



# Animal Defenders Office

Using the law to protect animals

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Dear Sir/Madam

## **Submission on the draft Animal Welfare Legislation Amendment Bill 2019 (ACT)**

Thank you for the opportunity to provide comments on the draft Animal Welfare Legislation Amendment Bill 2019 (“**draft Bill**”).

### *About the Animal Defenders Office*

The Animal Defenders Office (“**ADO**”) is a nationally accredited community legal centre that specialises in animal law. The ADO is run by volunteer lawyers, law students and other professionals. The ADO offers information and representation for individuals and groups wishing 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 based in the Australian Capital Territory (“**ACT**”) and is a member of the National Association of Community Legal Centres.

### *Background*

The draft bill follows on from the release of the *ACT Animal Welfare Management Strategy 2017-22* in 2017. The draft bill is intended:

... to ensure that the ACT has a best-practice, contemporary and effective regulatory system that protects and promotes the welfare of animals, prevents and deters cruelty to animals and responds appropriately to animal welfare abuses.<sup>1</sup>

### *About this submission*

The ADO welcomes the intention and spirit of the draft Bill, and supports many of its initiatives. We particularly support the recognition that animals are sentient beings with intrinsic value, and acknowledge that the ACT would be the first jurisdiction in Australia to make such a change. We congratulate the ACT Government for once again leading the country on animal law initiatives.

We also believe the draft Bill could be improved in some areas.

Our comments on the draft Bill are set out in detail below.

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<sup>1</sup> <https://www.yoursay.act.gov.au/animal-welfare-bill-amendments>, visited 7 February 2019.

Draft Bill (section)	ADO Comments
<b>Part 2 Animal Welfare Act 1992</b>	
5  Section 4A (AW Act)	<ul style="list-style-type: none"> <li>• We support the proposed amendments to the objects clause of the <i>Animal Welfare Act 1992</i> (ACT) (“<b>the AW Act</b>”).</li> </ul> <p><i>That animals are sentient beings with intrinsic value (s4A(1)(a))</i></p> <ul style="list-style-type: none"> <li>• We strongly support the recognition that animals are sentient beings with intrinsic value.</li> <li>• It is a scientific fact that animals are sentient, yet no Australian welfare law acknowledges this basic and fundamental feature of animals.</li> <li>• We welcome the placement of this important recognition in the objects clause of the AW Act.</li> <li>• This amendment would deliver on the ACT Government’s ‘commitment to be a leader in animal welfare.’<sup>2</sup></li> </ul> <p><i>That people have a duty to care for animals (s4A(1)(c))</i></p> <ul style="list-style-type: none"> <li>• We support the proposed reference to ‘duty to care’ in the objects clause.</li> <li>• Moving the reference to ‘duty to care’ to the objects clause from section 6B would clarify section 6B as an offence provision.</li> </ul>
6  Section 6A (AW Act)	<ul style="list-style-type: none"> <li>• We support the proposed amendments to the defined terms in this provision, in that they update and simplify the language used to define the terms.</li> <li>• We note and support that the definitions are not exhaustive.</li> </ul>
7  Section 6B (AW Act)  New sections 6C, 6E and 6G (AW Act)	<p><i>Section 6B</i></p> <ul style="list-style-type: none"> <li>• We support the clarification of section 6B as an offence provision.</li> <li>• We support the separation of ‘food’ and ‘water’ as proposed in sections 6B(1)(a) and (b), so that a person in charge of an animal can be prosecuted for failing to provide <i>either</i> food or water, rather than inspectors/prosecutors having to prove a failure to provide both.</li> </ul> <p><i>New section 6C—Failure to provide animal with water or shelter</i></p> <ul style="list-style-type: none"> <li>• We strongly support the proposed strict liability offence in section 6C of failing to provide an animal with water or shelter.</li> <li>• This is especially welcome given the increasingly hot summer temperatures our region is experiencing.</li> <li>• However, we suggest that the provision clarify that ‘access to shelter’ means actual shelter for each animal on premises, so as to avoid a situation where a single, small structure or shrub could satisfy the requirement for ‘access to shelter’, but not actually be able to provide shelter or shade for more than one animal should they try to use it at the same time.</li> </ul> <p><i>New section 6E—Failure to properly groom and maintain animal</i></p> <ul style="list-style-type: none"> <li>• We support the proposed strict liability offence in section 6E ‘of failing to properly groom and maintain an animal. The examples cited are useful and provide meaningful context.</li> </ul>

<sup>2</sup> <https://www.yoursay.act.gov.au/animal-welfare-bill-amendments>

Draft Bill (section)	ADO Comments
	<p><i>New section 6G—Abandoning an animal</i></p> <ul style="list-style-type: none"> <li>• We submit that the proposed offence in section 6G should be a strict liability offence.</li> <li>• We do not support a mental element (s6G(b)) being a necessary requirement of the offence.</li> </ul>
8 Cruelty. Section 7, penalty (AW Act)	<ul style="list-style-type: none"> <li>• We support the increased term of imprisonment in the penalty provision for the offence of cruelty (from 1 year to 2 years).</li> <li>• We note that this would lift the ACT to the third highest imprisonment penalty in Australia for a ‘cruelty’ offence.</li> <li>• We submit that the penalty units for the offence should also be raised as the penalty amount in the ACT for the offence of ‘cruelty’ is currently the second lowest in Australia (in terms of both penalty units and actual financial amount).</li> </ul>
9–10 Aggravated cruelty. Sections 7A(1) and (2), penalty (AW Act)	<ul style="list-style-type: none"> <li>• We support the increased term of imprisonment in the penalty provisions for the offence of aggravated cruelty (from 2 years to 3 years).</li> <li>• We note that this would lift the ACT to the fourth highest (but still the second lowest) imprisonment penalty in Australia for an ‘aggravated cruelty’ offence.</li> <li>• We submit that the penalty units for the offence should also be raised as the penalty amount in the ACT for the offence of ‘aggravated cruelty’ is currently the lowest in Australia in terms of penalty units, and the second lowest in terms of actual financial amount.</li> </ul>
11 New section 7C (AW Act)	<ul style="list-style-type: none"> <li>• We support the proposed strict liability offence of hitting or kicking an animal in section 7C.</li> <li>• However, we strongly disagree with the exclusion of using a whip on a horse as proposed in section 7C(3).</li> <li>• Whipping any animal is likely to cause pain or stress. We note that the current definition of animal cruelty in the AW Act (s6A) includes ‘causing [an animal] pain that is unjustifiable, unnecessary or unreasonable in the circumstances’ and ‘abusing, terrifying or tormenting’ an animal. We submit that when the action causing the pain is done for mere ‘sport’ it cannot objectively be considered ‘reasonable’ or ‘necessary’. We note that Norway has banned whipping in flat horse races on welfare grounds since 1982.<sup>3</sup></li> <li>• We submit that this exclusion is not ‘reasonable’ or ‘necessary’ and therefore cannot be justified in a jurisdiction wishing to be a ‘leader in animal welfare’.</li> </ul>
12 Section 9 (AW Act)	<ul style="list-style-type: none"> <li>• We support the expansion of this offence (‘Unlawful confinement of animals’).</li> <li>• We submit, however, that guidance may be necessary on the interpretation of ‘reasonable excuse’ in proposed section 9(3) so that it does not allow for outdated and/or cruel agricultural practices such as intensive farming.</li> </ul>

<sup>3</sup>Australian Broadcasting Corporation, *Study puts horse whipping under scrutiny* ABC News [www.abc.net.au/news/2012-03-20/study-puts-horse-whipping-under-scrutiny/39](http://www.abc.net.au/news/2012-03-20/study-puts-horse-whipping-under-scrutiny/39).

Draft Bill (section)	ADO Comments
14  Section 10(2) (AW Act)	<ul style="list-style-type: none"> <li>• We do not support the restriction of this provision to mammals (proposed s10(2)(a)) and submit that this be changed to 'animal' to include other animals such as birds and reptiles, who may suffer pain and/or injury in the same manner as a mammal would.</li> <li>• We support the reduction of the notification (alert) timeframe from 24 hours to 2 hours (proposed s10(2)(d)).</li> </ul>
16  Section 11 (AW Act)	<ul style="list-style-type: none"> <li>• It is not clear why the penalty for this offence has been reduced to 50 penalty units with no term of imprisonment.</li> <li>• We strongly support the retention of the exemption in the proposed subsection 11(5) regarding domestic cats.</li> </ul>
17  Section 12A(3) to (5) (AW Act)	<ul style="list-style-type: none"> <li>• We support the proposed rewording of this provision, as well as the increased penalty and the removal of the defence in the current section 12A(5).</li> </ul>
18  New section 13(2) (AW Act)	<ul style="list-style-type: none"> <li>• We support the creation of an offence in this new subsection.</li> <li>• We suggest that the offence should be one of strict liability and not require intention to be proved, as inferred by proposed paragraph 18(2)(b).</li> </ul>
22  Section 15 (AW Act)	<ul style="list-style-type: none"> <li>• We support the rewording of this offence, but it is not clear if it is a strict liability offence.</li> </ul>
23  Section 15A(1) (AW Act)	<ul style="list-style-type: none"> <li>• We support the increased penalty for this offence ('Transport of dogs').</li> </ul>
24  Section 15B(4) to (7) (AW Act)	<ul style="list-style-type: none"> <li>• We strongly support the changes proposed in section 24 of the draft Bill, in particular: <ul style="list-style-type: none"> <li>○ Making the offence in proposed subsection 15B(4) a strict liability offence,</li> <li>○ Removing the reference to 'making a profit or commercial gain' in the current subsection 15B(5), and</li> <li>○ Removing the 'veterinary practitioner' exemption in the current subsection 15B(6).</li> </ul> </li> </ul>
25  Sections 16 and 17 (AW Act)	<ul style="list-style-type: none"> <li>• We support the proposed version of the offence in section 16, especially the inclusion of the strict liability offence in proposed subsection 16(3).</li> <li>• We support the proposed version of the offence in section 17, the strong penalty for the offence in proposed subsection 17(1), and the proposed repeal of the exceptions contained in the current version of the offence.</li> </ul>
26 Section 18(3) definition of <i>rodeo</i>	<ul style="list-style-type: none"> <li>• We submit that the definition of 'game park' should also be amended so as to remove the exemption of 'fish' in paragraph 18(3)(a).</li> </ul>

Draft Bill (section)	ADO Comments
(AW Act)	
31-32  Section 24C (AW Act)	<ul style="list-style-type: none"> <li>Explanatory material for these changes would be welcome to explain the purpose of the proposed changes in ss 31–32 of the draft Bill, and why the application of the current section 24C(1)(b) to ‘non-business’ activities would be removed.</li> </ul>
35  New section 24D (AW Act)	<ul style="list-style-type: none"> <li>We support the creation of the new strict liability offence in proposed section 24D.</li> </ul>
36  New Part 3A Pet Businesses  (AW Act)	<ul style="list-style-type: none"> <li>We do not support the inclusion of ‘pet shops’ i.e. ‘a business that buys or sells animals to be kept as pets’ in the proposed new licensing regime for ‘pet businesses’.</li> <li>We submit that the ACT should follow the lead of Victoria and ban the sale of animals in pet shops unless the animal is from a rescue shelter.<sup>4</sup></li> <li>The sale of purpose-bred animals in pet shops creates a market for such animals and therefore for backyard breeding situations and puppy farms, while thousands of healthy pets are killed each year at shelters because the shelters cannot find a home for them.</li> <li>In our view the records requirements and other offences in proposed Division 3A.3 are not enough to ensure integrity in the sale of animals in pet shops.</li> <li>We support regulating boarding businesses as they deal with animals kept by other people (i.e. already purchased) and do not increase the demand for purpose-bred companion animals.</li> </ul>
37  New section 28 (2)–(3) (AW Act)	<ul style="list-style-type: none"> <li>We support the creation of this strict liability offence. It is an important addition to the enforcement regime regarding animal research licences.</li> </ul>
38  New section 35A (AW Act)	<ul style="list-style-type: none"> <li>The draft Bill seems to be suggesting that decisions on animal research proposals could be routinely made by a public servant (ie the authority, which is defined as ‘the Animal Welfare Authority under section 5’, which states that ‘The director-general must appoint a public servant as the Animal Welfare Authority’).</li> <li>If this interpretation is correct, it is a fundamental change and would appear to be a departure from the principles in the National Medical Health and Research Council’s <i>Code of Practice for the Care and Use of Animals for Scientific Purposes</i>, including the requirement for animal ethic committees to make decisions about animal research.</li> <li>Decisions on ‘authorisations to conduct a program of research or teaching, in relation to the use or breeding of animals at stated licensed premises’ should be made by animal ethics committees, as they are required to have veterinarians, animal welfare representatives and lay persons as members.</li> <li>Without further clarification as to the policy reason for this change, we do not support it.</li> </ul>

<sup>4</sup> *Domestic Animal Act 1994* (Vic) s 63AAB ‘Offences as to sale or giving away of animals by pet shops’.

Draft Bill (section)	ADO Comments
62  Section 56 (AW Act)	<ul style="list-style-type: none"> <li>We support the creation of new strict liability offences for the failure to comply with the relevant circus or travelling zoo permits (proposed sections 62(2) and (3)).</li> </ul>
63-64  Section 60 (traps) (AW Act)	<ul style="list-style-type: none"> <li>We support the revised trap offences under this provision. <ul style="list-style-type: none"> <li>In particular, we support the: <ul style="list-style-type: none"> <li>removal of the requirement for an ‘intention of catching an animal’ in the current section 60(1), and</li> <li>the addition of the ‘setting’ offence in proposed subsection 60(1A), and</li> <li>the increased penalty for possessing a steel-jawed trap or prohibited trap (current section 60(2)).</li> </ul> </li> </ul> </li> </ul>
66  Section 61 (AW Act)	<ul style="list-style-type: none"> <li>We presume this section is being repealed as there are no traps prescribed by regulation for the section.</li> </ul>
67 Section 62 ‘Trapping—general’ (AW ACT)	<ul style="list-style-type: none"> <li>We support the removal of the mental element previously contained in this offence.</li> </ul>
68  Section 62(1), penalty (AW ACT)	<ul style="list-style-type: none"> <li>It is not clear what the rationale is for removing the term of imprisonment from the penalty provision.</li> </ul>
69  New section 62 (1A) (AW Act)	<ul style="list-style-type: none"> <li>We support making the new offence a strict liability offence.</li> </ul> <p><b>General comment</b></p> <ul style="list-style-type: none"> <li>We suggest that the proposed changes do not deal with the problem of people being able to set traps on their own premises to catch animals not owned by them.</li> <li>People setting a trap on their own premises do not require a permit which means they do not have to comply with any permit conditions relating to animal welfare (as per the current section 65(b)).</li> <li>This is a serious loophole and should be addressed in the next version of the draft Bill.</li> </ul>
71  New section 65(2) and (3) (AW Act)	<ul style="list-style-type: none"> <li>We support the creation of the strict liability offence in section 71 of the draft Bill.</li> <li>We note that the draft does not seem to require the insertion of the subsection number before ‘A trapping permit is subject to...’. This clause would become subsection (1) if the propose changes are made to the current section 65?</li> </ul>
89 New section 81A	<ul style="list-style-type: none"> <li>Should this precede the proposed amendments to current section 82 (sections 84–88 in the draft Bill)?</li> </ul>

Draft Bill (section)	ADO Comments
(AW Act)	
91  New section 82A(2)(c) (AW Act)	<ul style="list-style-type: none"> <li>It is not clear how a person’s date of birth would assist an inspector carry out their functions in the context covered by s82A. On the face of it, therefore, we do not support this proposed change.</li> </ul>
101  New division 7.6A  (AW Act)	<p><i>New section 86B—Selling or rehoming seized animals</i></p> <ul style="list-style-type: none"> <li>While the proposed new section s86B seems to give the authority considerable power (ie to change the ownership of a seized animal), we support the change provided that: <ul style="list-style-type: none"> <li>the primary consideration is the welfare of the animal (proposed s86B(3)), and</li> <li>the authority has no power to order the destruction of the animal, and</li> <li>there is scope for review (proposed s86B(3)(b)).</li> </ul> </li> </ul> <p><i>New section 86C—Temporary prohibition on animal ownership etc</i></p> <ul style="list-style-type: none"> <li>We support the creation of the power of the authority to place a temporary ban on persons whose animal or animals have been seized due to welfare concerns.</li> <li>We query whether the prohibition order under the proposed section 86C should also cover the situation where the person being banned resides at premises where other animals are kept. The person may claim not to be keeping, caring for or controlling the animals, which can be difficult to disprove.</li> <li>We also query whether the animal referred to in proposed s86C(3)(a)(iv) (and ss100A(2A)(d), 101(3A)(c), 101A(3)(c), 101C(3)(d)) is different from an ‘assistance animal’ as defined under the proposed definition in s94 of the <i>Domestic Animals Act 2000 (ACT)</i> (“<b>the DAA</b>”). If it is different from an ‘assistance animal’, the requirement as currently worded in these provisions has a subjective threshold, will be difficult to disprove, and is likely to be often claimed by owners in the circumstances contemplated by the proposed provisions.</li> </ul>
111  Section 100A(3)(b) (AW Act)	<ul style="list-style-type: none"> <li>We support the proposed increase in the maximum duration of court orders from 6 to 12 months.</li> </ul>
115  Section 101(2)(b) (AW Act)	<ul style="list-style-type: none"> <li>Is proposed paragraph (b) missing the words ‘in the care’ before the second ‘of’?</li> </ul>
119  New ss 101A to 101C (AW Act)	<p><i>Section 101A Animal offences—permanent prohibition on animal ownership etc</i></p> <ul style="list-style-type: none"> <li>We support the creation of a court-ordered permanent prohibition on animal ownership for persons found guilty of an offence of aggravated cruelty.</li> <li>Given the subjective nature of the consideration in proposed paragraph 101A(3)(c) (as discussed above in item 101), we would support removing this consideration, or providing guidance on the weight a court should give it (which, we submit, should be low).</li> </ul> <p><i>Section 101B Animal offences—setting aside permanent prohibition order</i></p> <ul style="list-style-type: none"> <li>We do not support the proposed permanent prohibition orders being able to be set aside on application by the person against whom the order has been made. Aggravated cruelty</li> </ul>

Draft Bill (section)	ADO Comments
	<p>is a serious criminal offence, and involves the death of or serious injury to an animal. If a court considers it appropriate to ban the person from owning etc an animal, that judgement should not be able to be overturned.</p> <ul style="list-style-type: none"> <li>• If the proposed new section 101B remains, we submit that the minimum time period in subsection 101B(2) be increased to 10 years.</li> </ul> <p><i>Section 101C Prohibition order in special circumstances</i></p> <ul style="list-style-type: none"> <li>• We support the ability of the authority to apply to a court for a prohibition order in the circumstances set out in proposed s101C(1), and applicable to situations such as hoarding cases.</li> </ul>
120  New section 109 (3) (aa) (AW Act)	<ul style="list-style-type: none"> <li>• Given its subject matter expertise and broad representative base, we support the proposed function of AWAC to advise the authority about animal welfare legislation.</li> </ul>
122  New section 113 (AW Act)	<ul style="list-style-type: none"> <li>• We support this proposed provision, especially its application to <i>any</i> distressed animal (not just dogs).</li> </ul>
<b>Part 5</b>	<b><i>Domestic Animals Act 2000</i></b>
141  Dogs in public places must be controlled  New section 44 (3A) (DAA)	<ul style="list-style-type: none"> <li>• We have concerns about the proposed rule to limit the number of dogs a person can have in a public place.</li> <li>• We understand that that the effect of this rule may be to make it harder for foster carers to take on and/or care for foster dogs. It may also lead to a reduction in the amount of exercise for dogs while their carer walks them separately and/or on different days. Both outcomes would be contrary to the spirit of the draft bill ie to promote animal welfare.</li> <li>• Further concerns with the proposed rule are that: <ul style="list-style-type: none"> <li>○ It is arguable that stray or offleash dogs are more of a risk to public safety than multiple dogs being walked at the same time. Conversely, the evidentiary basis for the proposed rule in s44(3A) (evidence of dog attacks involving multiple dogs being walked at the same time) has not been demonstrated.</li> <li>○ There are already laws in place to address the issue of dogs putting public safety at risk ie s44(2)(c) of the DAA ('Dogs in public places must be controlled'), and that what is required is enforcement of existing 'control' laws rather a limit on the number of dogs walked.</li> <li>○ Too many variable factors determine what is a safe number of dogs to be walked together, such as the size and temperament of the dogs, and the time at which and the location in which they are being walked. Setting one number for all situations inevitably fails to take these variable factors into consideration and results in an 'unfair' law.</li> </ul> </li> <li>• We suggest that if a restriction on the number of dogs walked at the same time is pursued, consideration could be given to having a maximum number, except as allowed for by a person's multiple dog licence. For example, this would mean that where a person is licensed to keep more than 3 well-trained small dogs on a single residential premises, the licence could allow the dogs to be walked together.</li> </ul>
143	<ul style="list-style-type: none"> <li>• According to the explanatory note for the proposed new Part 5 'Assistance animals' of the DAA, the new Part would 'introduce a regulatory scheme for assistance animals'. The</li> </ul>

Draft Bill (section)	ADO Comments
Part 5 (DAA)	<p>explanatory note states that the protections for people with disability using an assistance animal will rely on:</p> <p>a new definition of assistance animal that is consistent with Commonwealth discrimination law. The regulatory scheme requires an assistance animal to be accredited as having been trained by a registered trainer in accordance with the assistance animal standards, accredited under a corresponding law, or assessed (for example, after training by an individual) as meeting the assistance animal standard.</p> <ul style="list-style-type: none"> <li>• We submit that the proposed scheme is not consistent with Commonwealth discrimination law as it excludes certain animals who would otherwise fall under the definition of <b>assistance animal</b> in paragraph 9(2)(c) of the <i>Disability Discrimination Act 1992</i> (Cth) (“the DDA”), as interpreted by federal courts. Under paragraph 9(2)(c) of the DDA, an animal is an assistance animal even if the animal is only trained (and not also accredited). There is no requirement for an animal who is an assistance animal under paragraph 9(2)(c) to meet a standard or to be accredited. Moreover, courts have recently read down the training requirement. For example, in August 2018 the Federal Court of Australia held that an assistance animal does not have to have ‘been trained to do specific positive acts to alleviate the effects of the relevant disability’, and that ‘an animal’s mere calm presence’ could be sufficient training for the purposes of anti-discrimination law.<sup>5</sup> In addition, in 2015 the Full Federal Court of Australia held that it does not matter what organisation or person has trained an assistance animal, as long as the animal has received the relevant training, and that the animal does not have to have been trained by an ‘accredited’ organisation.<sup>6</sup></li> <li>• If the effect of the proposed regulatory scheme is to narrow the definition of assistance animal so it is not aligned with Commonwealth anti-discrimination law and excludes some animals on whom vulnerable persons rely for assistance, then we would not support the proposed scheme.</li> <li>• However, if the purpose of the scheme is to create a law ‘that provides for the accreditation of animals trained to assist a person with a disability to alleviate the effect of the disability’ (s9(2)(a) of the DDA), which in turn is <i>one of several ways</i> of being an assistance animal, then we would support the proposal for a regulatory scheme.</li> <li>• If the latter approach is adopted, then the definition of assistance animal in proposed section 94 of the DAA would need to be widened so as to align with all three strands of the definition of <b>assistance animal</b> in Commonwealth anti-discrimination law (subsection 9(2) of the DDA).</li> </ul>

## Conclusion

The ADO commends the ACT government on the draft Bill and the many positive features it contains. The ADO believes the draft Bill could be improved by adopting the suggestions made in this submission.

Michael Sosower and Tara Ward  
**Animal Defenders Office**

7 February 2019

<sup>5</sup> *Reurich v Club Jervis Bay Ltd* [2018] FCA 1220, [237].

<sup>6</sup> *Mulligan v Virgin Australia Airlines Pty Ltd* [2015] FCCA 130, [65].