

Consultation on a new animal welfare act for Victoria - Directions Paper

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Animal Welfare Legislative Reform
Agriculture Victoria
State Government of Victoria
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The NSW Young Lawyers Animal Law Committee (**Committee**) make the following submission in response to the Consultation on a new animal welfare act for Victoria - Directions Paper (**Directions Paper**).

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Committee comprises a group of over 400 members interested in animal protection laws regulating the treatment of animals. The Committee aims to raise awareness and provide education to the legal profession and wider community, while increasing understanding about the importance of protecting animals from abuse and neglect. A common theme amongst Committee members is a passion and desire to use their legal skills and the law to improve protections for animals.

The Committee welcomes the opportunity to make a submission to this Directions Paper. In making this submission, the Committee aims to draw comparisons to strong and effective elements in the animal welfare legislation of other States and Territories of Australia, including New South Wales and the Australian Capital Territory.

The Committee thanks Law Institute of Victoria Young Lawyers for their contribution to this submission.

Structure of submission and summary of recommendations

The Committee’s submission will address Themes 1 and 2 of the policy proposals in the Directions Paper: safeguarding animal welfare, and a simplified and flexible legislative framework.

		Summary of recommendation
1.1	Animal sentience	Sentience should be referred to in the Objects and Principles of the Act, as well as in the definition of animals. This will bring the legislation into alignment with community values and laws in other Australian jurisdictions, and reflect global best practice.
1.2	Minimum standards of care	To ensure animal welfare is safeguarded, language used to describe minimum standards of care should be proactive rather than reactive. The language should be precise and objective, with clear definitions.
1.3	Prohibited acts	<ul style="list-style-type: none"> - The Committee supports a shift from prohibiting specified actions and behaviours that constitute cruelty, to providing a set of offence categories. - Reference to the harm caused as an aggravating factor (and in the format proposed which may dictate the offence category). - The undesirability of offences should be better reflected in the structure of the proposed tiers of offences. - There should be availability of financial penalties and imprisonment that is proportionate to the malice, negligence, harm and community disapproval of animal cruelty offences. - Certain animals should not be excluded from the categories simply by virtue of their species.
1.4	Controlled procedures	All controlled procedures (for livestock) which cause significant pain and/or are deemed to cause unnecessary pain and suffering should be prohibited. In the absence of prohibition, restrictions should be applied including the requirement for procedures to be undertaken by a registered veterinarian or other appropriate person, and with appropriate pain relief.
2.1	Consistency of the framework	The Committee supports a simplified framework that avoids cross-over or overlapping legislation on similar topics, in order to reduce confusion for people taking care of or working with animals.

Discussion

1.1 Animal sentience

The Committee strongly supports all three options proposed in 1.1 of the Directions Paper, namely to refer to sentience in the Objects and Principles of the Act, as well as to refer to sentience in the definition of animals. If enacted, it would bring the legislation into alignment with community values. As early as 2009, Peter Sankoff, an animal protection scholar, observed that '[w]e have formally abandoned the notion that these sentient beings are 'just' animals and undeserving of moral concern...' and that it is likely that 'the large majority of people in Australia... believe that animals *matter*, and that their welfare is something that is worthy of being considered'.¹ Referring to sentience in the Objects and Principles of the Act, as well as in the definition of animals, would accurately capture the impetus behind society's concern for animal welfare; it therefore represents an appropriate and desirable proposal.

The Committee strongly agrees that the legislative recognition of animal sentience reflects that caring for an animal is different to caring for a vehicle, house, or other inanimate property, and that policy development and regulatory decisions should be based on preserving animal welfare rather than merely responding to animal cruelty.²

The Committee is of the view that including similar wording to that written into the Objects of the Australian Capital Territory's *Animal Welfare Act 1992* (ACT), would adequately capture the sentient status of animals, specifically: "that animals are sentient beings that are able to subjectively feel and perceive the world around them, and have intrinsic value and deserve to be treated with compassion and have a quality of life that reflects their intrinsic value".³ This would also allow consistency between animal welfare legislation across Australian states and territories.

The proposal also reflects global best practice. By way of example in international jurisdictions, animal sentience was expressly recognised by legislation passed by the French National Assembly in 2014⁴, the New Zealand Parliament in 2015⁵, the Parliament of the Province of Quebec in 2015⁶, and Colombia in 2016.⁷

¹ Peter Sankoff, 'The Welfare Paradigm: Making the World a Better Place for Animals?' in Peter Sankoff and Steven White (eds), *Animals Law in Australasia: A New Dialogue* (The Federation Press, 2009) 7, 9.

² Directions Paper, 17.

³ *Animal Welfare Act 1992* (ACT) s 4A.

⁴ French Civil Code, Art. 515-14: "Animals are living beings gifted with sentience. Subject to the laws that protect the animals, they are subjected to the regime of goods."

⁵ s 4, Animal Welfare Amendment Act (No 2) 2015 (2015 No 49): "animals are sentient".

⁶ Quebec Civil Code, Art. 898.1: "Animals are not things. They are sentient beings and have biological needs. In addition to the provisions of special Acts which protect animals, the provisions of this Code and of any other Act concerning property nonetheless apply to animals."

⁷ Colombia Civil code, Art. 655: "Recognizing the quality of sentient beings to animals".

1.2 Minimum standards of care

The Committee supports introducing a minimum standard of care into the new laws. These laws should be used for the protection of all categories of non-human animals regardless of species, including but not limited to domestic animals, livestock, animals used in research, animals in entertainment and wildlife.

In protecting animal welfare, the Directions Paper correctly highlights the importance of introducing proactive, rather than reactive, language to safeguard animal welfare. The use of the ‘fail to provide’ provisions in POCTA⁸ means that it is geared towards punishing behaviour that has reached the stage of failing to provide for the animal. That is, it is reacting to poor behaviour rather than looking to prevent it at the outset. Conversely, introducing an obligation or duty of care is proactive and is a directive which protects animal welfare rather than punishing behaviour cruelty.

The Committee prefers the use of the term ‘obligation’ to describe the requirement to provide a minimum standard of care, as opposed to ‘breach of duty of care’. The Committee is not persuaded that consideration of reasonable measures taken by an individual should be used as a defence. Instead, taking into consideration a person’s conduct or circumstances out of their control can assist in determining severity of a penalty or sentence only.

Alternatively, should the term ‘duty of care’ be preferred, it is imperative that the language used in legislation is precise and the law well defined; the risk of not doing so being that more people disobey the duty. The Committee submits that using words such as ‘reasonable’⁹ or ‘appropriate’¹⁰ to describe a duty to care for animals poses a problem if they are not properly defined. These terms are subjective and vague, and in turn do not necessitate a strict standard to be met. In some attempt to resolve the ambiguity, the NSW legislation sets the period of 24 hours as a marker (for instance failing to provide an animal with food in 24 hours is evidence of failing to provide sufficient food).¹¹ Setting a timeframe is one way to set the standard. Another way is to strictly define who or what determines what is ‘reasonable’ or ‘appropriate’. By way of example, the equivalent New Zealand legislation has effectively enacted provisions whereby there is an obligation in relation to the physical, health, and behavioural needs of animals in that those “owning” or “in charge” of an animal

⁸ *Prevention of Cruelty to Animals Act 1986* (Vic) s 9(f) and 9(i).

⁹ *Animal Care and Protection Act 2001* (QLD) s 17 and *Prevention of Cruelty to Animals Act 1979* (NSW) ss 5(3)(a) & (b) and 8(1).

¹⁰ *Animal Protection Act 2018* (NT) s 6(b) s 6(1)(a-g).

¹¹ *Prevention of Cruelty to Animals Act 1979* (NSW) s 8(3).

must ensure that those needs of the animal are met in a manner that is in line with both good practice and scientific knowledge.¹²

Ideally, a body or organisation that is purely focused on, and knowledgeable in, animal welfare would be the most appropriate at assessing and setting the standard of what is a 'reasonable' provision of animal care. Such bodies could include the RSPCA, the International Fund for Animal Welfare, and World League for Protection of Animals.

The basic elements that should be included in the minimum standard of care should mirror what has been implemented in other jurisdictions as outlined in the Directions Paper (food and water, living conditions, treatment for disease and injury, and the opportunity to display normal patterns of behaviour).¹³ Such a minimum standard of care would ensure the physical, health, and behavioural needs of animals is achieved, paving way for adequate animal welfare practices and outcomes.

The Committee supports introducing a minimum standard of care to the new animal welfare laws and notes the importance of setting an objective standard which the provision of animal welfare must meet.

1.3 Prohibited acts

The Committee generally supports the shift from prohibiting specified actions and behaviours that constitute cruelty to providing a set of offence categories. This may address issues regarding the exhaustive nature of the current list of offences which leaves avenues open for behaviour which, while cruel, sits outside that list.

The Committee also supports the reference to the harm caused as an aggravating factor (and in the format proposed which could dictate the category of offence). It is the suffering endured by the victim animal that underpins the need for offences of this kind and in circumstances where that suffering and the need to remedy or prevent it is well understood (whether that be by lay persons or in industries that work with animals on a regular basis¹⁴), it ought to be at the forefront of considerations regarding the level of criminality in the offence. In terms of the proposed tiers of offences, while it is a useful mechanism, the Committee submits that the undesirability of the offences ought to be better reflected in the structure. Two examples illustrate the point:

- a) Omissions can be just as malicious, cruel and detrimental to an animal as positive acts done with the intention of causing harm.¹⁵ However, the proposed categories require that the latter is always 'worse'

¹² *Animal Welfare Act 1999* (NZ) s 10.

¹³ Animal Welfare Directions Paper, Minimum Standards of Care in Legislation, 19.

¹⁴ Locke, Sarina, 'Pain relief for livestock gets global investment boost with Dechra taking a share of Animal Ethics company' ABC Rural (online, 4 April 2017) <<https://www.abc.net.au/news/rural/2017-04-04/tri-solfen-animal-pain-relief-company-attracts-uk-investment/8413310>>

¹⁵ Heikkila, Karina Elizabeth (2018) *Could s 17 of the Animal Care and Protection Act 2001 (Qld) represent a Derridean justice-based approach to animal protections?* PhD thesis, Victoria University.

than the former. This could produce disproportionate outcomes when, for example, an offender who regularly starves a dog for extended periods of time (likely a Category 1 offence) is considered to have committed a milder criminal act than someone who kicks a dog in anger on a single occasion (at least a Category 2 offence, but potentially Category 4). The Committee therefore submits that the categories ought to better reflect undesirability through offence factors such as harm to the animal (whether by act or omission), *mens rea* of the offender, and duration of offence.

- b) Other aggravating factors ought to be incorporated into the category provisions from other areas of criminal law. This could include whether the offence was done in company, the relevance of the relationship between the perpetrator and the animal, etc.

The Committee also notes that the categorisation of offence will be rendered meaningless if the corresponding penalties do not provide adequate deterrence. NSW's recent proposal to significantly increase penalties for offences under its *Prevention of Cruelty to Animals Act 1979* (NSW) is indicative of the need to legislate accordingly, and the Committee supports the availability of financial penalties and imprisonment that is proportionate to the malice, negligence, harm, and community disapproval of animal cruelty offences.

As to the applicability of different categories to different animals, the Committee supports a system that affords the same protection to animals and the same penalties for offenders. That is, certain animals ought not be excluded from the categories simply by virtue of their species. While many animal cruelty offences would ostensibly relate to domestic animals or livestock, this should not exclude the application of animal cruelty laws to other categories of non-human animals including wildlife and animals used in scientific research.

Though certain animals are at greater risk of falling victim to acts of cruelty, or are at greater risk of suffering harm, this does not provide a justification for overlooking both the undesirability of causing harm (as a matter of public policy and the public interest) and the hardship endured by animals that are under a person's charge.

The broader Australian population arguably does not consider that those unwilling to take meaningful steps to reduce animal pain ought to benefit from exemptions or blanket defences. In recent surveys and reports, 95% of respondents viewed farm animal welfare with concern, and 91% wanted legislative and policy amendment to address it.¹⁶

¹⁶ Futureye, *Australia's Shifting Mindset on Farm Animal Welfare* (2018)
<<https://www.outbreak.gov.au/sites/default/files/documents/farm-animal-welfare.pdf>>.

Further, expert opinion from the RSPCA¹⁷ provides that there is little to no rationale for the absence of obligatory pain relief for certain procedures performed on animals. So while such procedures are likely to result in pain to an animal (particular in animal agriculture), that asserted inevitability should not be a defence against animal cruelty offences when the harm to the animal is perfectly capable of being minimised or eliminated.

Australia's performance in the animal welfare realm both from substance and consequence standpoint¹⁸ and from a community expectation standpoint¹⁹ is inadequate. This review presents an opportunity to address the problem and, in the Committee's submission, exemptions are obstructive to that process.

1.4 Controlled procedures

The Committee supports the introduction of a single regulatory framework in Victoria covering the performance of controlled procedures on animals, provided this framework increases protections for animals. A single framework would enable more appropriate protections for animals, as well as create clearer guidelines for humans.

Invasive procedures routinely carried out on animals include calf, lamb and pig castration, cattle de-horning, mulesing of sheep, tooth trimming and tail-docking of piglets, and beak trimming of chickens.

The Committee submits that all procedures which cause significant pain and/or are unnecessary be prohibited. This considers the substantial short and long-term suffering experienced by animals. In particular, the practice of debeaking is not only extremely painful in the short-term, but also considerably decreases a chicken's the quality of life. The Committee has previously commented in a New South Wales inquiry:

"This practice consists of the (often permanent) partial removal of the hen's beak with a heated blade without the application of an anaesthetic agent. Debeaking practices are a poor animal welfare practice causing hens to experience tissue damage, nerve injury, and pain and suffering during and in the aftermath of the procedure.²⁰ The partial removal of the hen's beak may also cause long-term and

¹⁷ Referenced in Phelps, Mark, 'RSPCA says no more excuses over pain relief for livestock' *Queensland Country Life* (online, 11 July 2018) <<https://www.queenslandcountrylife.com.au/story/5519623/rspca-backs-livestock-pain-relief-technology/>> ; and in *Meat & Livestock Australia*, 'Pain relief production extension' (online, 19 July 2018) <<https://www.mla.com.au/news-and-events/industry-news/archived/2018/pain-relief-production-extension/>>

¹⁸ World Animal Protection, *Animal Protection Index* (Web page index) <https://api.worldanimalprotection.org/?_ga=2.118557833.1445315575.1510019261-923385865.1510019261#>

¹⁹ Dr Jennifer Ford, *Advance Australian animal welfare: the urgent need to re-establish national frameworks* (World Animal Protection, 29 February 2016) 5

²⁰ Farm Animal Welfare Council, *Opinion on Beak Trimming of Layer Hens* (Web Page, November 2007) <<https://webarchive.nationalarchives.gov.uk/20110909181555/http://www.fawc.org.uk/pdf/beak-trimming.pdf>>

painful neuromas or tumours, deterring hens from using their beaks to forage or act on other natural instincts and behaviours.”²¹

Procedures such as debeaking should only be performed for genuine therapeutic purposes. In this case, an exception in the legislation would allow a beak may be removed under anaesthetic by a veterinary practitioner or another suitably qualified person if deemed necessary.

The Committee also submits that any invasive procedure with viable alternatives should be prohibited or phased out under legislation. Mulesing is commonly performed as a means to avoid flystrike. However, as highlighted during the *Inquiry into the Prevention of Cruelty to Animals Amendment (Restrictions On Stock Animal Procedures) Bill 2019*, there are more effective and humane solutions, such as breeding naturally resistant sheep. As highlighted in one of our previous submissions:

“According to [The Department of Primary Industries and Regional Development in Western Australia’s] research, the successful management of non-mulesed sheep requires “little extra time or cost” for producers.²² Australian Wool Innovation Limited acknowledges that breeding naturally resistant sheep is the “long term, sustainable solution” to reducing the risk of flystrike, and when integrated with other practices (such as short and timely lambing periods) could enable a successful move away from mulesing.”²³

The Committee is in favour of prohibiting all significantly painful and/or unnecessary procedures. However, in the absence of a prohibition, or for procedures which are necessary and significantly painful, restrictions should be applied including the requirement for procedures to be undertaken by a registered veterinarian (or other appropriate person depending on the industry and qualifications, for instance in scientific research) and with appropriate, safe and effective pain relief to ensure pain relief measures are fit for purpose and suitably dosed.

In December 2019, legislation was introduced in Victoria which required the use of pain relief when mulesing sheep.²⁴ This decision was supported by 87% of inquiry respondents.²⁵ This requirement should be extended

²¹ NSW Young Lawyers Animal Law Committee, Submission to Select Committee on the use of battery cages for hens in the egg production industry, *Inquiry into the Use of Battery Cages for Hens in the Egg Production Industry* (25 July 2019).

²² Government of Western Australia, Department of Primary Industries and Regional Development, ‘Managing non mulesed sheep’ (online, 22 October 2019) <https://www.agric.wa.gov.au/livestock-parasites/managing-non-mulesed-sheep>.

²³ NSW Young Lawyers Animal Law Committee, Submission to Portfolio Committee No. 4 – Industry, *Inquiry into the Prevention of Cruelty to Animals Amendment (Restrictions on Stock Animal Procedures) Bill 2019* (31 July 2020); Australian Wool Innovation Limited, ‘Breeding for Breech Strike Resistance’ (online, 17 July 2020) <https://www.wool.com/sheep/welfare/breech-flystrike/breeding-for-breech-strike-resistance/>.

²⁴ *Prevention of Cruelty to Animals Act 1986* (Vic) s 8(2).

²⁵ Animal Welfare Victoria, *Prevention of Cruelty to Animals Regulations 2019, Summary Report – Stakeholder Engagement* (November 2019) https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/5315/7604/3434/POCTA_Regs_Stakeholder_Engagement_report_FINAL.pdf

to apply to all painful procedures performed on animals. This decision would be reflective of the scientific consensus that animals subjectively feel and perceive the world around them, including experiencing pain and suffering. The RSCPA has also highlighted the range of available and affordable pain relief, commenting “there’s simply no reason for not providing pain relief for animals when undertaking painful procedures.”²⁶ A pain relief requirement would also bring the legislation closer in line with the community’s expectations and attitudes.

2.1 Consistency of the framework

The Committee notes from the Discussion Paper that the aim is to achieve a simplified legislative framework that is more flexible in its approach to better safeguard animal welfare. The Committee observes that Victoria’s current legislative framework includes multiple pieces of legislation and codes of practice in relation to livestock management, fisheries and so on. The Committee supports a simplified framework that avoids cross-over or overlapping legislation on similar topics, in order to reduce confusion for people taking care of or working with animals. While animal welfare legislation in Victoria may have regard to national codes of practice, the Committee does not necessarily share the views of such codes (for example, the Australian Animal Welfare Standards and Guidelines for Sheep²⁷ refers to mulesing and tail docking of sheep).

Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions, please contact the undersigned at your convenience.

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²⁶ Referenced in Phelps, Mark, ‘RSPCA says no more excuses over pain relief for livestock’ Queensland Country Life’ (online, 11 July 2018) <https://www.queenslandcountrylife.com.au/story/5519623/rspca-backs-livestock-pain-relief-technology/>.

²⁷ Australian Animal Welfare Standards and Guidelines - Sheep Animal Health Australia (AHA) 2014.