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## NSW Animal Welfare Reform Discussion Paper 2021

While there are some welcome improvements proposed in the Discussion Paper, there are a lot of missed opportunities to bring NSW into line with standards of modern animal welfare legislation. The Discussion Paper proposes to maintain the key limitations of the current Prevention of Cruelty to Animals Act in continuing to rely on wide-ranging exemptions and defences for practices that may otherwise amount to animal cruelty or breach the proposed minimum care requirements. The Discussion Paper fails to propose appropriate oversight mechanisms to ensure such practices receive appropriate scrutiny, nor does it include a process for bringing such practices into line with the core provisions of the Act over time. Accordingly, the proposed Act will perpetuate a two-tiered animal welfare system that lacks coherent principle.

For NSW to avoid lagging behind other states in Australia and countries around the world, it must introduce consistent animal welfare principles, appropriate governance structures, and accountable processes for decision-making into the framework.

For an example of a legislative review paper that seeks to do this, see the Victorian Government's 2020 [Directions Paper](#). For further detailed recommendations on the legislative elements below, see RSPCA Position Paper on Animal Welfare Legislation: [https://kb.rspca.org.au/bfd\\_download/pp-gp1-animal-welfare-legislation/](https://kb.rspca.org.au/bfd_download/pp-gp1-animal-welfare-legislation/)

### Proposal 1 – Consolidate Acts

The proposed consolidation of the POCTAA, ARA and EAPA into a single Act is positive and provides an opportunity for improving consistency in the interpretation and application of each framework.

### Proposal 2 - Objects

The Discussion Paper correctly notes the role of the Objects provisions of legislation in aiding the courts and others in the interpretation of the legislation. However, the objects proposed in the Discussion Paper fail to include recognising animal sentience. Animal sentience is the primary reason animal welfare matters and why animal welfare legislation exists. Recognising animal sentience is a key feature of modern animal welfare legislation around the world. It directs courts and other decision makers as to the core reasons for *why*

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it is important to treat animals appropriately. In doing so it enhances the principled consistency of the entire legislative regime.

The objects that are proposed in the table are very specific. Too much specificity in the objects provisions should be avoided as it can lead courts to interpret the provisions narrowly and in a way that excludes matters not specifically covered. For instance, the proposed objects include establishing a risk-based licensing framework specifically for the use of animals in science and exhibition. If the NSW Government wishes to expand the licensing framework to other areas of animal use it could be considered beyond the powers of the Act. Preferably the Objects would be drafted more broadly, such as 'establish a framework for the licensing of certain animal related business and activities.'

### **Proposal 3 – Definition of animal**

The proposed expansion of the definition of animal to include crustaceans and cephalopods at all times is positive.

### **Proposal 4 – Minimum care requirement**

The proposed introduction of a minimum care requirement framed as positive obligations and separate to the cruelty offences is positive.

The obligation to provide appropriate and adequate shelter should also include 'living conditions' as this is broader than shelter covering a range of other factors including hygiene.

The obligation to provide appropriate exercise that considers behavioural needs should be reframed as an obligation to 'provide appropriate opportunities to express behaviours that are necessary for maintaining the animal's welfare.' The term exercise may be interpreted narrowly so as to exclude a range of behaviours that are important for maintaining good welfare. For instance, perching is an important behaviour for chickens but would not be considered exercise.

### **Proposal 5 – Definition of animal cruelty**

Replacing 'pain' with 'harm' and specifically acknowledging the psychological suffering of animals is very positive. However, psychological suffering would be better placed in the definition of 'harm' rather than the definition of 'cruelty', which would include the element of harm anyway.



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It would be preferable for the substantive elements of the cruelty offence to be included in the offence provision itself rather than in the dictionary under the definition of 'cruelty'. This would be consistent with the structure of cruelty offences of other state and territory animal welfare laws.

Removing the qualifier of 'unjustifiably' is positive as it is superfluous. However, the proposed Act should go further and provide the courts with guidance on the interpretation of unreasonable and unnecessary harm. Section 4 of the UK Animal Welfare Act provides a good example of this.

### **Proposal 6 – New cruelty offences**

Generally support.

### **Proposal 7 – Prohibited and restricted procedures**

Generally support.

### **Proposal 8 – Defences**

These defences should be removed from the Act. No other animal welfare Act in the country contains such wide ranging defences. The practice of using wholesale exemptions and defences should be avoided in animal welfare legislation. The cruelty offence already contains the necessary qualifiers for protecting industry and other practices. The court's jurisdiction to determine what does and does not amount to unnecessary and unreasonable harm should not be artificially constrained by wholesale legislative carve outs. Doing so creates an incoherent, two-tiered animal welfare framework. State governments should strive to develop coherent legislation that promotes consistent principles and standards between the principal legislation and its subordinate legislation.

If defences are to be maintained, they should be consolidated into one defence for complying with an adopted Code or Standard. This would at least ensure there is a degree of specificity and certainty over the scope of the practices for which a defence may apply. It will also ensure there is further scrutiny of the practices in question, assuming the process for developing the Codes and Standards is robust.

Any defence included in the Act must be accompanied by the 'no unnecessary harm' qualification.



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The serious animal cruelty offence in s.530 of the Crimes Act must be amended to remove the exceptions in subsection (2). Legitimate activities carried out in the course of research, agriculture, religious practice, pest control or veterinary practice will not be captured by the offence, which requires intention to inflict severe pain, or recklessness as to whether severe pain is inflicted, in the course of torturing, beating or committing any other serious act of cruelty on an animal. The risk of such exceptions allowing for the intentional or reckless infliction of severe pain is high and completely unnecessary.

### **Proposal 9 – Penalties**

Generally support.

### **Proposal 10 – Power to administer sedatives**

Support.

### **Proposal 11 – Entry powers**

Generally support. Current entry powers must not be watered down.

### **Proposal 12 – Powers for Local Land Services and Council Officers**

Support

### **Proposal 13 – Enforcement arrangements**

Having multiple enforcement agencies is positive for increasing resourcing and ensuring there is sufficient enforcement capacity to address the need. However, delegating the majority of enforcement functions to private charitable organisations is problematic for two key reasons.

First, it offends elements of the Rule of Law which concern principles of transparency and accountability in the administration of the law and ensuring it is public in form and operation. Delegating law enforcement responsibilities to private organisations is the antithesis to these principles. Approved charitable organisations are accountable to the responsible Minister who has the power to revoke their status under the legislation and require reports. However, this is a limited form of accountability and has limited influence over the day-to-day operational practices of inspectors.



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Inspectors employed by private charitable organisations are governed and influenced by their employment contracts, and the management, policy, training and culture of these private organisations.

Second, delegating public law enforcement responsibilities to private charitable organisations places a disproportionate burden on the charitable sector to provide what is in effect a public responsibility. It should not be left to private charitable organisations to raise funds from those members of the public who are especially concerned about animal welfare to supply a public law enforcement service. In this respect, the NSW Government can be said to be free-riding off the generosity of that section of the public who are most concerned about animal welfare. The administration and enforcement of the Prevention of Cruelty to Animals Act is a public responsibility and should be treated as such by the NSW Government with full government funding and resourcing.

No other field of law enforcement is delegated to private charitable organisations. It is unique to animal welfare, largely derived from a 19<sup>th</sup> century model of law enforcement, and questions must be asked as to whether it remains fit for 21<sup>st</sup> century standards and expectations of law enforcement.

Having multiple agencies also presents risks in terms of a lack of consistency in enforcement training, responses, performance, and reporting. The revised animal welfare Act should establish a centralised, statutory Animal Welfare Authority to administer the legislation and coordinate the respective enforcement agencies. Statutory recognition of such an entity is important to ensure that it can be delegated with administrative decision-making functions and can carry out its duties in an independent and accountable manner.

### **Proposal 14 – Improve oversight of enforcement agencies**

These proposals are positive in the event that approved charitable organisations remain. However, they should be complimented with the establishment of a centralised statutory Animal Welfare Authority to provide further oversight, consistency and accountability.

### **Proposal 15 – Processes for rehoming seized animals**

Support shortening the timeframes, however, additional streamlining of processes for rehoming animals subject to court proceedings should also be included. See cl.14 RSPCA Position Paper.



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### **Proposal 16 – Prosecution proceedings**

Support increasing statutory limitation period to 3 years.

The authority to prosecute should not be restricted to those appointed under the legislation. Animal welfare law enforcement is chronically under resourced. The role of private legal action has been recognised in a wide range of legislative settings, including Australian consumer law and environmental law, as a means of enhancing enforcement capacity.

Private litigants should be permitted to uphold animal welfare legislation, particularly in contexts where enforcement agencies are under-resourced or disinterested. Judicial scrutiny and the risk of adverse cost orders are more than sufficient to provide a check on the potential for frivolous or vexatious proceedings. Standing to commence prosecution proceedings should therefore be left open under the new Act.

### **Proposal 17 – Livestock welfare panels**

The livestock welfare panel process imposes a significant administrative burden on enforcement agencies. If its scope is to be expanded it should be an optional process for the relevant enforcement agency to pursue, not a mandatory one.

Use of the term 'stock' should at least be substituted for 'livestock'.

Support the additional power to issue temporary prohibition orders, however this should be expanded to period much longer than 30 days.

### **Proposal 18 – Court orders**

Support all proposals.

### **Proposal 19 – Licensing schemes and committees**

Support the proposed licensing schemes but this should not be restricted to animals in research and exhibition. The powers for establishing licensing scheme should be broad and allow for additional schemes to be introduced.

Risk-based approaches to licensing are generally supported but should not result in reducing the scope and resourcing of compliance monitoring and enforcement activities.



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Strongly support the establishment of a statutory Animal Welfare Advisory Committee under the new legislation provided membership is balanced and includes animal welfare advocacy expertise (not simply animal welfare enforcement organisations). The AWAC should be transparent with the proceedings and reports published on a website. See for example, the Meat Industry Consultative Council:

<https://www.foodauthority.nsw.gov.au/industry/meat/meat-industry-consultative-council>

### **Proposal 20 – Miscellaneous**

Support all of these proposals.

However, the process for prescribing standards and other subordinate legislation under the Act must be improved. Modern animal welfare legislation places certain requirements and conditions on the development and adoption of subordinate legislation. National standards are developed at a national level but this process does not fall under any legislative framework. The standards are only imbued with legal status once they are formally recognised under state law.

The POCTAA currently provides a power for prescribing the standards and making regulations under the Act but there are limited requirements placed on the *process* for doing so. The new legislation should include a requirement that the Minister/secretary be satisfied the proposed standards/regulations reflect contemporary animal welfare science and community expectations, and are not inconsistent with the proposed minimum standards of care requirements in the Act. Including such requirements in the legislation will improve the accountability of the standards development and regulation-making processes. Part 5 and s.183A of NZ's Animal Welfare Act provide good examples of such requirements.