

Supplementary
Submission
No 402a

**INQUIRY INTO USE OF BATTERY CAGES FOR HENS IN
THE EGG PRODUCTION INDUSTRY**

Organisation: Animal Liberation

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Inquiry the Use of Battery Cages for Hens in the Egg Production Industry

Further submission made to the Legislative Council Select Committee on the
Use of Battery Cages for Hens in the Egg Production Industry



All correspondence in relation to this submission should be directed to:

Animal Liberation



*We acknowledge the
Traditional Owners of
country throughout Australia
and recognise their continuing
connection to land, waters and
culture.*

*We pay our respects to their
Elders past, present and
emerging.*



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**Further submission by Animal Liberation
to the Legislative Council Select Committee on
the Use of Battery Cages for Hens in the Egg Production Industry**

1. It is submitted that the use of battery cages to contain hens for egg production is cruel, is contrary to the current standards of our community and cannot be justified by any countervailing need. The fact that this practice continues is a stain on our community that should be rectified by legislation and an improved regime for animal welfare in New South Wales.
2. These submissions are organised by reference to the several terms of reference ('ToR') of the Select Committee.

ToR (a) (i): Are poor animal welfare outcomes and practices involved?

3. The keeping of hens in tiny cages is manifestly cruel and is itself a poor practice (in particular, a poor animal welfare practice) and a poor animal welfare outcome. It necessarily entails unnatural confinement in a space that is small and unpleasant, and deprivation of each hen's ability to walk and fly in a non-industrial environment (or even just to be outside).
4. It is also associated with poor outcomes such as the need to feed chickens antibiotics and take other unnatural steps to prevent the spread of disease.
5. It is self-evident that the arrangement is unnatural. Therefore, those who would contend that the practice is not cruel, or not associated with poor animal welfare outcomes or practices, bear a heavy onus to establish their contention with substantial, scientifically valid evidence.

ToR (a) (ii): Is there any sufficient justification?

6. Although justifications of the use of battery cages in egg production are sometimes advanced, the true question, as the terms of reference reflect, is whether or not those considerations justify the use of cages—whether or not the justifications are sufficient.
7. The two main considerations sometimes said to justify the use of battery cages in egg production should be identified and considered. The primary one is feeding people. The other is that the egg-producing industry creates profits for the egg-producing businesses (and associated businesses) and employment for workers.

8. However, the choice is not between feeding people or not, between having eggs or not, between having profits or not, or between having jobs or not. These are false dichotomies, for the abolition of battery cages would not mean an end to egg production, the industry or the associated employment. Rather, egg production is driven by the demand for eggs and, as has occurred elsewhere, will certainly continue even if battery cages are banned; and other forms of egg production—for example, free range—do not involve fewer jobs (if anything, they involve a slightly higher need for labour). The only real issue is whether or not those who resort to battery cage-based egg production should have the commensurate competitive advantage over their more ethical competitors and consequential higher profits. In short, do competitive advantage and higher profits for a few, less ethical producers justify the manifest cruelty involved?
9. This is the heart of the whole issue, and it is also the central issue in animal protection law, which can now be considered. A discussion of the current law on animal cruelty is in the Appendix to this Submission. It is clear that the unnecessary, unreasonable or unjustifiable infliction of distress, suffering or pain on an animal is a crime. Undoubtedly, to confine a hen in a small cage for most of its life (or, for that matter, any prolonged period) causes distress and suffering and pain. The question is whether or not it is necessary, reasonable and justifiable to do it.
10. As demonstrated in the Appendix, increasing the profit of a farmer or industrialist is not at law a necessary, reasonable or justifiable basis for inflicting the significant distress, suffering and pain that hens endure in battery cages. Not only is it clear that that is the legal position in NSW: it is also the legal position in many countries around the world and—perhaps most tellingly—it has been legal position since the nineteenth century.
11. It is true that it has taken time to recognise the cruelty involved. But once the cruelty is recognised then the law as expounded in the case of *Ford v. Wiley* in 1889 should be applied. If it is not then we should acknowledge to ourselves that our standards of animal protection are lower than those of nearly two centuries ago. And if we are not willing to acknowledge that proposition then we should end the cruelty of battery cages.

ToR (a) (iii): re battery cages consistent with community standards and supported by the public?

12. Community standards evolve over time. On this issue, the clear trend for many years—and most especially in recent years—has been towards improved animal welfare. Few Australians support cruelty. Few Australians consider cruelty to be justified by the pursuit of extra profit by some in the egg-producing industry. Many are already paying more for free-range eggs.
13. To the extent that some Australians support battery cage-based egg production, only a tiny minority, if any, do so because they prefer a cruel production method. Some may be motivated by choosing the cheapest available eggs, but most who are not opposed to

battery cages are in the category of those who are not aware of the issues or who have not considered them.

14. The correct approach to determining community standards on an issue is to determine what those standards are amongst reasonable people. The law presumes that reasonable people will make appropriate inquiry into the relevant facts, as indeed they do.
15. There is ample evidence that the community is opposed to 'battery cages' and 'battery hens', even if the community does not have detailed information about all that lies behind those terms. It is also clear that as ordinary, reasonable members of the community gain greater information about the reality behind the terms they develop an even greater opposition. The reality involved in the keeping of hens in battery cages is unacceptable to our community's standards.

ToR (b) (i): Legislation to prevent poor outcomes

16. Although it may be apparent to a lawyer with relevant expertise that on a correct construction of the law battery cages are illegal, it is just as clear that many in the general community and many egg producers are not aware of this legal position. This is evinced by the widespread use of the practice. Fairness—especially to egg producers—requires that parliament clarify the situation. Clarification would better come from the parliament in an orderly way, with a scheme for industry rehabilitation if parliament thought fit, than via decisions in the courts upon the prosecution of individual egg producers at an uncertain time and without a wide scheme for industry adjustment.
17. The need for parliament to provide clarity is made all the greater by subs. 9 (1A) of the *Prevention of Cruelty to Animals Act 1979* (NSW) ('the PoCtA Act'), which is discussed in the appendix and might mistakenly be taken to authorise battery cages, even though it plainly does not.
18. Accordingly parliament should enact an explicit ban on battery cages. It should also ban the sale of battery cage-produced eggs, so as to ensure that local producers are not disadvantaged by the importation of cruelty-based eggs. Given that such bans are becoming more common, those who ban early will gain a competitive advantage later.
19. A significant aspect of any statutory regime, including the PoCtA Act, is its enforcement mechanism. The PoCtA Act's regime is inadequate. Unlike most offences, even murder, for which any person has standing to commence a prosecution, an offence against the PoCtA Act can only be prosecuted by police, the RSPCA or the Animal Welfare League. That is a significant weakness in the State's animal welfare regime and the limitation should be abolished.

20. Furthermore, in practice, the police defer to the RSPCA. The leading role of the RSPCA in enforcing the PoCtA Act is an historical anomaly that arose because the first animal welfare laws in the United Kingdom were passed (in 1822), and the RSPCA was established and given a law enforcement role (in 1824), before the first police force was established (the London Metropolitan Police Service in 1829).
21. It need involve no criticism of the RSPCA to recognise that it is anachronistic for the public Police Force to be secondary to a private charity on an issue of law enforcement, or to propose that offences against the PoCtA Act should be amenable to private prosecution, like most other offences. It is not suggested that the RSPCA should be stripped of its role. It is, however, time for the police to have a greater role, and to remove the limitations on who may commence proceedings.
22. It is also time for an animal welfare commission. It should have special powers to investigate, for it would be investigating crimes against victims who cannot speak. It should also have research and education functions and authority to set minimum standards.
23. And it is open to conclude that the RSPCA's inspectors are not sufficiently well-trained to perform their role, having inadequate legal knowledge and an insufficient focus on the welfare of animals. One piece of evidence is the transcript of evidence recently given by an RSPCA officer in a case related to gross cruelty inflicted upon egg-producing chickens (said by the proprietor to be 'free range'). An extract is attached¹ (in fairness, the inspector's name and other names have been changed).

ToR (b) (ii): Legislation to set minimum standards

24. Legislation to set minimum standards would also provide greater clarity, and thereby be beneficial to egg producers. The benefits would include clarity itself and also the fostering of an even playing field for commercial competition, for it would tend to reduce the unfairness that arises from allowing producers with low standards to compete against those with higher standards.
25. However, the dangers in setting minimum standards should be recognised and addressed. They are sometimes (and sometimes wrongly) taken to be an authorization for people to act in accordance with the minimum standard. Any new legislation should be careful to make clear that merely complying with a minimum is not an excuse for inflicting cruelty. Also, set minimum standards tend not to move with changing community standards, and fall behind those standards; this is another reason for an animal welfare commission, which could more flexibly set and revise standards.

¹ Attached as optional supplementary file.

ToR (c) (i): Impact on the environment

26. Like many industrial enterprises, battery cage-based egg production involves concentration of pollutants so as to produce risks of chemical, noise, dust and odour pollutants. In many cases, these pollutants spread beyond the boundaries of the enterprise's own premises. In the result, such enterprises are profiting from operations that are conducted not only on their own land but also, in a real sense, on their neighbours' land—and certainly at their neighbours' amenity and expense.
27. In some respects, the pollution generated by battery cage-based enterprises may be greater than that generated by alternative egg-producing enterprises (for example, any increased use of antibiotics or other chemicals needed in greater quantities); in other cases it may be the same or less.
28. Nevertheless, the issue is worthy attention. It draws attention to an important principle: commercial enterprises should be conducted using their own resources, and without impinging on others or the environment. This principle applies to all egg-producing enterprises and may necessitate the moving of such enterprises away from populated areas. Such moves—which tend to the benefit of regional economies—reduce the economic logic of battery cage-based egg production. One of the advantages of accommodating hens in battery cages is that large numbers of hens can be accommodated in a relatively small area that requires less land. However, once factors such as odour pollution (which demand large amounts of land) are taken into account, it is necessary for egg-producing enterprise to operate on large lots whether or not they use battery cages. And if enterprises move away from metropolitan areas then land will be cheaper and the imperative to accommodate hens in high densities is reduced.

ToR (c) (ii): Impact on health of workers

29. The sheds in which hens are kept in battery cages are unhealthy workplaces. Perhaps more importantly for present purposes, they are less healthy for workers than the alternative, free-range arrangements.
30. Of particular note is the mental health of workers, which, in many cases, is deleteriously affected by the unsatisfactory nature of battery cage arrangements.

ToR (d): Trends in consumer demand for eggs

31. There has been a clear trend by consumers to prefer free-range eggs. Undoubtedly, there are problems with the free-range industry as well, but they should not detract from the conclusion that consumers increasingly prefer free-range eggs over battery cage produced eggs (nor from the conclusion that battery cages should be banned).

32. It can be noted that the trend towards purchasing free-range eggs, which has been long-standing, presaged a wider trend, now emerging, in favour of meat substitutes. In recent times, alternative meats have become so popular that recently in the United States CNN reported a shortage in production compared with demand. Most significantly, some meat alternatives have reached the point at which the product is indistinguishable from real meat, and approximately the same price.
33. This broad trend will affect the egg industry. An early move away from battery cages will better prepare NSW's egg industry for the future. A failure to begin this process now runs the risk—the significant likelihood—of severe commercial consequences in future.

ToR (e): Consumer protection

34. Consumers have a right to proper information about the products they buy. (Even accidental deception of consumers gives rise to legal action for deceptive and misleading conduct contrary to the *Fair Trading Act 1987* (NSW) and *Competition and Consumer Act 2010* (Cth).)
35. Although purchasers of cartons of eggs in supermarkets are served by the labelling of cartons, a vast array of other products that have eggs as ingredients are not labelled to distinguish between those that contain free-range eggs and those that contain cage-produced eggs. They should be. These products include not only processed foods available in supermarkets but meals served in restaurants.
36. The law should provide for proper disclosure.

ToR (f) (i) & (ii): Social and economic effects of a ban and of legislating measures & standards

37. A ban on battery cages would have impacts that are in some ways comparable to the impacts of other technological changes. For example, some specific jobs may be replaced by other jobs. In some ways, the economic effects would be unlike other cases: for example, the tendency of a ban would be to encourage the egg-producing industry to shift further from metropolitan centres, benefitting regional and rural NSW.
38. As in other cases, the net economic effect of replacing battery cage operations would be beneficial, for the change would be from an unsustainable industry that has lost community support to a sustainable industry that has support.
39. The social effects would be beneficial too, not least because of the sense that a ban would confer on NSW a sense, and reality, of being a progressive, leading society.

40. The same points apply to legislating minimum standards and other measures for animal welfare.

ToR (g): Advantages and disadvantages of different egg production methods

41. Each egg production method has advantages and disadvantages. Even battery cage-based production has the advantage of taking up less land—if the polluting effect on neighbours is not taken into account.
42. The critical issue is whether battery caged-based production methods have some advantage so large, or alternative methods have some disadvantage so large, that it outweighs the significance of gross cruelty on a wholesale, indeed, industrial, scale. No such factor is apparent. The disadvantages of banning battery caged-based egg production are very small, and to a large extent are illusory, when the long term and all the circumstances are taken into account,

ToR (h): Assistance to business

43. There can be considerable resistance to government (taxpayer) money being spend on industry assistance and subsidies. It is not the role of governments to protect businesses and investments from losing value when consumers reduce their liking for a product, whether because a new technology displaces the old or for another reason.
44. Nevertheless, industry assistance is often provided by governments, and can be justified on the basis of protecting jobs or the communities that are economically dependent on a significant local industry. Although it is unlikely that any particular town in NSW is economically dependent on cage-based egg production, it remains open to the government to conclude that an industry assistance package would be appropriate.
45. Unlike other cases, such a package can be justified on animal welfare grounds. Like creating sustainable jobs, raising animal welfare standards is properly a matter for the society as a whole, through its government. And if the government chooses, as it should, to raise animal welfare standards then it is appropriate for the government assist industry to meet those standards.
46. Furthermore, a well-designed package could use leverage so as to secure improvements that are partly funded by an assistance program and partly funded by the industry itself. For example, a funding program could offer enterprises a portion of the money needed to install new infrastructure and take other steps in the interests of animals (hens), on the basis that the funding was available only to those who were contributing their own funds—and only for a limited time: such an arrangement, coupled with information to the effect that old production methods would be phased out in the near future (whether by a legislative ban or by market forces), is likely to see enterprises invest in needed improvements in order to obtain corresponding funding from the assistance package. A further element of

such a scheme could be to withhold some of the funding until after the improvements were made: the guarantee of funding if the improvement was made to raise standards would enable alternative finance to be obtained (for its repayment would be secured by the government guarantee), but its temporary withholding would ensure that the improvements were made.

ToR (i) & (j): Scientific literature and other matters

47. As is well known, for several years each new scientific investigation into the sentience and intelligence of animals, including birds, has produced more evidence to the effect that animals' intelligence is higher than previously thought. That is certainly the overwhelming trend, and any research findings in the opposite direction (and none is known to the author) must be viewed with doubt.
48. Long gone are the days when it was thought that animals (and children) did not suffer pain. Not only is it clear that they do but that their suffering when subjected to cruel treatment goes beyond the merely physical. Psychological suffering can be significant, and is an especially significant issue in respect of long-duration confinement, just as it is for humans. Those who would contend that the confinement of hens in battery cages does not produce suffering—physical and psychological—bear a heavy onus of proving what cannot be proved, both because the probability that animals experience cruelty differently from the way humans do is so unlikely, and because the consequence of cruelty, and therefore the consequences of being wrong on this issue, are so great.

Appendix: The current state of the law

1. The *Prevention of Cruelty to Animals Act 1979* (NSW) ('the PoCtA Act') prohibits cruelty to animals, but defines 'cruelty' in a way that requires consideration to be given to whether or not what was done to the animal was justifiable, necessary or reasonable.
2. In particular, the meaning of 'cruelty' focuses not merely on the suffering that may have been inflicted on an animal but also on what need might have existed for it. Some suffering (emergency first aid, for example) is legitimate, and all the relevant circumstances must be considered.
3. Section 4 (2) provides:

For the purposes of this Act, a reference to an act of cruelty committed upon an animal includes a reference to any act or omission as a consequence of which the animal is *unreasonably, unnecessarily or unjustifiably*:

 - (a) beaten, kicked, killed, wounded, pinioned, mutilated, maimed, abused, tormented, tortured, terrified or infuriated,
 - (b) over-loaded, over-worked, over-driven, over-ridden or over-used,

- (c) exposed to excessive heat or excessive cold, or
- (d) inflicted with pain.

Section 4 (1) provides that '*pain* includes suffering and distress.'

4. The PoCtA Act is an example of legislation of a kind that exists in many jurisdictions and can trace their origins to the United Kingdom's *Cruel Treatment of Cattle Act 1822*, *Cruelty to Animals Act 1835* and *Cruelty to Animals Act 1849* (UK). The 1849 Act was considered by the Queen's Bench Division of the High Court in England in the seminal case of *Ford v. Wiley* (1889) 23 QBD 203 (per Coleridge CJ and Hawkins J, each agreeing with the other).
5. In *Ford v. Wiley* there had been a prosecution for an offence against s. 2 of the 1849 Act by a farmer who had dehorned his cattle, a procedure that inflicted pain and suffering and allegedly had the purpose of achieving the safety of other (confined) cattle who might otherwise be gouged and certainly had the purpose of increasing the profitability of the farmer's business.
6. Section 2 made it an offence to 'cruelly beat, ill-treat, over-drive, abuse, or torture . . . any animal' (*Ford v. Wiley* at pp. 209, 217), which is not materially different from the subs. 5 (1) of the PoCtA Act.
7. The Court accepted that '[n]ecessary' pain could lawfully be inflicted by humans upon 'animals over which we have assumed or have been given dominion' (p. 210). Indeed, even extreme pain (without proof of more) will not *per se* constitute cruelty (e.g., the court accepted that extreme pain may be caused to achieve great benefit, such as can occur in life saving surgery) (p. 209). However, the infliction of suffering on an animal will be lawful only if (i) the conduct involved is confined to '[t]hat without which an animal cannot attain its full development or be fitted for its ordinary use' (p. 209) and (ii) the suffering is 'only such . . . as is reasonably necessary to effect the result' (p. 210). Judging whether or not suffering is reasonably necessary requires consideration not only of the means but also the object itself: some pain and suffering will be so great that it will not be justified by even an otherwise legitimate purpose, for the object of the conduct involved must be an 'adequate and reasonable object' (p. 210). In short, the purpose of the infliction of suffering must be great enough to justify the suffering (legitimacy and proportionality of purpose), and the means used must be those that will reasonably minimise the suffering (legitimacy and proportionality of means). Coleridge CJ said (p. 215):

There must be proportion between the object and the means [T]o put thousands of cows and oxen to the hideous torments described in this evidence in order to put a few pounds into the pockets of their owners is an instance of such utter disproportion between means and object, as to render the practice as described here not only barbarous and inhuman, but I think clearly unlawful also.

The Court held that the infliction of animal pain and suffering merely because it was 'convenient and profitable . . . cannot with any show of reason be called necessary' (p. 209). That an animal was harmed "not . . . wantonly, but for the purpose of convenience

and profit, is not in itself to be a sufficient defence. It ought to be shewn to be necessary or reasonable under all the circumstances” (p. 223).

8. *Ford v. Wiley* has been considered and applied in various cases, including in New Zealand (*Garrick v. Silcock* [1968] NZLR 595), Canada (*R. v. Menard* (1978) 43 CCC (2d) 458), and elsewhere; and it has been discussed in South Australia (*Cunningham v. Sparrow* [1924] SASR 17) and cited in Western Australia (*Daniele v. Weissenberger* [2002] WASCA 289 at [45]). Whilst it has sometimes been theorised that the rationale of anti-cruelty laws is not protection of the animals from cruelty but the protection of human sensibilities, that is not the law in NSW, where not only is the relevant statute called the *Prevention of Cruelty to Animals Act* but it has been judicially opined that ‘[t]he offences created [by that Act] are created with the purposeful legislative intention of protecting animals’ (*Bell v. Gunter* (Supreme Court of NSW, Dowd J, unreported, 24 October 1997), quoted and followed in *Mark Pearson v. Janlin Circuses Pty Ltd* [2002] NSWSC 1118 at [7]).
9. Two Israeli cases provide clear and useful statements that accord with *Ford v. Wiley*. In *Let the Animals Live v. Hamat Gader Recreation Industries* [1997] IsrSC 51(3) 832 (LCA 1648/95) (cited in *Noah v. Attorney General* [2003] IsrSC 215), it was held:

we must examine and find out *what was the purpose* for which one did what he has done, and does this purpose reflect a worthy social value? Where we find that the purpose is worthy, we shall continue to examine whether the *means* one took is worthy. And finally: Is there a *balance* between the suffering and the torments endured by the animal and the purpose and means? Does it pass the *Proportionality Test*?

This passage was quoted by Strasberg-Cohen J, writing for the majority of the Supreme Court of Israel in *Noah v. Attorney General*, in which the force-feeding of geese in order efficiently to produce *foie gras* for human consumption was banned. No doubt, feeding humans is a worthy object that can justify (a reasonable level of) inflicting pain and suffering on animals. However, applying *Ford v. Wiley*, his Honour held:

Even when a desirable and legitimate object is sought to be obtained, the magnitude of the operation and the pain caused thereby must not so far outbalance the importance of the end as to make it clear to any reasonable person that it is preferable that the object should be abandoned rather than that disproportionate suffering should be inflicted (*Ford v Wiley* (1889) 23 QBD 203, 220).

10. With one qualification, these English and Israeli statements accurately reflect the proper construction of the PoCtA Act (especially ss. 5 and 6) (and also s. 530 of the *Crimes Act 1900*). The qualification is that the reference in *Ford v. Wiley* to the law’s allowing an animal ‘be fitted for its ordinary use’ is probably obsolete. Even if not, it was not intended to mean that, and should not now be taken to allow, ordinary or traditional uses to have some special protection from the law as otherwise expounded in *Ford v. Wiley*, *Noah v. Attorney General*, and the PoCtA Act.
11. *Ford v. Wiley* and the cases that have applied it also have application to s. 24 of the PoCtA Act. Beyond the general prohibitions of cruelty just discussed, the PoCtA Act has a series

of more specific prohibitions in ss. 7 to 23. Importantly, they do not limit the scope of ss. 5 and 6 of that Act (let alone of s. 530 of the *Crimes Act*. Then, in pars 24 (1) (a) and (b), 'Certain defences' are provided. Each defence, however is limited by the requirement that what was done was done 'in a manner that inflicted no unnecessary pain upon the animal'. This limit sets a high standard of welfare—'necessity'—that is perhaps sometimes overlooked. It is also language that attracts, at a minimum, the reasoning in *Ford v. Wiley*. Indeed, it is arguable that a test of 'necessity' is even stronger than the analysis provided by *Ford v. Wiley*.

12. Finally, s. 9 of the PoCtA Act should be mentioned. It provides:
- (1) A person in charge of an animal which is confined shall not fail to provide the animal with adequate exercise.
 - ...
 - (1A) Subsection (1) does not apply to a person in charge of an animal if the animal is:
 - (a) a stock animal other than a horse, or
 - (b) an animal of a species which is usually kept in captivity by means of a cage.

Properly understood, subs. (1) requires the exercising of confined animals and subs. (1A) makes an exception for, inter alia, animals usually kept in captivity by means of a cage. Even if hens are 'usually' kept in captivity by means of a cage, which might be debated, s. 9 does not provide that it is legal keep hens in battery cages. This is because subs. 9 (1A) provides an exception to subs. 9 (1), but it does not provide an exception to s. 5.

13. Accordingly, if a hen is kept in a battery cage thereby is caused pain, distress or suffering then an offence will have been committed against s. 5 of the PoCtA Act.