

Submission on the NSW Animal Welfare Law Reform Discussion Paper

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Department of Primary Industries

c/o Animal Welfare

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The NSW Young Lawyers Animal Law Committee (**Committee**) makes the following submission in response to the Animal Welfare Law Reform Discussion Paper (**Discussion 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.

Introduction

The Committee provides comments in response to questions 3, 5, 6, 9, 10, 12, 14, 15, 19 and 24 of the Discussion Paper:

- Question 3: Do you have any comments on the proposal to update the objects of the new laws?
- Question 5: Does the proposed minimum care requirement make it easier to understand a person's obligations when caring for animals?
- Question 6: Do you have any comments on the proposal to introduce a minimum care requirement?
- Question 9: Do you have any comments on the proposed new and enhanced offences?
- Question 10: Do you have any comments on appropriate exemptions that should apply to the proposed new offence of production or distribution of animal cruelty material?
- Question 12: Do you have any comments on the proposal to clarify how defences are intended to apply to give certainty to lawful activities?
- Question 14: Do you have any comments on the proposal to establish a consistent penalties framework?
- Question 15: Do you have any comments on the detailed breakdown of offences included at Appendix A?
- Question 19: Do you have any comments on enforcement arrangements for the new laws?
- Question 24: Do you have any comments on the proposal to broaden the application of Stock Welfare Panels and improve how they function?

Summary of Recommendations

1. The proposed minimum care requirements ought to be more detailed in order to establish a standard below which the requirements would not be maintained, and include the intention of the person in assessing the relevant standards of reasonableness and necessity.
2. Additional elements ought to be included in the minimum care requirements, including pain relief, daily food and drink and certain preventative care.
3. Omissions and failures to maintain the minimum care requirement ought to be included in the definition of "cruelty".
4. New offences ought to be included in the proposed amendments which provide more specificity around:

- a. greyhound live-baiting;
 - b. tethering, or unsuitable restraining of animals; and
 - c. animals being left unattended in vehicles.
5. A very narrow exemption ought to be included in the offences of creating or distributing animal cruelty material in the case of authorised officers being engaged in education and training for animal cruelty law enforcement and monitoring.
6. Amendments ought to be made to the defences currently available under section 24 of the *Prevention of Cruelty to Animals Act 1979 (POCTAA)* to:
 - a. remove the exemption of living bait in fishing;
 - b. improve the regulation of animal welfare in research; and
 - c. clarify the exemption relating to religious practices.
7. Penalties for corporate perpetrators of animal cruelty offences ought to be increased in order to better serve the objects of the amended legislation and act as a more effective deterrent to offending.
8. The charitable organisation provisions under the amended legislation ought to:
 - a. facilitate stronger information sharing between charitable organisations and other bodies charged with enforcement of animal welfare laws; and
 - b. create opportunities for other charitable organisations to contribute to animal welfare law enforcement and, in appropriate cases, become approved charitable organisations.
9. Stock Welfare Panels ought to:
 - a. be able to expand their educational operations to a wider range of animal-related individuals and industries; and
 - b. include a stronger animal welfare and animal care presence amongst their personnel.

Question 3: Objects

The Committee supports the proposals in the Discussion Paper in relation to updating the legislative objects. We submit that minimum welfare outcomes should be established.

The Committee recommends that, in order to support the introduction of the standard of “unreasonable or unnecessary harm”, a corresponding requirement of intention or recklessness should also be incorporated. The Committee considers that this will better serve the apparent intention of the changes in that the legislation will not be considered to apply to and capture situations, which occur as a result of actions outside the control of the relevant person (e.g. arising out of the nature of animals rather than from any human action or omission).

The Committee is of the view that in addition to minimum welfare outcomes, unacceptable outcomes should also be established. It is crucial that omissions/failures are also recognised as forms of cruelty, and not just positive acts.

Question 5: Obligations pursuant to the minimum care requirements

The Committee submits that the proposed minimum care requirement could go further to make it easier to understand a person’s obligations when caring for animals.

The proposed minimum care requirements provide clarification as to positive acts that must be taken by a reasonable person to care for an animal. The Committee submits it should also include omissions/failures that fall below such a standard, being that of a reasonable person (noting also our comments in relation to question 3), which may render an offender liable to prosecution.

The Committee observes, though, that there are situations that may arise which are outside the control of any person, which make adherence to the minimum care requirements impossible. The examples of this included in the Discussion Paper include bushfires and flood events. The Committee submits that those examples ought to be folded into the legislation itself, so as to avoid the prosecution of individuals recovering from natural disasters and the like for offences intended to prosecute those who fail to maintain adequate animal welfare standards due to their own actions or entirely foreseeable circumstances.

The call for empathy and justice towards animals is increasing in literature across disciplines.¹ It is therefore important that any legislative reform of animal welfare ensures a minimum standard of care for animals in an effective manner.

Question 6: Comments on the proposed minimum care requirements

The existence of a minimum care requirement would be an important feature of new legislation. As such, it is imperative that it covers both positive acts *and failures to act*.

The Committee submits that it is appropriate to add an obligation to provide appropriate pain relief for an animal, whether they can personally provide pain relief or require veterinary assistance to do so, in certain circumstances – particularly in procedures performed on livestock, like mulesing,² when, for example, the RSPCA has observed that there is little to no rationale for the continued absence of obligatory pain relief for certain procedures performed on animals.³ This obligation should exist in addition to the already proposed obligation to provide for the treatment of disease or injury.

More specifically, the Committee is concerned that the minimum care requirements, in their proposed form, require more clarity around what constitutes ‘minimum requirements’.

To that end, the Committee supports the addition of a “daily” requirement under the “food and drink” obligation so the minimum requirements reads:

*“...provide appropriate and adequate food and drink **on a daily basis.**”*

¹ Karina Elizabeth Heikkila, ‘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, 2018), 136.

² Pain relief for mulesing is already strongly supported both elsewhere in Australia (see, e.g., in WA - 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-mulesedsheep>) and in other OECD nations (see, e.g., in the UK - Protection of Animals (Anaesthetics) Act 1954 (UK) s 1, as cited in KS Schwartzkopf-Genswein et al, Achieving pain control for routine management procedures in North American beef cattle (2012) 2(3) Animal Frontiers 52).

³ 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-reliefttechnology/>; 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/>.

Question 9: New and enhanced offences

Animal fighting and greyhound live baiting

According to the Commonwealth Department of Agriculture, Water and the Environment in this year alone, 87 greyhounds have been exported.⁴ While the introduction of tougher penalties associated with inhumane practices, such as live-baiting, is welcome, there may be the unintended effect of 'shifting the problem elsewhere'. To ensure the welfare of greyhounds (and animals more broadly) we recommend including provisions in the new animal welfare legislation that prohibit the export of animals for entertainment purposes unless the exporter can ensure certain animal welfare conditions are met.

We also recommend including a duty to report in these offence provisions. This offence should require any individual that witnesses animal fighting or greyhound live-baiting to report the event to relevant authorities within a specified time. Failure to comply with this provision should attract a similar penalty to the proposed provisions relating to being present at a place where preparations are being made for animal fighting.

Enhanced offence - tethering

Rather than having a specific offence for tethering an animal, the Committee suggests introducing a more general offence that regulates how an animal can lawfully be restrained. For example, under section 9 of the *Animal Welfare Act 1992* (ACT) a person commits an offence if –

- (a) The person confines an animal; and
- (b) The confinement causes, or is likely to cause, the animal injury, pain or death.

Further, section 9(2) provides that, a person in charge of an animal commits an offence if –

- (a) The person confines the animal; and
- (b) The animal is not able to move in a way that is appropriate for the animal because of the confinement.

Including a provision like this would set a clear standard for how an animal should be confined or restrained, which the Committee considers would capture tethering.

⁴ Department of Agriculture, Water and the Environment, 'All non-livestock exports' (Web Page, 17 August 2021) <www.agriculture.gov.au/export/controlled-goods/live-animals/live-animal-export-statistics/greyhound-exports>.

Dogs in vehicles

In the United States of America, 31 states have specific laws relating to leaving dogs (and animals generally) unattended in a motor vehicle. These laws generally prohibit an animal being left unattended in a motor vehicle under conditions that could endanger the health or wellbeing of that animal.⁵

Given these animal welfare risks, we recommend that the proposed new provision prohibiting an individual from leaving an animal unattended in an enclosed vehicle be extended to other companion animals, including (but not limited to) cats, birds and rabbits.

Question 10: Exemptions to the proposed offence of production or distribution of animal cruelty material

The Committee would like to emphasise that it is important that a specific exemption is included to ensure that authorised officers can record instances of animal cruelty and distribute that material when it is, on balance, in the public's interest to do so. An exemption should be included to provide for authorised officers to possess and distribute such material during investigations into animal cruelty or for training purposes. The legislation needs to be clear that this exemption applies only in instances where an existing offence has/is being committed (i.e. this exemption would not serve as to authorise certain officers to make new material simply to aid training).

Question 12: Defences

The Committee acknowledges the utility of section 24 of the *Prevention of Cruelty to Animals Act 1979* (NSW) (**POCTAA**), where a specific provision outlining the available defences makes it clearer which animal husbandry practices for stock animals are permitted under the law.

The Committee submits that in legislation that has the maintenance of animal welfare at its centre, any defence must be robust and strongly justified. To that end, the Committee submits that:

⁵Animal Legal Defense Fund, 'Acts against leaving dogs in hot car', (Web Page) < <https://aldf.org/project/dogs-in-hot-cars/> >.

- a) the exemption of living bait in fishery is not justifiable given that fish and cephalopods have the capacity to experience pain and suffering and demonstrate obvious signs of a sentient being.⁶ The Committee fails to see the necessity of this exemption for live bait that is hooked or restrained or restricted in way that causes harm. The legislation's protection should extend to crustaceans in order to maintain consistency and avoid confusion;
- b) the exemption of animal research is not justified simply by its compliance with the *Animals Research Act*.⁷ It is well documented that the result of animal research is often not reflected in human trials (including in case of closer biological relatives such as chimpanzees).⁸ As a minimum a requirement to avoid unnecessary or unreasonable harm ought to be introduced in relation to this defence, as well as a requirement that the defence only applies when the relevant act is carried out in accordance with the terms of a relevant research licence; and
- c) if an exemption for religious practices is to be included, a Code(s) of Practice should be prepared outlining the preferred approach in animal handling and introducing concepts of animal sentience and animal cruelty.

Questions 14-15: Penalties

The Committee welcomes the structuring of individual offences within an escalating category model. However, the Committee also submits that corporations need to be held more accountable to establish a clearer, truer deterrent to profit-based decision-making when that decision-making produces adverse animal welfare outcomes – that is – circumstances where the financial penalty is far less than the fiscal gain to be made by committing the act (say, for example, where an imminent deadline to secure a deal leaves insufficient time for adequate animal welfare practices to be carried out). This type of decision-making involves companies weighing the risk of getting caught with the penalty they could potentially incur.

The Committee submits that a more serious penalty regime is appropriate in those circumstances, particularly for Category 1 and 2 offences.

⁶ N.A. Moltschaniwskyj et al, 'Ethical and welfare considerations when using cephalopods as experimental animals' (2017) 17 *Reviews in Fish Biology and Fisheries* 455, 457.

⁷ *Prevention of Cruelty to Animal Act 1979* (NSW), s 24(1)(e); NSWYL Animal Law Committee, Submission to Department of Primary Industries, *Consultation on NSW Animal Welfare Reform – Issues Paper* (26 June 2020) 7.

⁸ Institute of Medicine of the National Academies, Chimpanzees in Biomedical and Behavioural Research, *Assessing the Necessity* (15 December 2011); Akhtar, Aysha, 'The Flaws and Human Harms of Animal Experimentation' (2015) 24 *Cambridge Quarterly of Healthcare Ethics* 407.

For example, under the *Water Management Act 2000* (another act where offending corporations may weigh up penalties against the profitability to be derived from a contravening act, that act being one which has an adverse environmental outcome), the maximum penalty for a Tier 1 offence (arguably the counterpart to the Category 1 offences proposed) is 45,500 penalty units for corporations, or just over \$5m, and for a Tier 2 offence is 18,200 penalty units for corporations, or just over \$2m. When compared to the 5,000 penalty units/\$550,000 for Category 1 offences and 2,000 penalty units/\$220,000 for Category 2 offences concerning animal welfare, the imbalance and inadequacy is evident.

The Committee therefore submits that stronger penalties be introduced for, at minimum, Category 1 and 2 offences in order to better ensure deterrence and penalise breaches appropriately, particularly in the context of historically poor animal welfare performances in Australia.⁹ While further consideration of the precise quantum of an increase may be required, the Committee submits that a doubling of what is proposed in the Discussion Paper should be considered.¹⁰

Question 19: Enforcement arrangements for new laws

The Committee understands that approved charitable organisations deal with the bulk of animal cruelty offences in New South Wales.¹¹ The Committee has previously made submissions¹² to the NSW Government in support of making more effective use of the non-governmental charitable organisations (**NGCOs**) that could contribute to animal welfare monitoring and enforcement, and we reiterate and expand upon those submissions here.

The broader use of NGCOs as a resource in the animal welfare regime (particularly *POCTAA*) is an available, cost-effective means of addressing the state's animal welfare needs.¹³ Any proposed external complaints mechanism needs to be made in consultation with both RSPCA NSW and the Animal Welfare League (**AWL**) with the view of enabling information sharing, transparency and consistency in decision-making, without in itself creating onerous reporting obligations for either RSPCA NSW and AWL. Currently, both AWL and RSPCA NSW Inspectors can be subject to an internal review which needs to be responded to within 28 days

⁹ See, for example, Australia's 'D' rating in: World Animal Protection, Animal Protection Index (Web page index) https://api.worldanimalprotection.org/?_ga=2.118557833.1445315575.1510019261-923385865.1510019261#

¹⁰ The Committee refers to Queensland's regime under the *Animal Care and Protection Act 2001*, which has significantly higher incarceration and financial penalties than those proposed in the Discussion Paper.

¹¹ RSPCA Australia, Submission on Criminal Code Amendment (Animal Protection) Bill 2015, 12 March 2015.

and are reported to the Department of Primary Industries in their annual report.¹⁴

The Committee is of the view that the any external complaints mechanism should not easily allow animal cruelty offenders to abuse the process and in doing so, divert resources ordinarily used for investigations and enforcement of *POCTAA* to responding to external complaints. That is, the external complaints mechanism needs to be established in way that does not interfere with the investigative work that both RSPCA NSW and AWL perform. It needs to not be too onerous or deter inspectors from making adverse findings against animal cruelty offenders.

The Committee is of the view that other NGCOs (particularly those with species-specific knowledge) should be invited to become approved charitable organisations who can enforce *POCTAA*.

It is the Committee's ultimate view that greater transparency and information sharing in relation to investigations and administration will enable greater oversight by qualified officials and allow those measures to operate more effectively.

Question 24: Broadening the application of Stock Welfare Panels and improve their functioning

Since their introduction in 2012, Stock Welfare Panels (**SWPs**) have helped almost 28,000 animals.¹⁵ However, the current constitution and implementation of SWPs have led to ineffective outcomes, namely re-offending.¹⁶ SWPs need to balance their educational value and punitive nature. This can be achieved through legislative reform which holds stock animal welfare as its central consideration.

The Committee welcomes an expansion of the scope of the SWP process to include all stock animals regardless of the form of production or the size of landholding. This will capture many overlooked industries, such as piggeries. In particular, animals used in intensive agricultural practices presently do not fall under the narrow definition of 'depastured' animals.

¹⁵ RSPCA, 'Your Year in Review 2019-2020', (Web Page) <<https://www.rspcansw.org.au/wp-content/uploads/2020/10/1920-AR.pdf>>.

¹⁶ RSPCA, 'Statement from RSPCA NSW regarding seizure of cattle at Binnaway', (Web Page, 26 November 2019) <www.rspcansw.org.au/blog/media-releases/statement-from-rspca-nsw-regarding-seizure-of-cattle-at-binnaway/>.

To further promote the welfare of animals through SWPs, the Committee recommends the provisions in Part 2B of POCTAA and clause 31A of the regulations be amended as follows:

1. SWPs should increase their representation of persons with a background of animal welfare. This will ensure that the SWPs' focus remains on the welfare and the prevention of cruelty of animals, rather than maintaining commercial interests.
2. Departmental members and Local Land Services representatives of SWPs ought to have veterinary experience. While industry experience does allow for insightful remarks on the welfare of animals, it is incomplete for the purposes of SWPs. There is the potential for these members to focus solely on business practicality or logistics. Members with a veterinary background are, in the Committee's view, better positioned to further the objectives of POCTAA.

These amendments will enhance the integrity of SWPs by increasing their usage across various industries and by eliminating any potential conflicts of interests.¹⁷

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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¹⁷ Elizabeth Ellis, 'Bearing the burden: shifting responsibility for the welfare of the beast' (2013) 11(4) *Macquarie Law Journal* 39.