**Submission No 135**

# INQUIRY INTO ANIMAL CRUELTY LAWS IN NEW SOUTH WALES

**Organisation:** Animal Defenders Office

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Animal Defenders Office
*Using the law to protect animals*

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The Director
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Dear Committee Members

**Submission to the NSW Legislative Council Select Committee on Animal Cruelty Laws in New South Wales**

Thank you for the opportunity to provide a submission to the Legislative Council Select Committee on Animal Cruelty Laws in New South Wales ("NSW").

**About the Animal Defenders Office**

The Animal Defenders Office ("ADO") is a nationally accredited not-for-profit community legal centre that specialises in animal law. The ADO is run entirely by volunteers, and offers information and representation for individuals and groups wishing to take legal action to protect animals. The ADO also produces information to raise community awareness about animal protection issues, and works to advance animal interests through law reform.

The ADO is a member of Community Legal Centres NSW Inc., the peak body representing community legal centres in NSW.

**Our submission—overview**

The ADO acknowledges that humans' capacity for inflicting suffering on non-human animals is significant. For this reason, as long as the fundamental objective of the *Prevention of Cruelty to Animals Act 1979* (NSW) ("POCTA Act") is to prevent cruelty to animals,[1] it is of paramount importance that this objective, and the POCTA Act as a whole, is properly enforced. As is the case with other regulatory frameworks in place to protect the vulnerable in our society, animal protection laws must be exercised effectively, impartially, transparently, and with appropriate accountability.

This submission is not a critique of individual charitable organisations such as the Royal Society for the Prevention of Cruelty to Animals NSW ("RSPCA NSW") or the Animal Welfare League NSW ("AWL NSW"). The ADO values and respects organisations that aim to prevent, and dedicate resources towards preventing, cruelty towards non-human animals. However, it is also

[1] *Prevention of Cruelty to Animals Act 1979* (NSW), s3(a).

the ADO's responsibility to draw attention to the systemic flaws in the animal protection legal framework that make it difficult, if not impossible, for charitable organisations to meet the POCTA Act's objectives.

This submission seeks to present the ADO's concerns about the enforcement of animal cruelty laws in NSW through first outlining data and case studies which demonstrate the inability of the existing enforcement agencies to deal with the extent of animal cruelty in NSW.

The submission will then explore the systemic problems in the legal and structural framework of animal cruelty law enforcement in NSW which may at least partially explain some of the catastrophic failures in animal protection that our case studies highlight. Indeed, the ADO submits that these systemic problems not only prevent effective animal cruelty enforcement in NSW, but also offend basic principles that should underpin the exercise of coercive executive power, such as accountability to the community in whose name the power is supposedly exercised. Ultimately these systemic problems fail humans and non-humans alike.

Finally, the submission suggests ways to address these concerns, to ensure animal protection enforcement is conducted not only effectively, but transparently and with full accountability to the Government and, by extension, the people of NSW. The ADO submits that the best framework to deliver these outcomes would be through an independent, impartial and sufficiently funded statutory authority empowered to investigate, enforce and advise on animal welfare and prevention of cruelty to animals. At a minimum, the ADO submits that the existing framework requires significant adjustments to be fit for purpose, through guaranteed funding, full disclosure of enforcement activities and statistics, and proper review mechanisms.

The ADO's detailed submissions on the Terms of Reference are set out below.

**1(a) the effectiveness of the charitable organisations currently approved under section 34B of the Prevention of Cruelty to Animals Act 1979 ("the Act") in achieving the objects of the Act, namely:**
**(i) to prevent cruelty to animals**
**(ii) to promote the welfare of animals by requiring a person in charge of an animal:**
**(a) to provide care for the animal,**
**(b) to treat the animal in a humane manner,**
**(c) to ensure the welfare of the animal**

<u>Enforcement of the POCTA Act – an overview</u>

Animal cruelty offences under the POCTA Act are criminal offences and can be dealt with by the Local Court or Supreme Court.[2]

Despite the criminal nature of animal cruelty offences, 'approved charitable organisations' play a key role in the enforcement of those offences (as opposed to usual law enforcement agencies such as the police).

Under section 34B of the POCTA Act the relevant Minister may approve a charitable organisation as an enforcement agency under the Act. The definition of 'charitable organisation'

[2] Section 34(1), POCTA Act.

under the POCTA Act specifically refers to 'the Royal Society for the Prevention of Cruelty to Animals, New South Wales' (s4, definitions).

Individuals with enforcement powers under the POCTA Act are referred to as 'officers' and 'inspectors'. Members of an approved charitable organisation can be appointed as both types of enforcement officers.

For example, an 'officer' can be 'a member of the police force' or 'an officer of an approved charitable organisation…appointed by the Minister as an officer for the purposes of this Act' (s4, definitions). An 'officer' has certain limited enforcement powers, including to demand names and addresses.[3]

'Inspector' is defined to include those 'officers' appointed under the POCTA Act, and who are also authorised to carry out specific enforcement duties under the Act (s24D). Police officers are also 'inspectors' with enforcement powers under the Act (s24D). The enforcement powers of inspectors (including those appointed from a charitable organisation) include:

- To enter land (s24E)
- To examine animals (s24I)
- To seize animals (s24J)
- To destroy animals (s24J)
- To issue legally enforceable notices (s24N)
- To question persons (s24NA)
- To issue penalty notices (s33E)

In addition to these enforcement powers, approved charitable organisations are among the very few entities that have the authority to institute court proceedings for an offence against prevention of cruelty laws in NSW.[4]

The above is a summary of the regulatory framework which gives officers from private charitable organisations considerable, albeit inadequate (as will be discussed later in this submission), powers to enforce criminal laws under the POCTA Act in NSW.

The ADO is unaware of any other criminal laws that are enforced primarily by private charities. We submit that as a general principle it is inappropriate in 21st-century Australia to allow criminal laws to be enforced by private charities.

Lack of resources

One of the fundamental problems in delegating the enforcement of animal cruelty laws to private charities is that charities are funded by donations from the public rather than by governments, which means that the charity inspectorates are chronically underfunded.

[3] Part 2A, POCTA Act: 'Powers of officers'.
[4] Section 34AA, POCTA Act. The other entities are inspectors, police officers, the relevant Minister or departmental head, a person with the consent of the Minister or departmental head, or any other prescribed person or body [none is currently prescribed]: s34AA(1) POCTA Act.

For example, RSPCA NSW has only 32 inspectors[5] to police a state that is over 809,000 km$^2$ in size[6] and containing many, many millions of animals[7]. The number of inspectors is clearly inadequate to ensure compliance with, and to enforce, the objects of the POCTA Act.

Enforcement failures – farmed animals

Nowhere is the inability to properly enforce animal protection laws more amply demonstrated than in relation to farmed animals, and in particular, factory-farmed animals.

The last report by the national arm of the RSPCA on 'prosecutions by animal type' that the ADO could locate was for 2011-12.[8] That report shows that prosecutions of dogs, cats and horses constituted 85% of all prosecutions, whereas livestock were only 9% (approximately 24 prosecutions). Yet by far the largest number of animals used by humans then and now is in the agricultural sector.[9]

The lack of enforcement regarding animals used in commercial sectors is also evident in the very low number of routine inspections of commercial premises where animals are kept or processed.

The number of commercial premises using animals in NSW would be extremely high.[10] Yet RSPCA NSW is reported as carrying out only 87 routine inspections in 2017-18, down from 327 in 2011-12.[11] These low numbers of inspections are clearly inadequate and at the very least demonstrate that it is impossible to assess the efficacy of the current enforcement regime as there are not enough inspections to be able to measure compliance with the POCTA Act in relation to the millions of farmed and other commercially kept animals.

Lack of information about animal cruelty investigations in NSW

The paucity of information about animal cruelty investigations is another indication of the systemic problems in having private charitable organisations responsible for enforcing animal cruelty laws. The 2018-19 annual report of RSPCA NSW contains limited data and statistics about the RSPCA's enforcement activities, and in particular about complaints, written

[5] https://www.rspcansw.org.au/what-we-do/animal-welfare/our-inspectorate/#1500602646476-5f6a7cec-9204. The ADO was unable to find the number of AWL NSW inspectors.
[6] https://en.wikipedia.org/wiki/New_South_Wales.
[7] For example, according to the Australian Bureau of Statistics ("ABS"), in 2017-18 there were 30 million pigs, cattle and sheep in NSW: https://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/7121.0Main%20Features612017-18?opendocument&tabname=Summary&prodno=7121.0&issue=2017-18&num=&view=.
[8] 2011-12, https://www.rspca.org.au/sites/default/files/website/The-facts/Statistics/RSPCA%20Australia%20National%20Statistics%202011-2012.pdf.
[9] According to ABS data, at the time of the report there were 28 million cattle, 74 million sheep and lambs, 2.1 million pigs, and 83 million chickens in the agriculture sector in Australia; https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/7121.0main+features82011-12.
[10] Commercial premises involving animals would include the following *types* of premises: • Abattoirs • Aquariums • Breeding establishments • Circuses • Feedlots • Grooming establishments • Guard dog firms • Hobby farms • Intensive farms • Kennels • Livestock vessels (aeroplanes) • Markets • Pet shops • Petting zoos • Poultry farms • Pounds • Riding schools • Rodeos • Saleyards • Shelters • Shows • Tourist parks • Zoos. The number of such premises is unknown.
[11] https://www.rspca.org.au/sites/default/files/RSPCA%20Australia%20Annual%20Statistics%202017-2018.pdf.

directions, penalty notices, prosecutions, or convictions.[12] For example, while the report states '77 prosecutions commenced'[13], it does not provide any further information such as offences, types of animals involved, or outcomes. No information about written notices[14] or penalty notices[15] is included in the report, despite charitable organisations being required to report on the numbers of these notices issued each year.[16] It is therefore difficult if not impossible for the general public to determine how effectively these enforcement measures are working, and whether they are contributing to the efficiency of the administration of the Act.[17]

The AWL NSW's annual reports contain basic figures for complaints, attendances by inspectors, section 24N written notices, and penalty notices, but no information about prosecutions.[18]

The ADO submits that any organisation empowered to enforce the POCTA Act, which includes carrying out criminal prosecutions and exercising coercive powers, should be required to disclose how it has exercised its powers, so that relevant stakeholders, including the general public, can evaluate whether the enforcement agencies have exercised these powers effectively and appropriately.

**1(b) the ability of the charitable organisations currently approved under section 34B of the Act ("the approved charitable organisations") to achieve the objects of the Act, including:**

**(i) the level of funding provided by government**

Government funding

If private charities are given enforcement powers under prevention of cruelty to animals legislation, the ADO submits that it is in the public interest that these organisations be sufficiently funded by government to conduct inspection, investigation and enforcement activities in relation to animals in need.

[12] *2018-19 Your Year in Review*, Royal Society for the Prevention of Cruelty to Animals NSW: https://www.rspcansw.org.au/wp-content/uploads/2019/07/2018-2019_Year-in-Review_Online.pdf.
[13] Ibid, no page number in original.
[14] Section 24N, POCTA Act.
[15] Section 33E, POCTA Act.
[16] Section 34B(3), POCTA Act and clauses 34(2)(e) and (f), *Prevention of Cruelty to Animals Regulation 2012* (NSW).
[17] For example, in 2005 the POCTA Act was amended to allow authorised officers to issue penalty notices for a range of offences. This was done to 'greatly increase the efficiency of the Act's administration. The system will cover many types of offences that were often not prosecuted in the past': POCTA Amendment Bill 2004, Second Reading Speech: https://www.parliament.nsw.gov.au/bill/files/792/A5005.pdf. If the number of penalty notices issued each year is not known, it is impossible to evaluate whether the penalty notices are achieving their stated aim.
[18] The most recent AWL NSW annual report that the ADO could find is for the 2017-18 financial year: https://www.awlnsw.com.au/wp-content/uploads/2019/05/AWL_NSW_AnnualReport2018-1.pdf.

RSPCA NSW reported that it received just over $1 million by way of 'government grant' in 2018-2019, compared to over $25 million from legacies.[19] Government funding is the smallest source of income for the charity.

The ADO submits that the current funding provided by the NSW Government is manifestly insufficient to allow the RSPCA NSW to conduct inspection, investigation and enforcement activities to the degree required to prevent cruelty to animals in NSW.

**1(d) whether it is effective and appropriate for non-government charitable organisations to be granted investigative and enforcement powers for criminal prosecutions under the Act, with regard to their:**

**(i) capacity to exercise those investigative and enforcement powers**

The ADO submits that giving private charities (limited) powers to investigate and enforce criminal laws is inappropriate and unfair for both the charities and the animals they are meant to protect. The charities are not given the full range of investigation and enforcement powers that is given to other law enforcement agencies such as NSW Police. This means the charities cannot properly carry out their investigative and enforcement functions under the POCTA Act.

A recent example of how this failing in the current regime can lead to significant injustice to animals was demonstrated by the attempted prosecutions of certain greyhound trainers for live baiting.[20] Two greyhound trainers in NSW were charged with multiple offences under section 530 of the *Crimes Act 1900* (NSW) ('Serious Animal Cruelty') in relation to rabbits and a possum used as live bait to train greyhounds in late 2014 and early 2015. Part of the evidence against the trainers was undercover footage that was potentially in breach of the *Surveillance Devices Act 2007* (NSW). The District Court Judge ruled that the evidence was inadmissible, effectively destroying the prosecution's case against the defendants. The cases were heard on appeal by the High Court of Australia which, at the time of writing this submission, has reserved its decisions.

Charitable organisation officers do not have surveillance powers so are unable to gather the kind of evidence that can be critical to prove contraventions of animal protection laws, which usually occur deep inside private premises and away from public view.

The ADO submits that these cases provide an example of the restrictions on charitable organisations' capacity to enforce animal cruelty laws. It is also why it is inappropriate to have private charity officers responsible for enforcing criminal laws relating to animal cruelty. They show why these laws would be better enforced by public officials, such as police officers, who already have the necessary powers and training for covert surveillance and undercover investigations.

[19] The Royal Society for the Prevention of Cruelty to Animals New South Wales, *General Purpose Tier 2 Financial Report* pp8, 31 <https://www.rspcansw.org.au/wp-content/uploads/2019/10/finance2019.pdf> (30 June 2019).
[20] Grech v R and Kadir v R [2019] HCA, .

**1(d) whether it is effective and appropriate for non-government charitable organisations to be granted investigative and enforcement powers for criminal prosecutions under the Act, with regard to their:**

**(ii) ability to exercise those investigative and enforcement powers in relation to commercial premises and intensive farm operations involving high numbers of animals**

***Case studies***

The ADO has been involved in several matters that have unfortunately highlighted the inability of existing enforcement agencies to adequately enforce animal protection laws in NSW, especially in relation to farmed animals or animals kept in remote regions. The result is usually a substantial denial of justice to non-human animals used or kept by humans.

**Wally's Piggery**

Wally's Piggery was located just outside Canberra. In 2012 undercover footage of shocking conditions in which pigs were kept and killed in the piggery was released to the public.[21] The story made international headlines, and prompted an investigation by RSPCA NSW, the police, and the NSW Food Authority into the piggery. Fifty-three animal cruelty charges were laid against the managers, including 12 counts of aggravated animal cruelty. The managers pleaded not guilty.

In an inexplicable turn of events, however, RSPCA NSW dropped all animal cruelty charges laid against the managers of Wally's Piggery and the case against the defendants was dismissed in the Yass Local Court in November 2014.

This outcome caused deep concern amongst animal advocates across Australia. Advocates felt let down by the NSW legal system which had failed both to provide justice for factory farmed animals, and to sanction farmers who abuse the animals in their care.

The public was owed an explanation for this extremely disappointing outcome, yet details were difficult to obtain. The ADO contacted the RSPCA NSW at the time for an explanation, but was referred to their media release.[22] The release, however, contained little actual information, instead relying on incorrect statements[23] and circular arguments.[24] It completely failed to provide any cogent explanation for why all charges against the managers were dropped.

This case demonstrates a profound lack of accountability to the community by private charities that are entrusted with public duties to enforce animal cruelty criminal laws.[25]

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[21] https://www.aussiepigs.com/piggeries.php?name=wally.
[22] http://www.abc.net.au/radionational/linkableblob/5907270/data/nsw-rspca-statement-data.pdf.
[23] The release incorrectly stated that witnesses would not provide a statement to RSPCA NSW. The ADO understands that individuals in question were in fact prepared to provide statements, and that the RSPCA was advised of this during the preparation of the case.
[24] RSPCA NSW states that the footage allegedly obtained by activists was illegally obtained and therefore could not be used as evidence. Then, however, it insists that their case against the managers of the piggery did not rely on the activists' footage but the RSPCA's own footage. With respect, the lawfulness or otherwise of the activists' footage therefore seems irrelevant.
[25] More details about this case can be found here: https://www.ado.org.au/wallys-piggery-case-dismissed.

**Yass truck crash**

At 1.20am on the morning of Easter Monday, 2 April 2018, a poultry transportation truck crashed on Burley Griffin Way towards Binalong, NSW. The truck was carrying 108,000 one-day old live chickens in containers. It appears the chicks were being transported from a hatchery in Picton to a broiler (chicken meat) factory in Tabbita in NSW.

Most of the containers were thrown from the truck when it crashed down an embankment. The local council was reportedly in charge of the 'clean up' that lasted until the afternoon that same day.

In the early evening that day a number of local residents attended the crash site which had been ostensibly cleared of debris from the crash. These members of the public wished to make sure that no live birds had been left behind.

As they approached, the members of the public heard plaintive but feeble chirping. When they reached the site, a scene of utter devastation met their eyes. The area was scattered with hundreds of little bodies both alive and deceased. The area looked as though it had been bulldozed with live chicks left to suffocate and die in the dirt. The members of the public dug the baby chickens out of the dirt by hand.

The rescuers captured the scene and the rescue efforts on video and camera.

Over the following days the rescuers attended the ADO's office to report what had happened and what they had seen. They instructed the ADO to make a formal animal cruelty complaint to RSPCA NSW.

ADO's volunteer lawyers then compiled a detailed animal cruelty complaint to both RSPCA NSW and NSW Police. Our complaint set out various potential breaches of the *Prevention of Cruelty to Animals Act 1979* (NSW), the *Prevention of Cruelty to Animals Regulation 2012* (NSW), the *Prevention of Cruelty to Animals (Land Transport of Livestock) Standards 2013 No 2* (NSW), and section 530(1A) of the *Crimes Act 1900* (NSW).

The complaint is attached to this submission and marked as Attachment A.[26]

The ADO lodged the complaint with RSPCA NSW on Saturday 7 April 2018 at 4.10pm. At 4.47pm RSPCA NSW contacted the ADO to acknowledge receipt of the complaint and to ask for further information, which the ADO provided that same day.

On Thursday 12 April 2018 the Hon. Mark Pearson MLC asked the then Minister for Primary Industries in Question Time in the Legislative Council about the truck crash and the alleged acts of cruelty against the chickens. In his response the Minister advised that his Department (the Department of Primary Industries) had also reported the matter to the RSPCA.[27]

[26] Attached with permission from the complainants.

[27] https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1820781676-75933. We note that in his response the Minister also erroneously stated that the rescuers had not reported the matter to the RSPCA. This is incorrect as the ADO had lodged the complaint with the RSPCA 5 days before the Minister's statement.

Upon request, on 30 May 2018 the ADO provided contact details for the rescuer-complainants to RSPCA NSW.

As neither the ADO nor the complainants had received any further contact from RSPCA NSW, on 24 October 2018 the ADO sent an email to both the investigating OIC and RSPCA NSW's Legal Counsel asking for an update on the investigation.

The ADO did not receive a reply to our inquiry.

On 1 April 2019 the ADO again contacted RSPCA NSW for an update. We were aware that the statutory time limitation for commencing prosecutions under the POCTA Act was imminent (3 April 2019). After that point, it would not be possible to initiate a prosecution in relation to the alleged offences.

The Chief Inspector of the RSPCA NSW rang the ADO later that day (1 April 2019). Our office emphasised that the statutory time limitation was approaching and that we wanted an update on the case. The Chief Inspector said he did not know what was happening, but that he would get back to us.

On 3 April 2019 the statutory time period in which a prosecution could be brought in relation to the cruelty offences against the chickens ended.

On 10 April 2019 the RSPCA NSW Chief Inspector rang the ADO to advise that he wanted to find out why the matter had not proceeded to charges.

The Chief Inspector said he would be in touch.

At the time of writing this submission (December 2019), **the ADO has not received any further contact from RSPCA NSW.**

To this day, we do not know why the matter did not proceed to charges despite our detailed complaint setting out a broad range of potential offences.

In our view this case represents a tragic failure of our animal protection regulatory framework. Hundreds of new-born animals were buried alive, run over by motor vehicles, crushed, or simply left to die, and no person or person in charge has been held accountable for such unconscionable conduct towards sentient beings. This is despite a detailed and thorough complaint setting out multiple offences under prevention of cruelty to animals legislation and industry standards being provided to both RSPCA NSW and the NSW Police within five days of the incident occurring. The RSPCA confirmed it was investigating the incident. Witness contact details were provided to the RSPCA. **Yet to date no complainant has ever been contacted about the complaint.** Nor have they been advised as to why charges were not laid against the perpetrators of the cruelty to the newborn chickens.

This demonstrates an unacceptable lack of accountability by the current animal cruelty enforcement bodies, and a failure to fulfil their duties to investigate potential breaches of prevention of cruelty to animals legislation.

It also highlights the problem of not being able to compel a private charity to carry out public duties to investigate potential breaches of the legislation they are empowered to enforce.[28]

**Lakesland Hens**

On 10 June 2018 a local resident in the Wollondilly Shire in NSW found several hens on a public road, apparently escaped from a nearby barn egg facility. The resident spent hours trying to herd the hens back to the shed. At the shed the resident found hen carcasses strewn about everywhere and live hens in cramped conditions inside the shed. The resident contacted the police and the RSPCA that day.

By 19 June 2018 no action appeared to have been taken by either enforcement agency. Further evidence of the appalling conditions of the hens emerged later that night.

The following day members of the public contacted RSPCA NSW[29] demanding the matter be investigated.

RSPCA NSW officers attended the property at nightfall on 20 June 2019 but left shortly afterwards as it was too dark to see inside the shed.

They returned on the morning of 21 June 2019. They discovered approximately 1,000 dead hens, and approximately 4,000 hens alive but in very poor body condition, being emaciated, injured, dehydrated, and too weak to reach the food or water that had recently been provided to them. Despite the urgent need for veterinary treatment for many of the hens, no action was taken to relieve their suffering. Instead the enforcement officers decided to leave the premises without mitigating the hens' suffering, and to leave them in the care of the farmer who had been in charge of the hens up until that point and who was therefore allegedly responsible for their suffering and appalling condition.

We note that failure to take reasonable steps to alleviate pain or to provide veterinary treatment to animals are animal cruelty offences under the POCTA Act.[30]

Horrified at the failure to alleviate the pain and suffering of the hens, several members of the public tried to intervene to assist the animals, but were instead arrested and charged with a number of criminal offences including aggravated trespass.[31]

Sometime after these events, all 4,000 hens were put down.[32]

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[28] *Neat Domestic Trading Pty Ltd v AWB Ltd* [2003] HCA 35.

[29] Other stakeholders were also contacted, including the police, local council, and local land services.

[30] Section 5(3), POCTA Act:

> (3) A person in charge of an animal shall not fail at any time:
>
> …
>
> (b) where pain is being inflicted upon the animal, to take such reasonable steps as are necessary to alleviate the pain, or
>
> (c) where it is necessary for the animal to be provided with veterinary treatment, whether or not over a period of time, to provide it with that treatment.

[31] Section 4B ('Aggravated unlawful entry on inclosed lands'), *Inclosed Lands Protection Act 1901* (NSW). The ADO represented these individuals in their hearing before the Liverpool Local Court.

[32] The exact date when the hens were put down is not clear, but it was several days or even weeks after the investigation on 21 June 2018.

This case demonstrates the inability of private charities to prevent cruelty to or alleviate suffering of large numbers of animals (typically livestock), or to achieve other objects of the POCTA Act in relation to these animals such as providing care, treating them in a humane manner, and ensuring their welfare.[33]

**Other examples—rural regions**

The ADO regularly receives pleas for help from people in rural and remote regions of NSW who observe animal cruelty or neglect by local residents, but whose complaints to authorities go unheeded and who are powerless to assist. For example, a resident of a very small rural town has reported observing domestic dogs, puppies, goats, cats, kittens, horses, and rabbits suffering from severe neglect, permanently tethered, kept outside without shelter in extreme heat, cold, and rain, screaming from hunger at passers-by, and carrying untreated broken bones and other injuries. The incidents are reported to approved charitable organisations or the police, but invariably the animals die from their condition before an inspector makes it to the remote town (if they do), either to investigate or to take meaningful action. In reporting these incidents to our office, the resident stated in despair:

> I hope these awful stories make a difference. … No wonder I have such anxiety here – if you care about animals, it's an awful life for them.

**1(d) whether it is effective and appropriate for non-government charitable organisations to be granted investigative and enforcement powers for criminal prosecutions under the Act, with regard to their:**

**(iii) ability to conduct cases to test the application of legislative provisions in the Act**

In some jurisdictions in Australia, any person can start a private prosecution for a breach of animal welfare laws.[34]

Private prosecutions for animal cruelty offences were possible in NSW until 2007 when section 34AA was introduced into the POCTA Act. Section 34AA provides that proceedings for offences under POCTA legislation may only be instituted by certain limited parties, including approved charitable organisations, the police, and the relevant Minister.

This limitation was strongly criticised during parliamentary debates about the proposed amendment. It was noted that the authorised charitable organisations essentially monitor the treatment of pets and are therefore unlikely to bring prosecutions against commercial organisations.[35]

Moreover, it was pointed out that restricting entities that can initiate prosecutions inhibits the prospect of **test cases** that develop the law.[36] Before the restrictions were introduced, Australia's first case to consider the psychological suffering in a wild animal was initiated

[33] POCTA Act, s3(b).
[34] ACT, Queensland, South Australia, Tasmania.
[35] https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-80150.
[36] Ibid.

against a circus owner who tormented an elephant.[37] In other cases, rare injunctions were sought and, in one, obtained to stop anticipated cruelty to animals who were targeted in proposed aerial culling exercises.[38]

Of the relatively few prosecutions under POCTA legislation that have been brought since section 34AA was introduced,[39] few, if any, have tested, and therefore developed, the law, or tested its application to different categories or species of animals or different uses of animals.

Finally, requiring the Minister's consent for 'any other person to institute proceedings'[40] risks politicising the process of initiating prosecutions, and undermining the perception of prosecutorial independence. The relevant Minister is the Minister for Agriculture.[41] The departmental Secretary who can also give consent is the Secretary of the Department of Industry.[42] This also limits the prospects of prosecutions being initiated against agricultural industries which it is the primary function of the Minister and Secretary to protect.

The ADO therefore recommends that the restrictions on who can institute proceedings for offences against POCTA legislation be **removed**.

This recommendation applies only to prosecutions, and not to investigations.[43]

The ADO submits that it would be reasonable to allow other interested parties to bring proceedings given that private charities are inevitably under-resourced and that the police have other priorities. It would also allow anti-cruelty laws to develop in line with contemporary community expectations and values.

**1(d) whether it is effective and appropriate for non-government charitable organisations to be granted investigative and enforcement powers for criminal prosecutions under the Act, with regard to their:**

**(iv) accountability to government and the community**

**(v) exemption from the provisions of the Government Information (Public Access) Act 2009;**

**(vi) exemption from administrative review under the Administrative Decisions Review Act 1997.**

[37] *Pearson v Janlin Circuses P/L t/as Stardust Circus* [2002] NSWSC 1118.
[38] *Animal Liberation Ltd v National Parks & Wildlife Service* [2003] NSWSC 457; *Animal Liberation Ltd v Department of Environment & Conservation* [2007] NSWSC 221.
[39] https://www.rspca.org.au/facts/annual-statistics-2017-18. The latest statistics available on RSPCA Australia's website indicate that between 2012-13 and 2017-18, approximately 49,000-57,000 complaints were made, but only 358-370 prosecutions were initiated nationally.
[40] POCTA Act, s34AA(1)(e).
[41] 'Status information' re POCTA Act, https://www.legislation.nsw.gov.au/#/view/act/1979/200.
[42] POCTA Act, s4 'Definitions', ***Department*** and ***Secretary***.
[43] Suggestions that removing restrictions on prosecutions would lead to people entering farms to gather evidence is nonsensical, as powers to inspect and investigate potential breaches of the Act are and always have been limited to authorised officers: POCTA Act, Part 2A.

While the ADO recognises the RSPCA's unique history in the enforcement of animal welfare laws,[44] we are concerned about any legal framework in contemporary society that gives non-state entities coercive powers normally confined to the executive branch of government. The ADO submits that this framework prevents assurances, usually provided by relevant administrative law principles, that the powers are being exercised effectively and appropriately.

Moreover, one of the cornerstones of democracy and the rule of law is that the exercise of executive power, in particular coercive powers and powers relating to criminal penalties, must be transparent and accountable to ensure those powers are being exercised lawfully, diligently and appropriately.

In administrative law, for example, the following checks and balances apply to the exercise of executive power and to administrative decisions that affect the rights or interests of individuals:

1. Freedom of information or the rights of individuals to public access of government records.
2. Review of administrative decisions, either through merits or judicial review.
3. Routine and periodic Parliamentary scrutiny such as Budget Estimates.
4. Assessment or investigation of administrative actions, such as the Commonwealth or NSW Ombudsman.
5. Any compatible human rights or civil liberties, including freedom of expression.

The ADO submits that the delegation of this (executive) power to private or non-government entities should not exempt those entities from similar levels of public scrutiny. The ADO submits that it is the nature of the power itself, both in its policy objectives (in this case to prevent animal cruelty) and the consequences of its misuse, that requires that these checks and balances be put in place.

Oversight of authorised animal charitable organisations

None of the above considerations apply to private organisations empowered under the POCTA Act to conduct investigations and to enforce the Act. As highlighted previously in this submission, RSPCA NSW and AWL NSW do not provide annual reports with sufficient information to enable the public to properly scrutinise their performance in exercising these powers.

In addition, these private charities are not covered by the *Government Information (Public Access) Act 2009* which means that it is difficult, if not impossible, to get access to documents about their activities and performance under the POCTA Act.[45]

Furthermore, decisions by these private charities are not merits reviewable under the *Administrative Decisions Review Act 1997* (NSW).[46]

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[44] Society inspectors operated before a police force was established in England: https://en.wikipedia.org/wiki/Royal_Society_for_the_Prevention_of_Cruelty_to_Animals.
[45] The *Government Information (Public Access) Act 2009* (NSW) applies to government and public agencies. Private charities are not an 'agency' for the purposes of this Act: s4 'Interpretation': ***agency***.
[46] Administrative decisions are reviewable by the NSW Civil and Administrative Tribunal 'if enabling legislation provides that applications may be made to the Tribunal for an administrative review under

While these organisations are required to provide annual reports to the Minister responsible for the Act,[47] it is not clear whether the reports are made publicly available.

Moreover, the only formal complaints process or mechanism available to persons affected by a decision of the RSPCA is internal review—that is, review by the same organisation that made the original decision.[48] The ADO submits that this provides insufficient oversight of a body that wields significant powers that can include entering properties without consent and seizing and destroying companion and other animals used or kept by humans.[49]

It is also a concern that it can be unlawful for members of the community to discuss or speculate publicly on the activities of approved charitable organisations. The NSW Supreme Court case of *Royal Society for the Prevention of Cruelty to Animals New South Wales v Mal Davies* [2011] NSWSC 1445 held that RSPCA NSW can sue individuals for defamation of the RSPCA as an organisation. Of particular note is that in this case the RSPCA was not required to demonstrate real economic loss as a result of the public statements, but rather the amount of damages awarded was in recognition of the apparent need for RSPCA NSW to maintain its reputation so as to continue to generate the donations on which it relies.[50] In this case RSPCA NSW was awarded $100,000 in damages for statements made via a website and email by an individual to subscribers.

While the ADO recognises that not-for-profit organisations can sue for defamation under the *Defamation Act 2005* (NSW),[51] the ADO queries whether this should be available to entities that have criminal prosecution powers and that are not subject to public information disclosure obligations.

The ADO submits that the above factors raise concerns that the current animal cruelty enforcement framework lacks appropriate oversight mechanisms and is not subject to sufficient public scrutiny to ensure enforcement powers are being exercised effectively and are fit for purpose.

Furthermore, if it is argued that private entities should not be subjected to increased public scrutiny, then in our view private entities should not have coercive powers normally within the remit of the executive government.

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this Act of any such decision (or class of decisions) made by the administrator', *Administrative Decisions Review Act 1997* (NSW), s9. The administrator is the decision-maker: s8. The POCTA Act does not provide for applications to the Tribunal for decisions made under the Act.

[47] Section 34B(3), POCTA Act.

[48] *Complaints about enforcement*, Department of Primary Industries: 'If you would like to complain about an RSPCA Inspector involved in an animal cruelty matter, please contact the Chief Inspector of the RSPCA NSW in writing at inspectors@rspcansw.org.au or at PO Box 34, Yagoona NSW 2199', https://www.dpi.nsw.gov.au/animals-and-livestock/animal-welfare/complaints/enforcement.

[49] POCTA Act, Part 2A, Division 2 'Powers of inspectors'.

[50] *RSPCA NSW v Davies* [2011] NSWSC 1445, [49].

[51] Section 9(2).

**1(f) whether the Government should establish a specialist unit to investigate animal cruelty complaints and enforce animal protection laws, either as part of the NSW Police Force or as a separate statutory enforcement agency**

Previous findings of NSW Parliament

The ADO draws the Committee's attention to the findings in the report of the Select Committee on the Use of Battery Cages for Hens in the Egg Production Industry. In particular we note that the Select Committee found that "[e]nsuring positive animal welfare outcomes is a matter for government."[52]

We also note that the Select Committee recommended that "the NSW Government establish an independent office of animal welfare, as a distinct authority, separate and independent from the NSW Department of Primary Industries, to be responsible for animal protection issues".[53]

The ADO endorses this recommendation.

The ADO would also support the creation of a specialist unit within the NSW police force, using the New York Police Department's partnership with the American Society for the Prevention of Cruelty to Animals as a potential model.[54] The ADO's support for such a unit would be contingent on the unit being adequately funded, resourced, and trained, and established for the primary purpose of responding to animal cruelty complaints in both urban and rural areas.

If this Committee does not agree with these alternative enforcement models, or considers that investigation and enforcement should remain with private charities, then the ADO submits that sufficient checks and balances should be put in place, including comprehensive reporting to the public, inclusion in information access and administrative review schemes, increased Parliamentary and Ombudsman scrutiny, and being subject to external complaint mechanisms. Furthermore, significantly increased government funding should be allocated to the investigation and enforcement functions of these entities so that they can be carried out in a way that prevents as much animal cruelty as possible.

**1(g) any other related matter**

**Conclusion**

The ADO recognises the complexity of responding to animal welfare issues within such a large and diverse jurisdiction as NSW. The ADO also recognises the work that RSPCA NSW and AWL NSW carry out to achieve the POCTA Act's objectives. However, by delegating most investigation and enforcement functions to private charities with extremely limited funding and resources, the current framework will never be able to detect, prevent and deter cruelty to

[52] *Use of Battery Cages for Hens in the Egg Production Industry (Report; no. 1)*, Select Committee on the Use of Battery Cages for Hens in the Egg Production Industry (October 2019), Sydney NSW, page 57, par. 3.115.
[53] Ibid, p 38.
[54] https://www.aspca.org/animal-protection/nypd-partnership.

animals, and especially to farm animals, at a level that is acceptable by today's community standards.[55]

As such, we support calls for the creation of an independent statutory authority with responsibility for enforcing animal protection laws in NSW.

While such an authority is being created, we recommend that the existing framework be strengthened by:

1. Guaranteeing sufficient funding for existing enforcement agencies to enable them to carry out inspections, investigations and enforcement activities with respect to all animals in NSW;
2. Bringing the enforcement agencies within existing access-to-information and administrative-review regimes;
3. Requiring the enforcement agencies to disclose detailed information about their performance to the public and to be directly answerable to public, including Parliamentary, scrutiny when required;
4. Creating external complaint mechanisms for aggrieved individuals, including witnesses to animal cruelty whose complaints are not investigated and/or who are not provided with information about their complaint by the relevant enforcement agency; and
5. Removing restrictions on who can institute proceedings for offences against POCTA legislation.

We thank the Committee for taking our submission into consideration.

**Farnham Seyedi**
Volunteer Solicitor

**Tara Ward**
Volunteer Solicitor and Executive Director

Animal Defenders Office

6 December 2019

[55] See research commissioned by the Commonwealth Department of Agriculture in Futureye, *Australia's Shifting Mindset on Farm Animal Welfare* (2018). The nationally representative survey found that:

- 95% of people view farm animal welfare to be a concern; and
- 91% of people want to see some reform to address their concerns.

The report is available at: http://www.agriculture.gov.au/SiteCollectionDocuments/animal/farm-animal-welfare.pdf.