

GP1 Animal Welfare Legislation

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Introduction

The substance and form of animal welfare legislation fundamentally affects the welfare of animals which fall within its jurisdictional boundaries. The RSPCA has long played a vital role in the development and enforcement of animal welfare legislation throughout Australia, and is therefore well-placed to provide an informed opinion on the future development of these laws.

Animal welfare legislation is currently developed and administered at the state and territory level. It has undergone significant reforms in recent times. Most notably, the legislation has evolved to broaden its scope from simply prohibiting acts of cruelty to animals, to actively promoting the welfare of animals. This expansion is reflected through the imposition of positive duties on animal owners to provide for the welfare of animals under their custody and control. These duties are largely based on the 'five freedoms' (see below at 7). In most states and territories this expansion has also been reflected symbolically through changes in the title of the legislation from the 'Prevention of Cruelty to Animals Act' to the 'Animal Welfare Act' or 'Animal Care and Protection Act'.

While this is a positive development, RSPCA Australia believes there are still many areas in which the legislation can be improved. This position paper provides key policy objectives for fundamental provisions of animal welfare legislation, which if implemented, would form the basis of a 'model Animal Care and Protection Act' (the Act). It does not provide the precise drafting for such an Act, but in certain sections it does provide for the use of preferred terms for drafting purposes.

This position paper outlines what RSPCA Australia believes are core components of a model Animal Care and Protection Act. These include:

- a. Recognition of animals as sentient beings with intrinsic value;
- b. An absolute prohibition on all forms of animal cruelty;
- c. The promotion of animal welfare through the imposition of positive duties that are based on the 'five freedoms';
- d. Enforcement mechanisms which provide for both educational and punitive responses to animal welfare offences;
- e. Procedural mechanisms which promote the efficient and effective enforcement of the legislation; and
- f. Governance mechanisms which promote the legitimacy of the regulatory framework, particularly in relation to the values of due process, accountability, and compliance with legislative mandates.

This position paper is intended to be utilised by state and territory RSPCAs, other animal welfare organisations, and interested individuals, when they have an opportunity to be involved in the review and drafting of animal welfare legislation within their jurisdiction. RSPCA Australia believes the provision of a national position on animal welfare legislation will facilitate the aim of achieving national consistency in animal welfare law. Animal welfare legislation will continue to evolve. This position paper will be reviewed regularly to reflect changes in community expectations and attitudes, and developments in animal welfare science and technology.

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1. Title

- 1.1. RSPCA Australia believes the 'Animal Care and Protection Act' is an appropriate title as it represents the expanded contemporary approach to regulating the way in which human beings interact with animals. In particular, this title reflects the dual objects of promoting animal welfare through the imposition of a duty of care, and the protection of animals through prohibitions on animal cruelty.

2. Purpose

- 2.1. The purpose of the Act should expressly recognise animals as sentient beings with intrinsic value. RSPCA Australia believes that such recognition would reflect developments in community attitudes in moving beyond simply valuing animals for their instrumental worth. This recognition will also:
 - a. Influence developments in the legal status of animals under the common law;
 - b. Accord with principles set out in the Australian Animal Welfare Strategy;
 - c. Align with international legislative trends including the development of the United Nations Universal Declaration on Animal Welfare;
 - d. Reflect developments in our scientific understanding of animal cognition and sentience; and
 - e. Encourage progressively higher standards of animal welfare generally.
- 2.2. This recognition should form the justificatory basis for why the Act is necessary. The purpose should then outline the interrelated, yet distinctive objectives of preventing animal cruelty, and promoting animal welfare through both community education and awareness raising activities, and law enforcement efforts.

3. Preliminaries

- 3.1. The Act should bind the Crown. RSPCA Australia believes that the duties imposed under the Act should apply equally to government departments, instrumentalities and officers, as they do to ordinary members of the community.

4. Definitions

- 4.1. This position paper is not intended to provide an exhaustive list of definitions for terms used in animal welfare legislation. The four definitions considered below however are fundamental to the operation of such legislation. These definitions impact upon the scope and application of the Act, including the range of animals to be covered, the attribution of criminal responsibility, and key elements of animal cruelty offences.
- 4.2. 'Animal'
 - 4.2.1. As the purpose of the Act is to protect all sentient animals, the definition of 'Animal' should be broad and include all live vertebrate species of animal (excluding human beings) and certain species of Cephalopoda and Malacostraca such as octopi, squid, crabs, crayfish, and lobsters. RSPCA Australia believes there is no justifiable basis for excluding fish from the protections afforded under the Act.
- 4.3. 'Person in charge'
 - 4.3.1. The term 'person in charge' is a fundamental concept for attributing criminal responsibility under animal welfare legislation, particularly in relation to 'breach of duty of care' offences (see below at 7). The definition of this term should be inclusive and consist of the following persons:

- a. The legal owner of the animal;
- b. Any person who has custody or control of the animal;
- c. The employer of a person with custody or control of the animal if the employment is connected with such custody or control; and
- d. The occupier of a place or vehicle where the animal was at the relevant time.

4.4. 'Harm'

4.4.1. The terms 'harm' and 'pain' are generally used in animal cruelty offence provisions (see below at 8 and 0) to refer to the consequence of a particular act or omission.

4.4.2. RSPCA Australia prefers use of the term 'harm' as opposed to 'pain' as the ordinary meaning of harm has a broader application. The term should be defined broadly to include a range of effects, experiences and impacts, both mental and physical, such as 'pain', 'suffering', 'distress', 'damage', and also 'unconsciousness'.

4.5. 'Serious harm'

4.5.1. The term 'serious harm' is used to distinguish categories of animal cruelty offences, and is generally an element of an offence of *aggravated* animal cruelty (see below at 0).

4.5.2. RSPCA Australia believes that 'serious harm' should be defined as harm which:

- Endangers the life of an animal;
- Results in the animal being so severely injured or diseased, or in such other physical or mental condition, that it would be cruel not to euthanase the animal; or
- Results in serious and protracted impairment of a physical or mental function.

5. Animal Welfare Authority (the Authority)

5.1. Animal welfare regulation is a complex and specialised field involving a diverse range of considerations and competing interests. Accordingly, the administration of such legislation requires a diverse range of skills, expertise and importantly, independence.

5.2. RSPCA Australia believes that animal welfare legislation should be administered by a dedicated, independent statutory authority established under the Act. It is critical that the Authority is provided with adequate funding, resources and skills to enable it to perform its functions competently and effectively.

5.3. The Authority should be accountable to an appropriate Minister and be covered by the relevant state or territory Ombudsman and Freedom of Information legislation, as well as any other legislation dealing with the accountability of the public sector.

5.4. The Authority should have the following functions:

- Overseeing the enforcement of the Act, including the process for appointing inspectors;
- Instituting animal welfare monitoring and evaluation programmes with respect to commercial industries;
- Formulating and reviewing animal welfare policy and regulations under the Act;

- Providing advice to the Minister in relation to the administration and enforcement of the Act; and
- Representing the relevant state or territory government on national animal welfare advisory committees.

6. Animal Welfare Advisory Committee (the Advisory Committee)

- 6.1. RSPCA Australia believes the Act should establish an Animal Welfare Advisory Committee for the purpose of advising the responsible Minister on animal welfare matters, including the development of subordinate legislation under the Act (see below at 24). The constitution of the Advisory Committee should be established by the Act with representation from government, the veterinary profession, industry, the legal profession, relevant scientific experts, and animal welfare organisations.

7. Duty of Care

- 7.1. RSPCA Australia believes that animal welfare legislation should impose positive obligations on people who have custody or control of animals. The duties imposed should reflect the ‘five freedoms’.
- 7.2. RSPCA Australia believes that offences for breaching the duty of care provisions should be separate from the animal cruelty offences within the Act (outlined below at 8 and 9). This distinction will enhance the symbolic and educative effect of the duty of care provisions. However, there should still be parity between the maximum penalties available for duty of care offences and those provided for the standard cruelty offences. This will reflect the fact that duty of care offences are no less serious than animal cruelty offences.
- 7.3. **Appropriate food and water**
- 7.3.1. The person in charge must have an obligation to provide appropriate and adequate food and water for the animal. Appropriate and adequate food and water will be that which is necessary to meet the nutritional needs of the particular animal at the particular time in the animal’s growth and/or reproduction, and taking into account prevailing environmental conditions.
- 7.4. **Appropriate living conditions**
- 7.4.1. The person in charge must have an obligation to provide the animal with appropriate living conditions. RSPCA Australia prefers use of the term ‘living conditions’ in place of ‘shelter’ for broader application. The obligation should also be made to apply equally to ‘temporary’ living conditions. Appropriate living conditions will be those conditions which provide the animal with a clean and secure environment in which the animal can exercise natural behaviours, and be protected from adverse weather effects and predation.
- 7.5. **Prevention and mitigation of harm**
- 7.5.1. The person in charge must have a dual-fold obligation to first, take all reasonable steps to prevent the animal from suffering harm, and second, to take all reasonable steps to mitigate any harm that is suffered by the animal. In many cases this will require the provision of veterinary treatment. RSPCA Australia believes an obligation ‘to take reasonable steps to prevent and mitigate harm’ encompasses a broader range of circumstances than an obligation to simply ‘provide treatment for disease or injury’.

7.6. Expression of natural behaviour

- 7.6.1. The person in charge must have an obligation to ensure that the animal has the ability to express natural behaviours. This obligation can be satisfied through the provision of living conditions which enable the animal to express such behaviour, and if appropriate, by physically taking the animal to a suitable location in which it can express such behaviour.

7.7. Appropriate handling

- 7.7.1. The person in charge must have an obligation to ensure that any handling of the animal is appropriate and causes no, or minimal, distress to the animal.

8. Animal Cruelty

- 8.1. The Act should contain an absolute prohibition on animal cruelty. Animal cruelty is a malleable concept that can be interpreted in a variety of ways depending upon the context in which it is applied. Traditionally, animal welfare legislation has approached the concept by defining it as the infliction of ‘unnecessary harm’. The term ‘unnecessary harm’ is used to limit the circumstances in which a person can cause harm to animals.
- 8.2. RSPCA Australia is concerned that the prohibition has been interpreted too narrowly by the courts in a manner which diverges from the intended statutory objective of protecting animal welfare. Rather than asking the question of whether the harm was *necessary* in the circumstances, the courts have simply asked whether the harm was *reasonable* or *legitimate*. RSPCA Australia believes it is necessary to redefine the approach taken by the courts by focusing the question on whether the harm was *necessary*.
- 8.3. Accordingly, RSPCA Australia believes animal cruelty should be defined as an act or omission which causes, or is likely to cause, harm to an animal, unless such harm is necessary in the circumstances. The Act should then provide the court with guidance on how to determine whether the harm was necessary in the circumstances by outlining the following factors for the court to take into account:
- a. The necessity of the object and purpose of the act or omission which caused, or was likely to cause, the harm;
 - b. The necessity of the severity and duration of the harm caused; and
 - c. The availability of less or non harm-causing alternatives.
- 8.4. While further delineation of the prohibition is not as a matter of law necessary, in the interests of clarity, the Act could provide for a list of established categories of acts or omissions which constitute animal cruelty. This list may include provisions similar to the following, but must not limit the generality of the above prohibition:
- Beating, abusing, terrifying, or tormenting an animal;
 - Overriding, overworking or overdriving an animal;
 - Confining, tethering or transporting an animal in a way that is inappropriate for the animal’s welfare; and
 - Killing an animal in an inhumane manner, or in a way that does not cause death to occur as rapidly as possible.

9. Aggravated Animal Cruelty

- 9.1. RSPCA Australia believes that the Act should establish a separate category of animal cruelty for particularly serious offences that are committed with intention or recklessness, and result in serious harm or death to the animal.
- 9.2. This category of offending should be titled 'aggravated animal cruelty' and should attract higher penalties than those provided for under the breach of duty of care or animal cruelty offence sections above. Aggravated animal cruelty offences should also be classified as 'indictable offences' under the relevant state or territory criminal procedure legislation.
- 9.3. The Act should also include a 'fall-back' provision which provides the court with the power to find a person guilty of the standard animal cruelty offence, if the aggravating features of intention, recklessness, serious harm or death cannot be satisfied.

10. Other prohibited conduct

- 10.1. After the general offences listed above, the Act should then go on to address a number of specific activities that are prohibited. The Act may provide that these activities constitute animal cruelty or aggravated animal cruelty for the purposes of sections 8 and 9 above. Many of these prohibitions may also be addressed in regulations under the Act. This position paper does not intend to provide an exhaustive list of prohibited conduct, but recommends that the following be addressed:
 - Unlawful killing (i.e. killing an animal without reasonable justification, or otherwise in way that causes the animal unnecessary harm);
 - Abandoning or unreasonably releasing an animal;
 - Organising, attending or otherwise participating in animal fighting events;
 - Possession of animal fighting paraphernalia;
 - Organising, attending or otherwise participating in horse jumps racing events;
 - Organising, attending or otherwise participating in the operation of a game park within which animals are confined for the purposes of hunting;
 - Organising, attending or otherwise participating in rodeo events;
 - Surgical procedures designed to impair, disable or otherwise alter the natural physical form of an animal for aesthetic purposes;
 - Use and possession of steel-jawed traps and snares;
 - Use and possession of glue traps;
 - Use and possession of certain electrical devices (i.e. shock collars, prodders etc);
 - Use and possession of pronged collars;
 - Use of exotic animals in circuses;
 - Failing to take reasonable steps to mitigate harm caused to an animal after hitting the animal with a vehicle; and
 - Unlawfully baiting / poisoning animals.

11. Penalties

- 11.1. RSPCA Australia believes the penalties available under the Act should be sufficient to act as a deterrence to those people in the community who may otherwise be inclined to neglect or harm animals. The penalties must reflect the community's view that animal cruelty is a serious crime. RSPCA Australia believes that a combination of fines (including minimum fines) and terms of imprisonment are necessary. These

penalties should be imposed in conjunction with the appropriate court orders addressed below at 15.

- 11.2. RSPCA Australia believes that inspectors should also have the power to issue infringement notices which impose ‘on the spot’ fines for offences that are administrative in nature or not of the requisite level of seriousness to warrant criminal prosecution.

12. Enforcement

- 12.1. It is crucial that adequate funding and resources are provided by government to ensure that the provisions of the Act can be effectively enforced. RSPCA Australia believes that a cooperative approach should be adopted by government whereby all relevant agencies are encouraged to accept their responsibility for responding to, and addressing animal welfare incidences.

12.2. Inspector appointment

- 12.2.1. Inspectors should be appointed by the Minister after referral from the Authority. Sufficient numbers of inspectors must be appointed with supporting resources to ensure all animal cruelty reports can be attended to within a reasonable time period and investigated fully.

- 12.2.2. Inspectors should only be appointed once they have satisfactorily completed an appropriate course of training on the enforcement of the Act.

- 12.2.3. Once appointed by the Minister, inspectors should be classified as ‘public officials’ under relevant state or territory public sector legislation and be subject to the provisions of the relevant Ombudsman and Freedom of Information legislation, and other public sector accountability legislation.

- 12.2.4. The inspectorate should be composed of:

- All members of the relevant state or territory police force;
- Officers from RSPCA inspectorate departments; and
- Appropriate state or territory government officers (such as animal health officers).

12.3. Powers of inspectors

- 12.3.1. Inspectors must be provided with sufficient powers to enable them to effectively investigate suspected offences and enforce the Act.

12.3.2. *Entry to property*

- 12.3.2.1. Inspectors must be afforded a power to enter property for the purposes of administering the Act.

- 12.3.2.2. Forcible entry into dwellings should only be permitted by authority of a warrant from a Justice of the Peace or Magistrate, unless the inspector reasonably believes an animal is in imminent risk of death or injury, or evidence of an offence within the dwelling may be concealed or destroyed if entry is not immediately effected.

- 12.3.2.3. The power of entry should also include a power to conduct unannounced inspections of properties which are used for, or in connection with, a business or organised activity involving animals.

12.3.3. *Seizure of animals and property*

12.3.3.1. Inspectors must be afforded a power to seize animals if the inspector believes that seizure is required for the welfare of the animal. An inspector should also be empowered to seize animals or property if the inspector believes the animal or property is the subject of an offence, or may provide evidence of an offence.

12.3.3.2. Inspectors should be empowered to do all things reasonably necessary to effect seizure and provide appropriate care for seized animals, including the provision of veterinary treatment.

12.3.4. *Animal welfare notices*

12.3.4.1. Inspectors must be afforded a power to issue a formal written notice to a person in charge of an animal which directs that person to take certain action in relation to the animal.

12.3.5. *Other powers*

12.3.5.1. To further facilitate the effective enforcement of the Act, inspectors should also have the power to:

- Require people to assist the inspector in exercising the inspector's powers;
- Require people suspected of an offence, or people with knowledge of an offence, to provide their identity;
- Require people and companies to provide information in relation to an offence;
- Euthanase animals the inspector reasonably believes are so sick, injured or otherwise in such pain, that it would be cruel to keep the animal alive.

12.4. **Access to information**

12.4.1. Inspectors may require access to certain information held by various government agencies to facilitate enforcement of the Act. This information will usually be in relation to the identity or contact details of persons suspected of committing offences under the Act. It is critical that the legislative and administrative arrangements in the relevant state or territory recognise inspectors as law enforcement officers under the Act and provide for the authorised release of such information for enforcement purposes.

13. **Offence to hinder an inspector**

13.1. The Act should provide an offence for hindering or obstructing an inspector in the course of the inspector's duties. This offence should include the provision of false or misleading information to an inspector, and failure to comply with a direction given by an inspector (as listed above at 12.3.5).

14. **Dealing with seized animals**

14.1. Inspectors should be authorised to retain seized animals until the outcome of prosecution proceedings or any application for the animal to be forfeited to the Crown as provided for at 14.2 below.

- 14.2. The Act should provide a procedure for an inspector to apply to a magistrate for the forfeiture of a seized animal. Grounds to make the application should not be dependent upon the initiation of prosecution proceedings. For a forfeiture application to be granted in the absence of prosecution proceedings, a magistrate should be satisfied on the balance of probabilities that the animal's welfare may be put at risk if returned to the owner. The owner's past conduct in failing to care for the animal in an appropriate manner should be made a relevant consideration for the court to have regard to in determining the application under the Act.
- 14.3. If an owner seeks to contest a forfeiture application, the owner should be required to pay a bond or security to account for the ongoing costs of treatment and care for the animal(s) pending the outcome of any prosecution proceedings or forfeiture application.
- 14.4. If an animal has been seized due to apparent abandonment and the seizing agency has not received any response from the original owner, or person on their behalf, within 72 hours, the Act should provide for ownership of the animal to be transferred to the Crown.
- 14.5. If an animal is forfeited to the Crown the proceeds of any subsequent sale of the animal(s) is to be used to pay for the costs associated with the seizure of the animal(s) and any subsequent care and treatment provided to the animals. The balance of any proceeds should be directed to the Animal Welfare Trust Fund (see below at 21).

15. Court orders

- 15.1. Courts should be afforded a range of powers for dealing with animal cruelty offenders. As there are many cases in which a defendant is found guilty of an offence but not convicted, the authority to make the orders below should not be subject to a conviction being recorded, but to a finding of guilt or mental incompetence.
- 15.2. **Forfeiture of animal(s)**
 - 15.2.1. The Court should be authorised to order the forfeiture of the animal(s) subject to the prosecution proceedings, and also any other animals connected with the proceedings which the Court believes may be at risk.
- 15.3. **Prohibition on having custody of animals**
 - 15.3.1. The Court should be authorised to order that a defendant be prohibited from owning or having custody of animals for a specified, indefinite or permanent period.
- 15.4. **Care for animals in particular way**
 - 15.4.1. The Court should be provided with a broad power to order a defendant to care for an animal in a particular way.
- 15.5. **Psychological counselling**
 - 15.5.1. The Court should be provided with a power to order a defendant who has committed animal cruelty to undergo psychological counselling. RSPCA Australia believes this is very important in light of the confirmed connection between animal cruelty and human violence.

15.6. Compensation

15.6.1. The Court should be empowered to order compensation to be paid by the defendant for expenses associated with any seizure, treatment and care of animals connected with the offence being prosecuted. Compensation should not be confined to expenses associated with the particular animals for which the charges relate. There should be no cap to the amount of compensation that can be ordered by the Court under this provision.

15.6.2. To facilitate consistency in the awarding of compensation, the Act may empower the making of regulations which provide for a costs scale for common items of expenditure associated with seizing, treating and caring for animals.

16. Moiety

16.1. If the prosecution derives from an investigation conducted by an inspector employed by the RSPCA or other approved charitable organisation, a 50 per cent moiety of any fine imposed should be directed to the RSPCA or other approved charitable organisation.

17. National Animal Cruelty Offenders Register

17.1. The Act should provide a mechanism for recording the personal details of individuals who have been found guilty of offences under the Act on a national register. The Register would be accessible to members of state, territory and Commonwealth police forces, relevant government agencies, and RSPCA inspectorate departments.

18. Interstate recognition

18.1. The Act should provide for the recognition of interstate court orders which prohibit persons from owning or having custody of animals.

18.2. The Act should also provide for a mechanism to enable the recognition of equivalent interstate inspectors for the purposes of granting them authorisation to exercise powers under the Act in times of natural disaster or other emergencies.

19. Evidentiary issues - 'person in charge'

19.1. One of the most common grounds of dispute in animal cruelty prosecutions concerns the issue of whether the defendant was the 'person in charge' of the relevant animal(s) at the time of the alleged offence. Obtaining the evidence required to prosecute a person for animal cruelty can be difficult. Animals of course cannot tell investigators what occurred or provide testimony in court. In this regard animal cruelty investigators are presented with similar difficulties to those experienced in the investigation of offences concerning infant children. As a result of these evidentiary difficulties, many animal cruelty offences are not prosecuted.

19.2. To overcome this, RSPCA Australia believes that the Act should reverse the onus of proof with respect to the 'person in charge' element. An allegation in a Complaint or Information that a person was the 'person in charge' of the animal should be accepted as proved in the absence of proof to the contrary. This will place the onus on the defendant to prove, on the balance of probabilities, that he or she was not the person in charge of the particular animal(s) at the relevant time. Prosecution will still be required to present evidence on this point but will not have to meet the evidentiary standard beyond reasonable doubt.

20. Liability of employers (including companies) and directors

- 20.1. RSPCA Australia believes the Act should impose a degree of vicarious liability upon an employer for any breach of the Act by its employees. The concept of vicarious liability is necessary for encouraging a corporate culture of responsibility which promotes compliance with government regulation. Vicarious liability will encourage directors and officers of companies to take a greater interest in the way in which animals associated with the company's operations are managed and treated.
- 20.2. Where a company is found to have committed an offence, the Act should extend liability to the individual directors of the company, unless the directors can demonstrate that the offence did not result from a failure to exercise reasonable diligence to avoid the commission of the offence.

21. Animal Welfare Trust Fund

- 21.1. The Act should establish an Animal Welfare Trust Fund to be administered by the Authority. All money realised from fines (except any moiety as per 16 above) or infringement notices under the Act should be paid into the Animal Welfare Trust Fund.
- 21.2. The proceeds of the Trust Fund should be used to fund animal welfare initiatives within the relevant state or territory. The Authority should be required to consult with the Advisory Committee regarding the disbursement of trust funds.

22. Recovery of costs

- 22.1. The Act should provide grounds to recover all expenses incurred in the seizure, care and treatment of animals under the Act as a civil debt (if not recovered through prosecution proceedings).

23. Immunity from civil liability

- 23.1. The Act should afford inspectors, and any persons assisting inspectors in the exercise of their duties, immunity from civil liability.

24. Subordinate legislation (Regulations, and Standards and Guidelines)

- 24.1. The Authority should be responsible for coordinating the development of regulations and Standards and Guidelines under the Act. The Standards and Guidelines should be adopted under the Act through the regulations. The relevant regulation should make the Standards mandatory.
- 24.2. The Act should expressly state that such subordinate legislation cannot be inconsistent with the Act.
- 24.3. To promote the value of due process, the subordinate legislation-making process must provide for the following:
- Mandatory consultation with the Advisory Committee;
 - A public consultation process, including requirements for the advertising of such consultation; and
 - A requirement that the responsible Minister table the proposed new or amended regulations (including any adopted Standards and Guidelines) in parliament for consideration.