Animal Defenders Office
*Using the law to protect animals*

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

# INQUIRY INTO THE EXHIBITION OF EXOTIC ANIMALS IN CIRCUSES AND THE EXHIBITION OF CETACEANS IN NEW SOUTH WALES

**Supplementary questions**

**Hearing – 14 August 2020**

## Supplementary Questions for Animal Defenders Office

### Q1: The *Standards for exhibiting bottle-nosed dolphins* have not been updated since 1994 - what is your opinion on this?

**A1:**

We refer the Committee to our submission in which we stated the following (at pages 4-5):

> Cetacean displays must also comply with the General Standards[1], and the *Standards for Exhibiting Bottle-nosed Dolphins (Tursiops truncatus) in New South Wales* ("the Dolphin Standards")[2]. The Dolphin Standards were first published in 1994. At the time of writing this submission, the original 1994 version is still the only version available on the DPI website.[3] The ADO submits that it is unacceptable for highly intelligent, social and migratory animals such as dolphins to be kept in accordance with standards written over 25 years ago. We submit that both the standards and the very practice of permanently confining dolphins in extremely small enclosures purely for entertainment purposes are outdated, have not kept pace with scientific research about dolphins' behaviour and capabilities[4], and are no longer in keeping with community expectations.
>
> …
>
> Space requirements for exhibited cetaceans
>
> The minimum enclosure dimensions under the Dolphin Standards are a clear example of how out-of-date the standards are. The Dolphin Standards allow up to five dolphins to be permanently confined in as little as 1,400 cubic metres pool space (p5), which compares to approximately 2,500 cubic meters in a standard 50 m Olympic swimming pool[5].
>
> The ADO submits that this minimum enclosure requirement is extremely inadequate for animals who are now understood to swim up to 100km a day in the wild.[6]

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[1] *General Standards for Exhibiting Animals in New South Wales*, NSW Department of Industry (2019).
[2] *Standards for Exhibiting Bottle-nosed Dolphins (Tursiops truncatus) in New South Wales*, NSW Agriculture (1994), https://www.dpi.nsw.gov.au/animals-and-livestock/animal-welfare/exhibit/prescribed-standards2/dolphins.
[3] https://www.dpi.nsw.gov.au/__data/assets/pdf_file/0018/121554/dolphin-exhibition-standards.pdf.
[4] https://www.nationalgeographic.com/magazine/2015/05/dolphin-intelligence-human-communication/.
[5] FINA specifications, quoted in https://en.wikipedia.org/wiki/Olympic-size_swimming_pool.
[6] https://www.worldanimalprotection.org.au/dolphin-faq.

We reiterate these comments, and submit that a failure to update animal welfare standards regarding any animal for over 26 years despite changes in scientific understandings and community expectations is completely inadequate.

**Q2: Do you have concerns regarding the size of enclosures prescribed in the Standards for exhibiting circus animals for lions and monkeys? If so, please explain.**

**A2:**

We refer the Committee to our submission in which we stated the following (at pages 3-4):

> Space requirements for exotic circus animals
>
> Minimum enclosure space requirements are a useful measurement of the adequacy of standards and guidelines applying to exotic animals in circuses.
>
> In NSW the space requirements for keeping exotic animals in circuses are far below the minimum space required for the same species in zoos, and in the ADO's view are inadequate to protect the welfare of the animals held in captivity in a travelling circus.
>
> *Circus lions*
>
> Lions kept in a zoo in NSW must have an enclosure of at least 300 m²,[7] whereas in a circus the enclosure can be as small as 20 $m^2$.[8] Moreover circus lions may have access to these areas for only 6 hours during the day and can be kept in small 'animal wagons' for the remaining 18 hours.[9] Research has shown that animals in circuses spend only 1–9% of the day actually performing or being trained, meaning that most of their time is spent back in these limited enclosures.[10]
>
> *Circus monkeys*
>
> Animal circuses in NSW breed, keep and display Rhesus Macaque monkeys.[11] If these monkeys were to be kept in a zoo, they must be kept in an enclosure that is at least 6.5 m wide and 3.5 m high.[12] However, if these monkeys are kept in a circus, their enclosure can be as small as 2.4 m wide and 2.5 m high.[13]
>
> The ADO submits that these legal space limitations are extremely inadequate for wild animals such as lions and monkeys.

We reiterate the above concerns as originally expressed in our submission.

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[7] Appendix 1, *Standards for Exhibiting Carnivores in NSW*, DPI (2016).
[8] *Standards for Exhibiting Circus Animals in New South Wales*, NSW Department of Industry (2019), clause 7(4)(a)(ii): https://www.dpi.nsw.gov.au/animals-and-livestock/animal-welfare/exhibit/prescribed-standards2/circus
[9] Ibid, clause 7(4)(a)(i). An 'animal wagon' is 'any wagon, truck, float or van intended for the transport or holding, and/or static display, of an animal or animals' (*Standards for Exhibiting Circus Animals in New South Wales*, 'Definitions', ibid).
[10] Lossa G, Soulsbury CD and Harris S, (2009) 'Are wild animals suited to a travelling circus life' *Animal Welfare Journal 18*, 129-140.
[11] https://stardustcircus.com.au/monkeys/.
[12] *Policy on Exhibiting Primates in New South Wales*, NSW Agriculture (2000), p27, https://www.dpi.nsw.gov.au/animals-and-livestock/animal-welfare/exhibit/prescribed-standards2/primates.
[13] *Standards for Exhibiting Circus Animals in New South Wales*, op.cit, clause 7(4)(e)(ii).

**Q3: Can you please provide information about the legal proceedings brought involving Arna, an Elephant from Stardust Circus? What were the claims made in these proceedings regarding Arna's welfare?**

**A3:**

*The legal proceedings*

The parties to the legal proceedings involving Arna the elephant were Mark Pearson (Animal Liberation (NSW)) as the informant, and Janlin Circuses Pty Ltd, trading as Stardust Circus, as the defendant. The matter was originally heard in the Local Court in the Downing Centre on 17 May 2002. In that case the Magistrate considered that the evidence as it then stood could establish that, as a result of Arna having been brought into contact with the other elephants and those elephants having been taken away, Arna became distressed and therefore was inflicted with pain within the terms of the Act. However, the Magistrate found that it was necessary for the prosecution to establish that the defendant would have, or should have, known that the actions authorised against Arna would have caused her distress. The Magistrate dismissed the matter presumably on the basis that the evidence did not establish the mental element of the offence (this is not clear from the reported judgement of the Supreme Court).

The Magistrate's decision was appealed to the Supreme Court of NSW. In *Pearson v Janlin Circuses P/L t/as Stardust Circus* [2002] NSWSC 1118 (25 November 2002), the Supreme Court held that cruelty is an offence of strict liability and that *mens rea*, including intention or recklessness, is not a requirement of the offence. Thus the case established an important precedent in animal cruelty caselaw. The Supreme Court also dismissed the defendant's contention that the Magistrate could not have been satisfied beyond a reasonable doubt as to the guilt of the defendant on the evidence that had been before the Magistrate. The Supreme Court sent the matter back to the Magistrate to be heard again according to law. We have not been able to establish whether the Magistrate's judgement in the reheard matter was reported.

*The claims re Arna's welfare*

The claim made regarding Arna's welfare was that on 30 December 2000 at Gosford, NSW, Janlin Circuses Pty Ltd authorised the commission of an act of cruelty upon Arna. While elephants are inherently social animals, Arna had been deprived of social contact with other elephants for several years. The alleged act of cruelty upon Arna occurred when the defendant authorised three elephants to be kept in close proximity to her, then removed after a few hours. As a consequence, Arna became distressed, and was unreasonably, unnecessarily or unjustifiably inflicted with pain – an act of cruelty under s5(2) of the *Prevention of Cruelty to Animals Act 1979*.

The case is highly significant in terms of animal protection caselaw in that it was the first Australian case to consider psychological suffering in a wild animal.

**Q4: Are you aware of prosecutions for animal cruelty against Silvers' Circus and Sole Brother's Circus, or any other current or former circus with exotic animals in Australia? If so, please provide details.**

**A4:**

We are aware that Submission No. 20 to this Inquiry refers to prosecutions in the mid-1980s against Sole Brother's and Silvers' Circus for cruelty to a camel and lion cubs (respectively) (p7). We have been unable to find reported judgements in relation to these cases. This is, unfortunately, typical of animal cruelty cases. Most animal cruelty matters are prosecuted in the Local Court, the judgements of which are not reported. It is only when matters are appealed to a higher court, as in the Arna case in Q3 (appealed to the Supreme Court), that the decisions are reported and cited in subsequent cases. Usually the Local Court decisions are appealed on a technical legal issue, or on sentence, so again there is little judicial consideration of substantive animal cruelty issues.

By reference to 'any other current or former circus with exotic animals in Australia', we assume the question is referring to cases other than the Arna case referred to in Q3.

Other than the matters referred to above, we are not aware of prosecutions for animal cruelty against circuses involving exotic animals. However, for the reasons stated above, this is far from saying there have not been any prosecutions – only that we are not aware of them, as they would not be reported cases and it would involve significant research (beyond the scope of our unfunded volunteer-run organisation) to determine whether or not there have been any. Another factor reducing the likelihood of circuses being prosecuted for animal cruelty is that the circus guidelines[14] are set at such a low standard that they are easily met. Meeting these minimum standards would make it difficult to persuade a Court that an offence of animal cruelty has been committed, even if many in the community consider that 'circus life is inherently cruel for exotic animals regardless of how well the circus is managed or how well it complies with welfare codes or standards'.[15]

**Q5: At the inquiry hearing, we heard claims from industry of "protesters there screaming at children", things being "set on fire" or "stolen", and staff being "physically threatened". Are you aware of any legal proceedings that have been filed substantiating these kinds of claims?**

**A5:**

We are aware of the civil case of *Animal Liberation (Vic) Inc v Gasser* [1991] 1 VR 51, in which the organisation Animal Liberation Victoria appealed against interim injunctions that were granted to stop protestors demonstrating against an animal circus. The case concerned the conduct of demonstrators, but it did not include actions referred to in Q5. The single judge in the original matter found that '[m]embers of the public wishing to attend the performance of the circus that afternoon were required to pass between the two rows of demonstrators to gain entry. As they passed between the two lines of demonstrators they were offered leaflets which I assume contained material designed to advance Animal Liberation's cause. From time to time the demonstrators chanted 'Ban animal acts'.' The Supreme Court found that 'There was a prima facie case that the

[14] *General Standards for Exhibiting Animals in New South Wales*, NSW Department of Industry (2019); and *Standards for Exhibiting Circus Animals in New South Wales*, NSW Department of Industry (2019).
[15] Animal Defenders Office, Submission No.222 to the Portfolio Committee No.4 (Industry)'s Inquiry into the use of exotic animals in circuses and the exhibition of cetaceans in New South Wales.

demonstrators were hostile and argumentative, and that they obstructed the patrons by, inter alia, forcing them to walk the gauntlet of shouting demonstrators who were waving placards, and by crowding around, so as to obstruct, the entrance to the ticket office.'

The Magistrate's interim injunctions were set aside, but the Supreme Court made more detailed temporary orders for the protestors to refrain from their conduct until the matter could be heard in full.

We are not aware of other cases.

**Q6: The Committee's terms of reference defines 'exotic animals' as 'any animal that is not native and is not a stock or companion animal.'**

**(a) Do you believe the term 'exotic' is satisfactory? If not, what would be a better term, and is it used in any other jurisdiction?**

**(b) Do you agree that this is a satisfactory definition? If not, what would be a better definition?**

***(a) Do you believe the term 'exotic' is satisfactory? If not, what would be a better term, and is it used in any other jurisdiction?***

The law has long distinguished between wild animals and domesticated animals. Historically the distinction was between an animal *ferae naturae*, ie of wild nature, and *mansuetae naturae*, of tame nature. The distinction has important legal implications. For example, in common law, the owner of a wild animal (*ferae naturae*) (ie a wild animal kept in captivity) would be strictly liable for damages caused by the animal, whereas an owner of a tame animal (*mansuetae naturae*) would only be liable if the person knew the animal was prone to wild behaviour. Inherent in these concepts is the associated concept of danger. More recently common law jurisdictions have replaced the Latin terms with common terms such as dangerous or non-dangerous species.

Wild animals were conventionally classified in one of two further categories: those who are non-native ie **exotic**, and those who are native. Thus 'exotic' conventionally has a particular meaning in relation to animals, distinguishing those wild animals who are non-native from those native to a particular area.

Legislatures wishing to regulate exotic animals usually either adopt a broad definition, or enumerate particular animals they wish to include in exotic animal legislation.

The United States of America has a very high rate of exotic pet ownership. This shows that the concepts of exotic and ownership in a private domesticated setting (eg a circus) are not mutually exclusive.

One of the reasons exotic animals are distinguished from other animals in US regulatory frameworks is due to public health concerns, and especially the unique public health diseases and other epidemiological risks associated with 'exotic' animals kept as pets.

While the term 'exotic' is generally understood to mean non-local wild animals, the term can cover a wide variety of animals. In America, state jurisdictions are increasingly preferring to list particular species rather than formulate a generic definition. This also enables more effective enforcement.

See for example:

> *West's Oregon Revised Statutes ... Title 48. Animals. Chapter 609. Animal Control; Exotic Animals; Dealers. Exotic Animals. (Local Government Regulation)*
>
> **609.305. "Exotic animal" defined**
>
> …"exotic animal" means:
>
> (1) Any member of the family Felidae not indigenous to Oregon, except the species Felis catus (domestic cat);
>
> (2) Any nonhuman primate;
>
> (3) Any nonwolf member of the family Canidae not indigenous to Oregon, except the species Canis familiaris (domestic dog);
>
> (4) Any bear, except the black bear (Ursus americanus); and
>
> (5) Any member of the order Crocodylia.

As we discuss in our submission to the Inquiry (p9), this is similar to the approach taken in the *Animal Welfare Act 1992* (ACT) when dealing with circus animals. This Act uses the term 'prohibited animal' which is defined to mean:

> (a) a bear, elephant, giraffe, primate (other than a human) or feline (other than a domestic cat); or
>
> (b) an animal prescribed by regulation.[16]

While no animal is currently prescribed by regulation, it is a relatively easy mechanism for adding or removing species that lawmakers wish to be covered by the defined term.

**(b) Do you agree that this is a satisfactory definition? If not, what would be a better definition?**

The definition of 'exotic animal' in the Committee's terms of reference for this inquiry is reasonably comprehensive and includes common aspects of the term 'exotic' when used in relation to animals (ie foreign origin or character, not native to the home location, potentially dangerous or at least not tame). The question of whether or not it is 'satisfactory' would depend entirely on the regulatory context and its intended objective.

**Q7: The Committee's terms of reference refers to 'circuses'.**

**(a) Do you believe the term 'circuses' is satisfactory?**
**(i) If so, how should it be best defined in legislation?**

The term 'circus' is not defined in animal welfare legislation in Australia, in the two relevant guidelines for circuses in NSW,[17] or in the Australian standards and guidelines for exhibited animals.[18]

[16] Section 51. No animal is currently prescribed by regulation.
[17] *General Standards for Exhibiting Animals in New South Wales*, NSW Department of Industry (2019); and *Standards for Exhibiting Circus Animals in New South Wales*, NSW Department of Industry (2019).
[18] *Australian Animal Welfare Standards and Guidelines. Exhibited Animals – General*, NSW DPI, 2019.

In the absence of a legislative definition, the term 'circus' would be interpreted with reference to other terms with which it is associated in legislation. For example, in s22(2) of the *Exhibited Animals Protection Act 1986* (NSW), the term 'circus' is used with other terms:

> 'circus, fair, fun-fair, amusement park or similar place of public entertainment'

In this case 'circus' would be taken to be a particular kind of 'place of public entertainment'.

Where the term is not defined, the common dictionary meaning of a term would also be used to determine its statutory meaning. For example, the primary meaning of 'circus' in the online Oxford Dictionary is 'a travelling company of acrobats, clowns, and other entertainers which gives performances, typically in a large tent, in a series of different places.'[19]

In America, state laws define circuses broadly to mean 'animal enterprises'[20] or a type of 'animal facility', or more specifically as 'skilled performances by dangerous wild animals, clowns, or acrobats for public entertainment'[21] or 'a public entertainment consisting typically of a variety of performances by acrobats, clowns, and trained animals …'[22].

As Australian legislatures have to date not felt the need to define the term 'circus', we suggest it does not need to be defined in legislation. However, there may be a need depending on the context and the issue that a proposed legislative definition would seek to address.

**Q8: The Committee's terms of reference refers to the 'welfare' of exotic animals and cetaceans.**

**(a) Do you believe the term 'welfare' is satisfactory?**
**(i) If so, how should it be best defined in legislation?**
**(ii) If not, what would be a better term, and is it used in any other jurisdiction?**

**A8:**

We refer the Committee to our comments made on this issue in our submission on the *NSW Animal Welfare Reform – Issues Paper* ("the Issues Paper").[23]

> The *Prevention of Cruelty to Animals Act 1979* (NSW) does not provide an explicit definition of 'welfare'.
>
> The ADO suggests that the term should be defined in the State's primary animal protection statute. Without a definition it is not clear what is being 'ensured'. Failure to provide a definition risks leaving the purpose of legislation vague.
>
> The Issues Paper refers to the World Organisation for Animal Health's definition of 'welfare', which is based on the 'Five Freedoms model' (page 12). The Five Freedoms were developed in the 1960s in response to the new 'intensive' methods of confining farmed animals that were rapidly being adopted. The Five Freedoms recognise several basic elements that are necessary for animal welfare. The ADO submits, however, that the Five Freedoms should only be taken as a starting point for thinking about animal welfare today, since the freedoms outlined are not sufficient on their own to

[19] https://www.lexico.com/definition/circus.
[20] Florida, Fla. Stat. Ann. §§ 828.40-43 (2009);
[21] Iowa I. C. A. § 717F.1 – 13.
[22] https://www.animallaw.info/statute/tn-exotic-pet-part-4-exotic-animals#s402.
[23] https://www.dpi.nsw.gov.au/animals-and-livestock/animal-welfare/issues-paper.

ensure an acceptable level of welfare by contemporary standards. The ADO has two concerns in particular with relying solely on the Five Freedoms approach.

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

Secondly, the Five Freedoms' focus on minimising negative states fails to emphasise the promotion of positive states. By merely removing risks (eg hunger, thirst, disease) from the lives of animals, we do not necessarily ensure their good welfare; as animal behavioural scientist Jonathan Balcombe notes, for both animals and humans, 'a safer life is by no means a better life'.[24] These two points indicate that the Five Freedoms do not provide a comprehensive account of welfare.

Building on the Five Freedoms approach, the Australian Capital Territory ("ACT") has sought to promote a 'life worth living' approach in its *Animal Welfare & Management Strategy 2017-2022*.[25] This approach emphasises the importance of physical wellbeing, mental wellbeing (including the experience of positive emotions, such as pleasure and contentment), and living a natural life, with the ability to perform natural behaviours and experience elements of the natural world (eg sunlight and fresh air). The ADO recommends this approach over one which relies solely on the Five Freedoms.

The ADO wishes, however, to draw attention to a still more comprehensive account of animal wellbeing than either of the two previously discussed. The 'capabilities approach', which was first developed in the context of human development studies by the economist Amartya Sen, has since been applied in the case of animals by philosopher and legal scholar Martha Nussbaum. The capabilities approach posits that animals, like humans, have certain capabilities that contribute to lives that are dignified and flourishing (and not merely free of pain and suffering). Nussbaum outlines a list of 10 capabilities, that includes 'bodily health', 'bodily integrity', 'emotions', 'play', and 'control over one's environment'.[26] The ADO strongly recommends that a definition of animal welfare, or at least the understanding of animal welfare on which future reform is based, should take into account these capabilities, as a promising way of overcoming the limitations of approaches that rely too heavily on the Five Freedoms.

[24] Balcombe, J, 'Animal pleasure and its moral significance', *Applied Animal Behaviour Science*, 2009, 118, 208-216.
[25] ACT Government, *Animal Welfare & Management Strategy 2017-2022*, Canberra 2016, available at: https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.act-yoursay.files/4514/9068/1706/Animal_Welfare__Management_Strategy_2017__2022.pdf.
[26] Nussbaum, MC, *Frontiers of justice: Disability, nationality, species membership*, Harvard University Press, Cambridge, MA, 2006.