



## Animal Defenders Office

*Using the law to protect animals*

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The Animal Defenders Office Inc. is accredited by the National Association of Community Legal Centres.

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Dear Sir/Madam

### **Submission on the NSW Animal Welfare Reform – Issues Paper**

Thank you for the opportunity to provide a submission on the *NSW Animal Welfare Reform – Issues Paper* (“the Issues Paper”).<sup>1</sup>

#### *About the Animal Defenders Office*

The Animal Defenders Office (“ADO”) is a nationally accredited not-for-profit community legal centre that specialises in animal law. The ADO is run by volunteer professionals and students. It offers information and representation for individuals and groups wishing to take legal action to protect animals. The ADO also produces information to raise community awareness about animal protection issues and works to advance animal interests through law reform.

The ADO is a member of Community Legal Centres NSW Inc., the peak body representing community legal centres in New South Wales.

Further information about the ADO can be found at [www.ado.org.au](http://www.ado.org.au).

#### **General comment**

While the ADO does not support the use of animals for commercial, institutional or educational purposes, we have considered the measures proposed in the Issues Paper to improve the welfare of animals used by humans while such uses remain legal.

Our comments are set out below.

#### **Approach to regulation**

The Issues Paper states that the ‘vast majority of farmers, companion animal breeders, animal exhibitors, animal researchers, ... and private keepers are committed to ensuring high standards of welfare for the animals in their care. They operate well above the baseline set by legislation, and actively seek out ways to improve welfare outcomes’ (page 8).

The ADO disagrees with this assertion as the starting point from which to assess proposals for animal welfare reform.

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<sup>1</sup> Available at: <https://www.dpi.nsw.gov.au/animals-and-livestock/animal-welfare/issues-paper>.

It is impossible to know how commercial and institutional users of animals operate given the extremely low levels of inspections of facilities,<sup>2</sup> and of regulatory controls (as relevant to breeders and private keepers [although it is not clear what the latter refers to]). It is also difficult to see how it can be asserted that such entities ‘actively seek out ways to improve welfare outcomes’. Evidence to support such an assertion would be required if this is a premise on which law reform going forward is to be based.

At least in regard to animals used in agriculture, the ADO notes the now frequently cited 2018 study *Australia’s Shifting Mindset on Farm Animal Welfare*, commissioned by the Commonwealth Department of Agriculture.<sup>3</sup> This nationally representative survey found that ‘many of the public now support the ... views that animal welfare isn’t being sufficiently delivered by the agricultural sector for today’s values’ (p 20). It also found that:

- 95% of people view farm animal welfare to be a concern;
- 92-95% view farm animals as sentient; and
- 91% of people want to see some reform to address their concerns.

This indicates high levels of concern within the public about how animals are treated by animal users. For the purposes of the Issues Paper, this is relevant because it means that either the public does not perceive animal users to be operating ‘well above the baseline set by legislation’ or, the legislative baseline is set way too low.

While both propositions support the need for significant animal welfare reform, they do not support the starting premise that most animal users are doing the right thing. One significant danger with such a starting premise is that it denies the immense suffering of animals subjected to contemporary husbandry and other industry and institutional practices. This suffering must be acknowledged, so that particular practices are not overlooked by a regulatory regime too focussed on ‘outcomes’ rather than causes and means.

There would also need to be significant community consultation and agreement on what are acceptable ‘outcomes’. Allowing industry to determine outcomes (as is currently the case) is no longer appropriate and has led to the high levels of community concern about animal welfare in agriculture and other industries.

The ADO submits that, if used, ‘outcomes-focussed provisions’ must be used sparingly and monitored closely to ensure that they do not sanction animal suffering that the community considers unacceptable, despite any commercial advantages to industry or other animal users.

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<sup>2</sup> RSPCA NSW is reported as carrying out only 93 ‘routine inspections’ of the thousands of commercial establishments in NSW in 2018-2019. This compares to 1,053 in the (very much smaller) ACT in the same period. Commercial premises involving animals include the following types of premises:

• Abattoirs • Aquariums • Breeding establishments • Circuses • Feedlots • Grooming establishments • Guard dog firms • Hobby farms • Intensive farms • Kennels • Livestock vessels (aeroplanes) • Markets • Pet shops • Petting zoos • Poultry farms • Pounds • Riding schools • Rodeos • Saleyards • Shelters • Shows • Tourist parks • Zoos. The number of such premises is unknown. For the RSPCA statistics, see

<https://www.rspca.org.au/sites/default/files/RSPCA%20Australia%20Annual%20Statistics%20final%202018-2019.pdf>.

<sup>3</sup> Futureye (for the Cth Department of Agriculture), *Australia’s Shifting Mindset on Farm Animal Welfare* (2018): <http://www.agriculture.gov.au/SiteCollectionDocuments/animal/farm-animal-welfare.pdf>.

## **What is meant by ‘welfare’?**

The Issues Paper states:

The concept of animal welfare is multifaceted, and includes social, scientific, ethical and economic dimensions. Because of this complexity, there is no single agreed definition of ‘welfare’ and the term can mean different things to different people... (page 11)

The ADO agrees that the concept of animal welfare is multifaceted, and various human disciplines can contribute to our understanding of it. For example, ethics can certainly guide humans as to how we ought to treat other animals, and science may be able to help in interpreting animal behaviour. The ADO does not, however, accept that the concept should include economic or even social dimensions. The ADO submits that the wellbeing of an animal should be determined with reference to the animal, regardless of the social context in which the animal is used by humans, or the costs of ensuring good welfare.

One of the objects of the *Prevention of Cruelty to Animals Act 1979* (NSW) (“POCTAA”) is:<sup>4</sup>

to promote the welfare of animals by requiring a person in charge of an animal:

- (i) to provide care for the animal, and
- (ii) to treat the animal in a humane manner, and
- (iii) to ensure the welfare of the animal.

However, POCTAA does not provide an explicit definition of ‘welfare’.

The ADO suggests that the term should be defined in the State’s primary animal protection statute. Without a definition it is not clear what is being ‘ensured’. Failure to provide a definition risks leaving the purpose of the legislation unacceptably vague.

The Issues Paper refers to the World Organisation for Animal Health’s definition of ‘welfare’, which is based on the ‘Five Freedoms model’ (page 12). The Five Freedoms were developed in the 1960s in response to the new ‘intensive’ methods of confining farmed animals that were rapidly being adopted. The Five Freedoms recognise several basic elements that are necessary for animal welfare. The ADO submits, however, that the Five Freedoms should only be taken as a starting point for thinking about animal welfare today, since the freedoms outlined are not sufficient on their own to ensure an acceptable level of welfare by contemporary standards. The ADO has two concerns in particular with relying solely on the Five Freedoms approach.

First, the major focus of the Five Freedoms is on preventing behaviour that is likely to cause animals discomfort, distress, or pain. This is commendable, but it does not encompass all significant sources of animal distress. For example, lack of stimulation and the inability to make choices (eg when and what to eat, when and where to sleep, whether to socialise and with whom to socialise), neither of which are clearly covered within the Five Freedoms framework, can both severely and negatively impact on animal welfare.

Second, the Five Freedoms’ focus on minimising negative states fails to emphasise the promotion of positive states. By merely removing risks (eg hunger, thirst, disease) from the lives of animals, we do

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<sup>4</sup> POCTAA s 3(b).

not necessarily ensure their good welfare; as animal behavioural scientist Jonathan Balcombe notes, for both animals and humans, ‘a safer life is by no means a better life’.<sup>5</sup>

These two points indicate that the Five Freedoms do not provide a comprehensive account of welfare. Building on the Five Freedoms approach, the Australian Capital Territory (“ACT”) has sought to promote a ‘life worth living’ approach in its *Animal Welfare & Management Strategy 2017-2022*.<sup>6</sup> This approach emphasises the importance of physical wellbeing, mental wellbeing (including the experience of positive emotions, such as pleasure and contentment), and living a natural life, with the ability to perform natural behaviours and experience elements of the natural world (eg sunlight and fresh air). The ADO recommends this approach over one which relies solely on the Five Freedoms.

The ADO wishes, however, to draw attention to a still more comprehensive account of animal wellbeing than either of the two previously discussed. The ‘capabilities approach’, which was first developed in the context of human development studies by the economist Amartya Sen, has since been applied in the case of animals by philosopher and legal scholar Martha Nussbaum. The capabilities approach posits that animals, like humans, have certain capabilities that contribute to lives that are dignified and flourishing (and not merely free of pain and suffering). Nussbaum outlines a list of 10 capabilities, that includes ‘bodily health’, ‘bodily integrity’, ‘emotions’, ‘play’, and ‘control over one’s environment’.<sup>7</sup> The ADO strongly recommends that a definition of animal welfare, or at least the understanding of animal welfare on which future reform is based, should take into account these capabilities, as a promising way of overcoming the limitations of approaches that rely too heavily on the Five Freedoms.

### **Objects of the Acts**

The Issues Paper asks whether there is ‘anything additional to the current objects that should be included in the objects of new animal welfare laws’ (page 14).

The ADO recommends that New South Wales (“NSW”) follows the example of the ACT’s *Animal Welfare Act 1992* by acknowledging in the Objects sections of the relevant Acts<sup>8</sup> that animals are sentient beings and therefore have intrinsic value.<sup>9</sup> Acknowledging the ‘intrinsic value’ of animals means recognising that animals’ lives matter to them and are ethically significant. It means that an animal’s value is not merely dependent on how the animal may be used by humans, and that animals are deserving of compassion.

The ADO also recommends that NSW follows Queensland, Tasmania, the Northern Territory (“NT”), and the ACT in recognising that there is a duty to promote the welfare of animals. However, the ADO notes that the legislation in Queensland, Tasmania, and the NT places the duty of care on the person in charge of the animal, whereas in the ACT legislation, the Objects section states that the duty is on

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<sup>5</sup> Balcombe, J, ‘Animal pleasure and its moral significance’, *Applied Animal Behaviour Science*, 2009, 118, 208-216.

<sup>6</sup> ACT Government, *Animal Welfare & Management Strategy 2017-2022*, Canberra 2016, available at: [https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.act-yoursay.files/4514/9068/1706/Animal\\_Welfare\\_Management\\_Strategy\\_2017\\_2022.pdf](https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.act-yoursay.files/4514/9068/1706/Animal_Welfare_Management_Strategy_2017_2022.pdf).

<sup>7</sup> Nussbaum, MC, *Frontiers of justice: Disability, nationality, species membership*, Harvard University Press, Cambridge, MA, 2006.

<sup>8</sup> The three NSW Acts considered by the Issues Paper are the *Prevention of Cruelty to Animals Act 1979* (“POCTAA”), the *Exhibited Animals Protection Act 1986* (“EAPA”), and the *Animal Research Act 1985* (“ARA”).

<sup>9</sup> *Animal Welfare Act 1992* (ACT), section 4A.

'people' and does not specify that the person in question must be in charge of the animal.<sup>10</sup> In line with the ACT's example, the ADO submits that NSW animal welfare laws should recognise that people generally have a duty to care for the physical and mental welfare of animals, not merely those persons who are in charge of animals.

The ADO also recommends that NSW follows the NT and Victoria in including a provision concerning the promotion of community awareness about animal welfare and the prevention of cruelty to animals.<sup>11</sup>

In relation to the *Animal Research Act 1985* ("ARA"), the ADO suggests several additions to the Objects section, which aims 'to protect the welfare of animals used in connection with research' by requiring certain things.<sup>12</sup> These suggestions are in addition to the earlier recommendation that the Objects section in the ARA acknowledge animals' sentience and intrinsic value.

First, the ADO recommends that the use of animals for research should require *demonstrable* and *strong* evidence that the research will provide a direct benefit to the animals themselves, other animals, or the human community. This will help ensure that animals are subjected to potentially painful or distressing research only when there is a *demonstrable* benefit to be gained. The objects section should make clear that if the benefit is only for the human community, the non-human animal is being used potentially against their own interests of avoiding pain and suffering.

Second, we recommend that the Objects section acknowledge the '3Rs' (replacement, reduction, refinement),<sup>13</sup> and that the importance of 'replacement' first, and 'reduction' second, over 'refinement', be stated explicitly.

Third, we note that there have been suggestions for expanding the traditional 3Rs to cover the animals' post-research lives. This would be achieved by adding a fourth 'R', such as 'Rehoming', 'Retirement', 'Rehabilitation', or 'Release'.<sup>14</sup> The rehoming of research animals is already included in the *Australian code for the care and use of animals for scientific purposes*, which notes that '[o]pportunities to rehome animals should be considered wherever possible'.<sup>15</sup> The ADO therefore submits that the Objects section should include a direct statement about the treatment of animals after their use in research has ended. This would support the Department of Primary Industries ("DPI")'s draft *Research Animal Rehoming Guidelines* when they are released.<sup>16</sup>

### **Interactions between the Acts**

The ADO is not convinced of the need to combine the POCTAA, ARA and the *Exhibited Animals Protection Act 1986* ("EAPA"). The latter two Acts are primarily licensing regimes, while the former

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<sup>10</sup> *Animal Welfare Act 1992* (ACT), section 4A(c).

<sup>11</sup> *Animal Welfare Act 1999* (NT), section 3(c); *Prevention of Cruelty to Animals Act 1986* (VIC), section 1(c).

<sup>12</sup> ARA, section 2A(1).

<sup>13</sup> See the governing principles of the National Health and Medical Research Council's *Australian code for the care and use of animals for scientific purposes* (NHMRC 2013).

<sup>14</sup> Helwig, L, 'The 4th R: Rehoming, Retirement and Release - June 13, 2019', webinar, National Institutes of Health, Office of Laboratory Animal Welfare, accessed 14/6/2020, <https://olaw.nih.gov/education/educational-resources/webinar-2019-06-13.htm>; and Pereira, S, 'Current status of establishing the 3Rs concept in India', *ALTEX: Alternativen zu Tierexperimenten*, 23 Suppl., 2006, pp. 141-3, [http://www.altex.ch/resources/135145\\_33.pdf](http://www.altex.ch/resources/135145_33.pdf).

<sup>15</sup> NHMRC 2013: s.3.4.2.

<sup>16</sup> NSW Department of Primary Industries, *Research animal rehoming guidelines: For establishments and individuals involved in the care and use of animals for research and teaching in NSW [DRAFT]*, Animal Research Review Panel Guideline 27, September 2019.

sets out the main criminal offences for animal cruelty that apply (or *should* apply – currently there are too many exemptions for animals used in specific contexts) regardless of use or context. In the ADO's view the work required to combine the Acts would be better spent in improving the protections for animals in each individual statute.

Similarly, opportunities 'to make NSW's laws consistent with other jurisdictions' (Issues Paper, page 14), should only be taken where the reform would improve protections for animals, or at least not reduce them.

#### **Definition of 'animal'**

The Issues Paper asks:

Should additional species be included in the definition of 'animal' and therefore covered by animal welfare provisions (for example, cephalopods, crustaceans in all situations, other species)? Why? (page 18).

In order to ensure that NSW is a world leader in the promotion of animal welfare, the ADO recommends that the definition of animal be as broad as possible. The ADO proposes that, following an acknowledgement of the sentience of animals as the basis for their need for protection, then all sentient non-human animals should, *prima facie*, be included within the scope of animal protection legislation.

Since not all animals may be sentient (single celled organisms, for example), it should be acknowledged that sentience is to be assumed where there is sound scientific evidence that suggests, on balance, that the particular species or genus in question is likely to be sentient. Thus, the *default* position should be that all sentient animals are included in a definition of 'animal'. The definition could be worded along the following lines: '**animal** means all nonhuman animals where there is evidence that, on balance, they are sentient. This includes (but is not limited to): vertebrates, crustaceans, cephalopods, ...'.

The ADO also recommends that NSW follows the definitions found in the New Zealand *Animal Welfare Act 1999* which extends to mammalian foetus, avian pre hatched young and marsupial pouch young.<sup>17</sup>

If the sentience of an animal is not yet established, that animal may be included if desired by explicitly mentioning the species or genus. For example, Norway's *Animal Welfare Act* includes 'honey bees'.<sup>18</sup> In light of the vitally important ecosystem services provided by honey bees (eg pollination of agricultural crops), and the possibility that they are sentient, the ADO recommends including bees<sup>19</sup> in the definition of 'animal' in POCTAA, and outlining specific provisions for their protection.

An additional criterion for determining whether sentient creatures are included in the definition of animal for the purposes of animal protection statutes is whether the animal is used for human consumption. Insects such as crickets are an increasingly popular source of protein for humans, and

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<sup>17</sup> *Animal Welfare Act 1999* (NZ) s2, pars (b) and (c) of the definition of 'animal'.

<sup>18</sup> *Animal Welfare Act 2009*, s 2: <https://www.regjeringen.no/en/dokumenter/animal-welfare-act/id571188/> (accessed 14/6/20).

<sup>19</sup> At least the *apis mellifera* and native bees.

there are multiple insect farms operating in Australia.<sup>20</sup> Consideration should be given as to whether the welfare of these living creatures farmed for human consumption should be protected under animal welfare laws.

The Issues Paper also asks whether there should be a consistent definition of ‘animal’ across POCTAA, ARA and EAPA (page 18). The ADO submits that as long as there is a mechanism to exclude types of animals from ARA and EAPA as we progressively ban animals from being used for research (eg primates) and exhibition (eg exotic animals in circuses; dolphins in aquaria), a consistent definition could be used across relevant welfare laws.

Finally, the ADO suggests that, in light of the fact that animals are not objects, but rather are subjective beings, we recommend that individual animals be referred to using personal pronouns to indicate their intrinsic value (ie ‘she’ and ‘he’), rather than the impersonal pronoun (ie ‘it’).

### **Definition of ‘cruelty’**

The Issues Paper seeks comments on how ‘cruelty’ is currently defined within POCTAA (page 21).

The definition of an act of cruelty made in POCTAA (s4(2)) refers to actions and omissions that are committed ‘unreasonably, unnecessarily or unjustifiably’. The ADO has concerns with these qualifiers. The ADO suggests that consideration be given at least to removing ‘unjustifiably’, since, in theory, *any* action or omission may be justified by providing a reason – the point should be whether the reasons used to justify the action or omission are appropriate.

Furthermore, the ADO suggests that the definition of an act of cruelty should be supplemented with a statement that the specified acts of cruelty (ss4(2)(a)-(d)) may be permissible only where the individual animals subjected to the acts or omissions of cruelty ultimately benefit in some way from the action. This would go some way to ensure that animals’ legally protected interest in not being subjected to cruel treatment is not overridden *solely* for the benefit of humans.

In terms of specific acts that should be prohibited by POCTAA, the ADO supports the inclusion of the acts in the existing list (Issues Paper, Box 7, page 19), and the absence of exemptions. The list includes acts that our society once condoned but has more recently come to reject as unethical, such as baiting, animal fighting, hurdle racing. This may explain the low prosecution rates for some of these offences (Issues Paper, page 19), in that in general the public has moved away from practising or condoning such acts. For others, such as live baiting, which has been proven to be rampant within greyhound racing,<sup>21</sup> the low prosecution rates are no doubt indicative of low or no enforcement action in the relevant contexts.

The ADO submits that the list be expanded to reflect society’s better understanding of animal suffering.

For example, the ADO recommends the inclusion of certain acts that cause severe suffering to fishes. The ability of fishes to suffer from acts of cruelty is already implied by the inclusion of ‘fish’ within POCTAA’s definition of ‘animal’. Nevertheless, there has been a long-standing belief within the community that fishes cannot feel pain. This belief is increasingly being shown to be false by

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<sup>20</sup> *The Changing Landscape of Protein Production: Opportunities and challenges for Australian agriculture*, Australian Farm Institute, February 2020, <https://www.agrifutures.com.au/wp-content/uploads/2020/02/20-001.pdf>.

<sup>21</sup> *Special Commission of Inquiry into the Greyhound Racing Industry in New South Wales. Report*, Vol. 1, Chapter 3, 16 June 2016, Michael McHugh AC QC, [https://apo.org.au/sites/default/files/resource-files/2016-07/apo-nid65365\\_5.pdf](https://apo.org.au/sites/default/files/resource-files/2016-07/apo-nid65365_5.pdf).

research in animal welfare science.<sup>22</sup> Since fishes are capable of feeling pain, this leads to a host of welfare concerns surrounding the way they are currently, commonly used within the fishing and aquaculture industries and recreational fishing.<sup>23</sup> The ADO therefore suggests that, for example, the practice of letting fishes suffocate to death after being caught be included in the list of prohibited acts.

The ADO also makes the following recommendations based on precedents from other jurisdictions.

The ADO recommends that NSW follows the lead of Victoria and prohibits the practice of mulesing sheep without pain relief and the use of fruit netting that traps native flying foxes.<sup>24</sup>

The ADO recommends that NSW follows the lead of Victoria and prohibits the practice of breeding animals with heritable defects.<sup>25</sup>

The ADO recommends that NSW follows the lead of the ACT and prohibits the use of battery cages for layer hens and sow stalls and farrowing crates for pigs.<sup>26</sup> Removing or trimming the beaks of hens should also be prohibited as in the ACT.<sup>27</sup>

The ADO recommends that NSW follows the lead of the ACT and prohibits rodeos.<sup>28</sup>

The ADO recommends that NSW follows the lead of the ACT, and the NSW government in 2016, and prohibits greyhound racing.<sup>29</sup>

The ADO recommends that NSW follows the lead of the ACT and prohibits pig dogging.<sup>30</sup>

The ADO recommends that NSW follows the lead of the ACT and prohibits the use of exotic animals in circuses.<sup>31</sup>

While these practices *prima facie* meet the definition of cruelty, they are currently legal in NSW. Until NSW follows these precedents from other jurisdictions and bans these specific practices, NSW cannot consider itself a leader in animal welfare.

#### **Definition of ‘pain’**

The current definition of ‘pain’ in POCTAA is that it ‘includes suffering and distress’. Though pain, suffering and distress are difficult to define, the ADO submits that the POCTAA definition can be improved.

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<sup>22</sup> See for example Brown, C, ‘Fish intelligence, sentience and ethics’, *Animal cognition*, 2015, 18(1): 1-17; Brown, C & Dorey, C, ‘Pain and Emotion in Fishes – Fish Welfare Implications for Fisheries and Aquaculture’, *Animal Studies Journal*, 2019, 8(2): 175-201; and Sneddon, LU, ‘Evolution of nociception and pain: Evidence from fish models’, *Philosophical Transactions of the Royal Society B*, 2019, 374(1785): 20190290. <http://dx.doi.org/10.1098/rstb.2019.0290>.

<sup>23</sup> Wadiwel, D, ‘Fisheries and fish welfare: an uncanny silence’, Sydney Environment Institute, University of Sydney 2015, accessed 14/6/20, <http://sydney.edu.au/environment-institute/opinion/fisheries-and-fish-welfare-an-uncanny-silence/>.

<sup>24</sup> *Prevention of Cruelty to Animals Regulations 2019* (Vic) regs 8(2) and 13.

<sup>25</sup> *Prevention of Cruelty to Animals Act 1986* (Vic) s 15C.

<sup>26</sup> *Animal Welfare Act 1992* (ACT) ss 9A and 9B respectively.

<sup>27</sup> *Ibid* s 9C.

<sup>28</sup> *Ibid* s 18(1).

<sup>29</sup> *Ibid* s 18A, and *Greyhound Racing Prohibition Act 2016* (NSW).

<sup>30</sup> *Animal Welfare Act 1992* (ACT) s 17.

<sup>31</sup> *Ibid* s 52(2) and (3).

One suggestion is to distinguish between pain and suffering, though both are intimately connected.<sup>32</sup> Pain is often thought to refer to a negative state caused by some physiological ailment, and may be measured by physical indicators (e.g. changes in blood pressure or respiration). Suffering, on the other hand, commonly refers to a negative psychological state, which may be indicated by marked changes in behaviour. The ADO recommends that both physiological pain and psychological suffering are defined and included within the scope of POCTAA.

Another way to improve the current definition of pain in POCTAA would be to model a definition on that found in other legal contexts. For example, ‘pain and suffering’ is defined by the *Australian Law Dictionary* as the ‘physical and emotional distress that a person experiences as a result of a wrong. It may include physical agony, discomfort, impairment, depression, anxiety, mood swings, psychiatric conditions’.<sup>33</sup> This definition highlights important physical, psychological and emotional aspects of pain and suffering that could be recognised in POCTAA.

### **Person in charge**

The definition of ‘person in charge’ needs to be broad enough to ensure that all those who should take responsibility for cruel treatment of animals are appropriately held to account. For example, in commercial settings persons in charge should include not only the perpetrator of the cruelty but any managers or decision makers that may have been, or should have been, aware of the animal cruelty.

The ADO submits that NSW should adopt approaches in other jurisdictions, including:

- in South Australia, where a person is taken to be the owner of an animal in the absence of proof to the contrary;<sup>34</sup>
- in Tasmania, where an operator or manager of premises where an animal is held for commercial purposes, or a chief executive officer or manager (by whatever title known), or a director, of a body corporate that owns the animal, are all taken to have the care or charge of the animal;<sup>35</sup> and
- in Western Australia, where persons in charge will be both the person with actual physical custody or control of the animal, and, if that person is a member of staff of another person, that other person.<sup>36</sup>

### **Research**

The Issues Paper asks if there are any activities currently considered as research or teaching activities under the *Animal Research Act 1985* that should be excluded (page 25).

In general, the ADO is wary of removing or loosening regulatory controls on the use of animals. For example, the ADO would not support relaxing regulatory control of practices such as school hatching projects, which should be banned rather than deregulated due to the multiple animal welfare concerns associated with this practice,<sup>37</sup> including the inevitable oversupply of unwanted chicks and roosters.

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<sup>32</sup> Bueno-Gómez, N, ‘Conceptualizing suffering and pain’, *Philosophy, ethics, and humanities in medicine: PEHM*, 2017, 12(1), 7. <https://doi.org/10.1186/s13010-017-0049-5>.

<sup>33</sup> *Australian Law Dictionary*, 2017, 3<sup>rd</sup> ed., Trischa. Mann (ed.), Oxford University Press.

<sup>34</sup> *Animal Welfare Act 1985* (SA) s 42(2).

<sup>35</sup> *Animal Welfare Act 1993* (Tas) s 3A(1).

<sup>36</sup> *Animal Welfare Act 2002* (WA) s 5 (definitions).

<sup>37</sup> <https://kb.rspca.org.au/knowledge-base/what-are-the-animal-welfare-issues-with-chick-hatching-in-schools/>.

Furthermore, the ADO recommends that NSW should follow the lead of New Zealand and restrict research, testing, or teaching involving use of non-human hominids unless the activity is either in the best interests of the animal, or the animal's species without inflicting undue harm to the individual animal.<sup>38</sup>

### **Exhibit**

The Issues Paper asks if there are any activities that should be included in the definition of 'exhibit' in the EAPA (page 26).

The ADO recently responded to deep concern in the community about the plight of a caged sulphur crested cockatoo who is exhibited by a car sales company to entertain customers. The bird has been the subject of several petitions and campaigns to remove the bird from the cage in which he is permanently confined and to release the bird to a sanctuary.<sup>39</sup> The ADO made a complaint under the EAPA to the DPI on behalf of a member of the public. The DPI advised that the EAPA does not apply to this bird as his species is exempt from the operation of the Act. This effectively allowed the bird to continue to be displayed in distressing conditions with no regulatory controls or oversight.

The ADO strongly recommends that the exhibition of these birds, and other animals not listed in Schedule 2 to the EAP Regulation<sup>40</sup>, no longer be excluded from the operation of the Act.

The Issues Paper asks if there are any activities currently included in the definition of 'exhibit' in the EAPA that should be excluded (page 26).

As stated in the context of animal research, the ADO is wary of removing or loosening regulatory controls on any use of animals, and would not support exempting animal display activities from the regulatory requirements under the EAPA.

Moreover, the ADO would support removing most of the activities from the list in the EAP Regulation of exhibits that are exempt from the operation of the Act, including competitive displays of domestic farm animals and animals kept in a pet shop for display and not for sale.<sup>41</sup>

### **Examining compliance powers and tools**

#### *Limitations on who can institute proceedings for animal cruelty offences*

The ADO recommends that the ability to bring private proceedings for offences under POCTAA be reinstated in the Act.

In some jurisdictions in Australia, any person can start a private prosecution for a breach of animal welfare laws.<sup>42</sup>

Private prosecutions for animal cruelty offences were possible in NSW until 2007 when section 34AA was introduced into POCTAA. Section 34AA provides that proceedings for offences under POCTA legislation may only be instituted by certain limited parties, including approved charitable organisations, the police, and the relevant Minister.

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<sup>38</sup> Animal Welfare Act 1999 (NZ) s 85.

<sup>39</sup> See for example <https://www.facebook.com/Free-Toyota-the-Australian-Native-Sulphur-Crested-Cockatoo-1535019349974702/>; and <https://www.change.org/p/hayes-toyota-toyota-australia-geoff-provest-mp-tweed-shire-council-rspca-nsw-animal-welfare-le-free-toyota-the-australian-native-sulphur-crested-cockatoo>.

<sup>40</sup> Exhibited Animals Protection Regulation 2010.

<sup>41</sup> Ibid cl. 5.

<sup>42</sup> ACT, Queensland, South Australia, Tasmania.

This limitation was strongly criticised during parliamentary debates about the proposed amendment. It was noted that the authorised charitable organisations essentially monitor the treatment only of pets and are therefore unlikely to bring prosecutions against commercial organisations.<sup>43</sup>

Moreover, it was pointed out that restricting entities that can initiate prosecutions inhibits the prospect of test cases that develop the law.<sup>44</sup> Of the relatively few prosecutions under POCTA legislation that have been brought since section 34AA was introduced,<sup>45</sup> few, if any, have tested, and therefore developed, the law, or tested its application to different categories or species of animals or different uses of animals.

The ADO also considers that requiring the Minister's consent for 'any other person to institute proceedings'<sup>46</sup> risks politicising the process of initiating prosecutions, and undermining the perception of prosecutorial independence. The relevant Minister is the Minister for Agriculture.<sup>47</sup> The departmental Secretary who can also give consent is the Secretary of the Department of Industry.<sup>48</sup> This also limits the prospect of prosecutions being initiated against industries which it is the primary function of the Minister and Secretary to protect.

The ADO therefore recommends that the restrictions on who can institute proceedings for offences against POCTA legislation be removed. This recommendation applies only to prosecutions, and not to investigations.<sup>49</sup>

The ADO submits that it would be reasonable to allow other interested parties to bring proceedings given that private charity enforcement bodies are inevitably under-resourced and that the police have other priorities. It would also allow anti-cruelty laws to develop in line with contemporary community expectations and values.

#### *Statutory time limits for commencing prosecutions for cruelty*

Currently a prosecution for an animal cruelty offence under POCTA legislation must be commenced 'not later than 12 months after the date alleged to be the date on which the offence was committed'.<sup>50</sup> The ADO submits that this period is too short and offences go unpunished simply because the enforcement agencies fail to progress investigations to the point of commencing a

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<sup>43</sup> <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-80150>.

<sup>44</sup> Ibid.

<sup>45</sup> <https://www.rspca.org.au/what-we-do/our-role-caring-animals/annual-statistics>. For example, the latest statistics available on RSPCA Australia's website indicate that in 2018-19 in NSW 15,673 cruelty complaints were investigated but only 75 prosecutions were finalised:

<https://www.rspca.org.au/sites/default/files/RSPCA%20Australia%20Annual%20Statistics%20final%202018-2019.pdf>.

<sup>46</sup> POCTAA s34AA(1)(e).

<sup>47</sup> 'Status information' re POCTAA, which states that the Responsible Minister is the 'Minister for Agriculture and Western New South Wales, jointly with the Minister for Local Government',

<https://www.legislation.nsw.gov.au/#/view/act/1979/200>.

<sup>48</sup> POCTAA s4 'Definitions', **Department** and **Secretary**.

<sup>49</sup> Suggestions that removing restrictions on prosecutions would lead to people entering farms to gather evidence are nonsensical, as powers to inspect and investigate potential breaches of the Act are and always have been limited to authorised officers: POCTAA Part 2A.

<sup>50</sup> POCTAA s34(4).

prosecution within 12 months.<sup>51</sup> The ADO recommends that this period be extended to at least three years.

*Parliamentary Inquiry into Animal Welfare Laws in NSW – Committee recommendations*

Finally, in relation to compliance and enforcement, the ADO supports and encourages the adoption of the following recommendations by the Select Committee on Animal Cruelty Laws in New South Wales<sup>52</sup> regarding its recent inquiry into the ‘effectiveness of arrangements for the administration and enforcement of the laws of New South Wales for the protection of animals from cruelty’.<sup>53</sup>

**Recommendation 3**

That the NSW Government move responsibility for animal welfare matters out of the Department of Primary Industries.

**Recommendation 10**

That the NSW Government, as part of the review of the *Prevention of Cruelty to Animals Act 1979*, consider statutory time limits for the prosecution of animal cruelty related crimes.

**Recommendation 11**

That the NSW Government amend the *Prevention of Cruelty to Animals Act 1979* to require the approved charitable organisations to:

- table their annual reports in both Houses of the NSW Parliament
- comply with requests under the *Government Information (Public Access) Act 2009*.

**Recommendation 12**

That the Legislative Council Portfolio Committee responsible for Primary Industries (or other Portfolio Committee that has primary responsibility for animal welfare) be required to conduct a one day public hearing each year involving the approved charitable organisations, with the hearing to be conducted after the lodgement of the approved charitable organisations' annual reports in NSW Parliament. One of the core requirements of the hearing will be to examine the approved charitable organisations' compliance and enforcement responsibilities under the *Prevention of Cruelty to Animals Act 1979*. Further, that approved charitable organisations be invited to attend the relevant Portfolio Committee in conjunction with representatives from the Department of Primary Industries.

**Recommendation 13**

That the NSW Government establish and fully fund a specialist unit within the NSW Police Force to investigate and prosecute animal cruelty offences.

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<sup>51</sup> See our ‘Yass truck crash’ case study in our submission to the Select Committee Inquiry on Animal Cruelty Laws in New South Wales, pages 8-10:

<https://www.parliament.nsw.gov.au/lcdocs/submissions/66927/0135%20-%20Animal%20Defenders%20Office.pdf>.

<sup>52</sup> <https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=263#tab-termsofreference>.

<sup>53</sup> Select Committee on Animal Cruelty Laws in New South Wales, *Report—Animal cruelty laws in New South Wales*, June 2020; <https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=263#tab-reportsandgovernmentresponses>.

#### **Recommendation 14**

That the NSW Government establish an independent statutory body, the Independent Office of Animal Protection, to oversight the animal welfare framework. Further, that the NSW Government consult stakeholders on the appropriate functions of the new body.

#### **Penalty Infringement Notices**

In 2005 POCTAA was amended to allow authorised officers to issue penalty notices for a range of offences. This was done to ‘greatly increase the efficiency of the Act’s administration. The system will cover many types of offences that were often not prosecuted in the past’.<sup>54</sup> However, if information about the number of penalty notices issued each year, and the offences for which they were issued, is not made publicly available, it is impossible to evaluate whether penalty notices are achieving their stated aim.

The Issues Paper asks whether Penalty Infringement Notices should be made available under ARA. The ADO submits that they should, but that detailed information about the numbers of notices issued and the offences for which they were issued be made readily available to the public at least every year so their use can be monitored and evaluated.

#### **Disqualification and prohibition orders**

The ADO supports:

- making court orders prohibiting a convicted person from having anything to do with animals available in relation to persons convicted under the *Crimes Act 1900* (eg s 530); and
- giving authorised officers the power to seize animals held in contravention of prohibition orders.

#### **Addressing causes and reducing recidivism**

The Issues Paper discusses whether authorised inspectors should be provided with powers and tools to give ‘proactive support’ to help prevent adverse animal welfare outcomes (page 28).

While the ADO would support this proposal, we would urge that the use of the proposed powers and tools would not be at the expense of, or in lieu of, existing enforcement measures such as penalty notices, prosecution, fines and imprisonment. Any new powers or tools should be used in addition to, rather than as an alternative to, these existing enforcement tools. This is particularly important in commercial and agricultural contexts where perpetrators can be responsible for large numbers of animals.

The establishment of a register of animal cruelty offenders may also improve animal welfare outcomes and reduce recidivism by limiting the ability of offenders to gain access to animals.

The ADO would also support the inclusion of training on animal welfare issues as part of professional development for judicial officers. Such training could include the incidence of recidivism and non-compliance with animal ownership bans by animal cruelty offenders.

#### **Stock Welfare Panels**

The ADO does not generally support separate compliance measures and enforcement tools to be used in relation to animals in different contexts. POCTAA is about the prevention of cruelty to

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<sup>54</sup> POCTA Amendment Bill 2004, Second Reading Speech:  
<https://www.parliament.nsw.gov.au/bill/files/792/A5005.pdf>.

individual animals, and the appropriate punishment for such cruelty.<sup>55</sup> If an animal suffers, the enforcement measures must be the same regardless of where the cruelty occurs, or the type of community in which it occurs. To do otherwise undermines the public confidence in the effectiveness of anti-cruelty laws to protect all animals adequately.

The Issues Paper states that since the Stock Welfare Panel process was established, the panels have ‘facilitated better animal welfare outcomes for more than 15,000 animals’ (page 29). No evidence is provided to support this assertion. It is not clear how many panels have been formed since the process was introduced in 2012.<sup>56</sup> It is also not clear from whose perspective the animal welfare outcomes were considered to be ‘better’—that is, from the perspective of the animal owners (farmers) or the animals. For example, in one case, 800 animals are reported to have died during the period in which a panel was convened to ‘manage’ the situation.<sup>57</sup>

Membership of the panels does not appear to include an independent representative for the animals. If the panels are to continue, the ADO submits that they must include an independent representative for animals, selected from an animal protection organisation. This would avoid the panel being made up exclusively of people who either represent, or are or may be captured by, industry.

The ADO also submits that the use of, and outcomes from, panels should be transparent. The DPI and enforcement agencies should be required to report on and provide detailed information about the panels, their duration, their outcomes, and the fate of all animals involved (including those who do not survive), and this information should be made publicly available.

### **Penalties**

The ADO keeps track of maximum penalties for animal cruelty and neglect in the eight animal welfare jurisdictions in Australia.<sup>58</sup> NSW consistently ranks the lowest for both financial penalties and terms of imprisonment across the three types of offences monitored (cruelty, aggravated or serious cruelty, and neglect). As the largest jurisdiction in Australia, this is unacceptable.

The ADO supports any initiative to increase penalties in NSW, both court-ordered and fixed via penalty infringement notices, as a strong signal to potential offenders that the community does not tolerate animal cruelty or neglect.

### **Administration and licensing**

In principle, the ADO does not support a risk-based approach to regulating human interactions with animals.

There are inherent problems with such an approach, including:

- Who will assess whether the risk is low or high—animal users? Industry representatives or promoters? Or an independent body?

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<sup>55</sup> POCTAA s 33F.

<sup>56</sup> There are reports of 24 panels as at end 2019: <https://www.theland.com.au/story/6539431/rspca-moves-on-cows-horses-sheep/>.

<sup>57</sup> <https://www.rspcansw.org.au/blog/media-releases/statement-from-rspca-nsw-regarding-seizure-of-cattle-at-binnaway/> (posted 26 Nov 2019).

<sup>58</sup> <https://www.ado.org.au/penalties-for-animal-cruelty-and-ne>.

- What are the criteria for making the assessment? How important in the assessment process is the welfare of the individual animal (rather than industry considerations such as costs and time)?
- If an activity is classified as ‘low risk’, what checks and balances will there be on how the activity is carried out? Will the activity be monitored in any form?

The ADO submits that the only sectors that would benefit from any deregulation of animal industries or activities would be the industries themselves and the administrators of the regulatory scheme.

The animals, and those in our community who want a high level of animal care and to have confidence that animals are treated humanely, may inevitably lose out. For this reason, the ADO considers that activities involving animals should require more regulatory oversight, rather than less.

If, however, such an approach is adopted, the ADO submits that only ‘non-interfering’ activities such as observing animals in the wild should qualify as ‘low risk’ activities.

### **Panels and committees**

The Issues Paper discusses the role of animal welfare panels and committees. While the ADO accepts that these entities have a place in the animal welfare regulatory framework, the ADO submits that the legitimacy, or social licence, of these entities depends on their membership and, in particular, the number of animal representatives on the panel or committee. The ADO submits that the entities must contain enough members representing animals to give these representatives, and the animals they are there for, a proper voice. Otherwise animal representatives are outnumbered and, as a result, often intimidated into silence or consent.<sup>59</sup>

### **Conclusion**

The ADO submits that animal welfare laws in NSW require significant reform along the lines recommended in this submission if they are to improve protections for animals in this State.

Thank you for taking our submissions into consideration.

Our submissions were prepared with the assistance of Mary Ann Gourlay, Kelly Pearson, Sel Burek and Farnham Seyed, volunteers with the Animal Defenders Office.

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The Animal Defenders Office acknowledges the traditional owners of country throughout Australia and their continuing connection to land, sea and community. We pay our respects to them and their cultures and to their elders both past and present.

21 June 2020

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<sup>59</sup> Russell, D (2012) ‘Why animal ethics committees don’t work,’ *Between the Species*: Vol. 15: Iss. 1, Article 8.