

**Submission
No 129**

INQUIRY INTO ANIMAL WELFARE POLICY IN NEW SOUTH WALES

Organisation: NSW Young Lawyers, The Law Society of NSW

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Submission on the draft *Animal Welfare Bill 2022*

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The NSW Young Lawyers Animal Law Committee
(Committee) makes the following submission on the draft
Animal Welfare Bill 2022 (Bill)

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Committee comprises a group of over 400 members interested in animal protection laws regulating the treatment of animals. The Committee aims to raise awareness and provide education to the legal profession and wider community, while increasing understanding about the importance of protecting animals from abuse and neglect. A common theme amongst Committee members is a passion and desire to use their legal skills and the law to improve protections for animals.

The Committee welcomes the opportunity to make a submission on the Bill.

Summary of Recommendations

1. The acknowledgement of animal sentience should be explicit in the Bill's objects.
2. The requirement to maintain adequate exercise ought to be extended to stock animals (i.e. proposed s 18(3)(a) ought to be removed).
3. The Bill ought to be amended to include requirements to administer pain relief during certain procedures, including mulesing, dehorning, castration and branding.
4. The proposed exemptions and defences to offences under the Bill ought to be narrowed and clarified, as set out in these submissions.
5. The penalty regime under the Bill would be improved with more robust penalties that better reflect the objects of the Bill and better reflect and improve upon national standards.

The acknowledgement of animal sentience

1. The Consultation Outcomes acknowledge that the public feedback received on key proposals for new animal welfare laws in NSW was for the objects of the new laws to make specific reference to sentience and/or the intrinsic value of animals. Yet, the response to this in the Consultation Outcomes is that the Bill “acknowledges the concept of animal sentience through reference to protecting animals from harm.”¹
2. The Committee submits that the Bill should be explicit about animal sentience. The Bill's definition of “harm” includes distress, pain, and physical and psychological suffering.² Sentience refers to one's ability to subjectively feel and perceive the world around them.³
3. The Committee submits that an implicit reference to animal sentience is not sufficient and is likely to result in only a response to animal cruelty, when policy development and regulatory decisions should be based on preserving animal welfare. Legislative recognition of animal sentience reflects that caring for an animal is different to caring for a vehicle, house, or other inanimate property.⁴

¹ Consultation Outcomes, p7

² *Animal Welfare Bill 2022*, s 11.

³ *Animal Welfare Act 1992* (ACT), s 4A.

⁴ Agriculture Victoria, *Consultation on a new animal welfare act for Victoria* (Directions Paper, 20 October 2020), p17.

4. Furthermore, it is vital that the Bill refers to sentience in its objects to ensure it is in alignment with community values. The Committee's position in this regard has been made clear in submissions to consultations in other jurisdictions.⁵
5. As early as 2009, Peter Sankoff, an animal protection scholar, observed that '[w]e have formally abandoned the notion that these sentient beings are 'just' animals and undeserving of moral concern...' and that it is likely that 'the large majority of people in Australia... believe that animals *matter*, and that their welfare is something that is worthy of being considered'.⁶ Referring to sentience in the objects of NSW legislation would accurately capture the impetus behind society's concern for animal welfare; it therefore represents an appropriate and desirable proposal that has been advocated for by various stakeholders in response to the initial consultation.
6. The Committee is of the view that including similar wording to that written into the objects of the Australian Capital Territory's *Animal Welfare Act 1992* (ACT), would adequately capture the sentient status of animals, specifically: "that animals are sentient beings that are able to subjectively feel and perceive the world around them, and have intrinsic value and deserve to be treated with compassion and have a quality of life that reflects their intrinsic value".⁷ This would also allow consistency between animal welfare legislation between Australian states and territories.
7. The proposal also reflects global best practice. By way of example in international jurisdictions, animal sentience was expressly recognised by legislation passed by the French National Assembly in 2014,⁸ the New Zealand Parliament in 2015,⁹ the Parliament of the Province of Quebec in 2015,¹⁰ Colombia in 2016,¹¹ and Sweden and Brussels in 2018.¹²

⁵ For example, Submission to Agriculture Victoria, *Consultation on a new animal welfare act for Victoria* (21 December 2020) and Submission to Transport Canberra and City Services, *Consultation on the exposure draft of the Animal Welfare Legislation Amendment Bill 2019* (7 February 2019).

⁶ Peter Sankoff, 'The Welfare Paradigm: Making the World a Better Place for Animals?' in Peter Sankoff and Steven White (eds), *Animals Law in Australasia: A New Dialogue* (The Federation Press, 2009) 7, 9.

⁷ *Animal Welfare Act 1992* (ACT) s 4A.

⁸ French Civil Code, Art. 515-14: "Animals are living beings gifted with sentience. Subject to the laws that protect the animals, they are subjected to the regime of goods."

⁹ s 4, Animal Welfare Amendment Act (No 2) 2015 (2015 No 49): "animals are sentient".

¹⁰ Quebec Civil Code, Art. 898.1: "Animals are not things. They are sentient beings and have biological needs. In addition to the provisions of special Acts which protect animals, the provisions of this Code and of any other Act concerning property nonetheless apply to animals."

¹¹ Colombia Civil code, Art. 655: "Recognizing the quality of sentient beings to animals".

¹² 'Recognition of animal sentience on the rise', Veterinary Information Network Inc (Web Page, 14 May 2020) <<https://news.vin.com/default.aspx?pid=210&Id=9639465>>.

Exercise requirements and stock animals – proposed s 18(3)(a)

8. Section 18 of the Bill refers to the minimum care requirement of appropriate exercise for animals. However, sub-section (3) excludes stock animals from this requirement. The Committee submits that stock animals should not be exempt from this minimum care requirement.
9. The object of the *Prevention of Cruelty to Animals Act 1979* (NSW) (**POCTAA**), prescribed in s 3, is to prevent cruelty to animals and to promote their welfare.¹³ Significantly, the definition of an “animal” under the Act includes, for example, the general all-inclusive terms, ‘...any...bird’ and ‘any...mammal.’¹⁴
10. The Committee submits that the exception of stock animals under s 18 of the Bill to the minimum care requirement of adequate exercise is inconsistent with the existing object of POCTAA. The Committee previously raised this point in our 2019 submission to the Inquiry into the Use of Battery Cages for Hens in the Egg Production Industry in relation to hens:¹⁵

“Hens, like dogs, require physical exercise and the ability to exhibit their natural behaviours as outlined previously in this submission. In that regard, the Committee notes that keeping canines permanently confined to small cages is a breach of s 9 of POCTA. The Code of Practice for Breeding Dogs and Cats¹⁶ outlines that all animals under the breeder’s care must receive daily exercise. However, despite the abovementioned comparisons between hens and dogs, a contradictory standard appears to be present in POCTA whereby a layer hen confined permanently to a battery cage is not in breach of POCTA due to the exception it falls under in s 9 of the Act.

¹³ *Prevention of Cruelty to Animals Act 1979* (NSW), s 3(a)-(b).

¹⁴ *Ibid*, s 4.

¹⁵ NSW Young Lawyers Committee, Submission No 142 to Select Committee on the use of battery cages for hens in the egg production industry, *Inquiry into the Use of Battery Cages for Hens in the Egg Production Industry* (25 July 2019) 4, 7-8.

¹⁶ Department of Primary Industries (Industry and Investment), ‘Animal Welfare Code of Practice Breeding Dogs and Cats’, (Code of Practice August 2009)14, <https://www.dpi.nsw.gov.au/__data/assets/pdf_file/0004/299803/Breeding-dogs-and-cats-code-of-practice.pdf>.

11. In relation to cattle, studies show that exercised cattle have reduced respiratory morbidity, shorter recovery times, decreased prevalence of dark cutters, and improved emotional attitude compared with nonexercised cattle.¹⁷ Research has also indicated that exercise can have positive effects on heat stress in dairy cows.¹⁸
12. The above examples highlight the need for stock animals to be afforded appropriate exercise in order for the objects of POCTAA (and, as we understand it, the animal welfare objects of the Bill) to be met.

Pain relief

13. The Committee has previously made submissions requesting that the administration of pain relief to animals ought to be required in certain circumstances and for certain procedures.¹⁹ Mulesing of sheep is an example where, in the Committee's view, this ought to apply, given the lack of a reasonable rationale for the absence of such a requirement.²⁰
14. The justifications often used in that example, and in relation to other stock animal procedures, for having no requirement to administer pain relief are generally focused on the economics of providing such relief, in particular how it might play out in a market context and in respect of withholding periods post-administration.²¹ However, it does not "protect[s] animals from cruelty and harm" to place a non-quantified price (i.e. a market condition asserted by industry stakeholders) on the pain to which they are subjected.
15. The Committee considers that a Bill to modernise and improve legislation that has animal welfare at its core would fall short of its promise were it not to include pain relief requirements. As a minimum, the applicable circumstances ought to include mulesing, castration, branding and dehorning - inherently painful procedures- but further consideration should be given in the amending of this Bill

¹⁷ 'Impact of exercise on productivity, behavior, and immune functioning of weaned Bos indicus-cross calves housed in drylots', National Center for Biotechnology Information (Web Page, 2017) <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6292267/#r35>>.

¹⁸ 'Research from Kansas State University shows that daily exercise helps dairy cows reduce effects of heat stress', Kansas State University (Web Page, 14 October 2016) <<https://www.k-state.edu/media/newsreleases/2016-10/cowexercise101416.html>>.

¹⁹ NSWYL Animal Law Committee, Submission to Department of Primary Industries, *Submission on the NSW Animal Welfare Law Reform Discussion Paper* (16 September 2021) 6.

²⁰ 'RSPCA says no more excuses over pain relief for livestock' *Queensland Country Life* (online, 11 July 2018) <https://www.queenslandcountrylife.com.au/story/5519623/rspca-backs-livestock-painrelieftechology/>

²¹ NSW Legislative Council Portfolio Committee No. 4, *Provisions of the Prevention of Cruelty to Animals Amendment (Restrictions on Stock Animal Procedures) Bill 2019* (Report no. 45, September 2020) 19-20.

as to how such a requirement could be expanded to better protect animals from significant, but unnecessary and preventable, pain.

Defences

16. The Committee acknowledges the utility of section 24 of the POCTAA, where a specific provision outlining the available defences makes it clearer which animal husbandry practices for stock animals are permitted under the law. However, the Committee submits that in legislation that has the maintenance of animal welfare at its centre, any defence must be robust, reflective of modern scientific evidence, and strongly justified. To that end, the Committee submits the following relating to defences:

Aquaculture

17. The exemption of aquaculture under section 119 (d) has no qualification at all. This exemption is not replicated in other, similar instruments in Australia, including *Animal Care and Protection Act 2001* (QLD), *Animal Welfare Act 2002* (WA), and *Animal Welfare Act 1992* (ACT).
18. A host of physiological and behavioral evidence shows how the conventional tenets of animal welfare (avoidance of unnecessary pain and suffering, the acknowledgement of the animal experience of human acts, etc.) ought to logically be extended to fish.²² Fish have the nerves and neuron-pathways to be capable of feeling pain and suffering.²³ Behavioral evidence also suggests that fish engage in deliberate rubbing in response to localised pain and deliberate avoidance in response to fear.²⁴

²² The Humane Society, *An HSUS Report: The Welfare of Animals in the Aquaculture Industry* <<https://www.humanesociety.org/sites/default/files/docs/hsus-report-animal-welfare-aquaculture-industry.pdf>>; Rose, 'The neurobehavioral nature of fishes and the question of awareness and pain' (2002) *Reviews in Fisheries Science* 10(1)1-38; Chandroo, Duncan, and Moccia, 'Can fish suffer? perspectives on sentience, pain, fear and stress' (2004) *Applied Animal Behaviour Science* 86(3-4) 225-50; Chandroo, Yue, and Moccia, 'An evaluation of current perspectives on consciousness and pain in fishes' (2004) *Fish and Fisheries* 5(4) 281-95.

²³ Ibid.

²⁴ The Humane Society (n 1); Sneddon, 'The evidence for pain in fish: the use of morphine as an analgesic (2003) *Applied Animal Behaviour Science* 83(2)153-62; Sneddon, Braithwaite, and Gentle, 'Do fishes have nociceptors? Evidence for the evolution of a vertebrate sensory system' (2003) *Proceedings of the Royal Society London Series B: Biological Sciences* 270(1520) 1115-21; Yue, Moccia, and Duncan, 'Investigating fear in domestic rainbow trout, *Oncorhynchus mykiss*, using an avoidance learning task' (2004) *Applied Animal Behaviour Science* 87(3-4) 343-54; Damsgård, Juell, and Braastad, 'Welfare in farmed fish' (2006) *Norway: Fiskeriforskning* <www.fiskeriforskning.no/fiskeriforskning/publikasjoner/rapporter/welfare_in_farmed_fish>.

19. Fish reared in aquaculture systems may therefore face significant welfare challenges due to production practices and facilities, water and environmental quality, stocking densities, disease and parasites, selective breeding, genetic manipulation, feeding, external impacts, handling, netting and grading, transport, and method of slaughtering. Some of these welfare challenges are addressed, for example, in South Australia under Part Three of the *Aquaculture Regulations 2016* (SA) with regards to use of chemical substances, aquaculture facilities and equipment, notification of unusually high mortality rates, obligation to isolate unaffected aquatic organisms, control of aquatic organisms affected with disease, and stock densities.
20. The proposed legislation should therefore extend the same protections that apply to other animals (including other stock animals) by, at the very least, qualifying this exemption such that unnecessary harm must not be inflicted.

Living Bait

21. The exemption of living bait in fishery is not justifiable given that the above comments regarding animal experiences apply to fish and cephalopods, with both capable of experiencing pain and suffering, and emotional anguish.²⁵ The traditional assumption that fish lack some level of intelligence, interpersonal communication abilities, and overall consciousness to be considered sentient has been substantively disputed. The Committee fails to see the necessity of this exemption for live bait that is hooked or restrained or restricted in a way that causes harm. We further recommend that protection under legislation should extend to crustaceans to maintain consistency and avoid confusion.

Animal Research

22. The exemption of animal research is not, in the Committee's view, justified simply by its compliance with the *Animal Research Act 1985* (NSW).²⁶ By comparison, section 18 of the *Animal Welfare Act 1985* (SA) explicitly requires adequate premises and facilities for animal care and handling as well as adequate veterinary attention to animals subject to licensed animal research. Section 25 of the South Australian act also requires that the use of the animal be essential for the particular purpose and that persons intend to conduct the research have appropriate experience and qualifications. The

²⁵ Moltschaniwskyj et al, 'Ethical and welfare considerations when using cephalopods as experimental animals' (2017) 17 *Reviews in Fish Biology and Fisheries* 455-7; Cassuto and O'Brien, 'You Don't Need Lungs to Suffer: Fish Suffering in the Age of Climate Change with a Call for Regulatory Reform' (2019) *Canadian Journal of Comparative and Contemporary Law* 5 (1) <<https://www.animallaw.info/sites/default/files/CJCCL-Volume-5.pdf>> 31-44.

²⁶ *Prevention of Cruelty to Animal Act 1979* (NSW), s 24(1)(e); NSWYL Animal Law Committee, Submission to Department of Primary Industries, *Consultation on NSW Animal Welfare Reform – Issues Paper* (26 June 2020) 7.

Committee submits that, as a minimum, a requirement to avoid unnecessary or unreasonable harm ought to be introduced in relation to this defence, as well as a requirement that the defence only applies when the relevant act is carried out in accordance with the terms of a relevant research licence.

Religious Practices

23. If an exemption for religious practices is to be included, a Code(s) of Practice should be prepared to prevent unnecessary or unreasonable harm. A similar approach has been adopted by the European Union which prescribes that religious slaughtering without the stunning of the animal is only permitted in approved slaughterhouses.²⁷ The Court of Justice of the European Union found that this EU law is valid and does not violate the freedom of religion.²⁸

Penalties

24. The Committee reiterates its submissions²⁹ that the penalty regime under the Bill, particularly in cases involving corporate offenders and/or offences in categories 1 and 2, ought to be more severe. This would help to better serve the animal welfare objects of the Bill and better reflect the standards shown in other industry-regulating areas (e.g. environmental and water).³⁰

25. No material movement from the existing legislative penalties is proposed, despite the fact that:

- a. the proposed maximum penalty for an individual of one year's imprisonment for cruelty would be the equal lowest in Australia (behind WA, QLD, ACT, SA, and NT); and
- b. the proposed maximum penalty for an individual of two years' imprisonment for aggravated cruelty would be the equal lowest in Australia (behind WA, TAS, SA, ACT, and QLD).

²⁷ Peters, 'Religious Slaughter and Animal Welfare Revisited: CJEU, Liga van Moskeeën en islamitische Organisaties Provincie Antwerpen' (2019) *Canadian Journal of Comparative and Contemporary Law* 5 (1) <<https://www.animallaw.info/sites/default/files/CJCCL-Volume-5.pdf>>.

²⁸ *Liga van Moskeeën en islamitische Organisaties Provincie Antwerpen VZW v Vlaams Gewest* (29 May 2018), C-436/16, ECLI:EU:C:2018:335 (CJEU).

²⁹ NSWYL Animal Law Committee, Submission to Department of Primary Industries, *Submission on the NSW Animal Welfare Law Reform Discussion Paper* (16 September 2021) 9-10.

³⁰ For example, under the *Water Management Act 2000* (another act where offending corporations may weigh up penalties against the profitability to be derived from a contravening act, that act being one which has an adverse environmental outcome), the maximum penalty for a Tier 1 offence (arguably the counterpart to the Category 1 offences proposed) is 45,500 penalty units for corporations, or just over \$5m, and for a Tier 2 offence is 18,200 penalty units for corporations, or just over \$2m. When compared to the 5,000 penalty units/\$550,000 for Category 1 offences and 2,000 penalty units/\$220,000 for Category 2 offences concerning animal welfare, the imbalance and inadequacy is evident.

26. While recent penalty increases in NSW are, in the Committee's view, a step in the right direction, further strides ought to be made to improve the deterrent element in the Bill and bring NSW standards more in line with other jurisdictions or, preferably, improve upon them with more robust penalties.

Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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