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## **1. Overview**

The Animal Justice Party NSW (AJP) was established in 2009 in response to growing public concern over the abuse, harm and mistreatment of non-human animals across Australia. We aim to give a political voice to animals, to pursue the vital issues of animal protection through Australia's political system and to encourage political parties to adopt animal-friendly policies.

The Animal Justice Party NSW welcomes the NSW Government's commitment to the modernisation of the policy and legislative framework for animal protection in NSW.

The AJP strongly supports the development of a modern, compassionate animal protection framework that recognises the sentience of animals and the intrinsic worth of each animal, regardless of their assigned status as livestock, pest, exhibit, research subject or companion. We take the view that there can be no justification for the continuance of a regulatory framework that both sanctions and entrenches animal suffering in the service of profit and/or pleasure.

The AJP recognises an urgent need for a new animal protection framework which:

- incorporates contemporary scientific insights relating to animal capabilities which have been identified subsequent to the introduction of existing legislative frameworks<sup>1</sup>, and
- reflects changed community expectations and concerns relating to animal welfare.<sup>2</sup>

## 2. The Purpose of Animal Protection Laws

Animals subject to human activities must be protected in law from cruelty and suffering caused, or contributed to, by humans. In conformity with community expectations and evidence-based scientific data, the animal protection regime in NSW must implement a higher standard of care for animals; one predicated not exclusively upon the physical needs of animals but also upon their subjective and psychological well-being. In all cases where this cannot be achieved, a practice should be unlawful.

All animal protection laws should have as their objective, the prioritisation of the legitimate interests of animals to live according to the internationally recognised ‘five freedoms’ or ‘five domains’ of animal welfare: freedom from (i) hunger and thirst (ii) freedom from discomfort (iii) freedom from pain, injury and disease (iv) freedom to express normal behaviours and (v) freedom from fear and distress.

A central objective of any animal protection framework must involve a recognition of animal sentience which gives effect to these five domains. "As bioethicist and veterinarian David Mellor contends, such an objective is achieved by identifying both internal physical/functional states and external circumstances that give rise to negative and/or positive subjective mental experiences having animal welfare significance".<sup>3</sup>

The current animal welfare framework fails to give effect to these freedoms by exempting and/or sanctioning many objectively cruel commercial practices. For example:

- Confining cattle to feedlots and hens to battery cages
- Conducting mutilation practices (dehorning, castration, tail-docking, eyeteeth extraction) without anaesthesia.
- Confining research animals in laboratories and subjecting them to unjustifiable research experiments

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<sup>1</sup> Broom, Donald M. (2016) ‘Sentience and Animal Welfare: New Thoughts and Controversies’. *Animal Sentience* 5(11); David Mellor, ‘Welfare-aligned Sentience: Enhanced Capacities to Experience, Interact, Anticipate, Choose and Survive’ (2019) 9 *Animals* 440

<sup>2</sup> Futureye, ‘Commodity or Sentient Being? Australia’s shifting mindset on farm animal welfare’ (2018) <https://www.sheepcentral.com/wp-content/uploads/2019/05/190129-Commodity-or-Sentient-Being-Australias-Shifting-Mindset-on-Farm-Animal-Welfare-v.-7.0.pdf>

<sup>3</sup> See David Mellor, ‘Operational Details of the Five Domains Model and Its Key Applications to the Assessment and Management of Animal Welfare’ (2017) 7 (8) *Animals* (Basel) 60 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5575572/>

- Housing native, domesticated and exotic animals within enclosures that deprive them of opportunities to exercise their natural behaviours
- Causing exhibited animals to experience high levels of stress as a consequence of their interactions with humans

## RECOMMENDATION

1. That a central objective of any animal protection framework must involve a recognition of animal sentience which gives effect to the five domains of animal welfare.

### 3. The Animal Welfare Framework

The AJP is of the view that in all cases where animals are used by humans and may be at risk of harm, or whose survival may be threatened, such animals be protected by an accessible, comprehensive and streamlined legislative framework administered by an independent animal protection agency.

In line with legislative initiatives in Australia and overseas, the ALP submits that the subject matter of the *Prevention of Cruelty of Animals Act 1979* (POCTAA), the *Exhibited Animals Protection Act 1986* (EAPA) and the *Animal Research Act 1985* (ARA) be addressed in a single legislative instrument which strengthens protections for animals.<sup>4</sup>

And while beyond the scope of this welfare reform consultation, the AJP considers that all existing NSW legislation and associated Regulations, Codes, Standards and Plans having an impact upon animal well-being and survival be earmarked for review with the aim of developing a more modern, consistent, comprehensive, accountable and evidence-based animal protection framework in the state.<sup>5</sup>

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<sup>4</sup> See, for example, *Animal Welfare Act 1992* (ACT); *The Animal Welfare Act 2002* (WA) ; *Animal Protection Act 2018* (NT); *Animal Care and Protection Act 2001* (Qld); *Animal Welfare Act 1993* (Tas); *Animal Welfare Act 1985* (SA); *The Animal Welfare Act 1999* (NZ)

<sup>5</sup> Such legislation would include:

- That regulating the hunting of animals and recreational fishing (*Game and Feral Animal Control Act 2002*; *Fisheries Management Act 1944*)
- That aimed at protecting animals in the wild (*Threatened Species Conservation Act 1995*; *National Parks and Wildlife Act 1974*; *Biodiversity Conservation Act 2016*),
- That regulating companion animals (*Companion Animals Act 1998*)
- That regulating the management of so-called 'invasive' species and 'pests' that currently have little or no protection from acts of cruelty (*Biosecurity Act 2015* and the *NSW Invasive Species Plan 2018-2021*)
- That regulating the use of horses in entertainment and sport (*Thoroughbred Racing Act 1996*; *Code of Practice for the Welfare of Animals Used in Rodeo Events 1988*)
- That regulating greyhound racing (*Greyhound Racing Act 2017*)

The AJP also argues for the specific inclusion of native animals in any new animal welfare framework. We submit that the limited animal protections found in the *Biodiversity Conservation Act 2016* require reappraisal, specifically those permitting harm to native animals, such as the slaughter practices of the commercial kangaroo industry which allows for the decapitation or bludgeoning of joeys. That the Issues Paper makes no reference to native animals reflects a clear prioritisation by regulatory authorities of agriculture and animal trades over animal protection and survival more generally. It is also reasonable for the concerned public to ask whether the logging of forests and the clearing of native vegetation for agricultural operations comply with the state's animal welfare laws.

### **(a) Prevention of Cruelty to Animals Act 1979**

The current NSW Legislative Council's Select Committee Inquiry into Animal Cruelty Laws in New South Wales is examining the administration and enforcement of POCTA. Evidence led at the Inquiry highlighted concerns raised in a number of submissions, that the current animal protection regime is insufficiently resourced to ensure compliance. The AJP considers that because it relies on non-government, approved charitable organisations (ACOs), currently the RSPCA and Animal Welfare League, to investigate and enforce compliance, the Act is fundamentally flawed.

ACOs are inadequately resourced to undertake the policing and prosecution functions under POCTA, in that they receive little in the way of funds from government and rely upon substantial charitable fund-raising efforts in order to administer the legislation. With ACOs, the NSW government has effectively outsourced the responsibility for policing the protection of animals. This outsourcing results in a lack of accountability since ACOs are exempt from providing information to the public under the *Government Information (Public Access) Act 2009* and complaints are not amenable to investigation by the NSW Ombudsman. ACOs are not required to release to the public any information concerning their operations, including the reasons why so few investigations result in criminal charges and successful prosecutions. They are also not obliged to respond to complaints made against them, except via expensive civil litigation.

The AJP endorses the recommendations of the recently tabled *Select Committee on Animal Cruelty Laws in NSW*<sup>6</sup>, specifically:

- That the NSW Government, as part of its review of the *Prevention of Cruelty to Animals Act 1979*, increase penalties for animal cruelty offences.
- That the NSW Government moves responsibility for animal welfare matters out of the Department of Primary Industries.

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<sup>6</sup> *Select Committee on Animal Cruelty Laws in New South Wales*, 'Animal Cruelty laws in New South Wales, June 2020

- That the NSW Government ensure that the *Prevention of Cruelty to Animals Act 1979* and the animal welfare framework that supports it are overhauled to better meet growing community understanding of animal sentience and expectations about animal welfare, and to reflect modern knowledge and practices regarding the treatment of animals.
- That the NSW Government, as part of its review of the *Prevention of Cruelty to Animals Act 1979*, conduct extensive public consultation to ascertain community views about the new framework and ensure that the new legislation addresses modern community expectations about animal welfare.
- That the NSW Government 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.

### **(b) Animal Research Act 1985**

The AJP takes the view that testing and experiments on animals are cruel and unreliable. It has been demonstrated that testing on animals is not predictive of human outcomes and should not be used to study human diseases. " While we agree that pharmacological agents and other treatments need to be tested in a way that can tell us whether indicate they are safe and effective in humans, the use of animal species has been shown to be is problematic due to inherent interspecies differences in their biology genetic and biochemical systems, more specifically in genetics, anatomy, physiology, molecular biology and biochemistry." <sup>7</sup>

Consequently, the AJP supports the phasing out of all forms of testing and experimentation involving the use of animals for medical, research, cosmetic and/or pharmacological purposes unless it can be demonstrated that the experimentation will not harm the animal and will benefit research and the individual animals involved. As an interim measure, Governments at all levels have a responsibility to prevent the suffering of animals of any species for research, whether it be for scientific, commercial or military purposes.

The AJP argues that the regulatory framework in relation to animal research is manifestly inadequate in protecting animal interests. While setting out the functions, management,

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<sup>7</sup> See Humane Research Australia, 'Better ways to do research: An overview of methods and technologies that can replace animals in biomedical research and testing'. May 2019 <http://www.humaneresearch.org.au/interview/better-ways-to-do-research>

administration and licensing of animal research facilities and activities, the *Animal Research Act* is silent in relation to cruelty offences. Notwithstanding that the objects of the Act claim to protect the welfare of animals, there is nothing in the provisions that detail what these protections consist of.

Section 24(1)(e) of the *Prevention of Cruelty to Animals Act* provides a defence to animal cruelty in relation to procedures carried out in accordance with the *Animal Research Act*. This provision, together with the NSW Animal Research Review Panel Policy, sanction cruel procedures on animals considered 'integral' to a research project. These provisions, together with the *Australian Code for the Care and Use of Animals for Scientific Purposes* (2013) raise legitimate concerns that many procedures may be legally undertaken which would otherwise be considered a breach of animal cruelty laws.

As noted by *Humane Research Australia*, it is widely believed that the animals used in government-sanctioned experiments are protected from cruelty and suffering through State or Territory Animal Welfare Acts, the National Medical Health and Research Council (NHMRC)'s *Code of Practice for the Care and Use of Animals for Scientific Purposes*, and the Animal Ethics Committees associated with each research institution, whose task is to scrutinise every proposed use of an animal in an experiment. These mechanisms, however, fail to prevent cruelty and suffering from occurring because the medical and scientific researchers and the facilities they work in are, for the most part, self-regulated. There is no independent assessment, little transparency, and next to no accountability within the industry. The federal government, through the NHMRC, hands out hundreds of millions of dollars every year, yet has no independent assessment procedures in place to review the outcomes of the research it has funded, nor does it take responsibility for ensuring its own code of practice is adhered to by the scientists conducting the experiments.<sup>8</sup>

Numerous inconsistencies may be identified in legislation relating to research involving animals across state and territory jurisdictions. The AJP argues that animal research legislation is more properly a matter of federal law. With reference to the complex issues involved in the administration of this area of law, one which involves the operation and oversight of Animal Ethics Committees, Animal Research Review Panels, the NHMRC *Code for the Care and Use of Animals for Scientific Purposes* (2013), and the Therapeutic Goods Administration, the AJP argues that animal research legislation is more properly situated within a Commonwealth health portfolio administered by an independent federal agency rather than a state-based regime administered by the Department of Primary Industries.

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<sup>8</sup> Humane Research Australia, 'Australian regulations relating to animal use in research and teaching' <http://www.humaneresearch.org.au/australian-regulations>

### (c) Exhibited Animals Protection Act 1986

While s 3(2) of the *Exhibited Animals Protection Act* provides that ‘nothing in this Act affects the operation of the *Prevention of Cruelty to Animals Act 1979* or any regulation made under that Act’, the EAPA lacks an objects clause, and functions as little more than a licensing regime.<sup>9</sup> The care and management of exhibited animals is largely governed by generic standards, policies, codes and guidelines. The Standards identified in cl 8(1) of the Regulations, such as the *General Standards for Exhibiting Animals in New South Wales*, are primarily concerned with the facilities for the exhibition of animals and the conduct of animal display establishments. Compliance with these standards may be used as a defence against a charge of cruelty or aggravated cruelty to animals.

The AJP submits that in a new animal welfare framework, the primary legislation – Acts and Regulations - rather than Codes and Standards should set the parameters for animal care and protection.

The AJP holds the view that animals should never be removed from their natural habitats, forced to live in cages or to perform tricks for human entertainment. The AJP only supports zoos, marine parks and aquariums where they function in the service of animals. Functions may include breeding of endangered animals, rescue and rehabilitation and serving as a permanent home for animals where release is not possible. All zoos, marine parks and aquariums should transition to become conservation parks and sanctuaries. Where possible, conservation should be carried out in the native habitat of the species. To achieve these ends, The AJP calls for a comprehensive review of the EAPA to ensure that all facilities holding animals meet high standards, informed by current scientific knowledge.

While animal exhibitors, such as zoos, often defend their breeding programs under the pretext of conservation, many of the species that are being bred are not endangered or threatened. Because baby animals bring visitors through the gates, captive breeding is often undertaken for commercial reasons: to replenish animal inventories in order to lure patrons. Very few, if any, of the captive-bred species that face extinction in the wild, such as elephants, polar bears, gorillas, tigers, and chimpanzees, will ever be released back into their natural environments to bolster dwindling populations.

Animal exhibits are also defended for their educational value. The AJP argues, however, that it is unethical to allow animals to suffer just because we are curious about them. Further, keeping animals in cages does nothing to foster respect for them. The reality is

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<sup>9</sup> At best, the objects of the Act can be discerned from its Long Title: ‘An Act with respect to the exhibition of animals at marine or zoological parks, circuses and other places’

that captive animal exhibits are businesses and exist primarily for profit. There is nothing normal or natural about exotic animals living in enclosures and there is ample scientific research to demonstrate that animals living in captivity often suffer from boredom, depression, neurosis and stress.<sup>10</sup>

All zoos, marine parks and aquariums should develop and construct enclosures that mimic the natural habitat, allow animals to display natural behaviours, and include enrichment activities. Their social structure should be respected, so that solitary animals should not be housed with other individuals, but social animals should be maintained in appropriate social groups.

#### **(d) Standards, Guidelines, Policies and Codes of Practice**

A feature of much animal welfare legislation in NSW is the incorporation of codes of practice, standards and guidelines that address animal welfare issues in specific contexts. Although adherence to these guidelines is not a defence to the prohibition against cruelty under s 5 of the POCTAA, evidence of compliance or non-compliance with the codes is admissible in prosecution proceedings.<sup>11</sup>

The dangers of extensive reliance on non-parliamentary law making are well known. While there are various mechanisms to scrutinise subordinate laws such as the requirement for publication, notification and tabling, and the opportunity for disallowance by either House, there is no requirement in NSW that an incorporated code be published with the statutory rule or otherwise drawn to the attention of Parliament. The mechanisms for scrutinising delegated legislation are not helpful where the enabling Act sanctions the incorporation of further layers of governance, such as Standards and Codes of Practice. Another serious concern is that animal welfare codes and standards are often developed with significant input from bodies whose interests may be antagonistic to those of animals, such as industry organisations which lack political accountability.

As Elizabeth Ellis notes, 'issues associated with impartiality, transparency and accountability in this code-development process are especially acute because the regulatory subjects are sentient creatures without any direct legal claims or capacity to

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<sup>10</sup> Heather Bacon, 'Behaviour-Based Husbandry—A Holistic Approach to the Management of Abnormal Repetitive Behaviors' *Animals* 2018, 8(7), 103; Nicole Burgener, Markus Gussett and Hand Schmid 'Frustrated Appetitive Foraging Behaviour, Stereotypic Pacing, and Fecal Glucocorticoid Levels in Snow Leopards in Zurich Zoo' (2008) 11 *Journal of Applied Animal Welfare Science* 74–83; Avanti Mallapur and B C Choudhury 'Behavioural Abnormalities in Captive Nonhuman Primates' (2003) 6(4) *Journal of Applied Animal Welfare Science* 275–284; Viktor Reinhardt and Matt Rossell 'Self-Biting in Caged Macaques: Cause, Effect and Treatment' (2001) 4(4) *Journal of Applied Animal Welfare Science* 285–294; Andrzej Elzanowski and Agnieszka Sergiel 'Stereotypic Behaviour of a Female Asiatic Elephant in a Zoo' (2006) 9(3) *Journal of Applied Animal Welfare Science* 223–232.

<sup>11</sup> s 34A(3) POCTAA: Compliance, or failure to comply, with any guidelines prescribed or adopted by the regulations ... is admissible in evidence in proceedings under this Act of compliance, or failure to comply, with this Act or the regulations.

articulate their own suffering'.<sup>12</sup>

It is apparent that animal welfare standards, guidelines and codes of practice are often developed by industries in ways which prioritise efficiency over responsibility and which protect animal interests only to the extent that they may provide economic benefits for humans.<sup>13</sup>

The AJP contends that the proliferation of these quasi-legislative instruments, often developed by industry bodies, has contributed to the low level of successful prosecutions for animal cruelty. We advocate for a new animal protection regime that incorporates enforceable mandatory standards in regulations administered by an Independent Office of Animal Protection. These standards would be developed in consultation with an animal behaviour and welfare committee comprised of ethicists, welfare bodies and industry representatives, and informed by evidence-based research, animal sentience and the five freedoms.

## **RECOMMENDATIONS**

- 2. That in all cases where animals are used by humans and may be at risk of harm, or whose survival may be threatened, such animals must be protected by an accessible, comprehensive and streamlined legislative framework administered by an independent animal protection agency.**
- 3. That the manner in which animals are used by humans does not change who they are and should not direct how the law defines them or whether they are included or excluded from specific legislation, regulations, standards, guidelines or codes of practice.**
- 4. That an independent animal protection agency should monitor animal ethics committees to ensure compliance with the new framework.**

## **4. The Animal Welfare Model**

Modernising and improving animal welfare policy and legislation in line with evolving community expectations, scientific understandings and commercial realities involves a close interrogation of what is meant by 'welfare'. The concept of animal welfare is both values-based and science-based. In this respect, it is similar to other areas of mandated

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<sup>12</sup> E. J. Ellis, 'Making sausages and law: the failure of animal welfare laws to protect both animals and fundamental tenets of Australia's legal system' (2010) (4) Australian Animal Protection Law Journal 6-26.

<sup>13</sup> See, for example, Australian Meat Processor Corporation, 'Analysis of regulatory and Related Costs in Red Meat Processing', May 2018 [https://www.ampc.com.au/uploads/FINAL\\_Cost%20to%20Operate%20Report%20Oct%202018.pdf](https://www.ampc.com.au/uploads/FINAL_Cost%20to%20Operate%20Report%20Oct%202018.pdf)

science such as food safety and environmental sustainability where scientific understandings are used within a framework of values.

In discussions about animal welfare, people employ a variety of criteria to assess animal well-being and emphasise differing concerns. Those involved in animal production tend to emphasise the basic health and functioning of an animal, especially freedom from disease and injury. Others emphasise the affective states of animals; states like pain, distress and pleasure that are experienced as positive or negative. Others emphasise the ability of animals to live reasonably natural lives by enabling them to carry out natural behaviours and having natural elements in their environment. As David Fraser notes, 'while these criteria may overlap, they are sufficiently independent that the single-minded pursuit of any one criterion may lead to poor welfare as judged by the others.'<sup>14</sup>

The federal Australian Animal Welfare Strategy (AAWS) suggests that 'animal welfare reflects the ethical imperative and social expectation that any use of animals for the benefit of humans should minimise suffering of the animals involved. Welfare is related to health and wellbeing. *However, it extends beyond survival to also consider the quality of an animal's life.*' (emphasis added)<sup>15</sup>

While nowhere in NSW policy or legislation is the meaning of 'animal welfare' clearly articulated, it appears that the current model of animal welfare in the state is one based almost exclusively on the basic health and functioning of an animal, and one reliant upon alleged 'widely accepted' criteria contained in Standards and Codes of Practice.

The AJP submits that the existing welfare model of animal protection in NSW provides little, if any, significant protection to animal interests and largely functions to serve commercial imperatives and to make the public feel better about animal exploitation.<sup>16</sup> Specifically, the existing model fails to recognise animal sentience and commodifies animals as objects of property. As more about the mental and emotional capacity of animals is discovered, the way we treat them must similarly evolve. If we accept that animals are sentient beings, possessing consciousness, awareness and feelings, it follows that those farming, research and entertainment practices which institutionalise and/or 'normalise' animal suffering are no longer ethically supportable.

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<sup>14</sup> David Fraser The role of the veterinarian in animal welfare. *Animal welfare: too much or too little?* (2008) 50 *Acta Veterinaria Scandinavica* 2008 1

<sup>15</sup> Australian Government, Department of Agriculture, Water and the Environment, Australian Animal Welfare Strategy and National Implementation Plan 2010-14  
<https://www.agriculture.gov.au/animal/welfare/aaws/australian-animal-welfare-strategy-aaws-and-national-implementation-plan-2010-14#policy-objectives>

<sup>16</sup> For example, some people who have avoided animal products because of concerns about animal treatment have returned to eating them after being told by animal welfare organizations that animals are being treated more 'humanely'.

In any animal welfare framework, there must be provision for enforcement and as previously stated, the AJP considers that an independent statutory body is best placed to provide enforcement without the risk of regulatory capture by industry or the financial constraints of an ACO.

Prior to 2007, any person in NSW could institute a prosecution under POCTAA. In 2007, however, s 34AA was inserted into the Act to limit authority to prosecute to official bodies, except with the written consent of the government. In introducing the amendment, the Government expressed concern that without limiting the power to prosecute, POCTAA encouraged persons to engage in trespass and posed a threat to the bio- security of farms. While written consent may be obtained by the Minister for Primary Industries or his Director General, we have been unable to discover whether there have been any prosecutions under this provision.

The comments of Clover Moore MLA during the debate following the Second Reading Speech of the Prevention of Cruelty to Animals Amendment (Prosecutions) Bill 2007 were prescient:

“The bill will not only stop courts from hearing many cases of animal cruelty but will also encourage animal cruelty because perpetrators will know that legal action is unlikely. ...Private citizens will be able to initiate court action only with the permission of the Minister or the Director General of the Department of Primary Industries. That will create a conflict of interest because the Minister and the Director General are required to support industry. Corporate counsel for Voiceless, Katrina Sharman, asks: ‘Will the Minister responsible for ensuring the success of agribusiness in New South Wales, a multibillion-dollar industry, willingly endorse proceedings being commenced against factory farmers? This is a political quagmire, which the Minister would be best to avoid.’<sup>17</sup>

The AJP recommends a further protection: that an ‘open standing’ provision be included in the new framework which enables individuals, animal advocacy and other organisations to act in matters of public interest in relation to the treatment of animals. This would require the ‘authority to prosecute’ provisions in s. 34AA POCTAA to be revoked.

## **RECOMMENDATIONS**

- 5. That the new animal protection framework must encompass a conception of ‘welfare’ that recognises animal sentience, affective states and natural living as well as basic health and functioning.**

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<sup>17</sup> Clover Moor, MLA, Second Reading Speech Prevention of Cruelty to Animals Amendment (Prosecutions) Bill 2007  
<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-80150>

- 6. That the operation of any animal welfare framework must have regard to the subjective states of animals, such as fear and frustration, whether or not the basic physical health of the animal is affected.**
- 7. That the new animal welfare framework should revoke the property status of animals and enshrine a legal status for animals which recognises that animals have an inherent interest in their own lives which should be protected by law.**
- 8. That the new animal welfare framework should require the establishment of an Independent Office of Animal Protection (IOAP) to advocate for animal interests, examine and review legislation, policy and practices that affect animal health, welfare, care and protection. An IOAP would be tasked with reporting and making recommendations to parliament on legislative and regulatory changes that benefit animals.**
- 9. That the ‘authority to prosecute’ provisions in s 34AA POCTAA should be revoked. An ‘open standing’ provision should be included in the new framework which enables individuals, animal advocacy and other organisations to act in matters of public interest in relation to the treatment of animals.**

## **5. Recognising Animal Sentience**

Sentience is the reason that welfare matters.<sup>18</sup>

There have been significant advances during the last two decades in the science that underpins our understanding of sentience, and formal recognition that animals are sentient beings is now widespread.

The concept of sentience concerns the capacity of animals to consciously perceive by the senses; to consciously feel or experience subjectively; in other words, a capacity to have feelings. There is evidence for sophisticated cognitive concepts and for both positive and negative feelings in a wide range of nonhuman animals. All vertebrates, including fish, as well as some molluscs and decapod crustaceans have pain systems. Most people today

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<sup>18</sup> Australian Government, Department of Agriculture, Water and the Environment, Australian Animal Welfare Strategy and National Implementation Plan 2010-14  
<https://www.agriculture.gov.au/animal/welfare/aaws/australian-animal-welfare-strategy-aaws-and-national-implementation-plan-2010-14#policy-objectives>

consider that their moral obligations extend to animal species and that ethical decisions relating to the ways we protect animals should take into account research findings relating to sentience.<sup>19</sup>

The AJP considers that all NSW legislation relating to the treatment, use and care of animals should include, as a primary objective, recognition that animals are sentient beings that are able to subjectively feel and perceive the world around them. Animal sentience is described (RSPCA website) as:

*... the capacity of an animal to experience different feelings such as suffering or pleasure. Negative feelings or emotions include pain, fear, boredom and frustration, whilst positive emotions include contentment and joy. Sentience also extends to an animal's ability to learn from experience and other animals, assess risks and benefits and make choices. These abilities rely upon animals being aware of changes happening around them (perception) and being able to remember, process and assess information to meet their needs (cognition).*

The capacity of animals to subjectively feel and perceive the world around them has been demonstrated in scientific research with domesticated animals such as goats and horses. Scientists in the field, studying wild animals such as gorillas and chimpanzees observe animal sentience. Similarly, guardians of companion animals frequently observe sentient behaviour in them.

Recognition of animal sentience has become increasingly important to the community and is now recognised in many jurisdictions. These include: the Australian Capital Territory *Animal Welfare Legislation Amendment Act* (2019); the Victorian *Animal Welfare Action Plan* (2017); New Zealand *Animal Welfare Amendment Act* (2015); amendment of the *Code Civil* (2015) in France; Canada, Quebec *Animal Welfare and Safety Act* (2015); Belgium *Walloon Code of Animal Welfare* (2018); and the European Union under the *Treaty of Lisbon* (2008).

The A.C.T is the first Australian jurisdiction to acknowledge animal sentience in 2019 amendments to the *Animal Welfare Act* (1992). The main objects of the Act are to recognise that:

- *animals are sentient beings that are able to subjectively feel and perceive the world around them; and*

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<sup>19</sup> Broom, Donald M. (2016) Considering animals' feelings: Précis of *Sentience and animal welfare* (Broom 2014). *Animal Sentience* 5(1) <https://animalstudiesrepository.org/animisent/vol1/iss5/1/>

- *animals have intrinsic value and deserve to be treated with compassion and have a quality of life that reflects their intrinsic value; and*
- *people have a duty of care for the physical and mental welfare of animals.*

The Victorian *Animal Welfare Action Plan 2017* is an overarching plan that pertains to the treatment of all animals, whether companion or farmed animals, or animals used in entertainment or for research. The importance of the Action Plan is that it recognises animal sentience and the mental and physical wellbeing of animals within all these assigned categories. However, each of these categories is regulated under different legislation and hence the degree to which animal sentience is recognised in implementation is likely to vary, but for no objective reason other than for human benefit rather than animal protection.

Nevertheless, legal recognition of animal sentience is a significant step forward in animal welfare because it indicates a shift in thinking about the relationships between humans and animals. While an animal's ability to feel emotions may seem self-evident, historically, the law has categorised animals as property. The number of countries that now legally recognise animal sentience in their animal welfare laws attests to society's expectations about the way animals are regarded and treated. In NSW, the legal status of animals remains that of property with the law, making no distinction between an inanimate object such as a chair or a living being such as a dog or a horse capable of experiencing pain and suffering.

The AJP asserts that recognition and understanding of animal sentience is fundamental to identifying the needs of animals and assessing their welfare - physical and mental, under different circumstances. Hence it has relevance to all legislation pertaining to animals that are farmed or companion animals, used for entertainment or research.

## **RECOMMENDATION**

- 10. That all new legislation arising from this Review include a definition of animal sentience that incorporates the concepts of perception and cognition referred to above and that it models its objects on those contained in the *ACT Animal Welfare Amendment Act (2019)*.**

## **6. Statutory language**

The general public's condemnation of animal cruelty has increased significantly since POCTAA was first legislated forty years ago. The outcry against the various live export scandals shows community concern not just for protecting domestic animals from cruelty, but also the fate of sheep and cattle who were once seen merely as 'livestock'; literally

‘walking food’. As our scientific knowledge of animal behaviour grows and as new technologies improve our ability to understand the capabilities of animals, society has evolved to an understanding that there is a moral duty to prevent cruelty to animals under human care and control. This must be reflected in any new statutory language.

The AJP supports the retention of the primary objective listed in s3(a) POCTAA “to prevent cruelty to animals”. New Zealand’s *Animal Welfare Act 1999* and the Northern Territory’s *Animal Protection Act 2018* provide direction for a set of objectives to be adopted into the new framework. The AJP considers that the following objects drawn from these two Acts would be beneficial for animals:

- (i) to recognise that animals are sentient:
- (ii) to prevent cruelty to animals
- (iii) to require persons responsible for animals to attend properly to the care and welfare of those animals:
- (iv) to specify conduct that is or is not permissible in relation to any animal or class of animals:
- (v) to establish an Independent Office of Animal Protection
- (vi) to provide for the development and approval of codes of ethical conduct: <sup>[1]</sup><sub>SEP</sub>
- (vii) to promote community awareness about responsibilities and legal obligations associated with the care and protection of animals

In regards to (iii) attend properly’ – this language is too vague and should be defined by way of referencing the Five Freedoms as understood for each specific animal species.

A significant shortcoming of POCTAA is in the uncertain language in which key provisions are couched. For example, the reference to an act of cruelty in s4 imports the words ‘unreasonably, unnecessarily or unjustifiably’. The ambiguity of this phrase is compounded by similar references in other provisions, such as the defences in s24 that are available only where the accused satisfies the court that the specified act has been committed ‘in a manner that inflicted no unnecessary pain upon the animal’.

As Elizabeth Ellis points out:

‘Framed in this way, the construction of key words, such as ‘unnecessary’, is clearly critical to the Act’s scope and operation, yet its lack of enforcement in commercial contexts means there is an absence of Australian authority with respect to this. The result is a kind of circularity. If [the defences in s24] are assumed to support an interpretation of ‘unreasonably, unnecessarily or unjustifiably’ congruent with routine husbandry practices, this interpretation will rarely be subjected to scrutiny by the courts; in turn, the lack of judicial consideration reinforces the idea that the Act lacks application to commercial contexts. As a result, routine agricultural practices come to

determine the content and scope of the law.<sup>20</sup>

The AJP agrees that the problematic structure and language of the Act makes it uncertain whose interests are protected or what is required to ensure compliance with the legislation. The ambiguity of the language used in the legislation may also result in a diminished capacity for administrative oversight.

## **RECOMMENDATIONS**

**11. That the primary objective in s3(a) POCTAA “to prevent cruelty to animals” be retained in the new legislative framework and that the following objects be adopted into the new legislative framework:**

**(i) to recognise that animals are sentient:**

**(ii) to prevent cruelty to animals**

**(iii) to require persons responsible for animals to attend properly (according to the Five Freedoms) to the care and welfare of those animals:**

**(iv) to specify conduct that is or is not permissible in relation to any animal or class of animals:**

**(v) to establish an Independent Office of Animal Protection**

**(vi) to provide for the development and approval of codes of ethical conduct:**

**(vii) to promote community awareness about responsibilities and legal obligations associated with the care and protection of animals**

**12. That the new legislative framework clearly defines what acts and/or omissions amount to cruelty and avoid the use of language which enables ‘justifiable’ cruelty.**

## **7. Definitions of Cruelty and Pain**

The AJP’s primary stance is that humans have the responsibility to avoid causing harm and engaging in cruelty to animals through their diet and lifestyle practices.

We seek an end to human practices that cause pain and distress to animals, whether it be in agriculture, research or entertainment. We are working towards a society that does not hunt, farm, slaughter or confine animals for human benefit. We consider that all these activities are inherently cruel, unnecessary and cause suffering to animals. We seek the

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<sup>20</sup> E. J. Ellis, 'Making sausages and law: the failure of animal welfare laws to protect both animals and fundamental tenets of Australia's legal system' (2010) (4) Australian Animal Protection Law Journal 6-26.

transition to a plant-based society and economy where our food, fibre and other needs are met by exploiting plants, fungi and micro-organisms rather than animals. In the meantime, we strongly advocate for a legal framework that protects animals as much as possible from the harms caused by human exploitation.

Animal cruelty can take many different forms. It includes overt and intentional acts of violence towards animals, as well as animal neglect and the failure to provide for the physical, mental and emotional needs of an animal.

Section 4(2)(d) of POCTAA provides that if a defendant is able to establish that they were not acting in a manner in which the animal is unreasonably, unnecessarily or unjustifiably inflicted with pain, then no unlawful cruelty occurred. This phrase provides cover for most agricultural practices that involve the inflicting of pain and stress such as mulesing, castration, withholding of feed to spur egg production, and periods of little or no lighting to manipulate natural cycles and behaviours.

POCTAA defines 'pain' in s.4 as "includes suffering and distress", which seems to allow for both the physical infliction of pain as well as the notion of subjective mental distress and fear. When looking at the scientific literature seeking to modernise the definition of the human experience of pain, this definition from the International Association for the Study of Pain seems a suitable definition for animals given our modern understanding of animal sentience: "An aversive sensory and emotional experience typically caused by, or resembling that caused by, actual or potential tissue injury".<sup>21</sup>

Generally definitions of cruelty or 'unnecessary suffering' relate to inflicting physical harm on an animal and fall into two categories: neglect and intentional cruelty. Examples of intentional cruelty include abandonment and physical abuse, when an individual purposely inflicts physical harm or injury on an animal, or engages in animal fighting (e.g. dogfighting). Acts of neglect, whether deliberate or through ignorance, include an animal being denied basic necessities such as food, water, shelter or veterinary care. Australian laws across state jurisdictions pertaining to animal welfare include similar definitions and list a range of offences that constitute physical cruelty. Causing animals psychological harm in the form of distress, torment or terror also constitutes animal cruelty. The psychological dimension of cruelty is now recognised in animal welfare law in some jurisdictions.

Currently, NSW law falls far short of recognising the impact of psychological distress on animals held under human control. For example, the psychological stress suffered by confined animals; the lack of exercise and inability to express normal behaviours such as running, swimming, roosting, stretching or dust-bathing...

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<sup>21</sup> International Association for the Study of Pain; IASP's Proposed New Definition of Pain Released for Comment <https://www.iasp-pain.org/PublicationsNews/NewsDetail.aspx?ItemNumber=9218> n.d accessed 17<sup>th</sup> May 2020

The *Prevention of Cruelty to Animals Act 1979* defines acts of cruelty primarily as acts of physical abuse, although references to “tormented, tortured, terrified or infuriated” could reasonably be construed as psychological or mental cruelty. However, in the absence of specific provisions recognising animal sentience and the capacity to experience mental cruelty, these references are not generally interpreted as such.

The first jurisdiction in Australia specifically to recognise the psychological dimensions of cruelty is Australian Capital Territory. The 2019 amendments to the ACT *Animal Welfare Act (1992)* recognise animal sentience and impose a duty of care on people to care for both the physical and mental wellbeing of an animal. In accordance with these provisions, the Act includes definitions of acts of cruelty that can be interpreted as either physical or mental cruelty or both. In addition to a comprehensive range of provisions relating to activities and acts that constitute cruelty, the Act defines cruelty to an animal as including:

- *doing, or not doing, something to an animal that causes, or is likely to cause, injury, pain, stress or death to the animal that is unjustifiable, unnecessary or unreasonable in the circumstances; abusing, terrifying or tormenting the animal.*

The AJP considers that the terms ‘unjustifiable’ and ‘unreasonable’ are redundant where an act (or omission to act) is unnecessary. When it involves infliction of pain, an unnecessary act is also unjustifiable and unreasonable. The AJP is of the view that “unnecessary” should include any painful procedure that can be replaced by something less painful or at best; painless. For example, instead of docking the tail of a piglet, require enclosures to provide enrichment to avoid boredom-induced tail-biting and design spaces to reduce aggression caused by crowding. Where there are no painless alternatives, for example procedures such as castration, then analgesia both before and after the procedure should be mandatory.

The AJP strongly supports changes to Part 2 of POCTAA which comprises comprehensive provisions relating to animal welfare offences. While these provisions are given significant force by the recognition of animal sentience and its application to the range of offences, specific provisions allow for some animals and practices, such as farmed animals, introduced animals and those used in scientific research, to be subject to codes of practice or standards. These codes and standards effectively allow for confinement and management practices that might otherwise be deemed acts of unlawful cruelty.

In the view of the AJP, it is inexplicable that a civilised society would allow such practices as sow farrowing and gestation stalls, duck-farming without access to immersion in water, and battery hen cages where birds can barely move for their entire lives. If we have progressed sufficiently to understand animal sentience and the physical and psychological imperative to engage in natural behaviors, why are they not provided for as

a matter of good animal husbandry? The obvious answer is the economic imperative to cut costs and make more profits from each animal until they become no more than an economic unit. When a broiler chicken is worth less than a dollar to the grower, the sentience of every individual chicken is worth nothing.<sup>22</sup>

As Magistrate Crawford, stated in the Emanuel Exports live export case, “the prospect of commercial gain in exporting the sheep must be balanced against the likelihood of pain, injury or death to the relevant sheep being shipped in the second half (hotter months) of the year”.<sup>23</sup> In any new animal welfare legislation, there must be a re-balancing of interests so that animal sentience and the capacity for pain and suffering are given much greater consideration.

Some jurisdictions in Australia and overseas have introduced animal welfare measures to prevent cruelty to animals in all sectors through recognition of animal sentience. As mentioned elsewhere in this submission, the Victorian Government’s *Animal Welfare Action Plan 2017* recognises animal sentience and the mental and physical wellbeing of animals within all of the following categories: domestic companions, farmed animals, and animals used in entertainment. The recognition of the psychological dimensions of cruelty is limited when it involves the exploitation of animals used for human consumption.

With rapidly changing social attitudes towards the treatment of animals in food production systems, policy-makers can no longer afford to treat farmed animals as somehow less sentient than companion animals. It has always been a self-serving myth that cattle, sheep or pigs feel less pain or experience less suffering than animals not bred and born to be delivered to our plates. The animal rights movement, animal protection advocacy and the rise of animal justice parties around the world are increasingly making this a contested space for ‘business as usual’ for animal agriculture and it would be unwise for governments to ignore the changing moral and political landscape.<sup>24</sup>

The Belgian 2018 *Walloon Code of Animal Welfare* is described, by the many sources reporting on its adoption, as “the most progressive law in the world for animal welfare”. The Code declares that animals are sentient beings and prohibits several practices that broaden the definition of cruelty beyond those currently recognised in Australia, including animals destined for slaughterhouses.

Its provisions include prohibitions on:

- *keeping animals permanently tethered, including cetaceans and other species;*
- *shooting birds for sport;*
- *providing fairground pony rides;*

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<sup>22</sup> Meat chicken (broiler) industry, Poultry Hub, <http://www.poultryhub.org/production/industry-structure-and-organisations/chicken-meat/>

<sup>23</sup> Department of Local Government and Regional Development (WA) v Emanuel Exports et al (Magistrates Court 8 Feb 2008)

<sup>24</sup> The Global Political Movement For Animals <https://nsw.animaljusticeparty.org/the-global-political-movement-for-animals/>

- *keeping and using wild animals in circuses;*
- *using battery cages for laying hens, or any other animal;*
- *imposing on animals tasks that surpass their natural capacity;*
- *blinding singing birds;*
- *sending animals by mail;*  
while requiring
- *limited duration of transport of live animals to slaughterhouses to eight hours; and*
- *mandatory closed circuit television in all slaughterhouses to control the compliance of animal welfare rules during slaughter.*

The AJP recognises that while exploitation of animals for commercial, entertainment or research purposes exists, the unfettered application of animal welfare laws in the context of animal sentience and physical and psychological cruelty will be contested ground. The AJP considers that animal industries have successfully engaged in “regulatory capture” with the Department of Primary Industries accepting the industry line that “Happy animals are productive animals” and that industry doesn’t need more ‘red tape’ to improve the welfare of animals.”<sup>25</sup> Anyone who has witnessed the demeanour of a sow confined in a farrowing crate would be hard pressed to see a connection between happiness and productivity.

The concept of sentience is critical to understanding why we must do better at protecting animals from as much avoidable harm as possible while we still operate in a world where animals are exploited for human benefit. Perhaps the British animal welfare laws provide a more useful assessment of what constitutes cruelty or “unnecessary suffering”.

The United Kingdom’s *Animal Welfare Act 2006* uses the concept of ‘unnecessary suffering’ rather than cruelty. In s.4 (3) unnecessary suffering is considered in the context of:

- whether the suffering could reasonably have been avoided or reduced;
- whether the conduct which caused the suffering was for a legitimate purpose, such as the purpose of benefiting the animal, or the purpose of protecting a person, property or another animal;
- whether the suffering was proportionate to the purpose of the conduct concerned;
- whether the conduct concerned was in all the circumstances that of a reasonably competent and humane person

If similar provisions were incorporated into the new animal welfare framework it would assist in challenging the blanket protections against prosecution currently asserted for

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<sup>25</sup> Chris Groves. Chair of the National Farmers Federation, Animal Welfare Taskforce, Labor’s animal welfare policy would bring red tape, no outcomes <https://nff.org.au/media-release/labors-animal-welfare-policy-would-bring-red-tape-no-outcomes/> May 2016

compliance with codes of practice and standards, as well as for the defences available under s24 of POCTAA.

## **RECOMMENDATIONS**

- 13. That current definitions of cruelty in NSW animal welfare legislation be revised in the context of recognising animals as sentient beings, endowed with sensation, emotion and a capacity for psychological distress.**
- 14. That pain be defined in the new animal welfare legislation as “An aversive sensory and emotional experience typically caused by, or resembling that caused by, actual or potential tissue injury”.**
- 15. That provisions relating to acts of cruelty in NSW animal welfare legislation recognise mental as well as physical cruelty.**
- 16. That the new legislative framework incorporates the concept of animal sentience, mental and physical cruelty and unnecessary suffering, and apply to all animals regardless of their use in the commercial, entertainment and research sectors, drawing on examples from other jurisdictions.**

### **8. Fail to Provide v Duty of Care**

The AJP considers that the ‘fail to provide’ provisions under POCTAA should be replaced by a more positive expression of a minimum standard of care. Queensland was the first state to extend the legal concept of duty of care from being owed only between humans to encompass animals being owed a statutory duty of care. The *Animal Care and Protection Act 2001 Qld* states that any person in charge of an animal owes a duty of care to that animal. It promotes a positive and proactive approach to animal care and protection.

A duty of care means that the person in charge of an animal is legally obliged to care and provide for the animal’s needs in a reasonable way, including the provision of food and water, suitable accommodation and living conditions, the treatment of disease and injury, ensure any handling of the animal, including any confinement or transportation of the animal is appropriate.

The AJP supports the adoption of this “duty of care” approach to the care of animals in the new animal welfare framework. We do not support the use of the phrase “person in charge” because it can be difficult for prosecutions to succeed in determining who is in charge of an animal.

## RECOMMENDATIONS

**17. That the new animal protection framework establishes a statutory duty of care owed by any human handling or interacting with an animal for which they are responsible. This would be both a positive duty to ensure the provision of sufficient food, water, shelter, healthcare and exercise, as well as an obligation to take all reasonable steps to prevent pain, suffering and/or distress while they are in their care.**

**18. That the new animal protection framework specifies that a person commits an offence if they do not take steps as are reasonable in all the circumstances to ensure that the needs of an animal for which they are responsible are met.**

### **9. Person in Charge**

The AJP submits that the definition of 'person in charge' in s 4 of POCTAA has resulted in inconsistent and ambiguous interpretations. It has been narrowly interpreted in the NSW Supreme Court to mean 'a physical relationship in which the person is able to exercise some degree of ultimate responsibility or authority over an animal in its physical environment'.<sup>26</sup>

The new framework should employ the notion of 'person responsible' which is used in the UK *Animal Welfare Act 2006* to mean a person responsible for an animal whether on a permanent or temporary basis and which includes, but is not limited to, an animal of which he or she is in charge.

## RECOMMENDATION

**19. That the definition of 'person in charge' should be revoked and replaced with a concept of 'person responsible'.**

### **10. Definition of 'animal'**

There should be a revised definition of "animal" in the new animal welfare framework. It should include "all vertebrates" which encompasses mammals (including marsupials and monotremes), birds, reptiles, amphibians and fish. Consideration could be given to the presence of nerve cells, nerve tissues or pain receptors. There is evidence that cephalopods and crustaceans are sentient and therefore deserve legislative protection.

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<sup>26</sup> *Song v Coddington & Anor* [2003] NSWCS 1196

These species have the capacity to suffer, regardless of their intended use or situation and this should be consistent across all legislation.

## **RECOMMENDATION**

**20. That the definition of animal should include all vertebrates which encompasses mammals (including marsupials and monotremes), birds, reptiles, amphibians and fish, as well as extending the definition to include cephalopods and crustaceans.**

### **11. Setting the right penalties**

Since the 1970s, when POCTA came into force, there has been a significant change in how people view animals and a greater understanding of the ability of animals to experience pain, fear and suffering. Penalties are set not just to punish and deter individuals from re-offending but also to send a signal to society that this behaviour is unacceptable and offends the norms of civilised society.

POCTA's current penalty provisions do not meet contemporary community expectations that crimes against animals should be treated more seriously. The AJP submits that maximum penalties under a new animal welfare framework should be significantly increased from two to five years and that the crime of serious or aggravated animal cruelty should be increased to a maximum of ten years in recognition both of the harm caused to the animal and the risk to society given the well-established connection between animal abuse and violence towards humans, including child abuse, elder abuse and domestic violence"<sup>27</sup>

Where an animal agricultural business breaches the provisions of animal cruelty legislation there should be a significant financial penalty to ensure there is no profiting from unlawful animal cruelty. With modern intensive poultry facilities housing up to 1 million birds or intensive piggeries with thousands of confined animals, the number of potential victims is immense. Industry must be sent a strong message, that cutting corners on animal welfare to maximise profits will not be tolerated. There are already so

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<sup>27</sup> Gullone E (2012) *Animal Cruelty, Antisocial Behaviour, and Aggression: More than a Link*. Palgrave Macmillan [https://www.amazon.com/Animal-Cruelty-Antisocial-Behaviour-Aggression-ebook-dp-B00A208LCM/dp/B00A208LCM/ref=mt\\_kindle?\\_encoding=UTF8&me=&qid=](https://www.amazon.com/Animal-Cruelty-Antisocial-Behaviour-Aggression-ebook-dp-B00A208LCM/dp/B00A208LCM/ref=mt_kindle?_encoding=UTF8&me=&qid=)

Hodges C (2008) *The Link: Cruelty to Animals and Violence Towards People*. Animal Legal & Historical Center. Michigan State University College of Law: East Lansing. <https://www.animallaw.info/article/link-cruelty-animals-and-violence-towards-people> [accessed: 09Jun2019]

Phillips A (2014) *Understanding the Link between violence to animals and people: A guidebook for Criminal Justice Professionals*. National District Attorneys Association: Alexandria <https://ndaa.org/wp-content/uploads/The-Link-Monograph-2014-3.pdf> [accessed: 26Jun2019]

many exemptions for the lawful harming of animals that businesses should be severely penalised when found guilty of engaging in criminal behaviour.

The recent example of the Lakesland Hens case highlights the inadequacy of fines for businesses that fail to provide even the basics of life for their animals. In this instance, the owner engaged in the controversial practice of 'enforced moulting'; the denial of food and water to laying hens which triggers a stress-induced increase in the production of eggs. The court found that the proprietor, Shaun Stone, directly caused the death of 1000 chickens (with a further 3000 debilitated hens being seized and sent to slaughter). Stone was only fined \$6,500 in total, equaling a \$1.65 fine for each hen who suffered and died. This is a manifestly inadequate financial penalty for the deliberate cruelty inflicted by Stone. It reinforces the belief that farmed animals such as chickens have little to no intrinsic worth and their suffering of limited concern to society. That is not the case as shown by the findings of the Futureeye Report.

Stone was also placed on a 16-month community corrections order and prohibited from purchasing, acquiring, taking possession or custody of any animal for a period of five years. These additional penalties go some way towards addressing punishment and deterrence as well as preventing his access to potential animal victims over the next five years.

In February 2019 the Victorian Sentencing Advisory Council noted that:

'Criminal proceedings involving animal cruelty offences tend to attract considerable attention from both the media and the general community. To date, however, very little research has been published on the sentencing outcomes of those offences in Victoria, or in Australia generally.'

The Advisory Council noted community concerns with the low percentage of successful animal cruelty prosecutions and stated that these concerns are reflected in the views of stakeholders whose work involves the prosecution of those offences.

With reference to available data, the AJP has serious concerns about the over reliance on the use of s 24N direction notices and s 33E penalty infringement notices, and that excessive resort to these powers is a consequence of an overstretched inspectorate and of a regulatory welfare culture in which POCTAA is regarded as an animal welfare statute rather than part of criminal law enforcement.

Society is negatively impacted by the lack of care, consideration and empathy for sentient beings. Any measures to avert and punish such acts benefit society as a whole.

## **RECOMMENDATIONS**

- 21. That corporate fines should be increased to a maximum of 1000 penalty units, or \$110,000 so that sentencing can take into account the harm caused when businesses seek to make profits by flouting animal welfare standards, or where there are multiple victims harmed in intensive animal agricultural facilities.**
- 22. That penalties for corporations and commercial enterprises need to be much higher, otherwise fines may operate purely as a cost of doing business and fail to function as an effective deterrent to unlawful practices.**
- 23. That there should be very limited use of s 24N direction notices and s.33E penalty infringement notices in order to send a strong message about the serious, criminal nature of animal cruelty.**

## **Conclusion**

The AJP welcomes the review of POCTAA, ARA and the EAPA and supports substantive change to NSW's animal welfare framework. We look forward to animal sentience, the five freedoms and a focus on animal capabilities informing the new legislative regime. We also recognise that until animals are freed from human exploitation, there will be continued suffering and the needless slaughter of hundreds of millions of innocent animal victims of human speciesism.

## **FINAL RECOMMENDATIONS**

- 1. That the central objective of any animal protection framework must involve a recognition of animal sentience which gives effect to the five (freedoms) domains of animal welfare.**
- 2. That in all cases where animals are used by humans and may be at risk of harm, or whose survival may be threatened, such animals must be protected by an accessible, comprehensive and streamlined legislative framework administered by an independent animal protection agency.**
- 3. That the manner in which animals are used by humans does not change who they are and should not direct how the law defines them or whether they are included or excluded from specific legislation, regulations, standards, guidelines or codes of practice.**

- 4. That an independent animal protection agency should monitor animal ethics committees to ensure compliance with the new framework.**
- 5. That a new animal welfare framework must encompass a conception of 'welfare' that recognises animal sentience, affective states and natural living as well as basic health and functioning.**
- 6. That the operation of any animal welfare framework must have regard to the subjective states of animals, such as fear and frustration, whether or not the basic physical health of the animal is affected.**
- 7. That the new animal welfare framework should revoke the property status of animals and enshrine a legal status for animals which recognises that animals have an inherent interest in their own lives which should be protected by law.**
- 8. That the new animal welfare framework should require the establishment of an Independent Office of Animal Protection (IOAP) to advocate for animal interests, examine and review legislation, policy and practices that affect animal health, welfare, care and protection. An IOAP would be tasked with reporting and making recommendations to parliament on legislative and regulatory changes that benefit animals.**
- 9. That the 'authority to prosecute' provisions in s 34AA POCTAA should be revoked. An 'open standing' provision should be included in the new framework which enables individuals, animal advocacy and other organisations to act in matters of public interest in relation to the treatment of animals.**
- 10. That all new legislation include a definition of animal sentience that incorporates the concepts of perception and cognition referred to above and that it models its objects on those contained in the ACT 's Animal Welfare Amendment Act (2019).**
- 11. That the primary objective in s3(a) POCTAA "to prevent cruelty to animals" be retained in the new legislative framework and that the following objects be adopted into the new legislative framework:**
  - I. to recognise that animals are sentient:**
  - II. to prevent cruelty to animals**
  - III. to require persons responsible for animals to attend properly (according to the Five Freedoms) to the care and welfare of those**

**animals**

- IV. to specify conduct that is or is not permissible in relation to any animal or class of animals:**
- V. to establish an Independent Office of Animal Protection**
- VI. to provide for the development and approval of codes of ethical conduct:**
- VII. to promote community awareness about responsibilities and legal obligations associated with the care and protection of animals**

**12. That the new legislative framework clearly defines what acts and/or omissions amount to cruelty and avoid the use of language which enables 'justifiable' cruelty.**

**13. That current definitions of cruelty in NSW animal welfare legislation be revised in the context of recognising animals as sentient beings, endowed with sensation, emotion and a capacity for psychological distress.**

**14. That pain be defined in the animal welfare legislation as "An aversive sensory and emotional experience typically caused by, or resembling that caused by, actual or potential tissue injury".**

**15. That provisions relating to acts of cruelty in NSW animal welfare legislation recognise mental as well as physical cruelty.**

**16. That the new legislative framework incorporates the concept of animal sentience, mental and physical cruelty and unnecessary suffering and apply to all animals regardless of their use in the commercial, entertainment and research sectors, drawing on examples from other jurisdictions.**

**17. That the new animal protection framework establishes a statutory duty of care owed by any human handling or interacting with an animal for which they are responsible. This would be both a positive duty to ensure the provision of sufficient food, water, shelter, healthcare and exercise, as well as an obligation to take all reasonable steps to prevent pain, suffering and/or distress while they are in their care.**

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responsible are met.

19. That the definition of 'person in charge' should be revoked and replaced with a concept of 'person responsible'.
20. That the definition of animal should include all vertebrates which encompasses mammals (including marsupials and monotremes), birds, reptiles, amphibians and fish, as well as extending the definition to include cephalopods and crustaceans.
21. That corporate fines should be increased to a maximum of 1000 penalty units, or \$110,000 so that sentencing can take into account the harm caused when businesses seek to make profits by flouting animal welfare standards, or where there are multiple victims harmed in intensive animal agricultural facilities.
22. That the penalties for corporations and commercial enterprises need to be much higher, otherwise fines may operate purely as a cost of doing business and fail to function as an effective deterrent to unlawful practices.
23. That there should be very limited use of s 24N direction notices and s.33E penalty infringement notices in order to send a strong message about the serious, criminal nature of animal cruelty.

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