



Animal Defenders Office

Using the law to protect animals

ABN: 12837355070 | Member: CLCNSW Inc. | GPO Box 2259 Canberra ACT 2601 | www.ado.org.au | contact@ado.org.au
The Animal Defenders Office Inc. is accredited by the National Association of Community Legal Centres.

Department of Primary Industries
c/o Animal Welfare
Locked Bag 21
Orange NSW 2800

By email: animalwelfare.submissions@dpi.nsw.gov.au

Dear Sir/Madam

Submission on the NSW Animal Welfare Reform – Discussion Paper (2021)

Thank you for the opportunity to provide submissions about the *NSW Animal Welfare Reform – Discussion Paper* (“Discussion Paper”) prepared by the Department of Primary Industries (“DPI”) in New South Wales (“NSW”).¹

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. The ADO 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 NSW.

Further information about the ADO can be found at www.ado.org.au.

The ADO’s submissions on the measures proposed in the Discussion Paper are set out in detail below.

Introduction

Models of animal welfare

The ADO notes that the key proposed changes to existing laws as set out in the Discussion Paper are based on the Five Freedoms and Five Domains models of animal welfare (p 3). The ADO welcomes the adoption of the more contemporary ‘Five Domains’ model. However, the ADO is concerned that the ‘Five Domains’ model is merely a relabelling of the now outdated Five Freedoms model.² The ADO submits that there are more appropriate models than these on which to base animal welfare law reform in the 21st century. In particular, the ‘life worth living’ approach adopted by the

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

² ‘The Five Freedoms and Five Domains frameworks contain essentially the same five elements.’ RSPCA Australia, ‘What are the Five Domains and how do they differ from the Five Freedoms?’, <https://kb.rspca.org.au/knowledge-base/what-are-the-five-domains-and-how-do-they-differ-from-the-five-freedoms/>.

Australian Capital Territory (“ACT”)³, or the ‘capabilities approach’ which focusses on animals’ (and humans’) capabilities that contribute to lives that are dignified and flourishing and not merely free of pain and suffering, are preferable models because they place much greater emphasis on positive welfare states and experiences.⁴ Basing the proposed changes and enhancements on restricted models of animal welfare will necessarily limit the changes’ scope and ability to lead to meaningful protection of animals.

Targeted consultation

The Discussion Paper states that the DPI has:

...worked closely with a selection of key stakeholders to test the proposals outlined in this paper... These stakeholders were chosen because they have a legislated role related to animal welfare or to provide balanced stakeholder representation. (p6)

The ADO notes that most of the ‘key’ stakeholders listed in the table on page 6 (‘Box 1’) are animal users or make financial gain from the use of animals. Of the ‘animal welfare’ organisations (RSPCA and AWL), both receive government funding⁵ and at least the RSPCA benefits from schemes promoting the consumption of animals.⁶ An independent animal protection organisation should have been included in the ‘targeted consultation’ to ensure an effective representation of animals’ interests and the overall integrity of the consultation process.

Proposal 1 – replace the existing laws with a single Act

Question 1. Do you have any comments on the proposal to replace POCTAA, ARA and EAPA with a single, modern animal care and protection law?

The ADO submits that the benefit to animals in replacing the existing laws with a single Act has not been demonstrated. Reducing complexity and legislative requirements usually benefits animal users and administrators rather than animals.

As the Discussion Paper itself points out, the three Acts are different and have ‘different needs’.⁷

The *Prevention of Cruelty to Animals Act 1979* (NSW) (“POCTAA”) sets out criminal offences that should apply to animals regardless of their context. The other two Acts are mainly licensing regimes applying in very specific contexts.⁸ The ADO submits that the work required to combine the Acts would be better spent in improving the protections for animals in each individual statute.

³ 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.

⁴ Nussbaum, MC, *Frontiers of justice: Disability, nationality, species membership*, Harvard University Press, Cambridge, MA, 2006. Nussbaum outlines a list of 10 capabilities including ‘bodily health’, ‘bodily integrity’, ‘emotions’, ‘play’, and ‘control over one’s environment’.

⁵ The Royal Society for the Prevention of Cruelty to Animals New South Wales, *General Purpose Tier 2 Financial Report (Reduced Disclosure Requirements)*, 30 June 2020: <https://www.rspcansw.org.au/wp-content/uploads/2020/10/FY2020-RSPCA-NSW-FS-2409.pdf>. Animal Welfare League NSW Annual Report 2019-2020, https://www.awlnsw.com.au/wp-content/uploads/2021/01/AWL_NSW_AnnualReport20_28pp_soft.pdf.

⁶ RSPCA Approved Farming Scheme, <https://rspcaapproved.org.au/>.

⁷ Discussion Paper, p 26.

⁸ *Animal Research Act 1985* (“ARA”), and the *Exhibited Animals Protection Act 1986* (“EAPA”).

Authorised officers acting under the proposed single Act will require ‘different skills and expertise depending on the part of the new laws they are responsible for enforcing’. It is difficult to see how this scenario will not lead to further confusion and legislative overlap.

Moreover, the ADO does not support replacing three Acts with a single Act if it would lead to more substantive content being moved to the regulations, the making and amending of which has far less parliamentary scrutiny than primary legislation.

Proposal 2 – Update the objects of the Act

Question 2. Do the proposed objects clearly and effectively explain the purpose of the new laws?

Question 3. Do you have any comments on the proposal to update the objects of the new laws?

In an extraordinary and inexplicable omission, the Discussion Paper does not refer to animal sentience. This is unacceptable in any contemporary discussion of animal welfare law reform. Any new animal welfare law must acknowledge animal sentience, which has long been recognised in science, as well as the intrinsic value of animals. Not to do so is completely out of step with contemporary animal welfare legislation in other common law jurisdictions. For example, the UK, arguably the world’s leader in animal welfare law reform⁹, introduced the Animal Welfare (Sentience) Bill in May 2021 (“the Bill”)¹⁰. The Bill would enshrine sentience in domestic animal welfare law and establish an ‘Animal Sentience Committee’ to ensure government policy considers animal sentience.

The ADO submits not only that sentience and the intrinsic value of animals should be acknowledged in any new animal welfare law in NSW, but also that the acknowledgement should be placed in the objects clause of the new Act. This would follow the example of the ACT’s *Animal Welfare Act 1992*. The first clause of the objects clause in this Act states:

- (1) The main objects of this Act are to recognise that—
 - (a) **animals are sentient beings that are able to subjectively feel and perceive the world around them;** and
 - (b) **animals have intrinsic value and deserve to be treated with compassion and have a quality of life that reflects their intrinsic value;** and
 - (c) people have a duty to care for the physical and mental welfare of animals.¹¹

The Discussion Paper states that ‘[t]he science behind animal welfare has evolved’ since NSW animal welfare laws were introduced around 40 years ago.¹² It cites this as a reason for modernising the policy and legislative framework for animal welfare in NSW. This rationale is completely undermined, however, if the proposed new law fails to acknowledge what science has recognised for centuries, namely that animals are sentient beings.

⁹ The UK passed the first animal welfare law in the world almost 200 years ago, known as Martin’s Act after the main proponent and enforcer of the Act, Sir Richard Martin.

¹⁰ <https://bills.parliament.uk/bills/2867>.

¹¹ *Animal Welfare Act 1992* (ACT), s4A. Emphasis added.

¹² The Discussion Paper, p 3.

Proposal 3 – Update the definition of animal

Question 4. Do you have any comments on the proposal to update the definition of animal?

The ADO supports broadening the definition of animal as proposed in the Discussion Paper (p 10). In particular, we support the proposal to include ‘decapod crustaceans (e.g. crabs, lobsters) at all times’ and ‘cephalopods (e.g. octopuses, squids)’. The ADO notes recent international research on the sentience of cephalopods and crustaceans, which concludes:

Crustaceans and cephalopods undoubtedly experience the world in extremely different ways to ourselves. What matters, though, is whether that experience entails conscious experience of pleasure and pain. **We believe that the evidence is sufficient to show that these animals do experience pleasure and pain.**¹³

The ADO recommends that the inclusion of decapod crustaceans in the definition of ‘animal’ is extended to prawns.

The ADO also recommends that the new Act contain a mechanism for expanding the definition of animal as scientific understanding of animal sentience grows (eg by regulations). This is particularly important for invertebrates such as bees¹⁴ (already included in Norway’s animal welfare law¹⁵) and insects used to produce protein for human consumption such as crickets.¹⁶

Proposal 4 – Introduce a minimum care requirement

Question 6. Do you have any comments on the proposal to introduce a minimum care requirement?

The ADO would support a new offence of failing to meet a minimum care requirement if it applies to all animals covered by the new Act and is not undermined by exemptions or defences. We would also support the new offence if actual harm or pain does not need to be proved, and if it is intended to be used as a way to prevent animal cruelty from eventuating.

Example: minimum shade requirements

The benefits of a minimum care requirement would depend on how it is applied. It could be beneficial if it were to mandate minimum welfare requirements in certain contexts. For example, the Discussion Paper states that the ‘proposed minimum care requirement includes obligations to... provide appropriate and adequate shelter’ (p 11). Animals kept outside in the harsh summer conditions in Australia require shade, but shade is not mandated in NSW animal welfare laws. A minimum care requirement would be beneficial in this context if it stipulated meaningful requirements for shade for each individual animals kept outside.

¹³ Conservative Animal Welfare Foundation (CAWF), *Crustacean & Cephalopod Sentience Briefing*, <https://www.conservativeanimalwelfarefoundation.org/wp-content/uploads/2021/06/CAWF-Crustacean-Sentience-Report.pdf>, emphasis in original. The report was published in June 2021, confirmed in private correspondence to the ADO by the CAWF Co-Founder on 11 Sept 2021.

¹⁴ For example the *apis mellifera* and native bees.

¹⁵ *Animal Welfare Act 2009* (NO), s 2: <https://www.regjeringen.no/en/dokumenter/animal-welfare-act/id571188/>.

¹⁶ *Edible insects: A roadmap for the strategic growth of an emerging Australian industry*, CSIRO, 29 April 2021, <https://www.csiro.au/en/news/news-releases/2021/an-industry-with-legs-australias-first-edible-insects-roadmap>; and *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>.

Proposal 5 – Update the definition of cruelty

Question 8. Do you have any comments on the proposal to update the definition of cruelty?

The ADO supports including psychological suffering in the definition of cruelty.

The ADO supports updating the definition of cruelty to refer to ‘harm’ instead of ‘pain’. Pain, especially the experience of pain, including the emotional interpretation of the physical experience, can be notoriously difficult to prove in non-human animals. A requirement to prove pain can lead to the objectives of animal welfare laws being thwarted, where for example cruelty has clearly been inflicted on an animal yet prosecutors fall short of the evidentiary burden in proving pain and a perpetrator escapes conviction.

The ADO supports the removal of the qualifier ‘unjustifiably’ for the reasons provided in the Discussion Paper (p 12).

The ADO supports the proposal¹⁷ to keep the aggravated cruelty offence in the new animal welfare law and the serious animal cruelty offences in the *Crimes Act 1900*.

Proposal 6 – Introduce new offences and enhance existing offences

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?

Animal fighting and greyhound live baiting

The ADO supports the proposed increased penalty for this offence and expanding its scope as proposed (p 14).

Tethering

The ADO supports strengthening the offence of tethering as proposed (p 14).

Dogs in vehicles

The ADO supports the new offence relating to dogs in vehicles (p 14).

Production or distribution of animal cruelty material

The ADO supports in principle the idea of creating an offence that criminalises certain activities related to animal crush videos.

However, we would prefer the creation of a specific offence rather than an offence under the broad heading of ‘animal cruelty material’. The ADO submits that the offence as currently proposed is too broad and would risk infringing the right to freedom of speech and the implied freedom of political communication in the Constitution. In support of this submission, we note the fate of an analogous offence that was enacted in the US. In 1999 the US Government introduced the ‘Depiction of Animal Cruelty Act’ that made the production and sale of crush videos a federal crime.¹⁸ The effect of the Act was to criminalise depictions of other activities involving animals. In 2010 the US Supreme Court

¹⁷ Discussion Paper, p 13.

¹⁸ Depiction of Animal Cruelty Act of 1999, signed into law by President Clinton.

ruled that the law was unconstitutional in that it was overly broad and unlawfully abridged the First Amendment right to freedom of speech.¹⁹

If a broad heading such as ‘animal cruelty material’ were to be used, which the ADO does not support, the term would need to be defined appropriately so as to properly restrict the scope of the offence. For example, it would need to define the purpose for which the material is produced, being to entertain or to ‘appeal to the prurient interest in sex’.²⁰ The definition would need to ensure that the new offence does not have the effect of criminalising the distribution of animal cruelty material that is disseminated for the purposes of highlighting cruelty in animal-use industries or contexts.

If a broad offence were pursued, a public benefit defence would need to be considered. The defence could be based on the defence in section 91HA(3) of the *Crimes Act 1900* (NSW) pertaining to child abuse material. However, it should be stipulated that broadcasting footage of animal cruelty for political, transparency or awareness-raising purposes is not an offence.

However the offence is described, it should also criminalise *possessing* animal crush material, as is the case for child abuse material under section 91H of the Crimes Act. This is likely to be the main offence committed here in Australia, rather than producing or disseminating the material.

The ADO notes the proposed classification of the new offence as a Category 2 offence.²¹ This classification imposes a maximum penalty of 400 penalty units (\$44,000) and/or 12 months’ imprisonment. In the United States, the Preventing Animal Cruelty and Torture Act of 2019 imposes a maximum penalty of 7 years’ imprisonment for creating or distributing animal crush videos.²² We suggest that, following the US example, and in line with the harsh penalty relating to the production, dissemination or possession of child abuse material in NSW (imprisonment for 10 years, s 91H(2)), the offence of possessing, producing or disseminating animal crush videos should be a Category 1 offence if it is included in the new Act.

The ADO notes, however, that the above aspects of the offence make it more akin to offences in the Crimes Act. The ADO submits that a serious offence of this nature would be better inserted in the Crimes Act rather than an animal welfare statute which is limited to summary offences. The primary purpose of the offence is to criminalise the production and distribution (and possession) of audio visual material produced to ‘appeal to the prurient interest in sex’, rather than particular treatment of an animal. The offence could be inserted into the Crimes Act as section 531A following the existing offences dealing with serious animal cruelty in sections 530-531.

Prohibited and restricted items

The ADO supports in principle the expansion of offences that prohibit or restrict the use of items that have poor animal welfare outcomes.

The ADO submits that a list of permanently banned items should be included in the Act, with the usual catch-all provision of ‘and any other item prescribed in the regulation’. This would protect the core list while providing some flexibility to add new items in the future.

¹⁹ *United States v. Stevens*, 559 U.S. 460 (2010), about videos of dog fighting and pig dogging.

²⁰ Animal Crush Video Prohibition Act of 2010 (USA), section 2 (‘Findings’), (6) (A).

²¹ Discussion Paper, Appendix A, p 43.

²² Preventing Animal Cruelty and Torture Act 18 USC 1.

The ADO submits that the new offence should include items banned in other jurisdictions, such as:

- Prong collars (Victoria)²³
- Glue traps (Victoria and the ACT)²⁴
- Harmful fruit-tree netting (Victoria)²⁵
- Battery cages for layer hens (the ACT)²⁶
- Sow stalls and farrowing crates for pigs (the ACT)²⁷

Consideration should also be given to phasing out barbed wire fencing and the poison 1080, given their potential to cause significant pain and suffering to animals with whom these items come into contact.

Other proposed offences – prohibited acts

The ADO submits that new offences targeting certain cruel activities should be introduced in NSW. These activities *prima facie* meet the definition of cruelty under POCTAA. Prohibiting these activities is based on precedents from other Australian jurisdictions. The activities which should be prohibited are:

- Conducting or taking part in a rodeo (the ACT)²⁸
- Using exotic animals in circuses (the ACT)²⁹
- Conducting, or facilitating the conduct of, a greyhound race (the ACT and NSW)³⁰
- Taking part in a violent animal activity (defined to include using an animal to fight, injure or kill another animal) (the ACT)³¹
- breeding animals with heritable defects (Victoria)³²

The ADO submits that the following activities should also be prohibited, as they cause considerable pain and suffering to a significant number of animals:

- Macerating chicks
- School hatching projects
- Factory farming rabbits³³
- Leaving fishes to suffocate to death after being caught.

Other proposed offences – incitement to commit cruelty

The ADO submits that the new animal welfare laws should prohibit both inciting a person or persons to commit animal cruelty, and threats to commit animal cruelty. These offences would make it an offence to use social media to threaten to harm or kill animals. Threats to harm or kill cats are

²³ *Prevention of Cruelty to Animals Regulations 2019* (Vic), reg 11.

²⁴ *Prevention of Cruelty to Animals Regulations 2019* (Vic), reg 62; *Animal Welfare Regulation 2001* (ACT) reg 7C(1)(a).

²⁵ *Prevention of Cruelty to Animals Regulations 2019* (Vic), reg 13 (commenced 1 September 2021).

²⁶ *Animal Welfare Act 1992* (ACT) s 9A.

²⁷ *Animal Welfare Act 1992* (ACT) s 9B.

²⁸ *Animal Welfare Act 1992* (ACT) s 18(1).

²⁹ *Animal Welfare Act 1992* (ACT) s 52(2) and (3).

³⁰ *Animal Welfare Act 1992* (ACT) s 18A, and *Greyhound Racing Prohibition Act 2016* (NSW).

³¹ *Animal Welfare Act 1992* (ACT) s 17.

³² *Prevention of Cruelty to Animals Act 1986* (Vic) s 15C.

³³ See the exposé about this issue in Victoria this month:

<https://www.theage.com.au/national/victoria/victorian-rabbit-farm-under-investigation-following-animal-cruelty-accusations-20210908-p58pup.html>

particularly common.³⁴ The offences would also augment recent amendments to the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) that make it an offence to threaten harm to animals belonging to, or in the possession of, the victim-survivor (or a person with whom they are in a relationship).³⁵

The new offence could be modelled on the offence of 'printing or publishing writing inciting to crimes' in section 3 the *Crimes Prevention Act 1916* (NSW). If the threats to commit animal cruelty are made in comments on social media platforms, the new offence could clarify that the owners of pages could be 'publishers' for the purposes of the proposed offence.

The new offence could be a Category 3 or 4 offence.³⁶

Proposal 7 – Clarify prohibited and restricted procedures

Question 11. Do you have any comments on prohibited and restricted procedures?

The ADO supports in principle the clarification of offences that prohibit or restrict procedures that cause animals considerable pain and suffering.

The ADO submits that important details about the offences, such as the circumstances in which a restricted procedure may be undertaken, and any exemptions (such as husbandry practices) should be included in the Act rather than regulations. These are critically important aspects of the offences and should not be left to the regulations which can be changed with relatively little, if any, parliamentary scrutiny.

The ADO submits that there is no point in modernising animal welfare legislation if the list of exempted husbandry procedures remains the same. Community expectations have changed and many of these procedures are now considered unacceptable by the broader community, such as mulesing, castration or dehorning an animal without pain relief.

Equally, there is little point in relying on the qualifier that an exempted procedure must not cause 'unnecessary pain' because this is relatively subjective and differs depending on whether or not the user is expecting to make a commercial gain from the animal, and from the perspective of the animal.

The ADO therefore submits that the following procedures should be prohibited as in other jurisdictions:

- Mulesing sheep without pain relief (Victoria)³⁷
- Removing or trimming the beaks of hens (the ACT)³⁸

The ADO submits that debarking dogs should also be prohibited (not restricted).

The ADO also submits that dehorning and castration of an animal should be added to the restricted procedure list so that they can be carried out only by a veterinarian and with appropriate pain relief.

³⁴ <https://www.alleycat.org/community-cat-care/stop-violent-threats-against-cats/>.

³⁵ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s7(1)(c)(iv).

³⁶ Discussion Paper, Appendix A.

³⁷ *Prevention of Cruelty to Animals Regulations 2019* (Vic) regs 8(2).

³⁸ *Animal Welfare Act 1992* (ACT) s 9C.

Proposal 8 – Providing certainty for lawful activities

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 13. Do you have any comments on applying these proposed defences to the serious animal cruelty offences under the Crimes Act 1900?

The ADO objects to the following defences on the grounds that, but for the defence, the activities would be considered animal cruelty because they cause pain and suffering to the animal and they cannot be considered necessary or reasonable in a modern civilised society:

- Hunting an animal with dogs (banned in the ACT for its violent cruelty).
- Destroying animals with 1080 poison.
- Destroying an animal in accordance with a religion.
- Undertaking husbandry practices without pain relief.
- Using any animal as live bait or lure.

The ADO also objects to the proposal to apply these defences to serious animal cruelty offences in the *Crimes Act 1900* (p 18). Serious animal cruelty should only be considered ‘necessary’ in very rare, if any, circumstances. The offences in the Crimes Act already include exemptions, which are arguably already too broad.

Proposal 9 – Introduce a modern penalties framework with increased penalties

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?

The ADO supports a consistent penalties regime. The ADO supports, as a minimum, the penalty amounts nominated in the Discussion Paper (p 19) and notes that, where relevant, the proposed penalties are the same as those introduced under the *Prevention of Cruelty to Animals Amendment Act 2021*. We do not support reducing any penalty introduced under this Act.

We support an increase in the financial penalty for the offence of ‘cruelty’. In our view this penalty remains too low. It is currently lower than the equivalent penalty in Queensland, WA and Victoria.

Offences in Appendix A

The ADO supports the breakdown of offences included at Appendix A, as a different way of presenting existing offences in POCTA legislation.

The ADO makes the following submissions in relation to the content of the offences, as a way to achieve meaningful change (rather than rearranging existing offences).

Administering poisons

The Discussion Paper states that this offence relates to domestic animals only (p 39).

The ADO submits that this offence should apply to all sentient animals. If the conduct is enough to constitute the most serious of the proposed offences (Category 1) when done to one animal, it

should be an offence when done to any animal. The human-devised context superimposed on the animal does not reduce the animal's suffering. Therefore, the offence should apply uniformly to all animals.

Animal fighting and greyhound live baiting

The Discussion Paper states that this offence 'is also not intended to apply to rodeos' and that it should 'not result in unintended consequences for lawful activities like... lawful forms of hunting (where it causes no unnecessary harm)' (p 40).

The ADO submits that rodeos and hunting should be banned as they cause unnecessary and unreasonable harm to animals.

Cruelty

The activities that are deemed 'to be always cruel, irrespective of their outcome' include animal catching activities (p 41). The ADO agrees with this classification of animal catching activities.

The ADO submits, however, that classifying animal catching activities in this way precludes exemptions. Rodeos and fishing activities should therefore not be exempted from animal catching activities in the proposed cruelty offence.

Abandonment

The Discussion Paper states it is not intended that trap, neuter, release programs become a 'permitted activity' (p 42, footnote 7).

The ADO submits that TNR programs should be permitted as they are a humane and effective way of controlling the population of free-roaming cats or other animals.

Fail to comply with prescribed Standard

The Discussion Paper proposes that an action done in compliance with prescribed Standards will not constitute an animal welfare offence under another part of the new laws (p 45).

The ADO disagrees with this blanket exemption from animal welfare offences merely due to compliance with a prescribed standard. The standards set *minimum* care requirements and in certain situations they may not be adequate. The current framework should continue to apply, according to which either side in a prosecution for a cruelty offence can rely on the standard to support their case for compliance or failure to comply with the Act or regulations (s34A(3) POCTAA).

Proposal 10 – Provide authorised officers with new powers to administer sedatives and/or pain relief to animals

Question 16. Do you have any comments on the proposal to allow authorised officers to administer sedatives or pain relief?

The ADO supports the proposal to allow authorised officers to administer sedatives or pain relief (p 16).

Proposal 11 – Enhance authorised officer powers of entry

Question 17. Do you have any comments on the proposal to amend powers of entry to better support compliance?

It appears that the powers of authorised animal welfare officers to enter dwellings will be curtailed under the new Act. Currently, an inspector may enter a dwelling with the occupier's consent, a search warrant, or if she or he believes on reasonable grounds that an animal is suffering and needs attention.³⁹ Proposal 11 appears to remove the capacity for inspectors to enter dwellings or residences in the third situation, which is commonly referred to as the 'emergency' situation. This is a serious concern if it means inspectors can no longer enter dwellings to attend to suffering animals, where the inspectors have been unable to obtain the occupier's consent or a search warrant. Concerns about privacy should not override inspectors' ability to come to the aid of an animal in an emergency situation.

In principle the ADO supports reform that will provide easier and more streamlined entry for compliance purposes to premises where an industrial, agricultural, commercial or other activity licensed under NSW law is carried out in respect of an animal. Entry to premises in this context and for this purpose must be facilitated rather than restricted.

Proposal 12 – Provide Local Land Services and council officers with powers in critical situations

Question 18. Do you have any comments on the proposal to allow certain appropriately trained Local Land Services or council officers to exercise a limited set of powers to care for animals in critical situations?

The ADO supports this proposal on the proviso that the training is comprehensive and officers are required to undertake it on a regular basis such as annually. There would need to be comprehensive reporting requirements, including species, numbers and situations. Reports should be made frequently, such as every six months, to Parliament, so that the use of these emergency powers could be rigorously monitored by the Parliament and ultimately the community.

Proposal 13 – Consider enforcement arrangements

Question 19. Do you have any comments on enforcement arrangements for the new laws?

The ADO notes the Discussion Paper's comment that the current enforcement arrangements for each of the different animal welfare laws reflect:

...the different needs of each law – POCTAA has a broader scope and greater investigative requirements than the ARA and EAPA, which are predominantly licensing schemes. Under the proposed new, single piece of legislation, authorised officers will require different skills and expertise depending on the part of the new laws they are responsible for enforcing (p 26).

This raises the question of why amalgamate the laws, if the approach to enforcement is different for each one.

The Discussion Paper also advocates leaving the enforcement arrangements in place for POCTAA or its future equivalent (p 26). The Discussion Paper justifies its preference for the 'status quo' on the grounds that the charities can also look after the animals they seize.

³⁹ POCTAA s 24E(2).

The ADO rejects the premise for this proposal and the proposal itself. The proposal is to continue to allow private charities to enforce state criminal laws. This flies in the face of the evidence presented to the NSW Upper House select committee inquiry into animal cruelty laws in NSW.⁴⁰ Based on this evidence, the committee recommended that the NSW Government:

- Establish and fully fund a specialist unit within the NSW Police Force to investigate and prosecute animal cruelty offences.
- Establish an independent statutory body, the Independent Office of Animal Protection, to oversee the animal welfare framework. Further, that the NSW Government consult stakeholders on the appropriate functions of the new body.⁴¹

The ADO submits that the only solution to the many enforcement problems that came to light during the Inquiry is to establish an independent office of animal protection. Failure to do this will completely undermine any purported attempt to ‘modernise’ either animal protection laws or their enforcement.

The proposal to maintain the status quo (ie charities enforcing state criminal laws) is based on the assertion that it is a ‘robust enforcement framework’ (p 26). This assertion is simply not evidence based. To try to justify it by saying the charities know how to look after the animals they seize ignores the fact that police carry out investigations and arrests every day involving third parties such as children, domestic violence victims, homeless people, and so on, without the expectation that they should look after the affected victims themselves. For example, child protection agencies’ knowledge about the care of vulnerable children is not used as an argument that they should also enforce criminal child protection laws. Criminal law enforcement and victim care are two entirely separate matters requiring different skills, expertise, and equipment.

The police specialise in enforcement of criminal laws. The ADO therefore submits that at the very least a specialist unit within the NSW Police force should be established so that animal cruelty offences can be properly investigated by law enforcement officers with the full suite of surveillance and investigation powers. To do anything less is to relegate animal cruelty laws to an inferior category of criminal laws, and to entrench the appalling lack of enforcement of animal welfare laws in NSW.⁴²

Proposal 14 – Improve oversight of animal welfare enforcement activities

Question 20. Do you have any comments on the proposal to improve oversight of the enforcement activities of the approved charitable organisations?

Given the lamentable situation in NSW where animal cruelty laws are largely enforced by private charities, the ADO supports any measure that will improve the oversight and transparency of the charities’ compliance activities.

In particular, the ADO supports:

- Allowing the NSW Ombudsman to investigate complaints against the inspectorate function of the charities. This is long overdue and should be introduced immediately for as long as

⁴⁰ <https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=263>.

⁴¹ Recommendations 13 and 14 in the Report of the Select Committee on Animal Cruelty Laws in New South Wales, June 2020, <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2550/Report%20No%201%20-%20Select%20Committee%20on%20Animal%20Cruelty%20Laws%20in%20New%20South%20Wales%20-%202004%20June%202020.pdf>.

⁴² Report of the Select Committee on Animal Cruelty Laws in New South Wales, *ibid*.

private charities are allowed to enforce state criminal laws. A significant number of inquiries to the ADO is about the conduct of enforcement officers from the private charities, the perceived abuse of their powers, and/or the failure to act.

- Subjecting the approved charitable organisations to the requirements of the *Government Information (Public Access) Act 2009* (NSW).
- Requiring annual reports from approved charitable organisations to be provided to the Minister and tabled in Parliament, as a way of providing greater transparency and oversight of the existing enforcement agencies. However, the reports must contain meaningful information, rather than infographics and sweeping overview statements. For example, detailed information on matters investigated and prosecuted should be provided. Information such as animal types and offences would not breach privacy and should be provided as a minimum.

Proposal 15 – Amend timeframes and processes related to enforcement agency rehoming of animals

Question 21. Do you have any comments on the proposal to amend approved charitable organisation rehoming provisions to align them with the Companion Animals Act 1998?

The ADO understands the desire to standardise holding periods and reduce the current holding period for lost or seized animals from 21 days to 14 days (animals with an identifiable owner), 7 days (animals with no identifiable owner) or no minimum ('feral', surrendered, or infant companion animals). However, the evidence against a 21-day holding period is not clear. The ADO would not support the proposed reduction in holding periods if it increased the number or likelihood of healthy animals being killed because they cannot be rehomed and/or because they have exceeded a much-reduced minimum holding period. The ADO also does not in principle support reducing holding periods for animals held by an animal welfare charity. This is because the animal may be suffering from neglect or other trauma and may require a longer time to recover to a point where the animal is rehomeable.

If the holding periods are reduced as proposed, the charities must be required to report on and provide detailed information about the numbers of animals held under the various categories, and when an animal is put down because a holding period has expired.

The Discussion Paper notes that enforcement agencies are not permitted to sell or rehome 'restricted' dogs and proposes to extend this to apply to dogs who have been declared as 'dangerous' or 'menacing' (p 28). The ADO does not support limiting the ability to deal with dogs who have been declared dangerous or menacing. Rehoming these dogs, for example to specialist rescue organisations or persons well equipped to keep such dogs, can be a safe and positive outcome for the animal and the community in general.

Proposal 16 – Standardise statutory limitation periods and authority to prosecute provisions

Question 22. Do you have any comments on the proposal to standardise the statutory limitation period?

In general, of the options discussed (p 29), the ADO supports that which provides the longest time in which to commence proceedings.

In particular, the ADO supports the limitation period introduced by the *Prevention of Cruelty to Animals Amendment Act 2021* which extended the limitation period to three years and established that it commences from the time at which an inspector became aware of the alleged offence.⁴³

Question 23. Do you have any comments on the proposed approach to standardise authority to prosecute provisions?

The Discussion Paper proposes that the new laws will specify who can bring forward prosecutions for animal welfare offences, based on the current approach under POCTAA. The Discussion Paper states that this 'is the most effective and efficient approach to dealing with animal welfare cases' (p 29).

The ADO does not support limiting the ability to bring prosecutions, especially while the main enforcement agencies are private charities.

The assertion that maintaining the current restrictions on the ability to bring prosecutions 'is the most effective and efficient approach to dealing with animal welfare cases' is not supported by evidence.

The ADO submits that limitations on the authority to prosecute should be removed and any person should be able to institute proceedings as permitted under section 14 of the *Criminal Procedure Act 1986* (NSW). This would be to reinstate the approach to prosecuting animal welfare cases that was in place until 2007.⁴⁴ The objections to limiting the authority to prosecute that were raised in 2007 remain valid today. These include that:

- Authorised charitable organisations essentially monitor the treatment only of pets and are therefore unlikely to bring prosecutions against commercial organisations.⁴⁵
- Restricting entities that can initiate prosecutions inhibits the prospect of test cases that develop the law.⁴⁶
- Requiring the Minister's consent for 'any other person to institute proceedings'⁴⁷ politicises the process of initiating prosecutions and undermines the perception of prosecutorial independence (the relevant Minister being the Minister for Agriculture⁴⁸).

Proposal 17 – Broaden the application of Stock Welfare Panels and improve their functioning

Question 24. Do you have any comments on the proposal to broaden the application of Stock Welfare Panels and improve how they function?

The ADO does not generally support different compliance measures and enforcement tools depending on the contexts in which animals are kept and used by humans. POCTAA is about the prevention of cruelty to individual animals and the appropriate punishment for such cruelty. If an

⁴³ POCTAA section 34(4).

⁴⁴ POCTAA section 34AA was inserted in 2007 and 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.

⁴⁵ <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-80150>.

⁴⁶ Ibid.

⁴⁷ POCTAA s34AA(1)(e).

⁴⁸ 'Status information' for POCTAA, <https://legislation.nsw.gov.au/view/html/inforce/current/act-1979-200#statusinformation>.

animal suffers, the enforcement measures should 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 animal welfare laws to protect all animals adequately.

The Discussion Paper states that the 'Stock Welfare Panel process provides stock owners with advice and directions (in the form of an official warning) at multiple points to prevent the situation from worsening' (p 30).

The ADO submits that this is inadequate from an animal protection perspective and effectively means that large numbers of animals continue to suffer for lengthy periods of time.⁴⁹

The ADO also submits that it is not clear how expanding the scope of the stock welfare panel process to include all 'stock' animals would result in better animal welfare outcomes. For example, where the condition of the animals is poor there is no time to establish a panel. In the case of the Lakesland Hens⁵⁰, where 4-5,000 hens were on the point of starving to death when charity inspectors finally decided to investigate, the hens required immediate attention and veterinary care and would have continued to suffer and die during a prolonged panel process. Therefore, until there is evidence of the alleged benefits of the panels, the ADO cannot support a process that routinely results in large numbers of animals being allowed to suffer for lengthy periods and often experiencing a painful death.

If the proposal is implemented and the panel process is extended to other types of farmed animals, then the ADO submits that:

- Membership of the panels 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 use of, and outcomes from, the panels must be transparent. The DPI and enforcement agencies must 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 must be made publicly available.

The Discussion Paper proposes 'providing the Secretary the authority to issue an order that temporarily prohibits a stock owner from purchasing (or being responsible for) any additional stock for up to 30 days following stock being seized from them through a Stock Welfare Panel process' (p 30).

The ADO supports in principle the creation of a power to issue an order prohibiting a person who owns a farmed animal from purchasing or keeping other farmed animals following the seizure of animals for welfare purposes. However, the ADO submits that the proposed period of 30 days for the ban is inadequate. The ban should be for a lengthier period, such as 1-2 years, or until the issue with the animals is resolved, whichever is the longer.

⁴⁹ 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: <https://www.rspcansw.org.au/blog/media-releases/statement-from-rspca-nsw-regarding-seizure-of-cattle-at-binnaway/> (posted 26 Nov 2019).

⁵⁰ <https://henrescue.org/lakesland-hens/>.

Proposal 18 – Further improve the functioning of court orders

Question 25. Do you have any comments on the proposed enhancements to court orders?

The ADO supports the proposed measures discussed in this section of the Discussion Paper.

Proposal 19 – Establish licensing schemes and committees in the Regulation

Question 26. Do you have any comments on the proposed approach to licensing schemes and committees?

Question 27. Do you have any comments on the proposal to consider risk-based principles when reviewing licensing schemes?

Licensing schemes

The ADO repeats the concerns with risk-based principles that we raised in our submission in response to the Issues Paper (2020), as the Discussion Paper does not address them.⁵¹ Until those concerns are addressed, the ADO cannot support an approach that would appear to benefit only animal industries and the administrators of the regulatory schemes. The Discussion Paper does not demonstrate how the animals would benefit from such an approach, or how welfare outcomes would not be compromised.

The fact that licensing regimes involving the use of animals are complex is not a bad thing per se. Animals are extremely complex living, sentient beings, with complex behaviours and needs. Licensing regimes governing their use should be complex.

Ultimately it is impossible to comment on the merits of this proposal from an animal welfare perspective until the details of the licensing schemes are released. Until then, the ADO still has the following concerns:

- Who will assess whether the risk is low or high? Animal users? Industry regulators? An independent body? The ADO would support only the last of these options.
- What will the criteria be for making the assessment? How important in the assessment process will the welfare of the individual animal be (rather than industry considerations such as costs and resources)?
- 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?

Until these concerns are resolved, the ADO does not support a risk-based principles approach to regulating how animals are used by humans. The ADO is also wary of the details of these fundamentally important regulatory schemes being set out in subordinate legislation, which is subjected to far less parliamentary scrutiny than an Act. If amalgamating the current animal welfare statutes means that important details must be relegated to the Regulation, then in our view that raises serious concerns about the merits of the proposal to amalgamate.

⁵¹ Animal Defenders Office, *Submission on the NSW Animal Welfare Reform – Issues Paper*, 21 June 2020, pages 14-15.

Advisory committees

The ADO submits that the main advisory committees should be established as statutory committees in the Act (not the Regulation).

The Discussion Paper proposes that the Animal Welfare Advisory Council (AWAC) have the role of providing scientific advice to the Minister on animal welfare-related matters.

The ADO suggests that the purpose of the AWAC be broadened so as to provide general advice to the Minister on animal welfare matters.

The ADO submits that the AWAC's membership and functions be set out in legislation as is currently the case for the Animal Research Review Panel (ARA, Part 2).

Proposal 20 – Make other minor amendments to improve understanding and retain elements of the existing legislation that are effective

Question 28. Do you have any comments on these minor amendments and retained provisions?

The ADO has no comments regarding the minor amendments discussed under Proposal 20.

Conclusion

The ADO submits that the proposed animal welfare reforms in the Discussion Paper require significant modifications along the lines recommended in this submission if the reforms are to improve protections for animals in NSW.

Thank you for taking our submissions into consideration.

Our submissions were prepared with the assistance of Serrin Rutledge-Prior and Sarah Margo, volunteers with the Animal Defenders Office.

Tara Ward
Principal Solicitor (volunteer)

Animal Defenders Office
GPO Box 2259, Canberra ACT 2601
contact@ado.org.au | www.ado.org.au
ABN: 12 837 355 070 | Member: CLCNSW Inc. and CLC Australia Inc.

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.

17 September 2021