



## **RSPCA SUBMISSION**

# **ANIMAL PROTECTION BILL INQUIRY**

**9 March 2018**

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## Summary of recommendations

1. **Clause 3** - Include recognition of animal sentience in Objects of Bill.
2. **Clause 5** - Include fish, crustaceans, and cephalopods (squid, octopi etc) within the definition of 'animal' without limitation.
3. **Division 1, Part 2** - Retain the Animal Welfare Authority in the Bill and strengthen its independence as an independent government agency under Administrative Arrangements Orders.
4. **Division 3, Part 2** - Retain the Animal Welfare Advisory Committee within the Bill.
5. **Clauses 22-23** - Replace the 'minimum level of care' with the 'duty of care'.
6. **Clause 23** - Remove *mens rea* elements from standard offence of breaching the minimum level of care.
7. **Clause 24** - Remove *mens rea* elements from standard cruelty offences.
8. **Clause 4** - Define the terms 'suffering' and 'harm' and include 'mental distress' in the definition.
9. **Clause 29** - Remove exceptions for the use of metal jawed traps.
10. **Clause 32** - Refine exception for feeding live animals to captive display animals.
11. **Clause 33** - Expand list of species that could be used for blooding greyhounds.
12. **Clause 34** - Refine exception for farm dogs travelling un-restrained on vehicles.
13. **Clause 83** - Include additional power of entry in accordance with Approved Monitoring Program; expand exceptions from requirement to provide 48 hours notice to entry to greyhound establishments and entry under serious and urgent circumstances; and refine requirement for authorised officers to take reasonable steps to contact occupier prior to entry to land surrounding the premises.
14. **Clause 90** - include expressed power for authorised officers to directly obtain veterinary treatment to alleviate an animal's suffering.
15. **Clauses 113-115** - Include power for courts to make seizure and banning orders in the event a defendant is found mentally incompetent to have committed the offence or unfit to stand trial; and refine limits on court's power to make mandatory banning orders.

## 1. Recognition of animal sentience

The introduction of the Bill provides the NT with the unique chance to become the first jurisdiction in Australia to recognise the sentience of animals in legislation. The Victorian Government has flagged its intention to do so in its impending review of its animal welfare legislation this year.<sup>1</sup>

The European Union recognised animal sentience in 1997 with an amendment to the *Treaty Establishing the European Community*.<sup>2</sup> The Treaty recognises animals as ‘sentient beings’ and provides that Member States must pay regard to the welfare requirements of animals in formulating their policies.<sup>3</sup> In 2015, the New Zealand Government recognised the sentience of animals with an amendment to the *Animal Welfare Act 1999* (NZ), which now reads as follows:

An Act -

- (a) to reform the law relating to the welfare of animals and the prevention of their ill-treatment; and, in particular,-
  - (i) to recognise that animals are sentient;

...

[emphasis added]

This was shortly followed by the Government of Quebec.<sup>4</sup> Recognising animal sentience reflects contemporary scientific knowledge on animal welfare and is in keeping with modern developments in animal welfare law around the world.

The RSPCA recommends the NT Government seize this one-off opportunity to be the first jurisdiction in Australia to recognise animal sentience in law. This recognition would not be expected to attach to any operative provisions of the Bill and would therefore not impact the substantive obligations and duties of animal owners. It would simply be a symbolic, yet important, recognition of the basis for why animal welfare is important and why legislation to protect animals exists. Such recognition could be included in clause 3 ‘Objects of Act’ with a simple amendment along the following lines:

### 3 Objects of Act

The objects of the Act are:

- (aa) *To recognise that animals are sentient;*

...

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<sup>1</sup> See, Animal Welfare Action Plan, Victorian Government, 2017.

<sup>2</sup> *Protocol annexed to the Treaty of the European Community - Protocol on protection and welfare of animals* [1997] OJ C340.

<sup>3</sup> *Ibid*, p 0110.

<sup>4</sup> Quebec defines animals as ‘sentient beings’ in new legislation, *CTV News*, 4 December 2015:

<https://www.ctvnews.ca/politics/quebec-defines-animals-as-sentient-beings-in-new-legislation-1.2687500>

## 2. Definition of animal to include fish, crustaceans, octopi etc

The definition of animal contained in cl.5 of the Bill is too narrow and excludes a large number of animals from the protective reach of the statute including fish and crustaceans when not in captivity, and cephalopods (octopi and squid) entirely. There is now a substantial body of scientific evidence demonstrating that these species are sentient and capable of experiencing pain and suffering. They should be included within the definition of ‘animal’ without restriction. As currently drafted, the Bill will allow a person to engage in malicious cruelty towards fish and crustaceans when they are in a wild state, and cephalopods at any time, with impunity.

Just two days ago, a group of young men in Western Australia filmed themselves dragging a live shark behind their vehicle and posted the footage online. The incident shocked the public and made national headlines.<sup>5</sup> If such an incident occurred in the Northern Territory there would be no legal recourse as the shark was not “in captivity and dependent on a person for food” (cl.5(1)(b)).

There is no rational basis for such exclusions. Any perception that including fish, crustaceans, and cephalopods as animals under the Bill will limit fishing practices is unfounded as appropriate exemptions can be provided for legitimate fishing activities. This is how Victoria, Queensland, and Tasmania seek to protect legitimate activities like fishing while protecting sentient animal species from cruelty. Additionally, NSW and the ACT also take this approach with respect to fish. With the exception of the ACT, all of these jurisdiction have significant fishing industries, both commercial and recreational, and none have experienced difficulties with animal welfare legislation restricting or inhibiting these practices.

Continuing these exclusions will put the NT behind other states and territories, particularly with regard to fish. The RSPCA calls for fish, crustaceans, and cephalopods to be included in the definition of an animal without restriction, and for the Bill to include appropriate exemptions for legitimate fishing activities.

## 3. Retain Animal Welfare Authority

The Animal Welfare Authority should remain as a statutory authority established by the Act and afforded the powers outlined in Part 2. Animal welfare law should be administered by a dedicated, independent government agency. Instead of proposing to abolish the Animal Welfare Authority, the NT Government should be looking at ways to strengthen it.

The Minister noted the background to the introduction of the Animal Welfare Authority in his second reading speech. The establishment of the Authority was one of the core recommendations of the Parliamentary sub-committee’s 2011 report into the Mataranka Station incident. The response by officers from the then Department of Primary Industries, Fisheries and Mines to that incident was by all accounts woefully inadequate. Senior officers within the Department did not

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<sup>5</sup> ‘WA Fisherman captured towing dying shark behind car’ 9 News, 7 March 2018:  
<https://www.9news.com.au/national/2018/03/07/22/10/wa-fisherman-capture-towing-dying-shark-behind-car>

support a prosecution despite the matter being described as one of the worst cases of animal neglect in Australia, in which an estimated 200 to 800 cattle perished due to poor management and neglect.<sup>6</sup>

While this was one incident (albeit significant), the Parliamentary inquiry revealed more systematic failures in the administration of the legislation, including concerns about the Department's approach to enforcement.<sup>7</sup> While the Department did not have primary administrative responsibility for the Act at this point in time, the Department's officers were appointed as inspectors under the Act and were responsible for enforcement functions.

In response to questioning about the Department's decision not to prosecute, the then Chief Veterinary Officer stated that "the focus was the welfare of the animals, and whether to prosecute or not was a minor point."<sup>8</sup> When asked about the Department's enforcement culture, the Officer stated he could not recall any prosecutions under the livestock legislation in his 40 years with the Department.<sup>9</sup>

The Chief Veterinary Officer later raised the issue of "tensions" within the Department between working as "industry supporters" and regulating with respect to animal welfare.<sup>10</sup> To address the tensions the Officer recommended that the competing responsibilities be dealt with by separate agencies, with livestock management issues remaining the responsibility of the Department, while "cruelty and neglect type issues" be dealt with under an expanded Animal Welfare Branch within the Department of Local Government.<sup>11</sup>

The subsequent report handed down by the Parliamentary inquiry emphasised the need for a single agency to be responsible for the administration of the Animal Welfare Act, and the Animal Welfare Authority was expected to play the primary role in this administration. This was demonstrated by the report's recommendations to increase the investigatory and monitoring powers of the Animal Welfare Authority,<sup>12</sup> to ensure the Animal Welfare Act clearly described the Authority's structure, role and enforcement provisions,<sup>13</sup> and to ensure the Authority had appropriately skilled and qualified inspectors.<sup>14</sup>

It is concerning to the RSPCA that the Government is now proposing to abolish the Animal Welfare Authority. We note the rationale provided by the Minister in his second reading speech advising

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<sup>6</sup> NT Ombudsman (2010) *Report of Investigation into the Treatment of Cattle and Horses at Charles Darwin University Mataranka Station*, available at: <http://www.ombudsman.nt.gov.au/publications-reports/public-reports/>

<sup>7</sup> Council of Territory Cooperation, Animal Welfare Governance Sub-committee - Final Report, October 2011, available at: <http://www.nt.gov.au/lant/parliamentary-business/committees/ctc/animal-welfare/reports.shtml>

<sup>8</sup> Legislative Assembly of the Northern Territory, Council of Territory Co-operation, Sub-committee - Animal Welfare Governance, Public Hearing - Meeting No AWG09, 3 August 2011, p.15.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid, p. 28.

<sup>11</sup> Ibid, pp. 28-29.

<sup>12</sup> Recommendation 7, Council of Territory Cooperation, Animal Welfare Governance Sub-committee - Final Report, October 2011.

<sup>13</sup> Recommendation 8, Council of Territory Cooperation, Animal Welfare Governance Sub-committee - Final Report, October 2011.

<sup>14</sup> Recommendation 4, Council of Territory Cooperation, Animal Welfare Governance Sub-committee - Final Report, October 2011.

that in practice the CEO of the Department was simply appointed as “the Authority” and therefore its existence as a separate statutory body was in name only. Rather than seeing this as a reason for abolishing the Authority, the RSPCA sees this as a reason for strengthening its independence and resourcing.

Section 26(1) of the current Animal Welfare Act clearly allows for the appointment of a CEO to be the Animal Welfare Authority, and through administrative orders, the Authority could be established as an independent agency. Under such arrangements, accountability for the Authority would be maintained through the operation of ss.22 and 23 of the *Public Sector Employment and Management Act*, which would subject the Authority to the direction of the appropriate minister. Responsibility for the Authority could still be delegated to the Minister for Primary Industries, but the internal administration of the Authority would be independent.

The new Animal Protection Act can, and should, be governed in an independent and accountable manner by maintaining the Animal Welfare Authority in statute and strengthening it as an independent government agency under Administrative Arrangements Orders, no different to other independent authorities operating in the NT today. This would strengthen the independence and accountability of animal welfare services in the Territory consistent with what was envisaged by the 2011 Parliamentary sub-committee.

#### **4. Animal Welfare Advisory Committee**

The RSPCA supports the retention of the Animal Welfare Advisory Committee as a statutory committee under the Animal Protection Bill.

#### **5. Duty of care**

It would be preferable for the term ‘minimum level of care’ to be replaced with the concept of the ‘duty of care’. The concept of a duty of care to animals has proven to be highly effective from an educational and symbolic point of view in those jurisdictions that have employed it, including Queensland and Tasmania. As currently drafted, cl.22(1) has no legal effect. It mentions a ‘duty of care’ but this is not defined, nor is it currently linked to the offence of failing to provide an animal with the ‘minimum level of care’ in cl.23. This is confusing.

We would recommend that cl.22 of the Bill be redrafted and combined with cl.23 following the approach taken in the *Animal Care and Protection Act 2001* (Qld) as follows:

##### **23 Duty of care**

- (1) A person in control of an animal owes a duty of care to the animal.
- (2) The person must not breach the duty of care.

Maximum penalty: 100 penalty units or imprisonment for 12 months.

- (3) For subsection (2), a person breaches the duty if the person fails to ensure the animal:
- (a) has appropriate and sufficient food and water; and
  - (b) has appropriate accommodation and living conditions; and
- ...
- [follow on with current wording of the ‘minimum level of care’]

## 6. Remove *mens rea* elements from standard offence of breaching minimum level of care

The offence of failing to provide an animal with the minimum level of care under cl.23 of the Bill should not contain *mens rea* elements of intention and recklessness. The offence is drafted as follows:

### 23 Minimum level of care

- (1) A person commits an offence if:
- a) the person is in control of an animal; and
  - b) the person *intentionally* engages in conduct; and
  - c) the conduct results in the animal not being provided with at least the minimum level of care and the person is *reckless* in relation to that result.

[emphasis added]

No animal welfare law in the country, including the existing *Animal Welfare Act* in the Territory, contains elements of intention or recklessness within the basic breach of duty of care/neglect offences (see Table 1 in Appendix 1).

Section 43AK of the *Criminal Code Act* (NT) sets out the meaning of recklessness. It provides that a ‘person is reckless in relation to a result if:

- a) the person is aware of a substantial risk that the result will happen; and
- b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.’

Including these elements will cause significant difficulties in prosecuting many of the basic animal welfare offences. Having the onus to prove beyond reasonable doubt that a defendant was aware of a substantial risk to the relevant animal’s welfare, had knowledge of the circumstances of that risk, but proceeded with the offending act or omission anyway, will result in many cases of serious animal neglect going unpunished.

Take for example a case of a neglected dog that is kept in its owner's backyard and has been suffering from severe fly blown ears and infected ulcers for several months. The owner will simply have to claim that they were unaware of the dog's ailments, that they simply leave food out for the dog, that they don't handle the dog or come into close contact with it, and therefore they did not know it was suffering from fly strike or infected ulcers. It would then be up to the prosecution to prove that the defendant did *in fact* know of the dog's ailments, not that the defendant *ought* to have known. The standard effectively changes from an objective one based on what a reasonable person would do in the circumstances, to a subjective one, based on what that particular animal owner - regardless of how indifferent and complacent they may be - knew or did not know.

In the words of Lord Justice General Cooper, this would “unwarrantably impede the administration of a beneficial statute by requiring the prosecution to assume a very difficult and often impossible onus and by perhaps penalizing the intelligent and sensitive, while allowing the callous, indifferent or ignorant to escape” (*Easton v Anderson* 1949 JC 1). The majority of offending conduct under the current *Animal Welfare Act* will escape punishment. It will result in charges being dropped or not proceeded with, prosecutions being lost and offenders escaping justice, and worst of all, it may result in abused animals being returned to callous and neglectful owners.

The current wording of the equivalent offence provision in the *Animal Welfare Act* (NT) is as follows:

#### **8 Duty of care to animal**

- (1) A person in charge of an animal owes a duty of care to it.
- (2) The person commits an offence if the person breaches the duty of care.
- (3) Without limiting subsection (2), a person breaches the duty of care if the person fails to take reasonable steps to ensure the animal receives the minimum level of care.

This is a much clearer and simpler way of setting out the breach of duty offence based on a more objective standard of reasonableness. The RSPCA strongly recommends that cl.23 of the Bill be amended to reflect the current wording of s.8 in the *Animal Welfare Act* (NT).

### **7. Remove *mens rea* elements from standard cruelty offence**

As with the offence of breaching the minimum level of care, the Bill includes the element of intention within its cruelty offence provisions. The standard cruelty offence is currently drafted as follows:

#### **24 Cruelty to an animal**

- (1) A person commits an offence if:
  - a) the person *intentionally* causes suffering or harm to an animal or *intentionally* contributes to its suffering or harm; and

- b) the suffering or harm is unjustifiable, unnecessary, or unreasonable in the circumstances.

[emphasis added]

No animal welfare law in the country, including the existing *Animal Welfare Act* in the Territory, requires the element of intention within the basic cruelty offence (see Table 2 in Appendix 2).

Section 43A1 of the *Criminal Code Act* (NT) sets out the meaning of intention. It provides that a ‘person has intention in relation to a result if the person means to bring about or is aware that it will happen in the ordinary course of events.’

The current wording of cl.24 would require the prosecution to prove beyond reasonable doubt that the defendant intended to cause the animal suffering by their relevant act or omission. Again, in the words of Lord Justice General Cooper, this opens the door for the ‘callous, indifferent or ignorant to escape’ (*Easton v Anderson* 1949 JC 1). This is why the offence of animal cruelty has been interpreted by the courts based on an objective standard since the late 19<sup>th</sup> century (see leading case of *Ford v Wiley* (1889) 23 QBD 203).

Including intention in cl.24 will cause unnecessary difficulties for the prosecuting authority including charges being dropped or not proceeded with, more contested matters, and prosecutions being lost. This can be avoided simply by removing the element of intention from the offence to ensure the Territory’s animal welfare laws are equivalent to those operating in every other state and territory of Australia.

The current wording of the basic cruelty offence in the *Animal Welfare Act* (NT) relevantly provides as follows:

#### **9 Cruelty**

- (1) A person commits an offence if the person is cruel to an animal.

...

- (3) Without limiting subsection (1), a person is cruel to an animal (whether or not the person is in charge of the animal) if the person does any of the following:
  - (a) causes the animal unnecessary suffering;

This reflects the standard legislative approach to animal cruelty offences in all other states and territories. As shown in Table 2, the offence is generally defined as causing an animal unnecessary harm. There is significant case law available to the courts to provide guidance around what is necessary or unnecessary harm in the circumstances.

The terms ‘unjustifiable’ and ‘unreasonable’ in the Bill are superfluous. If the harm is unnecessary, it is unjustifiable and unreasonable. We recommend the reference to ‘unjustifiable’ and ‘unreasonable’ be deleted and the offence simply contain the paragraph ‘the suffering or harm is unnecessary in the circumstances.’

The RSPCA strongly recommends that cl.24 of the Bill be amended to remove the reference to intention and the terms ‘unreasonable’ and ‘unjustifiable.’

## 8. No definition of ‘suffering’ or ‘harm’

The Bill contains no definition of ‘suffering’ or ‘harm’ for the purposes of the offence provisions. Leaving these terms open to the Courts interpret may lead to significant uncertainty. Courts can often impute an element of time within the noun ‘suffering’ finding that the consequence to the animal must be one of ongoing or chronic pain thereby ruling out cases of cruelty that inflict fleeting or temporary pain. The term ‘harm’ as used in the *Animal Welfare Act 1985 (SA)* is preferable and this is consistent with the associated concept of ‘serious harm’ for the purposes of the aggravated cruelty offence in the Bill. Section 3 of the *Animal Welfare Act 1985 (SA)* defines ‘harm’ as ‘any form of damage, pain, suffering or distress (including unconsciousness)’. We recommend the Bill adopt the same or similar definition. It is essential that the definitions of these terms contain the elements of ‘mental distress’ or ‘psychological suffering’ to ensure the court can recognise states of mental pain and suffering that may be experienced by an animal.

The RSPCA strongly recommends the Bill be amended to include a definition of ‘harm’ consistent with s.3 of the *Animal Welfare Act 1985 (SA)* and that reference to ‘suffering’ be deleted.

## 9. Metal jawed traps

The RSPCA is opposed to the use of metal jawed traps under any circumstances due to the potential to cause extreme pain and suffering to animals. Metal jawed traps are unnecessary and not a humane method of controlling pest species. We therefore call for metal jawed traps to be prohibited outright and for the exceptions under cl.29(5)(a) & (c) to be removed from the Bill.

## 10. Exemption for feeding live animals to display animals

The exemption from the prohibited activity offences in cl.32 of the Bill relating to feeding a live animal to a display animal requires further refinement. As it stands, it is open to abuse and creates significant loopholes. The exemption outlined in subclause (6)(b) simply states that the offence of releasing a confined animal for the purpose of being killed by another animal does not apply to ‘the keeping and display of animals the normal diets of which include live food.’

The exemption provides no further guidance or restriction. Most carnivorous display animals will have normal diets including live food. This does not mean they will not eat dead animals that have been killed in a humane manner. Furthermore, the exemption is not confined to appropriate species of live animal. One could feed a live kitten to a captive python and the exemption would still apply.

Paragraph (b) should be amended along the lines of the equivalent exemption in s.43 of Queensland’s *Animal Care and Protection Act 2001* as follows:

- (b) the feeding of an animal to a captive display animal when the captive display animal will only eat live feed and it is essential for the captive display animal’s survival.

We also recommend the exemption include a further condition that the live feed animal is of an appropriate species. Without such amendments, the Bill could inadvertently exempt cruel live feeding displays that are carried out purely for sadistic forms of human entertainment.

## 11. Greyhounds

The RSPCA supports the offence of keeping animals that can be used as live bait on the same premises as racing greyhounds in cl.33. However, we are concerned that paragraph (d) unduly restricts the operation of the offence in stating that ‘the other animal is a species used for the purpose of bleeding a greyhound’. We question how this is to be determined. Of course, there have been prominent and well publicised cases of certain species like kittens, possums, piglets, rabbits, and chickens being used for bleeding, but the list of species that *could* be used for bleeding is much longer. We recommend that paragraph (d) be amended as follows:

‘the other animal is a species that is used, or could possibly be used, for the purpose of bleeding a greyhound.’

## 12. Travelling restraint exemption for farm dogs

The exemption for farm dogs from the obligation to restrain dogs travelling outside the cabin of a vehicle in cl.34(3) requires refinement. As it currently reads, a person could travel extensively on public streets with an unrestrained dog if travelling between properties for moving stock. To avoid doubt, the subclause should include the words ‘in the process of’ as follows:

- (3) Subsection (1) does not apply in relation to a dog that is in the process of being used to assist in the movement of stock.

## 13. Power of entry

The RSPCA supports the increased powers of entry for authorised officers contained in cl.83 of the Bill. However, there are a three amendments required for this clause.

First, there should be an additional power in subclause (2) to enter a premises in accordance with an approved monitoring program. Powers of entry are provided for scientific and greyhound establishments but not for those covered by an approved monitoring program established by the CEO under cl.78.

Second, the exemption from the requirement to provide 48 hours notice prior to entry in subclause (3)(b) only applies to entry under subclause (2)(a) - entry to the land surrounding the premises (i.e. backyards and paddocks); and (c) - scientific establishments. This exemption should also apply to entry under subclause (2)(b) - greyhound establishments; and especially for entry under (2)(e) involving serious and urgent circumstances. Requiring 48 hours notice to be given for entry under subclause (2)(e) would defeat the purpose of this entry power.

Third, the requirement for an officer to ‘take reasonable steps to contact an occupier of the premises about the inspection’ in subclause (4) is likely to be interpreted broadly by the court leading to the imposition of steps that would defeat the purpose of the subclause (2)(a) entry power. As currently drafted, it is unlikely that simply knocking on the front door of a property would be considered ‘reasonable steps to contact an occupier of the premises about the inspection.’ The Minister’s second reading speech alluded to some of the additional steps that may be required including:

- trying to contact the occupier beforehand by telephone - if the person is known and a telephone number is obtainable;
- when at the premises, knocking on the front door to see if the occupier or another person is at home;
- if no-one appears to be home, trying to call the occupier if in possession of a telephone number;
- waiting for a period outside of the front entrance or gate to a property to see if the occupier returns;
- asking nearby neighbours if they know the occupier, and if so, when that person may be returning to the premises; or
- if attending a rural property, in addition to trying to telephone in advance of the visit, driving to the entry building or homestead and asking to speak to the occupier to inform him or her, or another appropriate person, of the reason for the authorised officer’s visit.

It is entirely possible based on the current wording of subclause (4) that a court would go even further, particularly if the legality of entry is raised by defence. A court may require that authorised officers leave a note and come back to the premises in a couple of days or to make further inquiries to find out who the occupier is and where they are before entering the backyard.

This would defeat the purpose of the power which is to expedite the verification of animal welfare reports when such verification merely requires a visual inspection of an animal in a backyard or paddock. Many animal welfare reports can be attended to and closed out following a simple visual inspection of the animal. All other state and territory animal welfare Acts provide a power for officers to enter the land around the premises for the purposes of administering the legislation.

The current wording of subclause (4) may lead to the very same administrative burden that the introduction of subclause (2)(a) is seeking to avoid. It is recommended that subclause (4) be redrafted as follows:

- (4) However, before acting under subsection (2)(a), an authorised officer must take reasonable steps to contact any occupier who may be in or on the premises or surrounding land at the time.

## 14. Power to provide veterinary treatment

As currently drafted, the Bill does not appear to provide authorised officers with an explicit power to provide veterinary treatment to alleviate suffering. The powers afforded under cl.90 empower officers to direct the owner to obtain treatment for their animal but the clause does not explicitly authorise officers to provide that treatment themselves. Clause 94(1) places a duty on the CEO to ensure that seized animals receive the minimum level of care, which could include necessary veterinary treatment, but it would be preferable that a power to this effect be afforded directly to authorised officers in cl.90.

## 15. Court orders

The RSPCA supports the introduction of additional powers for the court to make orders with respect to the seizure and future possession of animals in cl.113 & 114 of the Bill. However, it is important to ensure that these powers are also available to the court in cases where the defendant is deemed mentally incompetent to have committed the offence or unfit to stand trial. Additionally, the draft Bill should include a general power for the court to make ‘any other order with respect to the care and control of any animal the defendant has in his or her possession.’

The RSPCA supports banning orders for defendants found guilty of animal welfare offences. However, we question why the proposed mandatory banning order in cl.115 is limited to five years and only after the defendant has been found guilty of three or more separate offences within a five-year period. This may inadvertently set an unreasonably high threshold in the mind of judges for imposing banning orders on serious first or second-time offenders. And in certain extreme cases of cruelty, indefinite banning orders may be appropriate.

The RSPCA believes that the mandatory banning order in cl.115 should be amended to apply to a person who is found guilty of ‘multiple offences’ and the ban period should be amended to provide ‘for a period of at least 5 years’.

## Appendix 1

Table 1 - *Mens rea* element in breach of duty of care offences

State/ Territory	Act	<i>Mens rea</i> element?	Provision
Qld	<i>Animal Care and Protection Act 2001</i>	No	<p>A person in charge of an animal owes a duty of care to it.</p> <p>The person must not breach the duty of care.</p> <p>A person breaches the duty only if the person does not take reasonable steps to provide the animal's needs for the following in a way that is appropriate—</p> <ul style="list-style-type: none"> <li>(i) food and water;</li> <li>(ii) accommodation or living conditions for the animal;</li> <li>(iii) to display normal patterns of behaviour;</li> <li>(iv) the treatment of disease or injury; or</li> </ul> <p>(b) ensure any handling of the animal by the person, or caused by the person, is appropriate.</p> <p>s.17</p>
NSW	<i>Prevention of Cruelty to Animals Act 1979</i>	No	<p>A person in charge of an animal shall not fail at any time:</p> <ul style="list-style-type: none"> <li>(a) to exercise reasonable care, control or supervision of an animal to prevent the commission of an act of cruelty upon the animal,</li> <li>(b) where pain is being inflicted upon the animal, to take such reasonable steps as are necessary to alleviate the pain, or</li> <li>(c) where it is necessary for the animal to be provided with veterinary treatment, whether or not over a period of time, to provide it with that treatment.</li> </ul> <p>S.5</p>

			<p>A person in charge of an animal shall not fail to provide the animal with food, drink or shelter, or any of them, which, in each case, is proper and sufficient and which it is reasonably practicable in the circumstances for the person to provide.</p> <p>s.8.</p>
Vic	<i>Prevention of Cruelty to Animals Act 1986</i>	No	<p>A person who:</p> <ul style="list-style-type: none"> <li>- is the owner or the person in charge of an animal which is confined or otherwise unable to provide for itself and fails to provide the animal with proper and sufficient food, drink or shelter;</li> <li>- is the owner or the person in charge of a sick or injured animal and unreasonably fails to provide veterinary or other appropriate attention or treatment for the animal</li> </ul> <p>commits an act of cruelty upon that animal.</p> <p>s.9</p>
ACT	<i>Animal Welfare Act 1992</i>	No	<p>A person in charge of an animal has a duty to care for the animal.</p> <p>A person in charge of an animal commits an offence if the person fails to take reasonable steps to provide the animal with appropriate—</p> <ul style="list-style-type: none"> <li>(i) food and water; or</li> <li>(ii) shelter or accommodation; or</li> <li>(iii) opportunity to display behaviour that is normal for the animal; or</li> <li>(iv) treatment for illness, disease, and injury</li> </ul> <p>s.6B</p>
Tas	<i>Animal Welfare Act 1993</i>	No	<p>A person must not do any act, or omit to do any duty, which causes or is likely to cause unreasonable and unjustifiable pain or suffering to an animal.</p> <p>A person is guilty of an offence under that subsection if the person -</p>

			<ul style="list-style-type: none"> <li>- has possession or custody of an animal that is confined, constrained or otherwise unable to provide for itself and fails to provide the animal with appropriate and sufficient food, drink, shelter or exercise;</li> <li>- has possession or custody of a sick or injured animal and fails to provide veterinary or other appropriate treatment for the animal</li> </ul> <p>s.8</p>
SA	<i>Animal Welfare Act 1985</i>	No	<p>A person who ill treats an animal is guilty of an offence</p> <p>A person ill treats an animal if the person - being the owner of the animal—</p> <ul style="list-style-type: none"> <li>(i) fails to provide it with appropriate, and adequate, food, water, living conditions (whether temporary or permanent) or exercise; or</li> <li>(ii) fails to take reasonable steps to mitigate harm suffered by the animal; or</li> <li>(iii) abandons the animal; or</li> <li>(iv) neglects the animal so as to cause it harm</li> </ul> <p>s.13</p>
WA	<i>Animal Welfare Act 2002</i>	No	<p>A person must not be cruel to an animal.</p> <p>A person in charge of an animal is cruel to an animal if the animal –</p> <ul style="list-style-type: none"> <li>- is not provided with proper and sufficient food or water</li> <li>- is not provided with such shelter, shade or other protection from the elements as is reasonably necessary to ensure its welfare, safety and health;</li> <li>- suffers harm which could be alleviated by the taking of reasonable steps;</li> </ul> <p>s.19</p>
NT	<i>Animal Welfare Act</i>	No	<p>A person in charge of an animal owes a duty of care to it.</p> <p>The person commits an offence if the person breaches the duty of care.</p>

			<p>A person breaches the duty of care if the person fails to take reasonable steps to ensure the animal receives the minimum level of care.</p> <p>s.8</p> <p>The minimum level of care required for an animal is that the animal: (a) has appropriate and sufficient food and water; and (b) has appropriate accommodation and living conditions; and (c) is appropriately treated for disease, injury or suffering; and (d) is allowed appropriate exercise;</p> <p>s.7</p>
NT	<i>Animal Protection Bill 2018</i>	Yes	<p>A person in control of an animal owes a duty of care to the animal.</p> <p>cl.22</p> <p>A person commits an offence if:</p> <p>(a) the person is in control of an animal; and</p> <p>(b) the person <i>intentionally</i> engages in conduct; and</p> <p>(c) the conduct results in the animal not being provided with at least the minimum level of care and the person is <i>reckless</i> in relation to that result.</p> <p>[emphasis added]</p> <p>cl.23</p> <p>The <b><i>minimum level of care</i></b> for an animal is the level of care required to ensure that the animal:</p> <p>(a) has appropriate and sufficient food and water; and</p> <p>(b) has appropriate accommodation and living conditions; and</p> <p>(c) is appropriately treated for disease or an injury, or when suffering; and</p> <p>(d) is allowed appropriate exercise</p> <p>cl.6</p>

## Appendix 2

Table 2 - *Mens rea* elements in standard cruelty offence

State/ Territory	Act	<i>Mens rea</i> element?	Provision
Qld	<i>Animal Care and Protection Act 2001</i>	No	A person must not be cruel to an animal. A person is taken to be cruel to an animal if the person does any of the following to the animal— (a) causes it pain that, in the circumstances, is unjustifiable, unnecessary or unreasonable; s.18
NSW	<i>Prevention of Cruelty to Animals Act 1979</i>	No	A person shall not commit an act of cruelty upon an animal. s.5 A reference to an act of cruelty committed upon an animal includes a reference to any act or omission as a consequence of which the animal is unreasonably, unnecessarily or unjustifiably inflicted with pain. s.4
Vic	<i>Prevention of Cruelty to Animals Act 1986</i>	No	A person who does or omits to do an act with the result that unreasonable pain or suffering is caused, or is likely to be caused, commits an act of cruelty upon that animal. s.9
ACT	<i>Animal Welfare Act 1992</i>	No	A person commits an offence if the person commits an act of cruelty on an animal. s.7

			<p>Cruelty, in relation to an animal, includes the following: (a) causing pain that is unjustifiable, unnecessary or unreasonable in the circumstances;</p> <p>s.6A</p>
Tas	<i>Animal Welfare Act 1993</i>	No	<p>A person must not do any act, or omit to do any duty, which causes or is likely to cause unreasonable and unjustifiable pain or suffering to an animal.</p> <p>s.8</p>
SA	<i>Animal Welfare Act 1985</i>	No	<p>A person who ill treats an animal is guilty of an offence.</p> <p>A person ill treats an animal if the person— (a) intentionally, unreasonably or recklessly causes the animal unnecessary harm</p> <p>s.13</p>
WA	<i>Animal Welfare Act 2002</i>	No	<p>A person must not be cruel to an animal.</p> <p>A person, whether or not the person is a person in charge of the animal, is cruel to an animal if the person – (a) tortures, mutilates, maliciously beats or wounds, abuses, torments, or otherwise ill-treats, the animal; in any other way causes the animal unnecessary harm.</p> <p>s.19</p>
NT	<i>Animal Welfare Act</i>	No	<p>A person commits an offence if the person is cruel to an animal.</p> <p>A person is cruel to an animal (whether or not the person is in charge of the animal) if the person does any of the following: (a) causes the animal unnecessary suffering;</p> <p>s.9</p>
NT	<i>Animal Protection Bill 2018</i>	Yes	<p>A person must not be cruel to an animal.</p> <p>cl.22</p> <p>A person commits an offence if:</p>

			<p>(a) the person <i><u>intentionally</u></i> causes suffering or harm to an animal or <i><u>intentionally</u></i> contributes to its suffering or harm; and</p> <p>(b) the suffering or harm is unjustifiable, unnecessary or unreasonable in the circumstances.</p> <p>[emphasis added]</p> <p>cl.24</p>
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