) of the New Zealand Animal Welfare Act 1999¹⁸ protects crustaceans, namely crabs and lobsters. While it is true that, in Australia, federal

¹¹ B Magee and R Elwood (2013), 'Shock avoidance by discrimination learning in the shore crab (*Carcinus maenas*) is consistent with a key criterion for pain', *Journal of Experimental Biology*, 353.

¹² In EU legislation, see for example: Directive 2009/147/EC on the Conservation of Wild Birds, art 15 ('Such amendments as are necessary for adapting ... to technical and scientific progress shall be adopted'). In EU jurisprudence, see for example: C-258/11, *Sweetman v An Bord Pleanála* (2013); Case 521-12, *Briels v Minister van Infrastructuur en Milieu* (2014).

¹³ Treaty on the Functioning of the European Union 2008, art 13.

¹⁴ G Liuzzo et al (2017), 'Analysis of provincial and municipal regulations governing crustacean welfare in Italy', *Italian Journal of Food Safety*, 54.

¹⁵ D Broom (2016), 'Considering animals' feelings: Précis of Sentience and animal welfare', *Animal Sentience*; available online at <<http://animalstudiesrepository.org/cgi/viewcontent.cgi?article=1015&context=animsent>>.

¹⁶ Federal Act on the Protection of Animals 2004, § 3(2); available online at <http://www.ris.bka.gv.at/Dokumente/Erv/ERV_2004_1_18/ERV_2004_1_118.pdf>.

¹⁷ Available online at <<https://www.animallaw.info/statute/norway-cruelty-norwegian-animal-welfare-act-2010#s2>>.

¹⁸ Available online at <<http://www.legislation.govt.nz/act/public/1999/0142/latest/DLM49664.html>>.

definitions of ‘animals’ variably include¹⁹ and exclude²⁰ crustaceans, it is submitted that many contemporary definitions were adopted before the height of scientific knowledge in this area. As a result, any inferences drawn from the omission of crustaceans from certain acts should be treated with caution and viewed in light of the more recent studies on pain experience abovementioned. This is underscored by the fact that, of these various definitions, the only explicit reference to decapods is also the most recent.

Closing remarks

What is remarkable from this discussion is that the AWA itself recognises that protection *should* be extended to invertebrates where scientific evidence exists, as is now the case for decapod crustaceans. The apposite question is rather whether protection *will* be extended in the future. In this respect, the crux of the issue is neither the need for a legal mechanism through which to protect decapods, nor the lack of scientific evidence on which to trigger it, but the satisfaction of the discretionary statutory standard in s1(3)(a) AWA.

On this view, the fact that reform has yet to be realised merely indicates a lack of political willingness on the part of the incumbent decision-maker. Whether more evidence will be required, or change is actually imminent, is utterly unclear. For want of legal certainty in future cases, it can only be hoped that, as pledged by Michael Gove,²¹ Brexit will provide a platform for UK animal welfare law to become more rigorous and comprehensive for recognised sentient animals – starting with decapod crustaceans.

About the Author

Jessica Allen is a postgraduate student reading for the Bachelor of Civil Law at the University of Oxford. She graduated with honours in Law with French and French Law at the University of Nottingham in 2017. Formerly the Vice President for Academic Activities of ELSA United Kingdom (2016-17), Jessica is an aspiring public lawyer with a demonstrated devotion to environmental law and international relations.

¹⁹ An inclusive definition exists in various forms in New South Wales (Prevention of Cruelty to Animals Act 1979), Victoria (Prevention of Cruelty to Animals Act 1986), Australian Capital Territory (Animal Welfare Act 1992), and the Northern Territory (Animal Welfare Act 2000). Of these definitions, it is noteworthy that decapods as a particular subspecies of crustacean have been explicitly identified in s3(3)(b) of the Prevention of Cruelty to Animals Act 1986.

²⁰ No provision is made for decapods in South Australia (Animal Welfare Act 1985), Queensland (Animal Care and

Protection Act 2001), Tasmania (Animal Welfare Act 1993), and Western Australia (Animal Welfare Act 2002).

²¹ In response to a failed amendment to integrate the EU Protocol on animal sentience into the European Union (Withdrawal) Bill 2017-19, tabled by Green Party co-leader Caroline Lucas, the BBC reported Michael Gove’s statement that ‘this government will ensure that any necessary changes required to UK law are made in a rigorous and comprehensive way to ensure animal sentience is recognised after we leave the EU.’ News coverage available at <<http://www.bbc.co.uk/news/uk-politics-42099678>>.