INQUIRY INTO ANIMAL WELFARE POLICY IN NEW SOUTH WALES

Supplementary questions – 21 March 2022

Supplementary Questions for Animal Defenders Office

Q1: In their submission, NSW Farmers have called for a particular definition of "animal welfare" in the Bill. Do you think the definition proposed by NSW Farmers should be adopted in the objects section of the Bill, or do you believe recognising sentience and intrinsic value in the objects is a better approach and why?

A1:

The ADO does not consider that the definition of "animal welfare" proposed by NSW Farmers should be adopted in the objects section of the Bill. The NSW Farmers' proposed definition of "animal welfare" is a self-serving definition for animal agriculture. It is more a guide to producing animals as profitable commodities rather than a definition that is appropriate to the vast array of animals to whom the Bill would apply.

It is generally not a good idea to attempt to define a concept such as "animal welfare" in an animal welfare statute, as while the term remains the same, the definition changes over time along with community values and scientific evidence, and can vary from animal to animal and species to species.

Defining "animal welfare", or any concept, is not advisable in an objects section of an Act. An objects clause is used to outline the 'underlying' or 'intended' purpose of legislation, or its 'general aims or principles'.[1] For this reason, acknowledging the sentience and intrinsic value of animals is appropriate for an objects clause, because it establishes a general principle on which the Act would be based (ie that animals feel pain and suffer, hence the need for an Act protecting their welfare), and it would assist the reader (and courts) in interpreting the legislation as a whole.

Q2: Representatives from the greyhound industry proposed there was duplication between the proposed Bill and the Greyhound Racing Act, and expressed the view that greyhound racing should be regulated by the Greyhound Racing Act only – and not in this new legislation. Do you think this would have an impact on the welfare of greyhounds and if so, how?

A2:

Any duplication between the proposed Bill and the Greyhound Racing Act indicates that the Greyhound Act is unnecessary, rather than the other way round.

[1] Australian Law Reform Commission, 'The objects of the Act', 2010, https://www.alrc.gov.au/publication/for-your-information-australian-privacy-law-and-practice-alrc-report-108/5-the-privacy-act-name-structure-and-objects/the-objects-of-the-act/.

If greyhounds used for racing were to be exempted from animal welfare legislation, they would lose the minimum standard of welfare protection that is provided by such legislation and that is independent of their use or function for humans. Making the greyhound racing industry solely responsible for the welfare of racing greyhounds is a classic example of the proverbial fox guarding the henhouse or wolf guarding the sheep.

Q3: The Australian Pork industry gave evidence that there needs to be a greater link between this Bill and biosecurity legislation. In relation to inspectors, they stated in their submission that "it is critical that the authorised officer is transparent about the process and timeframes with the producer". What is your reaction to this position? Do you think animal cruelty investigations may be impacted if inspectors are not able to enter animal agribusinesses without notice? If so, how?

A3:

The suggestion that authorised officers are transparent about their processes and timeframes is not unreasonable, but such an obligation need not affect the officers' ability to conduct unannounced inspections of animal trade premises. The ability to conduct 'pro-active' inspections of premises used for animal industries is a fundamental aspect of any animal welfare regulatory scheme. Then, once undertaken, authorised officers should be expected to be 'transparent' about the process and timeframe for any follow-up action or investigation.

Removing the ability to conduct unannounced routine inspections would privilege commercial benefits for animal users over the fundamental welfare interests of the animals being used. It would also make animal agribusiness virtually impossible to monitor adequately for its compliance with animal welfare legislative requirements.

Q4: There do not appear to be any whistle blower protections for individuals exposing animal abuse in this Bill – what provisions do you think should be included in the Bill to protect whistle-blowers?

A4:

Corporate-sector whistleblowing is a complex issue. Under commonwealth law, certain large companies are required to have whistleblowing protection policies.[2] These policies must include information about matters including the protections available to whistleblowers, and how the company will support whistleblowers and protect them from detriment.[3]

As a (significant) proportion of animal trades would not be large public companies, whistleblower protections and anti-retaliation provisions for employees who identify and call out misconduct that harms animals could be proposed, and an appropriate Act for such provisions could be determined. The provisions could allow the disclosures to be made to external enforcement agencies (such as an approved charitable organisation) rather than kept in-house. At the very least animal trades could be required to have a whistleblowing protection policy in place to protect disclosures about misconduct

[2] *Corporations Act 2001* section 1317AI.
[3] *Corporations Act 2001* section 1317AI(5).

that harms animals, and to make that policy available to officers and employees of the company.[4] Consideration could be given as to whether such requirements should be included in the proposed Bill, provided they were not beyond the scope of the Bill, or set out in separate legislation.

Such changes would complement the proposed consequential amendments to the *Public Interest Disclosures Act 1994* (NSW) ("PID Act"), or its 2022 equivalent[5], set out in Schedule 4 to the Bill (clause 4.21) according to which authorised officers from approved charitable organisations would be 'public officials' for the purposes of the PID Act. This would mean that disclosures about potential misconduct by authorised officers from approved charitable organisations could be protected under the PID Act.

Q5: The committee heard evidence that hunting groups would like to see the ban on game parks in NSW removed from the Bill. What are your thoughts on lifting the ban on game parks in NSW? If this ban was removed, what would that mean for animals in NSW?

A5:

Game parks are currently banned in NSW under s 19A of the *Prevention of Cruelty to Animals Act 1979* (NSW) ("POCTAA"). This provision was inserted into POCTAA under the Prevention of Cruelty to Animals (Amendment) Bill 1987 ("POCTAA Bill").[6] The object of the POCTAA Bill was 'to strengthen the Prevention of Cruelty to Animals Act to make it more effective in protecting animals.'[7] The measures proposed in the Bill, including the ban on game parks, were based on 'increasing community recognition that humans have responsibilities towards animals' and were considered to be 'clearly essential to limit the adverse impact of the activities of irresponsible and cruel people on the well-being of animals.'[8] The reforms were regarded as being 'urgently needed and will do much to improve and maintain standards of animal welfare in New South Wales.'[9]

The ADO submits that these reasons for banning game parks are just as relevant, if not more so, in contemporary NSW given the increased awareness of animal welfare in general and concern about 'trophy' hunting in particular.[10] The ADO suggests there would be even less tolerance today of killing wild animals merely for recreation and 'trophies' than in 1987 when the ban on game parks was introduced. The ADO also notes that game parks are banned under animal welfare laws in other jurisdictions in Australia.[11]

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[4] As per *Corporations Act 2001* section 1317AI(1).
[5] *Public Interest Disclosures Act 2022* (NSW).
[6] Prevention of Cruelty to Animals (Amendment) Bill 1987.
[7] Mrs Crosio, Minister for Local Government and Minister for Water Resources, Second Reading Speech, NSW Hansard, Legislative Assembly, 29 April 1987.
[8] Ibid.
[9] Ibid.
[10] See for example the community outrage in response to media reports of the American dentist who killed Cecil the lion in Zimbabwe in 2015 ('Cecil's killing sparked what's been called the biggest global response to a wildlife story ever', https://www.nationalgeographic.com/animals/article/cecil-african-lion-anniversary-death-trophy-hunting-zimbabwe), or to photographs of the Australian cricketer Glenn McGrath next to wild animals he had killed in Zimbabwe: https://www.abc.net.au/news/2015-02-21/mcgrath-apologises-for-hunting-photos/6177858.
[11] *Animal Welfare Act 1992* (ACT) s 18 and *Animal Welfare Act 2002* (WA) s 32.

Q6: Under the proposed Animal Welfare Bill, interim and final disqualification orders can only be made in respect to 'animal cruelty offences', and not to offences relating to exhibited animals and research animal licensing. Do you think disqualification orders should be extended to apply to exhibited and research animal offences – and if so, why?

A6:

Under proposed sections 128 and 130 of the Bill, a court may make a 'disqualification order' during proceedings or following a finding of guilt, but only in relation to an animal cruelty offence.[12] In the absence of explanatory material for the Bill, there is no justification for limiting the orders to one type of offence rather than 'an offence against this Act, the regulations or [relevant provisions in] the *Crimes Act 1900* in relation to an animal' as for other court orders proposed in the Bill.[13]

The ADO submits that it should be left to the discretion of the court as to when, and in relation to which type of offence, an order should be made. We note that the *NSW Animal Welfare Reform – Consultation Outcomes* paper also advocates this approach (p55):

> Court orders are made by the courts, not by enforcement agencies. Judges are best placed to consider the facts of each case and decide whether a court order is appropriate.

Moreover the ADO submits that maintaining a distinction between 'animal cruelty' offences and exhibited or research animal offences defeats the purpose of merging the three existing animal protection statutes (POCTAA, *Animal Research Act 1985*, *Exhibited Animals Protection Act 1986*).

Q7: This Bill tightens restrictions on inspections of residential premises, even when an animal business is taking place in a private residence (e.g. dog breeders). Do you have concerns with the stricter proposed legislation? How will this affect animals if oversight into animal breeding businesses is more difficult when conducted in private residences?

A7:

Under proposed s 67 of the Bill, residential premises (dwellings) can be entered only with the occupier's consent or with a warrant, or in certain urgent circumstances. These are narrower than the circumstances in which non-residential premises can be entered (s 66).[14]

The ADO notes that the proposed restrictions on entry to residential premises in the Bill may apply to 'a part of premises…used for residential purposes' (s 67(1), emphasis added), indicating that a single premises can be divided up into residential and non-residential for the purposes of entry under the Bill. The ADO suggests that if an activity of concern such as rogue or 'backyard' breeding is occurring in premises that are also used as 'residential premises', the part of the premises where the breeding is situated or taking place should be regarded as 'non-residential' and entry under

[12] Sections 128(1) and 130(1)(a).

[13] For example, ss 126, 127.

[14] The Bill's proposed limitations on entering non-residential premises are:

- At any time if an offence is suspected (s66(1)(a)), or
- With a search warrant (s66(1)(b)), or
- With consent (s66(1)(c)), or
- At a reasonable time, to check compliance with an order etc (s66(1)(d)).

proposed s 66 of the Bill could be used. However, to ensure that backyard breeding is not inadvertently protected under limited 'residential' entry powers, 'animal breeding' could be prescribed as a commercial activity under proposed s 66(2) of the Bill. This may help ensure that the full entry powers under s 66 of the Bill would be available for monitoring and compliance purposes regarding an activity that has serious animal welfare concerns.

Q8: A concern from many stakeholders has been that the Bill moves a lot of key provisions to regulations. Do you have the same concerns, and if so can you explain why it is concerning to have key provisions governing animal welfare in regulation, rather than legislation – even if a copy of the regulations is made available prior to the Bill being finalised?

A8: The ADO has previously expressed concerns about replacing the three NSW animal protection Acts with a single Act if it would lead to more substantive content being moved to the regulations, the making and amending of which has far less parliamentary scrutiny than primary legislation.[15] Critically important aspects of the new regulatory framework[16] should not be left to the regulations which can be changed with relatively little, if any, parliamentary scrutiny, and have legal effect as soon as they are made even if subsequently disallowed. If amalgamating the current animal welfare statutes means that important details must be relegated to subordinate legislation, then in our view that raises serious concerns about the merits of the proposal to replace the three Acts with a single Act and lengthy and complex regulations.

The ADO is also concerned about the delegation of much of the regulatory scheme to regulations because the Bill's proposed regulation-making power is much broader than its equivalent in s 35 of POCTAA. The proposed power in s 166 of the draft Bill omits crucial words contained in its POCTAA equivalent:

> The Governor may make regulations, **not inconsistent with this Act**, for or with respect to any matter that by this Act is required… [emphasis added].

The ADO submits that this important limitation on the regulation-making power under the draft Bill should be re-inserted in the Bill to ensure that the regulations (subordinate legislation) cannot permit anything that conflicts with the Act (primary legislation).

Animal Defenders Office Inc.
5 May 2022

[15] Animal Defenders Office, *Submission on the NSW Animal Welfare Reform – Discussion Paper*, 17 September 2021.
[16] The Bill s 20 (Requirement to comply with standards), s 40 (Prohibition on prohibited items), s 42 (Requirement to be licensed), s 45 (Regulations may provide for licensing scheme).