

**Submission  
No 91**

## **INQUIRY INTO ANIMAL WELFARE POLICY IN NEW SOUTH WALES**

**Organisation:** NSW Ombudsman

**Date Received:** 28 February 2022

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# Submission to the Standing Committee on State Development

**Inquiry into Animal welfare policy in NSW**

**28 February 2022**

# Animal welfare policy in New South Wales



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### Summary

Thank you for the opportunity to make a submission to this inquiry into Animal welfare policy in New South Wales.

The primary purpose of these submissions is to comment on the provisions of the proposed Animal Welfare Bill (**Bill**) that provide for the Ombudsman's oversight over 'authorised officers' and 'approved charitable organisations'.

We have no objection to those proposed provisions which concern our jurisdiction.

However, the Bill as currently drafted would continue what appears to be an anomaly: although the exercise of functions under animal welfare legislation by 'authorised officers' is included within our complaint-handling and oversight jurisdiction, it would be 'excluded conduct' (and therefore not in our jurisdiction) if the authorised officer is a police officer.

We do not otherwise comment on the policy merits of the Bill.

However, during the course of preparing this submission we have identified a matter which we have taken the opportunity to raise for the Committee's consideration. In particular, we have noted that the Bill will repeal specific provisions of current legislation and replace them with 'mere' regulation-making powers. In particular, we note:

- 1 the repeal of provisions in the *Prevention of Cruelty to Animals Act 1979*, the *Animal Research Act 1985* and the *Exhibited Animals Protection Act 1986* concerning the establishment and composition of committees and panels, and the inclusion instead of clauses that provide for certain matters to be dealt with by regulation
- 2 the replacement of the registration and licensing provisions of the *Animal Research Act 1985* with a clause providing that regulations 'may provide for a licensing scheme to carry out a licensed activity'
- 3 the replacement of the *Animal Research Act 1985* complaints scheme with a provision permitting the regulations to provide for a complaints scheme, and
- 4 clause 46 of the Bill, which provides for regulations to prescribe which decisions under the Bill are to be 'reviewable decisions' for the purposes of the Bill.

## Oversight of authorised officers and approved charitable organisations

### Ombudsman oversight over authorised officers

The Bill provides that:

- a) a public service officer, or
- b) a person employed or otherwise engaged by an approved charitable organisation

may be appointed as an ‘authorised officer’ (clause 91) and that the following individuals are also taken to be ‘authorised officers’:

- c) a police officer (clause 92), and
- d) an inspector appointed under the *Greyhound Racing Act 2017* (clause 94).

As currently drafted the Bill, when read with the *Ombudsman Act 1974*, will only permit the Ombudsman’s Office to oversight the conduct of authorised officers referred to in (a), (b) and (d), and not the conduct of authorised officers who hold their positions and undertake their functions by virtue of being police officers.

### Ombudsman’s current jurisdiction under the *Prevention of Cruelty to Animals Act 1979* (POCTA Act)

Until 1 July 2017, officers and inspectors exercising functions under the POCTA Act and who were members of the NSWPF fell within the Ombudsman’s complaint handling and investigation jurisdiction in respect of those functions.

At that time, the Ombudsman also had a broader role in the handling of complaints made about NSWPF officers in their capacity as police officers.

On 1 July 2017, the Ombudsman’s ‘police conduct’ jurisdiction ended and the Law Enforcement Conduct Commission (LECC) was established with a different jurisdiction regarding police conduct complaints.

Schedule 1 of the Ombudsman Act was amended by Act 61/2016 (Sch 6[22]) to reflect the fact that, generally speaking, police conduct complaints were no longer handled by the Ombudsman’s Office, but that the Ombudsman retained jurisdiction to handle certain complaints made in relation to specific Ombudsman functions that might also involve police officers.

The result was a new item in Schedule 1 of the Ombudsman Act which excluded from the Ombudsman’s jurisdiction:

*13 Conduct of the NSW Police Force or a member of the NSW Police Force unless the conduct:*

*(a) relates to a reportable allegation or reportable conviction (within the meaning of Part 3A), or the inappropriate handling or response to such an allegation or conviction, or<sup>1</sup>*

*(b) relates to a reportable allegation or reportable conviction (within the meaning of Part 3C), or the inappropriate handling or response to such an allegation or conviction.*

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<sup>1</sup> This paragraph of item 13 was subsequently repealed on 1 March 2020 when the Part 3A function to which it refers was transferred to the Office of the Children’s Guardian.

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The references to Part 3A and Part 3C were references to the Ombudsman’s reportable conduct scheme (relating to misconduct involving children) and reportable incident scheme (relating to misconduct involving people with disability), respectively. The result was that the Ombudsman retained jurisdiction to investigate the conduct of police in the context of those schemes (in the same way as it did with other public authorities).

It is not clear whether any consideration was given, at the time of this amendment, to the fact that the Ombudsman also had jurisdiction over NSWPF and members of NSWPF in the context of complaints made against officers and inspectors in respect of their specific functions under the POCTA Act.

### Consequences for oversight of ‘authorised officers’

Unless the Bill makes an additional consequential amendment to the Ombudsman Act, the Ombudsman will not be able to investigate the conduct of that subset of authorised officers who are police officers.

Although police conduct is now oversighted by the LECC, the LECC’s jurisdiction differs from that previously exercised by the Ombudsman. LECC is only able to investigate ‘serious misconduct’<sup>2</sup> or ‘serious maladministration’, as defined.<sup>3</sup> Complaints about officer misconduct and officer maladministration that do not meet those higher thresholds are referred to the Commissioner for Police.<sup>4</sup>

This creates the potential for conduct by a (non-NSWPF) authorised officer to be the subject of complaint to or investigation by the Ombudsman’s Office, where the same conduct by an authorised officer who is a police officer would not be, and may also not be the subject of independent external oversight by another body.

There may also be potential confusion when functions under the Bill are being exercised jointly by authorised officers – for example where an RSPCA officer and a NSWPF officer attend a premises together. In that case, one officer’s conduct in the exercise of the statutory animal welfare functions can be complained about to, and investigated by, the Ombudsman (the non-NSWPF officer) but the other’s cannot (NSWPF officer).

### Consequential amendment for consideration

If, as a matter of policy, it is intended that the conduct of authorised officers when exercising functions under POCTA should be consistently subject to the same oversight by the Ombudsman, then an amendment to the Bill is required.

This could be achieved by including a consequential amendment of the Ombudsman Act Schedule 1 item 13, to carve out (from conduct of NSWPF officers that the Ombudsman is not permitted to investigate), conduct that:

- (c) relates to the functions of an authorised officer under the *Animal Welfare Act 2021*.

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2 Defined in LECC Act s 10(1) as (a) conduct of a police officer, administrative employee or Crime Commission officer that could result in prosecution of the officer or employee for a serious [indictable] offence or serious disciplinary action against the officer or employee for a disciplinary infringement, (b) a pattern of officer misconduct, officer maladministration or agency maladministration carried out on more than one occasion, or that involves more than one participant, that is indicative of systemic issues that could adversely reflect on the integrity and good repute of the NSW Police Force or the Crime Commission, or (c) corrupt conduct of a police officer, administrative employee or Crime Commission officer.

3 Defined in LECC Act s 11(3)(b) as conduct of a police officer that is of a serious nature and, although not unlawful, (i) is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or (ii) arises, wholly or in part, from improper motives.

4 LECC Act s 26(b)(ii).

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It is noted that this amendment would give rise to the possibility (at least in theory) that conduct of a NSWPF officer, acting as an authorised officer under the POCTA Act, could come within the jurisdiction of both the Ombudsman and the LECC – if the conduct otherwise meets the definition in the LECC Act of ‘serious misconduct’ or serious maladministration’.

As with the Ombudsman’s jurisdiction in respect of NSWPF officers concerning reportable allegations and reportable convictions (under Part 3A and Part 3C), it would therefore also be appropriate to amend section 165 of the LECC Act to provide that:

The Ombudsman must give the [Law Enforcement Conduct] Commission notice in writing of any complaint received by the Ombudsman (or misconduct information of which the Ombudsman becomes aware) under the *Ombudsman Act 1974* concerning the NSW Police Force or members of the NSW Police Force that relates to the functions of an authorised officer under the *Animal Welfare Act 2021*.

To avoid any risk of potential duplication, and recognising the LECC’s primacy in respect of matters that may involve serious misconduct or serious maladministration by the NSWPF, section 165(4) already provides for the LECC and the Ombudsman to enter into arrangements regarding matters that the LECC may decide itself to investigate, take over the investigation of or otherwise deal with.

### Oversight of ‘approved charitable organisations’

The Bill contains a consequential amendment to the *Ombudsman Act 1974* (in Schedule 4 [4.23]) that expands the definition of ‘public authority’ in s 5(1) to include:

(g2) an approved charitable organisation within the meaning of the *Animal Welfare Act 2021*, but only to the extent it is exercising functions under that Act

The Ombudsman’s Office welcomes this amendment, noting that the Bill gives approved charitable organisations the power to:

- a) bring prosecutions for animal welfare offences: clause 116(2)<sup>5</sup>
- b) sell, rehome or destroy animals in certain circumstances: clause 155, and
- c) share information: clause 163.

For greater clarity we suggest that consideration be given to amending this provision of the Bill so that it reads:

(g2) an approved charitable organisation or an authorised officer within the meaning of the *Animal Welfare Act 2021*, but only in respect of conduct that relates to the exercise of functions under that Act.

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5 As with other public authorities, the Ombudsman will not have jurisdiction to investigate conduct relating to the actual carrying on of prosecutorial proceedings, which is a matter for the Court: Ombudsman Act item 8 of Schedule 1.

## Repeal of statutory safeguards and replacement with regulation-making powers

In preparing this submission, we have observed that the Bill will repeal a number of provisions of existing legislation, and instead include generally-expressed regulation-making powers.

It may be intended that regulations will subsequently be made that are consistent with the provisions of the to-be-repealed legislation.

We understand that this approach may be proposed with a view that it is merely a ‘drafting’ preference, having regard to the trend toward more ‘principles-based’ legislative drafting, where matters of substance are included in the legislation itself but matters of detail or process are relegated to regulation.

However, these changes do not appear to have been expressly discussed in the previous stakeholder consultation process that has been undertaken by the Government in respect of this Bill.

It also appears to us that, particularly in the policy context of this regime, at least some of the matters that are proposed to be repealed are ones that may be considered important – albeit in some cases perhaps ‘procedural’ – safeguards.

We raise them here to invite the Committee to consider whether it is appropriate that these cease to be prescribed by Parliament in statute, and whether the Committee is comfortable that these matters be left to the discretion of the Government by way of future regulation.

### Provisions relating to panels, committees

The Bill repeals the *Animal Research Act 1985*, the *Exhibited Animals Protection Act 1986* and the POCTA, and makes different arrangements for the various committees and other bodies constituted or recognised under those Acts.

However, unlike the above Acts, the Bill does not include provisions governing the constitution of and procedure to be followed by these entities, providing instead that those matters can be made the subject of regulations, as the table below indicates.

Entity	Current governing provisions	Relevant provisions of Bill
Animal Research Review Panel	Created by the <i>Animal Research Act 1985</i> Part 2 (ss 6-12), Schedule 1, Schedule 2  Provisions in this Act govern the constitution of, functions of, appointments to and procedure to be followed by, the Panel	The Bill provides for creation of and functions of Panel (cll 142, 143) <sup>6</sup> and the appointment of members by Minister (cl 145) but otherwise leaves the number of Panel members, their skills and qualifications, their selection, the conditions on which they hold office, and the procedure to be followed by the Panel, to be dealt with by regulation (cl 144).
animal care and ethics committees	Required by the <i>Animal Research Act 1985</i> as something a corporation must establish	The Bill provides (cl 45) that the regulations may provide for a licensing scheme and in doing so <i>may</i> provide, as a condition of granting

<sup>6</sup> We note, in passing, that the delegation provided for in clause 143(2) is duplicated in clause 147.



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	<p>before it can be accredited as a research establishment: s 20.</p> <p>The Act also prescribes the functions of these committees and provides for complaints to be made for, among other things, a research establishment carrying out animal research 'otherwise than with the approval, or in contravention of the directions, of the animal care and ethics committee for the establishment': s 22(1)(b)</p>	<p>licences, 'a requirement to establish animal care and ethics committees', as well as the minimum requirements of and the functions of those committees.</p>
Exhibited Animals Advisory Committee	<p>Created by the <i>Exhibited Animals Protection Act 1986</i> (ss 6-11), Schedule 1, Schedule 2.</p> <p>Provisions in this Act govern the constitution of, appointments to and procedure to be followed by, the Panel</p>	<p>The Bill provides for creation of and functions of Committee (cll 148, 149) and appointment of members by Minister (cl 150) but otherwise leaves the number of Committee members, their skills and qualifications, selection, conditions on which they hold office, and the procedure to be followed by the Panel, to be dealt with by regulation (cl 150).</p>

These bodies play a significant role in providing expert advice and a degree of independent oversight of animal welfare and stakeholder activity involving animals. Matters pertaining to the constitution, appointments, terms of office etc of the Animal Research Welfare Panel and the Exhibited Animals Advisory Committee are, in one sense, procedural details. However, these details also impact on their ability to remain independent, representative and sufficiently qualified to perform their functions.

The creation and functions of animal care and ethics committees, which are dealt with in the *Animal Research Act 1985*, will also not be provided for in the Bill, other than by permitting regulations to be made concerning these committees.

### Licensing provisions

Part 4 of the *Animal Research Act 1985* provides for the accreditation of animal research establishments and the granting of authorities for individuals to carry out animal research.

These matters are not dealt with in the Bill, clause 45 of which instead merely provides that the regulations 'may provide for a licensing scheme to carry out a licensed activity'.

The Bill does provide, at clause 42(1), that:

*A person must not carry out any of the following activities (a licensed activity) unless the person holds a licence to carry out the activity—*

- (a) animal research and the supply of animals for animal research,*
- (b) exhibiting animals,*
- (c) another activity prescribed by the regulations for this section.*

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and cll 43 and 44 make it an offence to contravene a condition of a licence, or fraudulently obtain a licence, respectively.

### Animal research complaints schemes

Part 4 of the *Animal Research Act 1985* provides for the handling of complaints relating to accredited animal research establishments and authorisations granted to individuals to carry out animal research. Under that Act, the Secretary is required to refer these complaints to the Animal Research Review Panel for investigation and report.

These provisions are not replicated in the Bill. Instead, clause 47 of the Bill provides that the regulations 'may provide for a scheme about complaints made to the Secretary'.

At the same time, clause 143(1)(c) of the Bill states that one of the functions of the Animal Research Review Panel is 'to investigate applications for licences for animal research and complaints referred to the Panel *under this Act*'.

The Bill will replace a mandatory complaint-handling scheme with a provision that permits, without requiring, the creation of a complaints scheme by regulation.

## 5 'Reviewable decisions'

Clause 46 of the Bill provides as follows:

46 Administrative review of certain decisions

(1) An aggrieved person for a reviewable decision may apply to the Civil and Administrative Tribunal under the *Administrative Decisions Review Act 1997* for an administrative review of the reviewable decision within 28 days after receiving notice of the reviewable decision.

(2) In this section—

*aggrieved person*, for a reviewable decision, means the person prescribed by the regulations as being the aggrieved person for the reviewable decision.

*reviewable decision* means a decision under this Act prescribed by the regulations for this definition.

This provision leaves all questions about the administrative review of decisions made under the Bill, and who may seek that review, to the Executive. We are not aware of any other Act that takes this approach to administrative review. Sometimes an Act may provide that regulations may prescribe *additional* matters that may be 'reviewable decisions', but it appears that the question of when administrative review of statutory functions should be available is usually considered a matter for Parliament.