Submission No 80

INQUIRY INTO ANIMAL WELFARE POLICY IN NEW SOUTH WALES

Organisation: RSPCA NSW

Date Received: 28 February 2022

Inquiry into animal welfare policy in NSW
SUBMISSION - RSPCA NSW

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Introduction

This submission represents the eighth occasion in two years that RSPCA NSW has provided the NSW Parliament with detailed and lengthy submissions in respect of vital issues of animal welfare. That is in addition to filing submissions on published discussion papers, giving evidence before Parliamentary Committees, providing individual and direct advice to the NSW DPI and other stakeholder groups, and participating in roundtable discussions established by Members of Parliament.

It is clear that animal welfare remains at the forefront of the public consciousness, and RSPCA NSW welcomes the opportunity to provide these comments in addition to the advice given throughout this reform project. We are committed to the process of modernising and adapting animal welfare regulation and RSPCA NSW is pleased to assist with the benefit of over 90 years' experience enforcing animal welfare legislation in NSW.

In August 2021 RSPCA NSW provided detailed comment in response to the NSW Animal Welfare Reform – Discussion Paper. Some of the following comment replicates the position expressed at that time. Given the Bill has now been produced in draft form, RSPCA NSW has amended relevant portions to include those developments and where appropriate comments on the NSW DPI consultation outcomes report.

Scope and Definitions

RSPCA NSW does not support combining the legislation and contends that the three Acts as combined in the Bill do not inherently fit together.

Page 8 of the Discussion Paper recorded the view that "*the relationship between POCTAA, ARA and EAPA is confusing, so replacing them with a single Act would help to simplify the laws and reduce overlap*." Included is the opinion of a survey respondent, that *"[t]he existence of multiple acts with differing objectives adds complexity for people working in the field of animal welfare […] Simplifying and improving consistency in the legislation and across jurisdictions can only benefit legislative efficiency and improve the ability of those on the ground to do their jobs effectively*." We disagree with this statement.

RSPCA NSW accepts that statutory construction is a complicated task, particularly where there are multiple pieces of potentially relevant legislation. However, there are many other pieces of legislation which interact far more extensively with animal welfare related conduct contained within POCTAA – for example the *Companion Animals Act 1988* (NSW) (CAA), *Greyhound Racing Act 2017* (NSW) (in respect of which authorised GWIC officers are also appointed POCTAA authorised officers). There is no suggestion, however, that these Acts need to be amalgamated to form one unified Act for the regulation of behaviour relating to animals.

In fact, many would argue that combining legislation does not simplify the task of statutory interpretation but rather, by forcing the unlike together, makes the job of interpretation harder. The Animal Welfare Bill 2022 (NSW) (**the Bill**) now runs to some 89 pages and 166 sections.

The Objects of the Bill:

RSPCA NSW submits that the Objects of the three current Acts are inconsistent with being served by one piece of legislation. The Objects section is designed to inform and guide judicial officers in interpreting the legislation the subject of consideration.

The structure employed by the Bill to set out the objects, followed by a section detailing how the objects are to be achieved is a useful tool and replicates a mechanism used to good effect in other regulatory environments.

The Bill has slightly amended the current POCTAA objects, and refers now to 'primary objects' including to promote the welfare of animals, and to prevent cruelty to animals. The response in the Consultation Outcomes records the view that legislation is to set enforceable minimum standards, and that there is a role for non-regulatory initiatives "(both by the NSW Government and across the community) to promote a higher standard of welfare." That is a core object of the RSPCA NSW Constitution, we have been committed to improving animal welfare through education for the better part of 150 years. However, it is not inappropriate in our view for the legislation to refer to an expectation that more than the bare legislated minimum is the best we can hope for animals in NSW.

Further, if the Acts are combined, the Objects section should capture the modernising goal of this legislation, and expressly reference improved scientific understanding in the field. It should in our submission be made explicit that the intention over time is to move away from merely regulating to a standard of "avoiding a life not worth living", to a "minimum standard of what constitutes living 'a good life'".[1]

[1] David Mellor, 'Updating Animal Welfare Thinking: Moving beyond the "Five Freedoms" towards "A Life Worth Living"' (2016) 6 *Animals* 21 (24) at [33].

Table 2. A Quality of Life (QoL) scale where the different categories are defined in terms of the relative balance of positive and negative experiences animals may have (adapted from [32]).

Category	Description
A good life	The balance of salient positive and negative experiences is strongly positive. Achieved by full compliance with best practice advice well above the minimum requirements of codes of practice or welfare
A life worth living	The balance of salient positive and negative experiences is favourable, but less so. Achieved by full compliance with the minimum requirements of code of practice or welfare that include elements which promote some positive experiences
Point of balance	The neutral point where salient positive and negative experiences are equally balanced
A life worth avoiding	The balance of salient positive and negative experiences is unfavourable, but can be remedied rapidly by veterinary treatment or a change in husbandry practices
A life not worth living	The balance of salient positive and negative experiences is strongly negative and cannot be remedied rapidly so that euthanasia is the only humane alternative

That change over time is no doubt going to have to be a process, but the current review should situate itself clearly within the broader animal welfare discussion.

An object which references this would include for example, the statement that:

> "*Animals have intrinsic value and deserve to be afforded a quality of life which reflects that value. People have an obligation to promote the wellbeing of their animals by ensuring they live a good life*."

The definition of animal

RSPCA NSW holds the view that the definition of animal and the objects of the Bill need to be considered in conjunction with each other. The Bill is designed to protect a class of being which cannot advocate for themselves, where owners and persons in charge of animals wield considerable, if not complete, control over the quality of life enjoyed (or not) by those animals.

Neither the Discussion Paper nor the Bill refers explicitly or implicitly to sentience at all. As described above, this is both a definitional problem, and a problem with identifying the scope of the legislation. As with the comments (above) regarding a theoretical underpinning for the Bill, the issue regarding sentience is one which threatens the modernisation of animal welfare regulation in NSW.

RSPCA NSW reiterates its position that the legislation should protect all sentient beings.

The Discussion Paper's explanation for the inclusion of only certain species within the definition of 'animal', avoids the obvious rationale for their inclusion, by excluding a reference to sentience. Even more so when the discussion paper references 'alignment with the *Australian code for the care and use of animals for scientific purposes'* as a motivation for a more inclusive definition of 'animal' and this Code appropriately references sentience to explain its scope.

The Consultation Outcomes Report records the following about sentience:

> *"The draft Bill acknowledges the concept of animal sentience through reference to*

protecting animals from harm, which is defined as including distress, pain, and physical and psychological suffering."[2]

Language is important, and we consider it fundamental that concepts like sentience appear in legislation which is set explicitly to modernize animal cruelty laws in NSW. The Consultation Outcomes Report provides no explanation of why it is necessary or desirable to avoid the term in legislation, in circumstances where potential trading partners desire its inclusion, and so an alternate view is not provided for consideration.

RSPCA NSW supports the inclusion of crustaceans and cephalopods in the definition of animal.

The minimum care requirement

RSPCA NSW supports the delineation made between offences contravening a minimum care requirement and offences constituting more serious acts of cruelty which have previously been somewhat unevenly caught in the s5 and s8 *Prevention of Cruelty to Animals Act 1979* (NSW) (**POCTAA**) offence provisions.

The proposed minimum care requirements use the term "appropriate" as the legislative standard for many of the offences described. Current framing of these offences relies on proof of a failure to provide "proper and sufficient" feed, drink and shelter. In our submission, given the significant changes proposed in this Act, legislative provisions which have already been the subject of judicial review and interpretation should be retained where possible.[3] If this is not done, then the courts are going to have to re-interpret these offences in the new legislation and consider whether the standards were deliberately framed differently to change the historic standard (bearing in mind that the normal principle of statutory interpretation is to assume that if Parliament has chosen to use a different form of words then it must have intended a different standard).

The minimum care requirements in the bill have added requirements designed, it would seem, to address the second and fourth domains (i.e., behaviour and interactions with the environment, other animals, and humans), that is a positive development. However, the reference to "appropriate exercise" is both too limited and narrow in our view to meet the proposed objective of providing for the care and protection of animals. Exercise refers to activity aimed at maintaining physical fitness. This, while not necessarily unimportant, speaks more to the health domain than to the domain related to behavioural interactions. In our submission, this requirement should be for "appropriate exercise and enrichment", to reflect the fact that a core reason it is recommended to provide an animal with periods of activity and freedom from confinement is not just to allow for exercise, but also to alleviate frustration and boredom and allow it to undertake goal-directed behaviour. Such a legislative treatment would ensure that where it is inappropriate to 'exercise' a certain species, there is still a requirement to provide opportunities for them to have positive interactions with their environments.

[3] With regard to "proper and sufficient" see for example the decision of then Magistrate Lerve in *RSPCA v Hamilton* [2008] NSWLC 13.

Further, in our submission, the minimum care requirements should include providing an animal with appropriate social interaction that is "suited to the physical and behavioural requirements of the animal". This should also include specifying that they must be provided with an "appropriately clean" living environment. This change would reduce the burden of otherwise having to prove that an animal is likely to be distressed by having to live surrounded by its own and other animals' excrement, such as in hoarding situations. There is a strong precedent for such an inclusion, as it is currently a requirement for the conduct of animal trades in clause 26 of the POCTAA Regulation and there is no sound scientific reason why this requirement would only be important to the welfare of animals kept within a 'trade'.

The definition of cruelty:

RSPCA NSW draws attention to the overlap in cruelty and aggravated cruelty definitions.

Sections 25 and 26 of the Bill are the offence creation provisions for committing an act and an aggravated act of cruelty. The definitions of which are provided in sections 7 and 8 respectively. The definition of act of cruelty includes inter alia an act or omission that results in an animal being (b) unreasonably or unnecessarily killed. The definition of an aggravated act of cruelty means an act of cruelty (insert unreasonably or unnecessarily killed) that results in (a) the death … of the animal. This inserts uncertainty into two of the most important offence provisions and should be corrected to make it clear which offence has been committed.

RSPCA NSW supports the inclusion of psychological harm into the definition of aggravated cruelty and the provisions related to powers of veterinary practitioners and Authorised Officers. Aggravated cruelty therefore includes a situation where the animal is so injured, diseased or psychologically suffering to an extent that it is cruel to be kept alive.

New offence provisions:

Section 34(2)(a) tethering

RSPCA NSW reiterates its previous submission that (consistent with the guidance in the relevant Department of Primary Industries (DPI) policy)[4], consideration be given to both (a) the length of tether as a percentage of the length of the animal tethered and (b) the weight of tether as a percentage of the weight of the animal.

Further, the tethering offence proposes to include a requirement that tethering must allow for access to food, water and shelter and protection from harm. These requirements, however, do not meet the basic tenants of the Five Freedoms. Accordingly, it is necessary, in our submission, to include a requirement that the animal has access to an environment that is appropriate for its physical and behavioural needs.

The provision as drafted, does not include for example ensuring that a tethered animal can move freely (over and above sitting down and standing up), nor do they require that a tethered animal must be able to toilet appropriately, that is away from the place they are tethered to.

[4] Department of Industry Tethering Animals Policy IND-0-195
https://www.dpi.nsw.gov.au/_data/assets/pdf_file/0011/1310996/Tethering-animals-Policy.PDF

Section 37 dogs in vehicles

The current exemption at s7(2A) *POCTAA*, for livestock working dogs is not supported in its current form nor is the proposal to carry it across to the new offence provision. The exemption carries an unjustified risk to the welfare of these dogs and presents an enforcement issue in determining whether a dog is genuinely a working dog. At page 19 in the Consultations Outcomes report, it is noted that the exemption reflects that while working livestock, vehicles may occasionally cross or use public roads – for example, while moving stock between paddocks or parts of a property. However, the exemption applies to dogs "being used to control or protect stock animals." Arguably at any point where a dog is on the back of a vehicle then by definition, they are not at that time being used to control or protect stock animals. However, RSPCA NSW considers there are serious risks regardless of the length of the intended journey which mean that a dog should be appropriately tethered.

If a dog is caused harm (including distress) due to being confined in a hot car and exposed to excessive heat, an act of cruelty has been committed. Section 37(6) defines hot weather as an ambient temperature of 28 degrees or more. However ambient temperature is not the only arbiter of the potential for poor outcomes for dogs in cars. RSPCA NSW provides a relevant summary of the scientific literature on this issue below:

- The upper end of a dog's thermoneutral zone is estimated to be 27 degrees Celsius. At temperatures above 31 degrees Celsius heat is no longer lost through the skin and heat loss by evaporation through panting becomes the only means for the dog to cool itself.[5]
- Increased humidity, dehydration, confinement in closed spaces with poor ventilation, obesity and upper respiratory tract complications (such as the dog being brachycephalic) all impede the effectiveness of panting.
- Confinement prevents the dog responding to its motivation to seek shade, water and from fulfilling other behavioural mechanisms for relief from hyperthermia. Thwarted attempts to respond to internal motivations are known to cause frustration and distress.
- A vehicle's temperature rises rapidly, particularly in the first 30 minutes.[6] Therefore, once the interior reaches 32 degrees Celsius the animal can be expected to be experiencing discomfort and to be at risk as the temperature rapidly rises.
- The below experimental and modelled data indicates:
- at 23 degrees C ambient temperature a vehicle's interior can rise to 32 degrees C within 10 minutes;
- at 26 degrees C ambient temperature, a vehicle can increase to 32 degrees C within 5 minutes;
- at 29 degrees C ambient temperature, a vehicle can rise to 32 degrees C within 3 minutes;
- at ambient temperatures of 21 degrees C and above, a vehicle can reach almost 40 degrees C in 30 minutes.

[5] Jordan, M; Bauer, A. E; Stella, J. L; Croney, C. (2016) Temperature Requirements for Dogs. Are they tailored to promote dog welfare? Purdue University, Centre for Animal Welfare Science.
[6] McLaren, C; Null, J; Quinn J.(2005) Heat Stress From Enclosed Vehicles: Moderate Ambient Temperatures Cause Significant Temperature Rise in Enclosed Vehicles. Pediatrics Vol 116 (1).

As is apparent event at much lower ambient temperatures, dogs left for longer periods are at risk of significant harm.

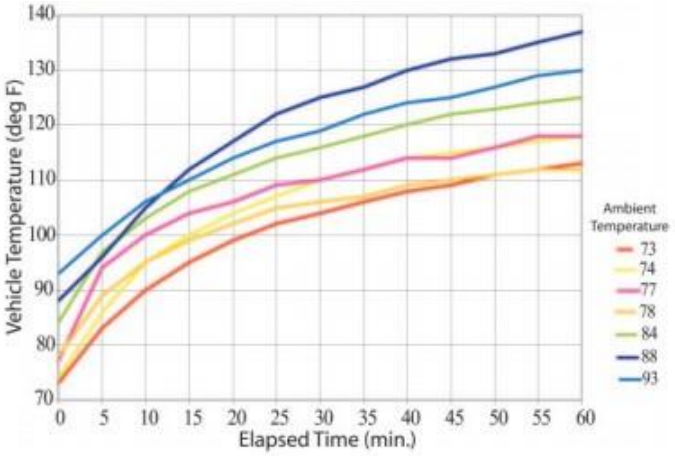

Fig 3. Representative vehicle temperature rise over time.

Elapsed time	Outside Air Temperature (F)					
	70	**75**	**80**	**85**	**90**	**95**
0 minutes	70	75	80	85	90	95
10 minutes	89	94	99	104	109	114
20 minutes	99	104	109	114	119	124
30 minutes	104	109	114	119	124	129
40 minutes	108	113	118	123	128	133
50 minutes	111	116	121	126	131	136
60 minutes	113	118	123	128	133	138
> 1 hour	115	120	125	130	135	140

Estimated Vehicle Interior Air Temperature v. Elapsed Time

Courtesy Jan Null, CCM; Department of Geosciences, San Francisco State University

Accordingly, we consider that this provision could be more nuanced, such that it is an offence to leave a dog in a car for:

- any period once the ambient temperature is 32 degrees C.
- for greater than 5 minutes when the temperature is >26 degrees C
- for greater than 10 minutes when the temperature is > 23 degrees C
- for greater than 30 minutes when temperature is > 20 degrees C

If these thresholds are imposed (to acknowledge that the above circumstances cause discomfort, physiological and psychological stress and pose an imminent risk of further welfare decline), then it follows in our submission that this should be the point at which an enforcement officer can intervene. However, s67(1)(c) of the Bill (and its corollary s24E *POCTAA*) only allows the vehicle to be entered if the animal has or is in imminent danger of significant physical injury or has a life-threatening condition. So, although an inspector would have grounds to take action against the person in charge of the dog when they are located, the animal could be provided no relief until it had declined to the point of having 'a life-threatening condition that requires immediate veterinary treatment'.

In our submission, this inconsistency in the draft Bill requires attention and remediation if the proposed offence provision is to improve animal welfare. This could be achieved by changing

the power of entry to include a power for an authorised officer to enter a vehicle where the animal is "in imminent danger of significant physical injury or harm."

In addition, RSPCA NSW considers the exemption at s37(2)(a) undermines the protective nature of this provision. Essentially if a dog is left in a hot car in the shade, then an enforcement agency would still have to prove a cruelty (that is a negative impact on the animal, regardless of the risk posed for such activity). The evidence for temperature increase in cars on hot days is independent of shade or even windows cracked for ventilation. The consequence of that is there should be no differentiation in the standard how or where a car is parked.

Section 39 production or distribution of animal cruelty material

RSPCA NSW supports attempts to regulate the conduct of people involved in committing, filming and disseminating footage of animal cruelty online. That is particularly so in the context of reported increases in the number and severity of "crush" videos, and other "Jackass" type programs gaining traction online.

Such incidents trigger enormous numbers of animal cruelty complaints to RSPCA NSW, and warrant condemnation in the strongest terms. However, there are some issues which might need to be further considered in respect of the exact conduct which is proposed to be conduct / behaviour element of the offence – that is, the production or distribution of the animal cruelty material. Connected with that are jurisdictional concerns in respect of proving where the substantive offence occurred.

There is a similar conflict between federal and state jurisdiction for other dissemination-type offences. For example, there are federal charges (often prosecuted by the Commonwealth DPP following AFP investigation) of using a carriage service to threaten or harass or using a carriage service to transmit child abuse material. The related NSW offences of stalk/intimidate or produce child abuse material, are investigated by NSW Police and prosecuted either by police prosecutors or the NSW ODPP upon election.

These are difficult, labour and time intensive offences to investigate, and they can be very difficult to prove. For example, obtaining any evidence of usernames to prove beyond reasonable doubt the identity of the person who uploaded, and therefore at some point possessed and disseminated such material, from Facebook, Twitter, Tiktok and other social media platforms is extremely difficult. For obvious reasons, the investigation techniques required to investigate offences of dissemination of animal cruelty material online are very different to those required to investigate allegations of acts of cruelty on individual animals.

Sections 22 and 23 prohibited and restricted procedures

Advice provided by a registered specialists in canine reproduction, confirms that surgical artificial insemination of canines should be a prohibited procedure. There is no justifiable reason for this procedure where non-surgical, anaesthetic-free, minimally invasive, effective alternatives exist, including for the use of frozen semen. The risks and discomfort associated with undertaking surgical artificial insemination are unnecessary with trans-cervical artificial insemination now available. We are aware that the Minister has given some undertakings to

industry about this procedure, however it appears as a prohibited procedure in section 22(1)(e) of the draft Bill. For the reasons above, surgical artificial insemination should remain a prohibited procedure. Unwillingness of some veterinarians to acquire the skills or equipment to undertake trans-cervical artificial insemination is an insufficient justification for permitting the unnecessary procedure where expert opinion within the profession confirm it as outdated.

Ear tattooing of canines and felines needs to be clarified in the new Act as a restricted procedure (only to be undertaken by veterinarians), as it currently fits the definition of a restricted act of veterinary science within the Veterinary Practices Regulation. Clause 4(1)(b) prohibits the carrying out, by a non-veterinarian, "any treatment, procedure or test on an animal that, according to current standards of the practice of veterinary science, to avoid harm or suffering to the animal, should not be undertaken without anaesthetising the animal (otherwise than by a topical anaesthetic) or without sedating or tranquillising the animal."

For avoidance of doubt, correspondence by the NSW Veterinary Practitioners Board clarifies that the current standard of practice requires ear tattooing of dogs and cats to be performed under general anaesthesia.[7]

This example illustrates the point that the public do not seek information on what acts they are prohibited to perform in legislation designed to regulate the veterinary profession. The result is that these Veterinary Practice regulatory offences are, by definition, of non-veterinarians; yet the enforcement authority (Veterinary Practitioners Board) has no jurisdiction to take action outside the profession. In our submission, referral to an animal welfare enforcement authority would be rendered meaningful by including the undertaking of restricted acts of veterinary science as an offence in the animal welfare act. To enhance clarity, the specifics of these restricted acts should be made clear, particularly the undertaking of a procedure that should be performed under anaesthetic or surgery.

Section 40 offences involving prohibited items

RSPCA NSW Inspectors regularly become aware that prohibited items, particularly shock collars are being lawfully purchased in other Australian jurisdictions. The prohibition on such items needs to make it clear that such items, even if lawfully purchased elsewhere are prohibited to possess in NSW.

Defences and exemptions in the draft bill

Any defences provided must be informed by the most contemporary animal welfare science available to ensure that what is proposed is consistent with the activities within the "certain defences" not causing unnecessary harm. Section 24 of POCTAA provides detail on species, age and husbandry procedures which are exempt. The age limits applied to stock husbandry procedures at s24 POCTAA are not appropriate, in light of the available evidence and require correction. However, the approach of providing detail means that there is no ambiguity for the public or for enforcement agencies on what activities are legal. This appears to be replaced in

[7] https://www.vpb.nsw.gov.au/ear-marking-or-tattooing-female-companion-animals

the draft bill at Part 8 Division 2 with a general defense for " performing prescribed animal husbandry in a way that inflicted no unnecessary harm on the animal". It appears that this detail will then be prescribed within the regulations which would provide the flexibility to update as appropriate.

RSPCA NSW reiterates its submission that mandatory use of pain relief and a phased ban on mulesing should be enshrined in legislation. In the absence of this action, a harm reduction approach would include recommendation to place restrictions (veterinary procedure only) to:

- The mules procedure after three months;
- De-horning of all bovine species over three months of age;
- The castration of cattle, sheep and goats over three months of age;
- The castration of pigs over 21 days;
- The tailing of sheep over three months of age;

Section 5(2) exemption for police and corrections dogs

RSPCA NSW does not support the exemption provided in respect of police and corrections dogs in the course of their duties. It is not immediately apparent what acts of cruelty or other offences contrary to the Bill might be committed presumably by a Police or Corrections officer, which would require this exemption. The argument that these animals may be exposed to welfare risks in the course of their important work would already be excluded from criminal liability by the operation of the unnecessary and unreasonable test. That is likely why this issue has not arisen, nor does it appear to be an issue. In a protective act like an Animal Welfare Act, excluding the animals used in the course of their duties by police officer partially tasked with enforcing the Act is likely to cause consternation and confusion amongst the public who may react in a knee-jerk type way as to why police are 'immune' from 'laws' protecting animals. In circumstances where this was not averted to in the discussion paper, nor has RSPCA NSW been made aware why the exemption is necessary we recommend its removal.

The penalties framework

At page 19 of the Discussion paper, reference is made to the following principles:

- a sufficient deterrent to a person committing the offence
- proportionate to the severity of the offence
- in line with community expectations
- comparable to other jurisdictions.

RSPCA NSW would draw attention to the purposes of sentencing as detailed in s3A *Crimes (Sentencing Procedure) Act 1999* (NSW). Maximum penalties need to be set which reflect the principles of sentencing law in our view:

3A Purposes of sentencing

The purposes for which a court may impose a sentence on an offender are as follows—

(a) to ensure that the offender is adequately punished for the offence,

(b) to prevent crime by deterring the offender and other persons from committing similar offences,

(c) to protect the community from the offender,
(d) to promote the rehabilitation of the offender,
(e) to make the offender accountable for his or her actions,
(f) to denounce the conduct of the offender,
(g) to recognise the harm done to the victim of the crime and the community.

Tiered penalties are now commonplace in regulatory prosecutions, and RSPCA NSW supports their use in this context.

Section 72(1)(d) Powers of Authorised Officers to administer sedatives and/or pain relief to animals

RSPCA NSW supports this amendment.

The exemption for administering anaesthetics and sedatives (a restricted act of veterinary science) is already available to certain individual applicants under the *Veterinary Practices Act*. There is an issue at the moment however, which inserts a nearly insurmountable hurdle relating to a veterinarian's authority to only dispense medication for an animal under their care. There are also some limitations in the *Poisons and Therapeutic Goods Act 1996* (NSW) in relation to having medications in one's possession.

Flexibility would be beneficial regarding which medications may be used, as there is regular advancement in medication development and labelling. To mitigate risk, RSPCA inspectors are well supported by veterinary staff who can be contacted. Inspectors have regular and relatively immediate contact with both internal and private practitioner veterinarians. There would be no desire to have controlled substances, that is schedule 8 substances, included within this authority, but inclusion of schedule 4 and schedule 4 (appendix D) drugs would provide sufficient flexibility to intervene appropriately when required.

This provision currently limits the use of sedatives by inspectors to circumstances where the animal then requires veterinary treatment. However, there are also occasions where animals require prompt euthanasia on site. Inspectors currently have the power to euthanase animals that are cruel to be kept alive. Premedication with sedatives is often the recommended approach to reduce pain, stress and fear in the animal during handling for euthanasia. Examples of these scenarios include wildlife that have been severely injured, beyond repair, in motor vehicle accidents or horses with severely fractured limbs.

To allow for this provision to fully support the desired animal welfare outcomes, an addition is required to allow for sedation and pain relief to be used also in circumstances where the inspector is exercising their power to destroy an animal.

Part 7, Division 3 Powers of entry

There have previously been some definitional inconsistencies in relation to the descriptions given to homes on property as distinct from land, animal trades, and other types of structures within the current *POCTAA* and *POCTAR*. The draft Bill appears to have reconciled those.

RSPCA NSW supports the construction of the entry powers pursuant to this division.

Particularly, RSPCA NSW supports a specific approach to authorising entry for "rechecking" purposes and suggests that the provision explicitly refer to the power of entry to recheck including buildings (i.e. not being the dwelling house where animals are kept).

In relation to the change in terminology towards "written notices" (section 73(1)), it is noted that if there is not a substantive need to change terminology, then as much as possible consistent language should be used. Accordingly, for our purposes, "written directions" is the preferred term as it accords with the current s24N and s24NA *POCTAA*.

Section 106 Local Land Services and council officers with powers in critical situations

This proposal is supported. Consideration should be given to include the authority to enter private land where there is reasonable suspicion that an animal could be suffering. The bushfire context is relevant where, in the absence of a property owner to provide consent, the ability to search land that was bushfire impacted to identify injured animals is crucial. The animals cannot usually be identified from outside the front fence to provide the impetus for entry. In addition, the power should include the ability for the LLS or council officer to be accompanied by anyone required to assist. For example, DPI veterinarians and private veterinarians were called upon to assist LLS with searching and euthanising fire injured animals.

Enforcement Arrangements

For the reasons espoused in our submission to the Animal Cruelty Inquiry, RSPCA NSW does not support an independent office of animal welfare.

The discussion paper refers to enforcement of the *Exhibited Animals Protection Act* (**EAPA**) as predominately enforcing a licensing scheme which was suggestive that the enforcement officers would not require particularly extensive skills and expertise relevant to animal care. The series of Codes underpinning the EAPA have a range of husbandry requirements related to the provision of proper nutrition and environments for complex species. Without quite advanced knowledge of animal care and animal welfare it is difficult to see how the legislation could be effectively enforced. This knowledge is also required to identify breaches of *POCTAA* for timely referral. This should be addressed, at least, at a policy level to ensure enforcement officers have the necessary expertise.

Section 103 annual reporting

RSPCA NSW supports arrangements for Approved Charitable Organisations (**ACO**) reporting to Parliament via Portfolio Committee 4. However, notes the additional administrative and personnel impost appearing before the Committee will incur to a Charitable organisation with recurrent funding under $500,000 annually.

Section 154 sale and rehoming of animals in ACO custody

RSPCA NSW recommend an amendment to the currently framed s154(7) prohibition on ACOs rehoming surrendered animals the subject of proceedings. There is a small incongruity within s154 that repeats the same problem in the current s30A *POCTAA.* That is although ACOs can rehome animals surrendered to it immediately (ie without a holding or notice period) that capacity is restricted once proceedings commence. Respectfully it cannot have been, nor could it continue to be Parliament's intention that animals surrendered to the RSPCA have to be held whilst court proceedings finalise, particularly in circumstances where COVID has delayed the fixing of hearings by years. It would cause severe detriment to animals to have to wait for Court matters to finalise. Nor should defendants be responsible for costs accrued in that respect when they have surrendered animals to the RSPCA for them to be rehomed.

RSPCA NSW agrees that a requirement for charitable organisations to retain a stray or abandoned animals for 21 days is unreasonable and not conducive to good animal outcomes. The proposal to align the rehoming provision with the *Companion Animals Act 1998* (NSW) (**CAA**) is problematic because the CAA has not been reviewed in over 20 years and may not represent best practice.

Because of the inconsistency in the way in which canines and felines are approached within the CAA, the two species must be considered differently in relation to how charitable organisations are required to manage their care as stray animals. Section 63A(1) of the CAA requires an approved premises (which includes charitable organisations) to deliver a "seized" animal to a council pound within 72 hours if it has not been claimed. All stray dogs fall within the definition of a "seized" animal, which means they will be transferred to a pound facility and processed according to council process. Abandoned dogs, often received through our inspectorate, remain in the care of RSPCA prior to rehoming. It is accepted that, for canines, the period of detaining and making inquiries to find an owner could align with s64 of the CAA.

If a notice is required to be given under s63 CAA, the legislation provides that if the animal is not claimed that the animal may be destroyed or sold after the period of fourteen (14) days following the giving of the notice. Notice is ordinarily given by posting a letter to the last known address of the registered (or otherwise known) owner.

The use of the word "give" in the legislation brings into application s76 *Interpretation Act (NSW) 1987*. This means that the notice isn't deemed to have been given until seven (7) working days after the letter has been posted, and then a full fourteen (14) days must be given from that day. To avoid this unnecessary effluxion of time, RSPCA NSW suggests that section 154(3) be amended to require a holding period of three days for unidentified cats and seven days for identified cats, and that the Act specify that the holding starts from the date of entry into custody. We further suggest that the same period be specified for dogs.

Stray cats are rarely captured by the definition of 'seized' under the CAA and, consequently, council facilities rarely accept transfer of stray cats from approved charitable organisations. Therefore, the burden of undertaking the council function falls to these organisations.

The CAA has the longest statutory requirement for the holding of stray animals in Australia.

For comparison, a summary of jurisdictional statutory holding periods are as follows:

State	Identified	Un-Identified
Victoria	8 Days	8 Days
WA	7 working days	3 working days
NSW	14 working days	7 working days
Tas	5 working days	3 working days
Qld	Nil (RSPCA QLD practice: 5 days)	Nil (RSPCA QLD practice: 3 days)
SA	Nil	Nil

The adverse consequences of lengthy pound stays include:

- at-capacity pound facilities with reduced capacity to care for animals,
- increased animal stress,
- subsequent increased rates of infectious disease,
- reduced home-ability
- higher euthanasia rates due to infectious disease, behavioural decline and capacity limitations
- impact on staff responsible for managing animals over longer times.

This cascade of issues and poor outcomes, related to length of stay, is well described by shelter medicine experts.[8]

The justification for holding periods is likely to relate to allowing anyone seeking to be reunited with the pet adequate time to do so and, for identified animals, correspondence to reach an individual if there are contact details available.

However, data on over 17,500 stray cats in RSPCA shelters across four Australian states demonstrates that holding period length is not correlated with reclaim rates for either identified or non-identified cats.

State	Reclaim rate identified cats (holding period)	Reclaim rate un-identified cats (holding period)
NSW	35% (14 – 21 working days)	6% (7 - 21working days)
Victoria	47% (8 days)	5.1% (8 days)

[8] Karsten CL, Wagner DC, Kass PH, Hurley KF. An observational study of the relationship between Capacity for Care as an animal shelter management model and cat health, adoption and death in three animal shelters. Vet J. 2017 Sep;227:15-22. doi: 10.1016/j.tvjl.2017.08.003. Epub 2017 Aug 7. PMID: 29031325.

State	Reclaim rate identified cats (holding period)	Reclaim rate un-identified cats (holding period)
Qld	46% (5 days)	7% (3 days)
SA	40% (Nil)	3% (Nil)

Furthermore, an analysis of 3,052 stray cats that came into RSPCA NSW shelters in financial year 2021 found that the average time for an identified cat to be reclaimed was 2.4 days and the average time for non-identified cats to be reclaimed was 4.25 days. In total, 18% of stray cats entering the shelter are identified, and 82% are unidentified.

RSPCA NSW recommends that statutory holding periods for stray cats in approved charitable organisations recognise that shelters do not have the same statutory function as council pounds, and that, according to the CAA, local and state government do not intend for cats picked up by the public as "stray" to be managed in the same way as dogs. Further, approved charitable organisations are unique in that they are required to allocate shelter capacity to inspectorate animals as well as allocating resources to assist vulnerable people when they are seeking temporary refuge for their animals.

There is no evidence that longer holding periods within RSPCA shelters improves rehoming rates, and the health and behavioural outcomes are at greater risk, RSPCA NSW recommends that, for cats, the holding periods are brought in line with interstate approaches and made three days for unidentified cats and seven days for identified cats. The intention is to increase the ability to rehome stray and homeless cats and prevent unnecessary stress from prolonged shelter stays.

It should be understood that the average length of stay for a cat being rehomed in an RSPCA shelter is currently 25 days, while they undergo microchipping and desexing and promotion for adoption. Accordingly, the opportunity for an owner to come forward and reclaim their animal would not end after 3-7 days.

By failing to include provision specifically for infant animals the Bill perpetuates the inconsistencies with the CAA (see s64(2)) as well as risking the welfare of some of the most vulnerable animals. Very young or weak motherless kittens and pups require experienced, dedicated neonatal foster carers to safeguard their welfare. RSPCA NSW accepts, and hand raises many hundreds of neonatal kittens each year. They require intensive, around the clock care and can still have high mortality rates at very young ages due to a range of risk factors associated with being orphaned.

A Bill requiring infant animals to be held for seven days fails to acknowledge the resources required to adequately care for these animals and in doing so puts them at risk. Approximately 3% of our feline intake last year were these vulnerable kittens that were unviable in part because there were insufficient carers to provide this skilled, intensive care. We continue to invest in training and recruiting carers but where they do not exist, infant animals cannot be allowed to suffer.

Statutory limitation periods and authority to prosecute provisions

Statutory limitation period
RSPCA NSW supports retaining the newly amended limitation period.

The savings and transitional provisions which amended the limitation period to three years in 2021 however did not specify whether the increase in limitation period related to matters already within an Inspector's knowledge. This should be clarified.

Authority to prosecute provisions

Whilst it is not an element of the Discussion Paper, we are cognisant of the repeated calls to make POCTAA (or its equivalent) offences prosecutable by private prosecutors. That is not an approach supported by RSPCA NSW. It is not an efficient way to do justice and it often causes difficulties for the NSW ODPP who ultimately takes over prosecutions (which they may determine to withdraw for want of evidence).

Most regulatory offence frameworks (road transport, environmental offending, water offences) have authority-to-prosecute provisions which restrict who can commence proceedings. That is so for good reason. Regulatory prosecutions are a niche set of offences in the world of criminal prosecutions, and the Courts prefer uniform approaches to these matters, which you get if you have a small number of authorised prosecutors. There is no evidence that the three authorised prosecutors – AWL, NSW Police and RSPCA NSW are not fulfilling their obligations.

The Government response to the Select Committee report did not support the removal of the authority-to-prosecute provision. There has not been a demonstrated need to change that position now.

Part 6 – the application of Stock Welfare Panels

RSPCA NSW supports the expanded application of stock welfare panels.

Efficacy of court orders
Section 130(1)(a) Court orders

RSPCA NSW supports the extension of disqualification orders to offenders diverted pursuant to the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW). We would like to clarify the previous intention was to extend such orders also to "non-conviction" bonds pursuant to s9(1)(b) *Crimes (Sentencing Procedure) Act 1999* (NSW). The current drafting of the Bill does not reflect this.

This has been the subject of discussion for some time, in that courts cannot order the disposal of animals in RSPCA NSW custody, where no conviction has been recorded. We had understood the intention was to capture s9(1)(b) non conviction bonds with the s14 *Mental Health and Cognitive Impairment Forensic Provisions Act* diversions. There are good reasons why someone being sentenced following a plea or finding of guilty might not warrant a conviction, but should not have custody of an animal.

Section 74 animals can be seized if held in contravention of a court order

RSPCA NSW supports this proposal.

Section 158 recognition of interstate prohibition orders

RSPCA NSW has not had to request interstate recognition of orders, but upon review of a companion animal breeder who entered NSW following prosecution in Victoria, the issue did need to be considered. There is significant state variability as to the statutory basis for disqualification orders, and how they are applied in practice. That limits the capacity for recognition of NSW orders externally, but hopefully, with a provision framed widely enough, it should be possible for the Minister or their delegate to recognise interstate orders in NSW more easily.

Section 128 interim disqualification orders

RSPCA NSW supports the extension of interim disqualification orders.

At page 56 of the Consultation Outcomes Report, the comment is made that "the draft Bill carries across the current interim disqualification order provisions available under *POCTAA* with no changes." That is not so. Whilst RSPCA NSW has previously commented that the section would benefit from the inclusion of a statutory test, which would assist the court in making a determination pre-conviction to award custody to RSPCA NSW. Currently s31(4) does not give the Court any guidance as to when the order should be made. The draft Bill has incorporated the disqualification order test – the court being satisfied that if the person were to be a responsible person in respect of an animal they would **be likely** to commit a further offence.

That is a very difficult bar to reach before the substantive matter has even been determined. RSPCA NSW recommend consideration be given to including matters to consider, rather than a conclusive determination about probability of reoffending.
For example, elements such as:

- number of animals seized
- number of animals retained
- the seriousness of the offending conduct if proved (for example the seriousness of the veterinary conditions)
- the extent of the negligence or omission the subject of the charges
- any difficulty the particular animals pose for a lay carer to provide
- the cost of housing the animals until the substantive proceedings can be finalised (which is getting increasingly long because of COVID delays to the court system)
- other issues as it might be in the interests of justice to consider – for example noncompliance with written directions, lack of insight to offending conduct, pre-existing or prior prohibition / disqualification orders

It might also be useful to stipulate that such applications are civil applications and can proceed "on the papers" without the need for oral evidence.

In addition to the capacity for interim disposal orders to be sought, RSPCA NSW recommends that where stock animals are seized from an owner who has an existing disqualification order in place, authority should be granted for the ACO or NSW Police to dispose of that animal in

advance of the commencement of any proceedings against the owner. That could be achieved by inserting within s129 a provision which empowers an authorised officer, having seized a stock animal from an owner who at the time of seizure is a disqualified person within the meaning of s130(2)(b) of the Bill, the authorised officer may destroy, sell or dispose of the thing, or authorise its destruction, sale or disposal. This would allow seizing authorities to efficiently deal with seized animals, allowing them to be rehomed at an early stage, or making provision for the stock to be sold or transferred.

Licensing schemes and committees in the Regulation

It is understood that the impetus for risk-based licensing is to reduce administrative burden on licensees and to allow for allocation of resources in the most appropriate way. Although there are some examples of lower risk activities, in general, the activities being licensed carry significant risk of harm if there is non-compliance. It is therefore, in our submission, necessary to resource the enforcement adequately to provide high level oversight rather than relying on an estimation of the severity of the outcome if non-compliances are missed.

Section 121 protections from liability

RSPCA NSW supports this inclusion.

The provision however refers to "things done by or under the direction of authorised officers: and provides that "[a]n authorised officer is not guilty of an offence against this Act or the regulations for anything done in good faith in the exercise of the officer's functions as an authorised officer." This does not provide protections to the actual ACOs who commence proceedings in the NSW Local Court. This provision needs to encompass things done by individual authorised officers, but also the commencement of matters by the organisation.

In that regard, we refer the commentary of Justice Rothman in the *Brighton* costs judgment to NSW DPI for consideration.[9] RSPCA should have the benefit of costs protections as does every other prosecutor in NSW. It is neither fair nor appropriate that a charitable organisation which performs a significant statutory function should also have to bear litigation costs for unsuccessful prosecutions. In Brighton, RSPCA NSW was ordered to pay costs after Brighton successfully appealed to the Supreme Court, then had to incur further costs appealing that decision (successfully) to the NSW Court of Appeal. RSPCA NSW should be afforded costs protections pursuant to the *Criminal Procedure Act 1986* (NSW) and the *Costs in Criminal Cases Act* (NSW) as every other prosecutor is protected.

Review

Given the significant step this reflects, RSPCA NSW recommends an initial 12-month statutory review, and thereafter three yearly review periods.

[9] *Brighton v Will (No 2)* [2020] NSWSC 925. Available here.