Submission No 253

INQUIRY INTO ANIMAL WELFARE POLICY IN NEW SOUTH WALES

Organisation: Lawyers for Animals

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Via email: state.development@parliament.nsw.gov.au

15 March 2022

Dear Sir/Madam,

Submission to the Inquiry into Animal welfare policy in New South Wales

Thank you for your invitation of 25 January 2022 to provide a submission to the Inquiry into Animal welfare policy in New South Wales ("**the Inquiry**") conducted by the New South Wales ("**NSW**") Legislative Council's Standing Committee on State Development ("**the Committee**"). The Inquiry relates to the draft *Animal Welfare Bill 2022* (NSW) ("**the draft Bill**"). Our comments and recommendations on the draft Bill are set out below. We note that our submission is slightly delayed, and abbreviated, rather than comprehensive, on account of time pressures related to the wave of Covid-19 that have particularly impacted our volunteers during the consultation period.

Who we are

Formed in 2005, Lawyers for Animals ("**LFA**") is a not-for-profit incorporated association based in Victoria, run by an executive committee of lawyers and with members in various Australian States and Territories. LFA is staffed entirely by volunteers.

LFA's objectives include:

1. alleviating the suffering of animals by engaging with those who create or administer laws in Australia to strengthen legal protections for animals;
2. promoting better animal welfare practices amongst animal-related industries in Australia; and
3. undertaking educational activities in an effort to dispel myths and increase

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awareness relating to animals and the law.

Since April 2013 (subject to two interruptions during the Covid-19 Pandemic) LFA has also worked in partnership with the Fitzroy Legal Service to operate the Animal Law Clinic: a free legal advice service run with the primary objective of improving animal welfare.

LFA's approach to the draft Bill

LFA is guided by a philosophical commitment to anti-speciesism.

The term 'speciesism' was first coined by British psychologist Richard Ryder in 1973[1], but gained greater prominence through Professor Peter Singer's 1975 book, *Animal Liberation*[2]. In a nutshell, 'speciesism' connotes the prejudice that most humans feel and practise toward members of other animal species, based on their physical differences, and largely ignoring their physiological, mental and emotional similarities. Speciesism is perhaps more easily understood by reference to two closely related concepts: 'racism' and 'sexism'. When people are 'racist', 'sexist' or 'speciesist', they consider one group - almost always their own - to have superior value, and therefore, superior rights, to another physically distinct group. In all three cases, the underlying physiological, mental and emotional similarities between the groups are ignored, sometimes at a subconscious rather than conscious level.

Since almost all farmed animals are plant-eating, passive, prey animals - physically and mentally unequipped to challenge the human apex predator - this made them an easy source of high-fat food for our less agriculturally advanced and hence food-challenged ancestors. It is likely that the historical reliance on killing such animals for food encouraged human predatory instincts towards them, helping to stem empathy, and thus encouraging a greater degree of speciesism by humans toward farmed animals, than is generally felt and practised toward traditional companion animals, like dogs and cats.

While humans and animals generally differ in both their level and range of intelligence - be it intellectual, emotional, sensory or kinetic - not all humans are more intelligent than animals. But it is not by reason of intelligence, alone, that human or animal life holds value. In discussing this question, British Enlightenment philosopher, abolitionist and legal scholar, Jeremy Bentham, wrote:

> *The day has been, I am sad to say in many places it is not yet past, in which the greater part of the species, under the denomination of slaves, have been treated by the law exactly upon the same footing, as, in England for example, the inferior races of animals are still. The day may come when the rest of the animal creation may acquire those rights which never could have been witholden from them but by the hand of tyranny. The French have already discovered that the blackness of the*

[1] Richard Ryder, 'All beings that feel pain deserve human rights', The Guardian, 6 August 2005 viewed 02/03/2018 at: https://www.theguardian.com/uk/2005/aug/06/animalwelfare

[2] Peter Singer, *Animal liberation*: *A new ethics for our treatment of animals,* 1975, New York: New York Review

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skin is no reason a human being should be abandoned without redress to the caprice of a tormentor. It may one day come to be recognised that the number of the legs, the villosity [hairiness] of the skin, or the termination of the os sacrum [the tailbone - where an animal's tail commences] are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason or perhaps the faculty of discourse? But a full-grown horse or dog, is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day or a week or even a month, old. But suppose the case were otherwise, what would it avail? The question is not, Can they reason? nor, Can they talk? but, Can they suffer?[3]

Since there is ample scientific evidence that animals experience physical pain and psychological stress in a similar way to humans[4], as an anti-speciesist organisation, LFA strives to prevent and alleviate the suffering of all sentient animals.

LFA accordingly supports the normative rule that, to the extent animals are under human control or influence, humans are obligated to uphold 'The Five Freedoms'[5] towards them. The Five Freedoms – or basic rights – of animals, as interpreted by RSPCA Australia (in italics), are:

1. Freedom from hunger and thirst: *by ready access to fresh water and a diet to maintain full health and vigour.*
2. Freedom from discomfort: *by providing an appropriate environment including shelter and a comfortable resting area.*
3. Freedom from pain, injury or disease: *by prevention through rapid diagnosis and treatment.*
4. Freedom to express normal behaviour: *by providing sufficient space, proper facilities and company of the animal's own kind.*
5. Freedom from fear and distress: *by ensuring conditions and treatment which avoid mental suffering.*[6]

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[3] Jeremy Bentham, Introduction to the Principles of Morals and Legislation, 1789, chapter 17, footnote

[4] For research links and information see: Marc Bekoff 'After 2,500 studies it's time to declare animal sentience proven', 6 September 2013, LiveScience website viewed 18/03/2018 at:https://www.livescience.com/39481-time-to-declare-animal-sentience.html

[5] An early version of 'The Five Freedoms' was enunciated by the UK Government body, the Farm Animal Welfare Council, shortly after its formation in 1979. It drew on conclusions in the 1965 'Report of the Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems', which was commissioned by the UK Government partly in response to concerns raised by Ruth Harrison's 1964 book 'Animal Machines'. The Five Freedoms are now recognised by animal organisations worldwide, including the World Organisation for Animal Health (better known by its historical acronym: OIE); various Societies for the Prevention of Cruelty to Animals (SPCAs); and various veterinary organisations including the Australian Veterinary Association and the Federation of Veterinarians of Europe.

[6] This version of The Five Freedoms is taken from RSPCA Australia's website (accessed 5 March 2022): https://kb.rspca.org.au/knowledge-base/what-are-the-five-freedoms-of-animal-welfare/#moving-on-from-

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Unlike RSPCA Australia, who promoted The Five Freedoms for many years, yet steadfastly deny they imply an animal's freedom to live its natural lifespan (unless compassionate euthanasia is required); LFA acknowledges that an animal's right to life is fundamental to any ability to experience 'The Five Freedoms', and must therefore be implicit within each. Further, LFA accepts as self-evident, that the deliberate killing of any animal in such as way as to render it's flesh edible (hence, without barbiturate overdose) inevitably inflicts both mental suffering and a degree of physical pain, and denies 'normal behaviour'. For instance: if you had the mental, emotional and sensory intelligence of a farmed or non-native wild mammal, and were suddenly torn from of all that was familiar and comforting; transported (potentially for long hours without food or water) to a fear-drenched abbattoir, where you smelled, heard and sensed the fate awaiting you and your fellows; before being forcibly restrained and subjected either to electric shock or captive bolt to render you insensible, then hung and cut so as to bleed-out and die; or (like most pigs) placed in a gas chamber to endure death by chemical suffocation - would such acts, inflicted on you, be contrary to your 'Five Freedoms'? Moreover, the killing of animals in situations other than genuine euthanasia, effectively denies their 'normal behaviour', including ongoing relationships with their fellow-animal 'family', which in turn, impacts surviving animals within their family and social group.

As appointed agents theoretically responsible for enforcing animal cruelty laws in various parts of Australia, any RSPCA would display a direct conflict of interest were they to oppose the killing of animals by industry, which all Australian Governments sanction and promote. So it is unsurprising that in 2020, RSPCA Australia withdrew its long-term support for 'The Five Freedoms', and instead embraced the 'The Five Domains', which avoid recognising any animal rights, instead focusing on animals' welfare within an implicitly accepted framework of exploitation and killing. LFA simply considers 'The Five Domains' a regressive theory, lacking any rational, philosophical underpinning, and designed by animal industry to delay the recognition of basic animal rights. However, just as human rights for oppressed social groups - for instance: slaves, women and children - inevitably developed out of historic, now archaic (for being grossly insufficient) welfare initiatives, such as the Code Noir or the Married Women's Property Acts - and were ultimately encapsulated in International Treaties[7]; so too, LFA envisages, the continued failure of welfare initiatives by Governments that are manipulated by animal industry, will eventually lead to the recognition of basic, common rights shared by all sentient beings. This is what 'The Five Freedoms', in bare form, represent. The recognition of basic rights is the only foundation from which genuine fairness and justice may grow, in the long-term.

LFA is committed to the ideal of alleviating animal suffering by seeking to uphold these ba-

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the-five-freedoms
A simplified version of The Five Freedoms was adopted by the OIE into their Terrestrial Animal Health Code, Ch.7.1 Introduction to the Recommendations for Animal Welfare, Article 7.1.2.2 (accessed 5 March 2022): http://www.oie.int/index.php?id=169&L=0&htmfile=chapitre_aw_introduction.htm

[7] For example: the International Convention on Civil and Political Rights (Australia ratified in 1980); and the International Convention on the Rights of the Child (Australia ratified in 1990)

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sic animal rights. However, LFA is an incrementalist organisation, working to achieve practical benefits for animals at a time when humans are still largely afflicted by or transitioning from speciesism. Therefore, LFA additionally supports legal reforms that will, on balance, improve animal welfare in both the short and long term. It is this principled yet pragmatic approach that guides LFA in its response to the current draft Bill.

Comments and recommendations on the draft Bill (by Division or Section)

Section 1 - Name of Act

The draft Bill proposes that the Act be named 'The Animal Welfare Act'. LFA recommends it be re-named 'The Animal Protection Act.' While the nomenclature is trivial compared with the Act's content, nevertheless, it sets the tone and ambition of the document. By changing just one word in the title, Parliament can demonstrate modernity and attunement to contemporary values, rather than clinging to the vestiges of increasingly antiquated 'welfarism'. Just as the modern regime of 'Child Protection Acts' in Australia (and elsewhere) evolved from the now outmoded (and perceivably patronising) system of 'Child Welfare Acts' - so it would be anachronistic to use the title 'Animal Welfare Act' in 2022. Child 'protection' reflects the increased value and urgency that society has afforded to children's safety, as child abuse ceases to be the hidden and taboo subject it formerly was. Similarly, animal 'protection' reflects the increased value and urgency that NSW society places on keeping animals safe from cruelty, indicated by increased public reporting of animal cruelty offences, and decreased tolerance for animal cruelty offenders and their crimes.

Social recognition of and intolerance toward animal cruelty has increased significantly in recent decades, evidenced by levels of public outrage over each new, ghastly case of animal cruelty, usually representing a direct failure of the (presently dysfunctional, charity-led) system of law enforcement. This trend in recognition is set to continue as scientific discoveries relating to animal sentience explode age-old myths and draw ever-closer parallels between the physical and emotional states of human and non-human animals. These parallels must be differentiated from neurological discoveries which are helping to explain how human brain development diverged from our animal cousins, creating increased capacity for general intelligence, though with significant limitations (evidenced by anthropogenic climate change). Meanwhile, scientific study into the psychological, physical and environmental benefits of adopting a plant-based diet and of embracing animal companionship and empathy during the sixth mass extinction, could usefully encourage the ethos of planetary guardianship apparently required before humanity can prioritise shifting the Earth's path away from catastrophic climate change, over trivial, short-term interests.

The positive intent of the NSW people to protect animals from cruelty would be encapsulated in the name: 'Animal Protection Act.' In contrast, 'Animal Welfare Act' seems to sound weak and lacking in purpose. This is presumably why the Northern Territory has named

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their new anti-cruelty law 'The Animal Protection Act 2018'. Victoria may well follow that example with their own new Act, yet to be released in draft form; which would leave NSW lagging further behind in animal protection.

Section 3 - Objects of the Act

The draft Bill's stated objects are limited to promoting the welfare of animals and preventing cruelty to animals. Neither the Objects, nor the definition of 'animal' in Schedule 3, refer to animal sentience. Nor is there a section dedicated to 'Principles of the Act' in which animal sentience might feature. LFA recommends that the public recognition of animal sentience be explicitly acknowledged as the first object of the draft Bill, thereby fulfilling the educative function required of any modern law which also aims to promote welfare and prevent cruelty. This will bring NSW up to date with Australian and World's best practice.

Since May 2015, New Zealand has recognised animal sentience in the long title to *The Animal Welfare Act 1999* (NZ). In 2019, *The Animal Welfare Act 1992* (ACT) was amended to acknowledge animal sentience and the intrinsic value of animals as the Act's first object. In October 2020, the Victorian Government announced (in a Directions Paper) that it will recognise animal sentience in its Act to replace *The Prevention of Cruelty to Animals Act 1986* (Vic). And in May 2021, the United Kingdom introduced a Bill to recognise animal sentience under its animal protection laws. Recognising the sentience of animals in the law principally intended to protect animals from cruelty makes sense, will attract media attention and through this, should achieve long-overdue public education and acceptance. The recognition of sentience in a revised draft Bill may be expected to educate many members of NSW society (from newer arrivals to life-long residents) - including those who work within animal industries - in a way they may previously not have been privileged. It will send a clear message that the dark days of treating animals as machines; of inflicting physical and/or psychological pain on them without empathy and without regard for personal and public conscience, must end. In the wake of centuries of mounting scientific evidence, philosophic and, more recently, legal progress; for the NSW Parliament to now exclude reference to animal sentience in its new law intended to reflect society's aspiration to end animal cruelty, is almost tantamount to declaring that: 'animals lack sentience'. We urge the Committee to reconsider such an anomaly.

Section 7 - Meaning of "act of cruelty"

Section 7(1) refers to acts of cruelty including those which 'unreasonably or unnecessarily' harm, kill or expose an animal to excessive heat or cold. LFA strongly recommends that the words 'or unnecessarily' be removed from each of the three relevant subsections.

The 'reasonableness' test is a time-honoured tool of jurisprudence, applied for centuries to determine many criminal and civil wrongs. In the area of animal cruelty, it is used, either

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deliberately or unconsciously, when determining whether a defendant committed an act of cruelty, or if a defence (such as 'necessity') applies. In simple form, the test involves asking: 'would an objectively reasonable person, in the same subjective circumstances as the accused, have acted in the same way?' LFA affirms the use of this test to determine whether a defendant who harms, kills or exposes an animal to excessive heat or cold, commits an act of cruelty. However, LFA strongly recommends that the words 'or unnecessarily' be removed from Sections 7(1)(a), (b) and (e), because they:

- needlessly complicate the definition of an 'act of cruelty';
- confuse the legal community and general public by appearing to introduce a second test of 'necessity', distinct from the common law defence of 'necessity'; and
- increase the subjective element of the definition of an 'act of cruelty' - which ought only be relevant to mitigation - with the potential effect of excusing what are otherwise clear acts of cruelty, offensive to public morality.

Necessity is a full defence to criminal charges under the common law of NSW, and is open to any criminal defendant to raise, including those accused of animal cruelty. Like other common law defences, the defence of necessity requires no codification or mention within a statute to apply. Only if a proscribing law explicitly excludes the common law defence of necessity, will it cease to apply (in the specified circumstances). For a defence of necessity to succeed, the accused must first establish a basis for this defence, after which the prosecution bears the onus of disproving that defence beyond reasonable doubt.[8] The basis of a common law necessity defence in NSW is currently limited to circumstances where:

1. '*the commission of the crime was necessary, or reasonably believed to have been necessary, for the purpose of avoiding or preventing death or serious injury to the defendant, or another;*
2. *necessity was the sine qua non of* [that is, the essential reason for] *the commission of the crime; and*
3. *the commission of the crime, viewed objectively, was reasonable and proportionate, having regard to the evil to be avoided or prevented.*'[9]

LFA submits that the 'reasonableness' test, together with existing common law defences (including necessity), provide ample discretion for investigators, prosecutors and judiciary to fairly determine whether or not an act of animal cruelty has been committed. Including the words 'or unnecessarily' - in the context where a common law 'necessity' defence already exists, suggests that Parliament intends to extend the excuse of necessity by en-

[8] *R v Rogers* (1996) 86 A Crim R 542
[9] *R v Cairns* [1999] 2 Crim App Rep 137

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couraging a more subjective test of the accused's guilt, for instance, to take account of matters such as their personal (or corporate) financed and profitability; or their emotional dependence on any animal(s) in question - potentially useful in defending animal hoarders. While LFA believes such subjective factors are relevant in the potential mitigation of sentence, we strongly discourage the Committee from inserting such mitigatory considerations into the determination of guilt, where the actions of the defendant are already subject to the 'reasonable person test'.

It is conceivable that an act of cruelty (including serious neglect) may be considered 'unreasonable' from the perspective of an objectively reasonable person in the circumstances of the accused (applying the 'reasonable person' test); yet may be considered 'necessary' to achieve a particular public policy objective, or a subjective, emotional objective of the defendant. LFA contends that any public policy objective which relies on sustained animal cruelty and suffering must be poor policy, requiring urgent revision. In this context, even a small improvement to the draft Bill, ensuring clarity and fairness in the definition of animal cruelty, will likely generate additional indirect benefits to our society and economy, in the longer-term. In contrast, the words 'or unnecessarily' appear likely to have adverse consequences neither envisaged nor intended, given the existence of the 'necessity' defence in common law.

Section 7(2)(b) proscribes as an act of cruelty: '... advertising, promoting or taking part in an activity in which an animal is released from confinement for the purposes of people catching, chasing, confining or shooting at the animal' - also known as 'canned hunting'. Such hunting is banned in NSW, presumably because it is considered even more inhumane and cowardly than hunting wild animals. Animals released from confinement are unlikely to have been raised in the wild, where they would have developed and honed instincts and skills to evade humans and other predators. Wild animals should also be less disoriented and more familiar with the territory on which they are hunted, than animals recently released and potentially still confined (by perimeter fencing). LFA commends the effective inclusion of 'canned hunting' within the definition of 'act of cruelty'.

However, Section 7(3) exempts from the application of Section 7(2)(b):

> *'... an activity that is constituted by the release of fish into a body of water so that the fish may be caught by recreational fishers.*
> *Example— the release of fish into a lake so that the fish may be caught as part of a fishing competition'*

This exemption appears to undermine the stated objects of the draft Bill: to improve animal welfare and to prevent cruelty, and as such, is poor policy. It is also an apparent example of speciesism, because the exemption is based solely on the various species of the ani-

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mals - fish - rather than on some distinguishing characteristic which diminishes the suffering of the creatures to be excluded from protection. Section 7(3) also offers an unintended defence to cruelty, for people who may recklessly release fish into bodies of water for the purpose of recreational fishing without first ensuring that water quality, oxygenation, temperature and food availability are sufficient to avoid inflicting long-term suffering on these animals. Public fury over the mass fish kills in the Darling River in past years, indicate increasing awareness of the cruelty involved in exposing fish to unlivable water quality.

LFA's research into NSW fishing competitions reveals that only a very small number involve the release of native fish into small and fully enclosed 'bodies of water' such as dams, where their release may be expected to achieve little or no long-term environmental benefit, and where comparisons to 'canned hunting' are obvious. Fewer still involve the permanent capture/killing of the animals released, since most freshwater angling competitions in NSW now appear to be held on a 'catch and release' basis. In these circumstances, LFA recommends that it remain permissible for native fish species to be released into large (but temporarily) enclosed bodies of water (such as Lake Mulwala), but only under the supervision of Government environmental officers; and only with the primary intention of environmental improvement. If this were the policy objective of any release of native fish, then Section 7(2)(b) would not apply to such releases, since the primary purpose of the release would no longer be 'so that the fish may be caught by recreational fishers'. This would, in turn, make Section 7(3) redundant. LFA recommends that removing Section 7(3), will motivate the organisers of freshwater fishing competitions to seek alternative reasons to release native fish into bodies of water and to liaise with appropriate Environmental officers before doing so. However, in the longer term, it would be advisable to tweak the associated environmental law, to proscribe the release of native fish without the primary objective of environmental improvement and without the supervision and approval of authorised Environmental officers. The removal of Section 7(3) will further maintain the integrity of the objects of the Act.

Part 3, Division 1 - Minimum care requirements

LFA generally commends Part 3, Division 1 of the draft Bill, which prescribes minimum care requirements ("**MCR**"s) that a 'responsible person' for an animal must meet to avoid being found guilty of an offence under Section 13. This offence carries a lower maximum penalty than the offence of cruelty. The Division is structured so that, without limiting the discretion to determine what the minimum requirements are in the particular circumstances of an animal, maximum periods are specified, beyond which the failure to provide appropriate food, drink, shelter or exercise will be deemed not to meet the relevant MCR. The appeal of this two-tiered definition is that it allows prosecutors to rely on the deeming provisions to more easily prove when certain MCRs have not been met; but also grants the

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animal cruelty inspectors full discretion to immediately intervene to provide food, drink, shelter or exercise, when the welfare of the animals will be severely compromised by waiting for the deeming period(s) to elapse.

We note an apparent oversight within Section 16(1) wherein the content of the provision currently refers only to 'clean water' rather than to all 'appropriate drink' (as it is titled). This will require minor amendment to protect baby mammals, not yet weaned and still reliant on regular milk to meet their high daily nutritional requirements, for instance: young kittens, puppies, dairy calves, lambs, piglets and kids. LFA recommends that 'or more appropriate drink' be inserted after the words 'clean water' in Section 16(1).

In Sections 15(1)(a), 16(1)(a), 17(1)(a) and 18(1)(a), the draft Bill respectively refers to a period that may be prescribed in regulations 'for the species, or other class, of animal'. In this context, LFA interprets 'or other class' to be a reference to other potential taxonomic classifications of the animal in question, for instance where species are too numerous to be listed in the regulation.[10] LFA would be most concerned if the phrase 'or other class' were to be given a broader, less contextual, interpretation; for instance, to refer to animals classified within the regulations according their role within a particular animal industry - for instance, dairy calves or layer hens. This could potentially allow certain members of a species to be afforded lower MCRs than equivalent animals within the same species, which lacks scientific and philosophical basis. In fact, this interpretation would undermine the coherence and analogical reasoning within the draft Bill, and subvert the simple principle that like cases ought be treated alike. Therefore, to avoid doubt and potential misunderstanding of these phrases in the future, LFA recommends that the word 'taxonomic' be inserted before the word 'class' in Sections 15(1)(a);16(1)(a); 17(1)(a); and 18(1)(a) of the draft Bill.

Finally, Section 18(3) specifies two exclusions from the general rule that unless appropriate opportunity to exercise is provided to an animal within each 24 hours (or a lesser or longer period specified for the animal within regulations); the MCR on appropriate exercise is deemed not to have been met. The specified exclusions are:

> *(a) a stock animal, other than a horse; or*
>
> *(b) an animal of a species that is usually kept in captivity, if the animal is kept in a cage or tank of a height, length and breadth that provides the animal with an opportunity to exercise.*

The definition of 'stock animal' in Schedule 3 of the draft bill includes 12 listed animals (including horses) plus any other animal prescribed by regulation. The list of stock animals

[10] For instance, there are around 28,100 known species of what we commonly regard as 'fish'. This collective group of animals are so distantly related that no single taxonomic classification applies to them - 'fish' is not a taxonomic term. Instead, this group may most simply be classified as animals of the Subphylum Vertebrata which are not members of the Classes: Amphibia; Reptilia; Aves (birds); or Mammalia.

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excluded from the operation of the Section 18 deeming provision includes: alpacas, camels, cattle, pigs, poultry and sheep. This deeming provision applies to all companion animals including horses - even to companion animals like dogs and cats that are treated as for-profit producers by commercial breeders. LFA is unaware of any scientific evidence proving that 'stock animal' species suffer less harm (psychologically or physically) from intensive confinement over extended periods, than common companion animal species. Moreover, if there were such evidence, this would likely be reflected in regulations for the keeping of the species. Since Section 18(1)(a) specifically allows for such regulations to determine the period during which denial of the opportunity to exercise appropriately will not automatically be deemed to breach the MCR for exercise contained in Section 13(2)(e), Section 18(3) appears to be unnecessary.

Section 18(3) is also damaging to the objects of the draft Bill, in appearing to blithely reinforce the speciesism that commonly causes humans to favour the welfare of familiar companion animals - like dogs, cats and horses - over the welfare of stock animals, without scientific or philosophic justification. LFA presumes that the driving force behind Section 18(3) is the perceived commercial interest of certain low-quality, high volume animal industries (many foreign-owned), that have - in recent years - developed an increasing reliance on the intensive confinement of stock animals in feedlots, stalls, cages and/or overpopulated sheds. Without the application of Section 18 to stock animals, Section 13(2)(e) will generate increased discretion in investigators, prosecutors and judiciary to decide when the opportunity for a particular animal to exercise has been inappropriate, without any obligation to refer to specific regulations which would be persuasive, not binding. While this may be of benefit to stock animals in the long term, on balance, LFA prefers the transparency, certainty and potential uniformity of the deeming provision applying to all animals, in order to educate and guide animal industry on the need to allow stock animals appropriate exercise, and to make the prosecution of those causing harm to animals, less onerous. Therefore, LFA recommends that Section 18(3) be removed from the draft Bill.

Section 20 - Requirement to comply with standards

Section 20(2) provides an extremely broad and full defence to all possible charges under the proposed Act by certain individuals, stating that:

> '*[a] responsible person for an animal does not commit an offence against this Act for an act or omission in relation to the animal if the act or omission is in accordance with a prescribed standard.'*

The prescribed standards to which this Section refers are those contained in NSW Codes of Practice and Regulations, which almost all apply to specific animal industries that would

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not exist unless they extracted profit from the animals under their control. Such standards are made without Parliamentary input or (genuine) oversight, and are commonly designed by the industries, themselves, in what has become known as an exercise in 'regulatory capture'.[11] In relation to various acts of cruelty and potentially aggravated cruelty that may be permitted under Section 20(2) as a result of being permitted within the prescribed standards, LFA expresses its strong disapproval of proposed Section 20(2). The purpose and objects of the draft Bill will be significantly undermined if the Committee allows animal industry so significant an exemption from cruelty prosecution and legal scrutiny, merely by following the standards that they, themselves, effectively generated. Alternatively, the draft Bill could allow Cruelty Inspectors, Prosecutors and Courts to assess and determine whether a reasonable person would have acted in the manner of the 'responsible person', or if an act of cruelty has been committed.

At the very least, since the draft Bill sets out Minimum Care Requirements which the Committee and later the Parliament will duly scrutinise, LFA recommends that these discretionary MCRs be preserved to protect both the integrity of the Bill, and the Parliamentary process which generated it. This might be done by requiring that any prescribed standard which excuses non-compliance with an MCR is at least as beneficial to animal welfare as the MCR in question. LFA recommends that Section 20(2) be amended as follows: after 'prescribed standard' insert 'which meets the minimum care requirements in Section 13.' In reality, this issue will likely only arise where a Court is hearing matters concerning potential breaches of prescribed standards which render Sections 13 and 25 of the proposed Act, applicable, and the Court may then determine if a prescribed standard is not considered 'appropriate' under an MCR. Allowing limited judicial scrutiny of prescribed standards, in this way, is likely to lead to gradual improvements in animal welfare rather than locking in standards which may be archaic in the wake of scientific and social progress.

Section 32 - Prohibition on animal fighting

LFA was alarmed to discover, seemingly buried within a provision in the draft Bill that ostensibly prohibits violence against animals as entertainment, two provisions with the opposite effect, primarily with regard to rodeos. Section 32(2)(a) exempts from the ban on animal fighting all rodeos conducted:

[11] Jed Goodfellow 'Regulatory capture and the welfare of farm animals in Australia' in Animal law and welfare: international perspectives, editors Deborah Cao & Steven White, Switzerland, Springer, 2016, pp. 195-235 (Ius Gentium-Comparative Perspectives on Law and Justice) at Part 6.1: 'Over representation of Industry Interests in Standards Development'
Relevant extracts can be viewed at pp.9-10 of : http://lawyersforanimals.org.au/wp-content/uploads/2011/01/LFA-Submission-on-draft-Poultry-Standards-05-03-18.pdf

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'in accordance with a standard prescribed by the regulations for this section or a person who does all that the person could reasonably be expected to do to conduct the rodeo in a way that complies with the standard...'

Section 32(3) takes the matter significantly further, stating:

To avoid doubt, neither of the following is an act of cruelty—
(a) conducting a rodeo in accordance with subsection (2)(a),
(b) participating in a rodeo conducted in accordance with subsection (2)(a).

LFA notes that Section 32(3), if it were to be included in the proposed Act - which we discourage for the reasons, below - would be more appropriately located under the Section 7 definition of 'act of cruelty' where two other exemptions to the definition are listed. However, LFA disapproves of the exemptions proposed in Sections 32(2)(a) and 32(3), because there is no scientific or philosophic basis for such an exemption, and the cruelty and animal violence associated with rodeos ought no longer be sanctioned by the State as appropriate entertainment for adults, let alone for impressionable children.

Section 7 of the draft Bill variously proscribes as acts of cruelty:

- *an act or omission that results in an animal being— ... unreasonably or unnecessarily harmed, or.... abused, ... terrified, tormented, tortured or*
- *riding or using an animal that is unfit for that purpose [or]*
- *... advertising, promoting or taking part in an activity in which an animal is released from confinement for the purposes of people catching, chasing, confining or shooting at the animal'.*

Yet under Section 32(3) and the 'NSW Code of Practice for animals used in rodeo events', activities such as calf-roping (pictured below) and poddy riding, would not constitute acts of cruelty. Calf-roping is permissible under the Code using calves over 100kg, which means that the calf may not yet be weaned (early weaning commences around 100kgs or 12 weeks of age[12]). During calf-roping events, calves are chased by a rider on horseback, lassoed and jerked to a halt, the rider then dismounts and - while the horse maintains tension on the lasso around the calf's throat - throws the calf to the ground and ties three of its feet together. This series of acts is likely to cause the calf to suffer protracted fear, long-term psychological trauma and anxiety (potential lifelong distrust of humans and horses), pain and potential injuries such as damage to the windpipe and soft tissues of the neck, bruising and/or broken ribs, and oxygen deprivation from choking. Such deliberate infliction of harm for mere entertainment would certainly constitute an offence under Section 7 were there no exemption granted. Similarly, the poddy calf riding events permitted under the NSW Code for calves weighing 200kgs or more, and all acts undertaken to terrify, torment and infuriate bulls and broncos, to encourage them to buck, would likely constitute cruelty were they not exempted from the proposed Act. Sanctioning

[12] See: https://agriculture.vic.gov.au/livestock-and-animals/beef/health-and-welfare/early-weaning-of-beef-calves

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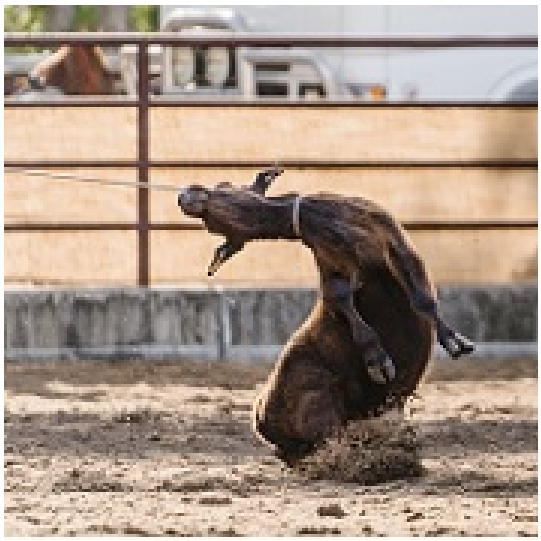
such cruel activities is contrary to the objects stated in the draft Bill; incompatible with the wider NSW community's perception of animal cruelty; and strongly opposed by RSPCA Australia.[13] Calf roping is already banned in Victoria and South Australia. The draft Bill provides an opportunity for NSW laws to catch up, and for the NSW Parliament to the reflect broader NSW community values, not the views of a small minority.

https://kb.rspca.org.au/knowledge-base/what-are-the-animal-welfare-issues-with-calf-roping-in-rodeos/



Animal Liberation Queensland - http://rethinkrodeos.com/

If the exemption were removed, and such rodeo activities permitted by the Code still did not constitute cruelty or animal fighting, then rodeo organisers and participants could not be successfully prosecuted. LFA believes rodeos, like all violence against animals presented as human entertainment, can easily be replaced by increasingly popular but less inhumane entertainments, either involving or not involving animals. Those involving animals could promote voluntary human-animal partnerships, without violence, such as: gymkhana and adult equestrian events; polo; sheep-dog trials (where biting and undue rough handling would be strongly discouraged and penalised - to maintain calm and

[13] https://www.rspca.org.au/take-action/calf-roping-in-rodeos

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compliant stock animals); dog agility trials; and animal shows. The latter might include categories for all species, including stock and companion animals, that go beyond mere appearance, to encourage the exhibition of cross-species communication, talents and skills (provided the training required was not detrimental to the animal - hence excluding demeaning circus tricks).

Section 32(2) also seeks to exclude from the category of animal fighting offence:

> *(b) mustering stock, working stock in yards or another routine animal husbandry activity, or*
> *(c) conducting sheep dog trials.*

LFA is unable to account for the reference to these activities in this provision, since none should involve 'animal fighting', nor the encouragement thereof - in fact, quite the opposite, if they are to achieve their purpose, which involves keeping both stock animals and dogs passive, calm and attentive, minimising anxiety.

LFA recommends that Sections 32(2) and (3) be removed from the draft Bill.

Thank you for reading this submission. Should the Committee have any queries concerning its content, please contact Lawyers for Animals via email: enquiries@lawyersforanimals.org.au

Yours faithfully,

Nichola Donovan
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