

Submission
No 229

**INQUIRY INTO EXHIBITION OF EXOTIC ANIMALS IN
CIRCUSES AND EXHIBITION OF CETACEANS IN NEW
SOUTH WALES**

Organisation: NSW Young Lawyers Animal Law Committee

Date Received: 8 December 2019

Inquiry into the Use of Exotic Animals in Circuses and the Exhibition of Cetaceans in New South Wales

8 December 2019

The Director,

Select Committee on the Use of Exotic Animals in Circuses and the Exhibition of Cetaceans in New South Wales

Parliament House, Macquarie Street, Sydney NSW 2000

portfoliocommittee4@parliament.nsw.gov.au

Contact: **David Edney**
President, NSW Young Lawyers

Daniel Cung
Chair, NSW Young Lawyers Animal Law Committee

Contributors: Timothy Allen, Shar Doudman, Emily Hancock, Cynthia Lam, Rishika Pai, Kelly Pearson, Giulia Proserpi-Porta and Joanna Smith-Lawson

The NSW Young Lawyers Animal Law Committee (**Committee**) makes the following submission in response to the Terms of Reference on the inquiry into the use of exotic animals in circuses and the exhibition of cetaceans in New South Wales (**Terms of Reference**).

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 and 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 the protection of animals.

Summary of Recommendations

The Committee considers that this inquiry presents an opportunity to make a powerful statement against animal cruelty.

The lives of animals kept in captivity for the purposes of entertainment for humans are invariably compromised by the abject cruelty of keeping a sentient being in an enclosed environment.

1. With respect to the Terms of Reference, in summary the Committee submits that:
 - a) The use of exotic animals in circuses is associated with poor animal welfare practices and outcomes, and therefore animal pain and suffering. Phasing out the use of exotic animals in circuses must occur to meet community expectations.

- b) The poor animal welfare environment in circuses is also present in exhibitions of cetaceans. The perceived benefits of keeping a wild animal in a confined environment are outweighed by the harms associated with confinement.
- c) In light of the findings in (a) and (b) above, the Committee submits that the NSW government should:
- i. urgently prohibit the continuation of the practice of breeding of exotic animals for use in circuses and cetaceans for exhibition;
 - ii. ban (or phase out) of the use of exotic animals in circuses and cetaceans for exhibition, and/or
 - iii. regulations as recommended by organisations including the Australian Veterinary Association and the NSW Department of Industry ought to be enforced to ensure better housing, reduced travelling time and time spent in confinement to improve the welfare of circus animals pending discontinuation of the use of exotic animals in circuses.
- pending discontinuation of the exhibition of cetaceans, the Cetacean Welfare Assessment Index should be utilised as a measure of cetacean welfare, taking into account health, food, housing and behaviour, and noting the necessity of providing 'environmental enrichment, noise limits and retreat space' and 'open enclosures,' for cetaceans in captivity.
- d) With the emerging public support for phasing out circuses, suitable new homes for the animals will need to be thoroughly considered and prepared. Adequate funding will be required to implement this.

Discussion

The Committee submits that inhumane practices in the use of exotic animals in circuses and the exhibition of cetaceans in New South Wales, fail to consider the sentient status of exotic animals and cetaceans. Research indicates that exotic animals and cetaceans exhibit preferences as to their environments, experience physical sensations and emotional responses, and possess complex cognitive abilities, all of which indicate a level of sentience in exotic animals and cetaceans.

The Committee comments on each of the Terms of Reference as follows:

- 1. That Portfolio Committee No.4 – Industry inquire into and report on the use of exotic animals (defined as any animal that is not native and is not a stock or companion animal) in circuses and the exhibition of cetaceans in New South Wales, and in particular:**

(a) the welfare of exotic animals exhibited in circuses in New South Wales, with consideration of community expectation

The use of exotic animals in circuses is associated with poor animal welfare practices and outcomes, and therefore animal pain and suffering.

When considering whether circuses and other exhibitions of animals have particular animal welfare concerns, it is important to be clear about what constitutes “animal welfare”. Animal welfare refers to the state of an animal, including the subjective feelings and sensations that animals experience as a result of their health and environment. To ensure animal welfare, adequate consideration must be given to the Five Domains model (nutrition, environment, health, behaviour and mental state) which is an evidence-based framework used across industries to assess the welfare impacts of particular activities on animals (**Five Domains Model**).¹

The purpose of the Five Domains Model is to draw attention to areas that are relevant to welfare assessments, recognising that animals can experience a range of negative to positive feelings.² Animal welfare involves the extent to which an animal is coping with its living conditions. Scientific evidence indicates that an animal is in a good state of welfare if it is healthy, comfortable, well nourished, safe, able to express innate behaviour, and is not suffering from unpleasant states such as pain, fear and distress.³ Such positive opportunities for good animal welfare are not present in the circus or exhibition industries.

There are significant welfare concerns for exotic animals in circuses. A comprehensive study conducted in 2009 conclusively found that wild animals in circuses suffer adverse welfare impacts. Circus animals spent the majority of the day confined: approximately 1 to 9% of the day performing/training, and the remaining time in exercise pens that were smaller than the minimum zoo standards for outdoor enclosures. The study concluded that non-domesticated animals (including captive bred wild animals)⁴, considered to be suited for circus life by the circus industry, should exhibit low space requirements, simple social structures, low cognitive function and an ability to be transported without adverse welfare effects. None of the most common species exhibited by circuses – such as elephants, lions and other large cats – meet this criteria.⁵

¹ RSPCA (2019) ‘What are the Five Domains and how do they differ from the Five Freedoms’ RSPCA information sheet <https://kb.rspca.org.au/knowledge-base/what-are-the-five-domains-and-how-do-they-differ-from-the-five-freedoms/>

² Mellor, D.J. Operational Details of the Five Domains Model and Its Key Applications to the Assessment and Management of Animal Welfare. *Animals* **2017**, 7, 60.

³ World Association of Zoos and Aquariums (2015) ‘Caring for Wildlife – The World Zoo and Aquarium Animal Welfare Strategy’. <https://www.waza.org/priorities/animal-welfare/animal-welfare-strategies/>

⁴ RSPCA, ‘Use of exotic animals in Australian circuses’ (RSPCA Information Paper 3/217, RSPCA, 2017).

⁵ Iossa, Harris (2009) ‘Are wild animals suited to a travelling circus life?’ *Animal Welfare* 18(2):129 – 140 at https://www.researchgate.net/publication/228662205_Are_wild_animals_suited_to_a_travelling_circus_life_Animal_Welfare accessed at 5 September 2019.

More recently, a study in 2016 compiled for the Welsh Government's inquiry into wild animals in travelling circuses concluded that these animals are subjected to conditions that fall short of appropriate animal welfare. In particular, it was found that the animals had an inability to exhibit natural behaviours and suffered physical deformities, injuries, lameness and psychological distress mainly caused by the following environmental factors:

- Small enclosures used in travelling circuses;
- Limited or no environmental enrichment; and
- Being tethered, caged and transported, as well as being trained and having to perform.

These issues are not mitigated for wild animals bred in captivity, with these animals still suffering from the effects of their natural instincts being tempered by captivity.⁶

While it is clear that animals suffer in these environments, regulatory frameworks set up to deal with animal welfare have not kept up with the comprehensive evidence base on this issue and are now falling short of being relevant and appropriate in light of such evidence.

The welfare of wild animals in circuses in New South Wales is dealt with under the *Exhibited Animals Protection Act 1986* (NSW), the *Exhibited Animals Protection Regulation 2010* (NSW), the *Prevention of Cruelty to Animals Act 1979* (NSW) and associated regulations.

The *Exhibited Animals Protection Act 1986* (NSW) (**EAP Act**) and associated regulations set licence requirements for displaying animals in circuses. Non-compliance with licence requirements constitutes an offence and penalty of up to 20 penalty units or imprisonment for up to 6 months, or both.⁷

The Standards for Exhibiting Circus Animals are issued pursuant to cl 8(2) of the *Exhibited Animals Protection Regulation 1995* (NSW) which are designed to ensure greater animal welfare for wild animals in circuses. Some of these standards include:

- Allowing licence holders to breed animals that are retired from performing;
- Caged big cats' food must be kept at a distance from an area of defecation;
- Elephants must be transported in a float that is big enough for the animal to stand but not large enough for the animal to turn around to prevent injury;
- Animals must receive at least 45 minutes of exercise a day; and

⁶ RSPCA, 'Use of exotic animals in Australian circuses' (RSPCA Information Paper 3/217, RSPCA, 2017).

⁷ *Exhibited Animals Protection Act 1986* (NSW), s 12.

- Prohibition on forcing an animal to perform if it is demonstrating an unwillingness to perform.⁸

These minimal standards fall short of providing optimal animal welfare, as measured by the Five Domains Model, for exotic animals.

The Committee recognises that the NSW Government does have enforceable codes of conduct designed to promote good animal welfare and penalties for cruelty to wild animals in circuses. However, the very nature of circuses, with the constant travelling, the isolated housing and the performance training makes it impossible to provide the appropriate environment for the wild animals featured in circuses irrespective of the enforceable standards published by government.

Lifting minimum standards as an immediate first step is critical, but phasing out the use of exotic animals in circuses must occur to meet community expectations

Across Australia, community support of circuses that use exotic animals has declined significantly for decades, largely due to welfare issues not reflecting community expectations. According to a 2015 survey, approximately 68 per cent of Australians are ‘concerned’ or ‘very concerned’ about the use of exotic animals in circuses.⁹ The percentage is greater among Australians aged between 18 to 25, with 75 per cent ‘concerned’ or ‘very concerned’ about the issue.¹⁰

Public concerns are evident in the action taken by the Australian Capital Territory (**ACT**) and several local councils in NSW. By way of example, the ACT banned circuses that use exotic animals over 25 years ago.¹¹ Furthermore, more than 40 NSW local councils have prohibited circuses that use exotic animals from performing on their land, including Parramatta, Lismore, Newcastle, Blue Mountains, Warringah, Woollahra, Hornsby, Randwick and Ku-ring-gai councils.¹²

Research indicates that NSW residents are not attending circuses as frequently as other live performances. In 2016, just 346,002 residents attended circus and physical theatre across NSW, which represents just 5.7%

⁸ NSW Department of Primary Industries (2019) Standards for Exhibiting Circus Animals in New South Wales at https://www.dpi.nsw.gov.au/__data/assets/pdf_file/0004/121549/Exhibited-Animals-Standards-For-Exhibiting-Circus-Animals-in-New-South-Wales-February-2019.pdf

⁹ RSPCA Australia, ‘Use of exotic animals in circuses’, Information paper: the truth about exotic animals in circuses, (Web Page, March 2017) 3 <<https://kb.rspca.org.au/wp-content/uploads/2019/03/Exotic-Animals-in-Australian-Circuses-RSPCA-Information-Paper-March-2017.pdf>>.

¹⁰ Ibid.

¹¹ New South Wales, Parliamentary Debates, Legislative Council, 25 October 2018, 18 (Mark Pearson).

¹² Ibid.

of all NSW live performance industry attendance.¹³ In 2011, more than 10,000 people in NSW signed a petition calling for a ban on the use of exotic animals in circuses.¹⁴

The public's concern with respect to this practice has already led to change in the industry. Stardust Circus retired two of its elephants in 2008 after public pressure and a directive from the Department of Primary Industries.¹⁵

The decline in the number of circuses that use exotic animals and the emergence/popularity of circuses featuring human performers further highlights the lack of public support for circuses that use exotic animals.

The popularity of alternative circuses has been attributed to the community's increased ethical awareness and concern for animals.¹⁶ In NSW, Stardust, Lennon Bros and Circus Royale are the only circuses that continue to exhibit exotic animals including camels, monkeys and lions.¹⁷ Community concerns about the use of exotic animals in circuses is highlighted by the fact that these circuses offer information on their websites as to the welfare of the animals they exhibit. This includes the conditions in which the animals perform under, are housed, trained and transported.¹⁸ However, the three circuses remain controversial, with members of the public often protesting their presence.¹⁹ Tigers, elephants and bears are no longer exhibited in any circus in Australia.²⁰

Circuses which use only human performers including Circus Oz, the Flying Fruit Fly Circus and Cirque du Soleil, are redefining the concept of circuses, and have proved a hugely successful popular alternative to circuses with animals.²¹ The popularity of Cirque du Soleil resulted in NSW's 2016 Circus and Physical Theatre attendance figures increasing by 122% and its revenue increasing by 140%.²² This strongly demonstrates the

¹³ Tom Gotsis, 'Exotic animals in circuses - e-brief issue 2/2018', *NSW Parliamentary Research Service*, (Web Page, October 2018) 10 Parliament of NSW <www.parliament.nsw.gov.au/researchpapers/Documents/Exotic%20animals%20in%20circuses.pdf>.

¹⁴ *Ibid* 10.

¹⁵ New South Wales, *Parliamentary Debates* (n 3).

¹⁶ Tom Gotsis (n 5) 10.

¹⁷ Stardust Circus, 'About Us', *Stardust Circus* (Web Page, 2019) <www.stardustcircus.com.au/about-us/>; Damian Syred's Circus Royale, 'Caring for the animals in Damian's Circus Royale', *Animal Care* (Web Page, 2019) <www.circusroyale.com/index.php/mnuinfo/mnuanimals>.

¹⁸ See for example Stardust Circus, 'Animal Welfare', *Stardust Circus* (Web Page, 2019) <www.stardustcircus.com.au/animal-welfare/>; Damian Syred's Circus Royale, 'Caring for the animals in Damian's Circus Royale', *Animal Care* (Web Page, 2019) <www.circusroyale.com/index.php/mnuinfo/mnuanimals>.

¹⁹ New South Wales, *Parliamentary Debates* (n 3) 17.

²⁰ Tom Gotsis (n 5) 9.

²¹ *Ibid* 10.

²² *Ibid* 2.

financial viability of alternative circuses, and the fact that animals do not need to be used in circuses to attract large crowds.²³

What is clear is that removing the ability of circuses to use exotic animals as part of their performance will not limit the attractiveness of circuses. Several operators have already shown that the business model can be adapted to take into account community expectations. For those operators who are still not heeding the call of the community to stop their poor animal welfare practices, it is appropriate that the Government step in to ensure that the circus industry's use of exotic animals from a bygone era is not part of contemporary Australia – a strong statement in favour of community expectations on adequate animal welfare standards.

NSW should join international jurisdictions in making a change in favour of animal welfare

The use of exotic animals in circuses is being banned around the world, largely because of changing community expectations and animal welfare concerns.²⁴ On an international level, 45 States have prohibited, or are transitioning to, prohibiting the use of animal circuses, including Sweden, Colombia, Mexico, India, Singapore, Malta, Belgium, Slovenia and Greece.²⁵ Local municipalities in countries including USA, Canada, Brazil, Spain, Norway and Poland have prohibited exotic animal circus performances.²⁶

In England, opinion polls revealed overwhelming public support of outlawing exotic animal circuses.²⁷ This led to the passing of the *Wild Animals in Circuses Act 2019* (UK), which cemented a complete prohibition on the use of wild animals in travelling circuses.²⁸ Under the act, “wild animal” is defined as any animal which is not commonly domesticated in Great Britain.²⁹

When Ireland banned the use of exotic animal in circuses in 2018, the country's Minister for Agriculture, Michael Creed, described the move as aligning with modern welfare standards expected by the community:³⁰

“The use of wild animals for entertainment purposes in circuses can no longer be permitted. This is the general view of the public at large and a position I am happy to endorse ... This is a progressive move, reflective of our commitment to animal welfare”.

²³ Animals Australia, ‘Exotic animal circuses’, *Circuses* (Web Page, 2019) <www.animalsaustralia.org/issues/circuses.php>.

²⁴ RSPCA Australia (n 1).

²⁵ New South Wales, Parliamentary Debates (n 3) 20.

²⁶ RSPCA Australia (n 1) 3.

²⁷ Lucy Pasha-Robinson, ‘Wild animals to be banned from circuses in England by 2020, says Government’, *Independent* (Web Page, 27 February 2018) <www.independent.co.uk/news/uk/home-news/wild-animals-circus-ban-england-2020-defra-government-a8230691.html>.

²⁸ *Wild Animals in Circuses Act 2019* (UK) s 1.

²⁹ *Ibid* s 1(5).

³⁰ Hayley Halpin, ‘The use of wild animals will be banned in Irish circuses in January 2018’, *The Journal IE* (Web Page, 9 November 2017) <www.thejournal.ie/animal-ban-circus-3689018-Nov2017/>.

In US, public pressure forced one of the world's oldest circuses to shut down in 2017. Ringling Brothers, which had been operating in the USA for nearly 150 years, attributed the community's disquiet about animal welfare, as one of the main reasons for its demise.³¹

Accordingly, it is clear that on an international scale, progressive legislative amendments and consumer choices are increasingly being influenced with consideration to community expectations of animal welfare in the exotic animal circus industry.

(b) the welfare of cetaceans exhibited in New South Wales, with consideration of community expectation

The poor animal welfare environment in circuses is also present in exhibitions of cetaceans

The exhibition of cetaceans produces a range of negative welfare outcomes, primarily stemming from stress and disrupted natural behaviours.

Cetaceans display highly developed and complex cognitive and social functions.³² This has been observed in both wild and captive environments. For example, orcas are considered amongst the most intelligent creatures on earth when assessed through common indices such as brain size and encephalization quotient.³³ In practice, sophisticated behaviours have been regularly observed, including empathetic behaviour, pranks, tactics and emotional restraint.³⁴

Coupled with a natural habitat that extends over vast areas of ocean, these traits make cetaceans ill-suited to confinement, especially within ill-designed or low-stimulation enclosures in artificial environments.

When cetaceans are taken from their natural environment, their behavioural traits shift under stress, often resulting in anti-social behaviour and increased aggression. As at May 2016, SeaWorld (since its inception in 1964) has contained 65 orcas, where 29 (45 per cent) of those orcas have been involved in at least one published aggressive incident.³⁵ Similar changes in behaviour have been observed amongst dolphins and

³¹ ABC News, 'Ringling Brothers and Barnum and Bailey Circus to close after 146 years', *ABC* (Web Page, 15 January 2017) <<https://www.abc.net.au/news/2017-01-15/ringling-bros-and-barnum-&-bailey-circus-to-close/8183848>>.

³² See, for example, dolphins in RSPCA, *Research Report: The Welfare of Dolphins in Captivity* (Report, February 2019) pp 2-6.

³³ Anderson, Robert et al, 'Orca Behaviour and Subsequent Aggression Associated with Oceanarium Confinement' (2016) 6 *Animals* 49.

³⁴ *Ibid.*

³⁵ *Ibid.*

other cetaceans.³⁶ This significantly compromises their ability to form and maintain healthy and positive relationships with one another.

The changes also result in negative physical health impacts. Despite the purportedly protective environment of confinement, mortality and birthing rates are worse amongst cetaceans in captivity when compared to their wild counterparts. However, weight loss, loss of appetite, reduced calving and reproductive success, arteriosclerosis, stomach ulcers, and increased susceptibility to diseases have all been observed amongst cetaceans in captivity and the stress they endure manifests itself physically.³⁷

The perceived benefits of keeping a wild animal in a confined environment are outweighed by the harms associated with confinement.

It is often argued by proponents of cetacean exhibition that any negative impacts on cetaceans due to their captivity is outweighed by its benefits, primarily in the area of conservation and research.

While some success has been observed in the area of rescue, rehabilitation and release,³⁸ the cetaceans exhibition industry cannot claim the same conservationist focus. The aim of the cetaceans exhibition industry is to capture, confine, breed and exhibit cetaceans for the entertainment of humans. Cetaceans on exhibition are not offered an opportunity at reintroduction to their natural habitat, and programs seeking to do so have historically been minimal in number and poor in execution.³⁹

Research justifications are equally insufficient. While captive research has improved human understanding of cetacean nutrition and physiology, it has a significantly detrimental effect on welfare and, in any event, is of limited utility given that cetacean behaviour is prone to change when placed in captivity.⁴⁰

In recent times, it has been widely considered that all that can be learnt from captive analysis of cetaceans has been learnt, and that the adverse welfare impacts outweigh any research benefits that may be garnered.⁴¹ As such, the research justification has fallen away.

³⁶ RPSCA at 1.

³⁷ Rose, N.A. and Parsons, E.C.M., *The Case Against Marine Mammals in Captivity* (Washington, DC Animal Welfare Institute and World Animal Protection, 5th ed., 2019), p 57.

³⁸ *Ibid* at 22-23.

³⁹ *Ibid* at 20.

⁴⁰ Parliament of the Commonwealth of Australia, Senate Select Committee on Animal Welfare, *Dolphins and Whales in Captivity* (Report 1985) 5.41.

⁴¹ *Ibid* at 5.21.

Steps must be taken in this space to meet community expectations

The Committee submits that the exhibition of cetaceans is inconsistent with community standards and is not supported by the public.

The Australian public is aware of the detrimental effects to animals when they are confined to spaces substantially smaller than their natural environment or otherwise prevented from displaying natural behaviours. This is reflected in the EAP Act which provides a specified regime of care when dolphins are kept for exhibition.⁴² Further, the *Standards for Exhibiting Bottle-nosed Dolphins (Tursiops truncatus) in New South Wales (Standards)* sets a minimum pool area of 245 square meters (by surface area) if five animals are held.⁴³ However, the roaming area of a pod of dolphins in the wild is between 100 and 400 square kilometres.⁴⁴ Given this significant disparity, no human-made pool can adequately provide the space naturally enjoyed by dolphins in their natural habitat in the ocean with their pod family.

It is arguable that to trade off the small area of captivity which the dolphins must endure, both the Standards and the EAP Act require the exhibiting body to conduct conservation education as a part of the entertainment package. However, this is not compulsory for the ticket-holder to attend, therefore the “value” of holding dolphins in captivity is questionable given the limited reach the education program has.

The vast area that cetaceans cover in their annual migration patterns is common knowledge, and a pen within a park is insufficient to meet these needs, and thus, is insufficient to allow for the animals’ wellbeing. As of 1985, there were seven venues in Australia that exhibited cetaceans as a part of their experience/product.⁴⁵ This has now reduced to two: Dolphin Conservation Marine Park in Coffs Harbour and Sea World Gold Coast. Concerns of animal cruelty are considered worldwide to be the cause of the decrease in marine park venues, combined with an increasing trend of consumers preferring to see whales and dolphins in their natural habitat in the ocean.⁴⁶

In the US, the proliferation of mass media technologies has resulted in the production of a number of documentaries on wild cetaceans, often with a focus on animal welfare. The release of the film ‘Blackfish’ in 2013 details the consequences of the stress of confinement and forced unnatural behaviours in orcas. The

⁴² *Exhibited Animals Protection Act 1986 No 123 (NSW)* s 8. Only bottle-nosed dolphins (*tursiops truncatus*) are the subject of regulation.

⁴³ *Standards for Exhibiting Bottle-nosed Dolphins (Tursiops Truncatus) in New South Wales* sub-r 2.4.4 (d)(ii); *Exhibited Animals Protection Act 1986 No 123 (NSW)* s 13.

⁴⁴ World Animal Protection, *Behind the Smiles* (Report, 24 October 2019) 23.

⁴⁵ Senate Select Committee on Animal Welfare, Parliament of Australia, *Dolphins and Whales in Captivity* (Report, 1985) 13.

⁴⁶ Senate Select Committee on Animal Welfare (n 4) 10-12.

film has been strongly linked with negative outcomes for SeaWorld (the venue the subject of much of the film) after public condemnation of the unnatural environment suffered by orcas, namely their life being confined to a swimming pool as opposed to the ocean, and the raft of stressors and behavioural issues it creates in orcas. In 2014, SeaWorld saw a drop of \$US80 million in revenue and had 1 million fewer visitors. The decline in visitor numbers has steadily continued every year since then.⁴⁷ This highlights the community expectations in the US of the welfare of cetaceans exhibited, and the impact of those expectations on the industry.

In 1985, the Senate Select Committee for Animal Welfare issued a report titled 'Dolphins and Whales in Captivity'. Part of the evidence it considered concerned the legislative actions of parliaments worldwide regarding the capture, exhibition and breeding of cetaceans. It lists the governments of the United Kingdom (1983), European Union (1984), United States of America (1985) and Argentina as having restricted or banned the practice altogether.⁴⁸ The 'Behind the Smile' report, prepared by World Animal Protection further lists the reduction or banning of dolphin exhibits in the United Kingdom (1992), New Zealand (2008), Greece (2012), India (2013) and Canada (2019).⁴⁹

The 'Dolphins and Whales in Captivity' report states that since the 1960s, the global public has increased its awareness of the behaviours and capabilities of cetaceans though the increased amount of information accessible via mass media (including documentaries such as 'Blackfish') and that this has led to a prevalent belief that cetaceans should not be confined to marine parks.⁵⁰ This report recommended (as long ago as 1985) that "no further facilities for keeping captive cetacea be permitted to be established in Australia", and "that the keeping of cetacea should eventually be phased out unless further research justifies their continuance."

It is unnecessary to hold cetaceans in captivity for research purposes given the limited reach the education program has given attendees at marine parks are reducing. Furthermore, taking into consideration the fact that cetaceans in captivity are unable to display their natural behaviours, the value of research based on captive exhibitions is a fundamentally flawed representation of the natural behaviours of cetacean life observed in the wild.

⁴⁷ Naomi A Rose and ECM Parsons, *The Case Against Marine Mammals in Captivity* (Report, 5th ed, 2019), 87.

⁴⁸ Senate Select Committee on Animal Welfare (n 4) 11 [2.21].

⁴⁹ World Animal Protection (n 3) 19.

⁵⁰ Senate Select Committee on Animal Welfare (n 4) ix [8.9], [8.10].

(c) in light of the findings in (a) and (b) above, whether:

(i) to allow the continuation of the practice of breeding of exotic animals for use in circuses and cetaceans for exhibition,

Exotic animals in circuses

The Committee submits that the practice of breeding exotic animals for exhibition should be urgently discontinued and banned. As highlighted in section 1(a) of this Submission, public concern for animal welfare – both in NSW and internationally – has been linked to exotic animals being taken out of circuses, and the demise of circus businesses that exhibit exotic animals. The community’s declining support of exotic animal circuses has also sparked the emergence and popularity of circuses solely featuring human performers, which demonstrate that circuses can remain viable without, and do not need to breed or use, exotic animals for profit.

Cetaceans

The support for cetacean exhibition is historically, and continues to be, significantly low. The need for breeding is unnecessary given the limited future that cetacean exhibition is likely to have within the Australian entertainment and tourism industries. Furthermore, the sole venue of captive dolphins in New South Wales, Dolphin Marine Conservation Park, announced in March 2019 that it has ceased breeding dolphins and will not recommence the practice.⁵¹ Accordingly, a ban on breeding cetaceans will have little to no impact on the industry.

Both public opinion and exhibitory industries have moved away from the breeding of cetaceans for exhibition.

The Committee submits that NSW law ought to be updated to bring it into line with community expectations.

(ii) there should be a phase out of the use of exotic animals in circuses and cetaceans for exhibition, and/or

Exotic animals in circuses

The Committee submits that there should be a ban (or phase out) of the use of exotic animals in circuses.

⁵¹ Dolphin Conservation Marine Park, ‘No Longer Breeding Dolphins’ (Article, 14 March 2019) <<http://www.dolphinmarineconservation.com.au/article/no-longer-breeding-dolphins>>.

As outlined in this submission, there are a number of jurisdictions that have already banned the use of exotic animals in circuses. This has not led to the phase out of circuses, as animal performers are replaced with human circus artists.

There is mounting scientific evidence, as outlined in this submission, that demonstrates that wild animals are not suited to performing in circuses, the act of which results in poor animal welfare and an inability to display their natural behaviours. Despite a circus owner's best intentions, it is impossible for a circus environment to provide the required space, environment and enrichment required by wild animals to be in optimal animal welfare that replicates their natural habitat.

Cetaceans

As outlined above, the Committee submits that cetaceans are ill-suited to, and suffer significantly from, captivity and exhibition. It highlights the unethical nature of cetacean exhibition that the intelligence, energetic nature and physical prowess of cetaceans (which makes them ill-suited to captivity and needing of greater stimulation and mobility) are the same qualities that appeal to captors in the entertainment sphere, and allow cetaceans to learn and perform the tricks put to them.

Cetacean exhibition has already been illegalised in many locations globally, including several US states and in varying forms and extents in countries such as India, Chile, Switzerland and Greece, while Canada has prohibited the breeding or capture of any further captive cetaceans and the UK has implemented more stringent laws relating to dolphinariums and other methods of cetacean captivity.

The exhibition of cetaceans is inconsistent with the terms of the *Prevention of Cruelty to Animals Act 1979* (NSW) (**POCTA**) because:

1. the welfare of animals is not promoted by the exhibition of cetaceans, contrary to the objects of POCTA;
2. cetaceans on exhibition are not, simply by virtue of such confinement, treated humanely, contrary to the objects of POCTA; and
3. cetaceans subject to such confinement, regardless of the periods during which they are "exhibited", are not afforded adequate exercise, contrary to section 9 of POCTA.

Furthermore, given the unique nature of cetaceans within the animal kingdom,⁵² the Committee questions the efficacy of the EAP Act. That EAP Act lacks the level of specificity and species appropriateness to effectively execute its purpose,⁵³ namely the protection of the animals caught by the ambit of that EAP Act.

Public disapproval of cetacean exhibition, as outlined in this submission, illustrates the distinctive place in nature and public regard that is occupied by cetaceans. Such distinction ought to be replicated in suitably bespoke regulation, starting with the prohibition of their exhibition.

The Committee submits that as should be the case with exotic animals in circuses, there should be a ban (or phase out) of the use of cetaceans for exhibition.

(iii) there should be any other legislative or regulatory action that the committee considers appropriate

Exotic animals in circuses

The welfare of animals in circuses in NSW is currently governed under the *Exhibited Animals Protection Act 1986 (NSW)* and the *Exhibited Animals Protection Regulation 2010 (NSW)*. However, according to the RSPCA, these regulations offer minimum requirements that prevent animal cruelty and do not ensure high animal wellbeing.⁵⁴ To improve the welfare of circus animals, regulations ought to enforce better housing, reduced travelling time and time spent in confinement. The Australian Veterinary Association provides a list of welfare criteria that should be met, to ensure greater welfare of circus animals. These include:

- that animals already in circuses retire to a suitable home and a close bond to their human carer is continued;
- that systematic welfare checks be conducted;
- that daily exercise for animals is ensured; and
- an enriched environment is ensured.⁵⁵

⁵² Australian Government, Department of Environment, Water, Heritage and Arts, *Conservation and Values: Global Cetacean Summary Report* (Report, June 2009).

⁵³ A problem identified in much outdated law relating to marine mammals, as discussed in relation to the International Whaling Commission in Gillespie, Alexander, 'Small Cetaceans, International Law and the International Whaling Commission' (2001) 2 *Melbourne Journal of International Law* 257–303.

⁵⁴ RSPCA, *The Truth About Exotic Animals in Circuses* (2017) <<https://www.rspca.org.au/blog/2017/truth-about-exotic-animals-circuses>>

⁵⁵ Australian Veterinary Association, *Circus Animals* (8 July 2011) < <https://www.ava.com.au/policy-advocacy/policies/miscellaneous-welfare-issues-events-and-exhibits-involving-animals/circus-animals/>>

The NSW Department of Industry has also issued a guideline, regulating the standards of animal circus exhibitions in New South Wales.⁵⁶ The standards refer to the specific needs of the individual circus animal groups, and also reveals general principles that are essential for all exotic animals, which includes taking adequate rest stops during travelling,⁵⁷ ensuring sleeping and food areas are kept separate⁵⁸ and 'adequate ventilation,' while in transit.⁵⁹

Cetaceans

There are regulations in place in NSW regulating cetacean welfare. However, these are outdated and lack the latest scientific findings about cetaceans.⁶⁰ In its report, the RSPCA recommends introducing the Cetacean Welfare Assessment Index as a measure of cetacean welfare.⁶¹ This takes into account health, food, housing and behaviour. The RSPCA report further highlights the necessity of providing 'environmental enrichment, noise limits and retreat space'⁶² as well as 'open enclosures,'⁶³ for cetaceans in captivity.

(d) any other related matter

Exotic animals in circuses

One major consideration in banning (or phasing out) animal circuses is the issue of rehoming. Animals, bred or raised in circuses, are not fit to be released into the wild.⁶⁴ Finding suitable homes for these animals can prove difficult, as was the case when the American travelling circus, Ringling Bros. and Barnum & Bailey, closed.⁶⁵ With the emerging public support for phasing out circuses,⁶⁶ suitable new homes for the animals will need to be thoroughly considered and prepared. Animal sanctuaries, such as Zambi Wildlife Retreat based in NSW, which rehomes and rehabilitates exotic circus and zoo animals,⁶⁷ will be crucial to implementing this. Adequate funding will be required to implement this.

⁵⁶ NSW Government Department of Primary Industries, *Standards for Exhibiting Circus Animals in New South Wales* (Feb 2019) <<https://www.dpi.nsw.gov.au/animals-and-livestock/animal-welfare/exhibit/prescribed-standards2/circus->> (DPI Standards).

⁵⁷ DPI Standards, 9.

⁵⁸ DPI Standards, 10.

⁵⁹ DPI Standards, 10.

⁶⁰ RSPCA, *Research Report: the welfare of dolphins in captivity* (Feb 2019) <file:///E:/animal%20law/circuses%20and%20exotic%20animals/rspca%20report.pdf > at 11. (RSPCA dolphin report).

⁶¹ RSPCA dolphin report, 10.

⁶² RSPCA dolphin report, 11.

⁶³ RSPCA dolphin report, 13.

⁶⁴ ABC News, *Holding killer whales in captivity is being phased out, so are dolphins next?* (October 2019) <<https://www.abc.net.au/news/2019-10-21/killer-whales-in-captivity-phase-out-are-dolphins-next/11600318>>

⁶⁵ The Washington Post, *One problem with shutting down the circus, where will the animals go?* (19 January 2013) <<https://www.washingtonpost.com/news/animalia/wp/2017/01/19/one-problem-with-shutting-down-the-circus-where-will-the-animals-go/>> (Washington article)

⁶⁶ Washington article.

⁶⁷ Zambi Wildlife Retreat (2018) <<http://www.zambiwildliferetreat.com.au/about-us>>

Cetaceans

As discussed in section 1(b), an often-argued justification for holding cetaceans in captivity is the rehabilitation and research opportunity that captivity allegedly provides.⁶⁸ However, this argument has come under growing criticism.⁶⁹ According to the RSPCA, no dolphinarium in Australia provides a ‘formal scientific research program.’⁷⁰ Further, studying dolphins in captivity presents a number of flaws, including inadequate sample size, restricted social groups and space.⁷¹ Studies conducted with cetaceans in their natural environment offer a more ethically sound and reliable snapshot into cetacean life.⁷² As expressed in the RSPCA report, captivity represents a restriction to cetacean freedom and provides limited research opportunities.

Accordingly, the Committee submits that there is no value of research based on captive exhibitions as the research does not adequately represent a scientific insight into the natural behaviours of cetacean life observed in the wild.

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.

Contact:

David Edney
President
NSW Young Lawyers

Alternate Contact:

Daniel Cung
Chair
NSW Young Lawyers Animal Law Committee

⁶⁸ Australian Veterinary Association, *Welfare of Cetaceans in Captivity* (1 Jan 2010) <<https://www.ava.com.au/policy/157-welfare-cetaceans-captivity>>

⁶⁹ RSPCA dolphin report, 13.

⁷⁰ RSPCA dolphin report, 13.

⁷¹ RSPCA dolphin report, 14.

⁷² Marino L & Frohoff T (2011) Towards a new paradigm of non-captive research on cetacean cognition. *PLoS ONE*, 6(9) as referenced in RSPCA dolphin report, 14.