NSW ANIMAL WELFARE REFORM
ISSUES PAPER
### Contents

#### 1 | Introduction ......................................................................................................................... 4
- The reform process .................................................................................................................. 5
- The consultation process ........................................................................................................ 5
- Have your say .......................................................................................................................... 6
- Development of this issues paper .......................................................................................... 7
- Our approach to regulation ..................................................................................................... 8
- Outline of this issues paper ..................................................................................................... 9

#### 2 | Background ........................................................................................................................ 10
- NSW animal welfare framework ............................................................................................ 10
- What do we mean by ‘welfare’? ............................................................................................. 11

#### 3 | Reviewing the purpose of the Acts ................................................................................. 13
- Objects of the Acts ................................................................................................................ 13
- Interaction between the Acts ................................................................................................ 14

#### 4 | Defining key terms ............................................................................................................ 16
- Animal ...................................................................................................................................... 16
- Cruelty ...................................................................................................................................... 18
- Failing to provide care .......................................................................................................... 21
- Pain ......................................................................................................................................... 23
- Person in charge ..................................................................................................................... 24
- Research ................................................................................................................................. 24
- Exhibit ..................................................................................................................................... 25
- Other ........................................................................................................................................ 26

#### 5 | Examining compliance powers and tools ....................................................................... 27
- Powers of inspectors .............................................................................................................. 27
- Enforcement tools .................................................................................................................. 27
- Disqualification and prohibition orders .................................................................................. 28
- Addressing causes and reducing recidivism ......................................................................... 28
- Inspector qualifications ......................................................................................................... 29
- Stock Welfare Panels ............................................................................................................ 29

#### 6 | Setting the right penalties ................................................................................................ 31
- Previous consultation on specific penalties ............................................................................ 31
- Court-ordered penalties ......................................................................................................... 31
7 | Streamlining the framework ................................................................. 33

Administration and licensing ................................................................. 33
Panels and committees .......................................................................... 33
Animal Welfare Advisory Council (AWAC) ........................................... 34
Animal Research Review Panel (ARRP) ............................................... 34
Exhibited Animals Advisory Committee (EAAC) ................................. 34
Other ...................................................................................................... 34

8 | What do you think? ............................................................................... 35
1 | Introduction

Protecting the welfare of animals is a priority of the NSW Government.

The Animal Welfare Action Plan outlines the NSW Government’s commitment to safeguard animal welfare and to provide a strong regulatory framework that promotes responsible animal ownership and care in NSW.

As part of the Action Plan, the NSW Government is investigating options to modernise the policy and legislative framework for animal welfare in NSW. We are also examining how the laws interact with each other and looking for opportunities to streamline and strengthen the framework.

The science behind animal welfare has evolved since the current NSW animal welfare legislation was introduced around 40 years ago, and so have community expectations. The existing laws have been modified and added to over the years, resulting in the unnecessarily complex and prescriptive system in place today.

We have worked with the animal welfare enforcement agencies and stakeholder groups to identify the focus areas for reform, and we are now seeking your feedback on the issues identified throughout this issues paper. This is an important step towards modernising our animal welfare laws, and it is your opportunity to help set the direction for animal welfare policy reform.

The NSW Government is committed to continuing to work with the community and all stakeholders to develop these important policy and legislative changes over the coming months and years.
The reform process

Modernising the animal welfare policy and legislative framework is a large and complex task, and this issues paper represents an early step in the process (see Figure 1).

Stage 1 – Act
Deliver a new Act setting out the high-level legal and policy principles for protecting and promoting welfare.

Stage 2 – Regulation
Develop new regulations to support the implementation of the new Act.

Stage 3 – Standards
Develop new standards which are easy to understand and follow.

Consultation 1 – Issues
We are here

Consultation 2 – Proposals

Consultation 3 – Draft Bill

Figure 1: Outline of the three-stage reform process

Stage 1 is focused on what NSW’s animal welfare laws should look like – considering things like what is allowed and what is prohibited, what inspectors can and cannot do, and what the penalties are for breaking the law.

Stage 2 involves developing new regulations to support the implementation of the new legislation. Stage 2 will commence following the passage of legislation through Parliament.

Stage 3 involves developing new standards documents that are easy to understand and follow. However, the Australian Animal Welfare Standards and Guidelines, which are continually developed through a Commonwealth-led process and reflect the best available science, will continue to be implemented throughout the reform project.

The consultation process

The NSW Government is committed to consulting with all stakeholders from the beginning to the end of the reform process, and public consultation is integral to the reform project. The feedback we receive will shape the future of animal welfare laws in NSW.
This issues paper marks the first round of consultation of the project. After the consultation period for this issues paper closes, the NSW Government will consider all of the feedback received and begin developing policy proposals in response to the issues raised. Stakeholders will have a further opportunity to comment on this stage of the reform in further rounds of consultation.

**Have your say**

We value your comments on how we can improve our animal welfare framework and look forward to receiving your input into this important process. You can provide your feedback on this issues paper by completing our online survey at: [http://www.surveymonkey.com/r/DPIAnimalWelfareIssuesPaper](http://www.surveymonkey.com/r/DPIAnimalWelfareIssuesPaper) or by sending a written submission to animalwelfare.submissions@dpi.nsw.gov.au.

This round of consultation will close on 21 June 2020.
Development of this issues paper

This issues paper was developed by the NSW Department of Primary Industries (DPI) following:

1. **A review of the NSW animal welfare framework** – DPI has a detailed understanding of the existing animal welfare framework developed over many years of administering NSW’s animal welfare laws and policy.

2. **Comparison to other frameworks** – A comparison was undertaken across equivalent animal welfare laws around Australia and internationally, and with modern legislative frameworks like NSW’s *Biosecurity Act 2015*.

3. **Consideration of modern research and science** – There was an examination of technical issues, drawing on DPI’s extensive capability in animal welfare research and development and understanding of modern primary industries practices.

4. **Stakeholder feedback** – This paper considers issues raised with DPI and the Minister by a wide range of stakeholders over recent years. We also examined compliance and enforcement data and outcomes in collaboration with our animal welfare enforcement agencies. Finally, the issues identified in this paper were tested with a selection of key stakeholders (see Box 1).

**Box 1: Key stakeholders included in targeted consultation**

- RSPCA NSW
- Animal Welfare League NSW
- NSW Police
- Greyhound Welfare Integrity Commission
- Animal Research Review Panel
- Animal Care Australia
- Australian Veterinary Association
- DOGS NSW
- NSW Veterinary Practices Board
- Exhibited Animals Advisory Committee

DPI acknowledges that there is a large and diverse range of stakeholders with an interest in animal welfare, and it has not been possible to consult with everyone prior to developing this issues paper. The stakeholders listed above were chosen because they have a legislated role in the animal welfare framework or in order to provide balanced stakeholder representation at this preliminary stage.

This paper is an opportunity for you to provide your views on the issues we have identified. It is also your opportunity to raise any additional issues for us to consider during the development of NSW’s new animal welfare laws.

We look forward to receiving feedback from a wide range of stakeholder groups and the broader community on this issues paper.
Our approach to regulation

The NSW Government’s commitment to safeguarding animal welfare is not exclusively achieved through legislation. The role of legislation is to establish the baseline of acceptable conduct, recognising that where the baseline is not achieved, it will result in unacceptable animal welfare outcomes.

The purpose of a legislated baseline is to ensure that the few individuals who do the wrong thing – failing to provide an acceptable standard of welfare for their animals – are held to account. Beyond legislation, there is an important role for non-regulatory initiatives in promoting positive animal welfare which extends above the baseline of acceptable conduct. These initiatives can be led from both within and outside of government.

The vast majority of farmers, companion animal breeders, animal exhibitors, animal researchers, pet owners and private keepers are committed to ensuring high standards of welfare for the animals in their care. They operate well above the baseline set by legislation, and actively seek out ways to improve welfare outcomes.

Industry-led and third-party quality assurance programs provide an opportunity for industries to display that they go above and beyond the baseline (and there may be a market advantage in doing so). Other NSW Government, industry-led and third-party programs can also play a role in driving better animal welfare outcomes above the baseline, like education programs and extension services on best practice animal husbandry.

Modern legislation seeks to use outcomes-focussed provisions where possible – specifying the desired outcome, but not the means by which that outcome must be achieved. This creates more flexible and future-proof laws and allows for evolving industry best practices and innovations, without reducing protections or oversight.

However, prescriptive provisions do have a place in legislation. They are justified where a high level of certainty is required, and where the risks and impacts associated with non-compliance are high. Where it is believed a particular action would always cause an unacceptable animal welfare outcome (for example, promoting and inciting animal fighting), regulation of the action rather than the outcome may be most efficient.

It is important to strike the right balance between prescriptive and outcomes-focussed provisions in the development of the new laws. The NSW Government will work with stakeholders and experts and will consult with the community on the development of new provisions throughout the reform process, to ensure that we get this balance right.
Outline of this issues paper

This paper asks for your feedback on the issues that we have identified within the current framework. An overview of the existing animal welfare framework and a discussion on what is meant by the term ‘welfare’ is provided to give context for the issues that follow.

The issues are set out in a way that reflects the core components of an Act – the objects, definitions, offences, compliance and enforcement powers, penalties, and administration.

- **Section 2 – Background** provides an overview of the existing animal welfare laws
- **Section 3 – Reviewing the purposes of the Acts** considers the current objects of the animal welfare laws
- **Section 4 – Defining key terms** looks at key definitions within the current animal welfare laws
- **Section 5 – Examining compliance powers and tools** outlines the current inconsistencies in powers and tools available to support compliance with animal welfare laws
- **Section 6 – Setting the right penalties** summarises the outcomes of previous feedback on certain animal welfare penalties
- **Section 7 – Streamlining the framework** looks at ways of making the existing animal welfare laws easier to understand and navigate.
2 | Background

**NSW animal welfare framework**

Animal welfare is primarily regulated in NSW under three separate Acts and their associated Regulations, Codes, and Standards and Guidelines documents:

- *Prevention of Cruelty to Animals Act 1979* (POCTA)
- *Exhibited Animals Protection Act 1986* (EAPA)
- *Animal Research Act 1985* (ARA)

The most serious animal cruelty offences are dealt with under the *Crimes Act 1900*. An overview of the three Acts is provided below (see Figure 2).

[Figure 2: Outline of animal welfare Acts]
Interaction of the Acts

There is overlap between the three Acts:

- POCTA applies to all animals (as defined in the Act)
- The exhibition of animals must be done in accordance with the requirements in the EAPA and the provisions of POCTA
- Research involving animals must be conducted in accordance with requirements under the ARA, which includes licensing and ethics approvals. Conducting research in compliance with these requirements provides a defence to breaching some provisions under POCTA.

The existing animal welfare framework also interacts with other legislation like the Companion Animals Act 1998, Veterinary Practice Act 2003, Game and Feral Animal Control Act 2002 and various Acts related to racing. With the exception of the specific defences outlined in the ARA, POCTA applies to the welfare of all animals even when there is other legislation governing a particular activity.

These other pieces of legislation do not fall within the scope of the reform project, however DPI will continue to consider the way they interact with the animal welfare legislative framework as the reform progresses.

What do we mean by ‘welfare’?

The concept of animal welfare is multifaceted, and includes social, scientific, ethical and economic dimensions. Because of this complexity, there is no single agreed definition of ‘welfare’ and the term can mean different things to different people – especially in considering what constitutes a good, or positive, standard of welfare.

International perspective

Australia is a member of the World Organisation for Animal Health (OIE), which is the international organisation responsible for improving animal health worldwide. The OIE regularly reviews its animal welfare guidance and standards, in consultation with member countries, to ensure they are in line with the latest scientific developments.

Box 2: OIE definitions (adopted in 2019)

Animal welfare means the physical and mental state of an animal in relation to the conditions in which it lives and dies.

An animal experiences good welfare if the animal is healthy, comfortable, well nourished, safe, is not suffering from unpleasant states such as pain, fear and distress, and is able to express behaviours that are important for its physical and mental state.
This OIE definition of welfare is based on the internationally accepted Five Freedoms model:

1. Freedom from hunger or 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 or rapid diagnosis and treatment
4. Freedom to express normal behaviour by providing sufficient space, proper facilities and company of the animals' own kind
5. Freedom from fear and distress by ensuring conditions and treatment which avoid mental suffering.

Comparison with other jurisdictions

State and Territory governments have the principal responsibility for animal welfare in each jurisdiction. The Australian Government is responsible only for trade and international agreements relating to livestock welfare, including live animal exports and export abattoirs.

While the animal welfare laws across Australia refer to welfare, no jurisdiction defines welfare in its legislation beyond high level clarifications that it refers to health, safety and wellbeing. Instead, the laws seek to protect welfare through prescribing what pain and cruelty is, and by prohibiting acts of cruelty.

Each jurisdiction takes a different approach to protecting animal welfare, and the differences in the language and structure of the frameworks can mean direct comparisons can be difficult. Where possible, a comparison of NSW with equivalent legislative provisions in other jurisdictions has been provided.

Recent and ongoing animal welfare reforms around Australia include:

- Victoria recently released an animal welfare action plan and signalled its intention to review its regulatory framework in the near future.
- Western Australia is currently undertaking a review of its animal welfare laws.
- The Northern Territory parliament passed new animal welfare laws in 2018, which will commence when the new regulations are finalised.
- The Australian Capital Territory passed new animal welfare laws in October 2019.

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1 See https://www.oie.int/fileadmin/Home/eng/Health_standards/tahc/current/chapitre_aw_introduction.pdf
3 | Reviewing the purpose of the Acts

As a first step towards modernising and streamlining the legislation, the objects of the animal welfare framework should be reviewed and considered to ensure they are fit for purpose for the future. This section considers the existing objects of the three Acts and their interaction.

Objects of the Acts

An Act usually contains one or more ‘objects’, which describe the purpose of a piece of legislation. Objects are important because they can be used by the courts and others to help interpret legislation.

Objects of POCTA

Box 3: Objects of POCTA

The objects of POCTA are to:

(a) prevent cruelty to animals, and
(b) to promote the welfare of animals by requiring a person in charge of an animal:
   (i) to provide care for the animal, and
   (ii) to treat the animal in a humane manner, and
   (iii) to ensure the welfare of the animal, and
(c) to promote the welfare of dogs and cats by requiring information about them to be provided when they are advertised for sale.\(^3\)

Different jurisdictions’ animal welfare legislation reflects the above broad principles of promoting welfare and preventing cruelty, however some also provide for additional objects.

- Queensland, Tasmania, Northern Territory and Australian Capital Territory legislation provide for a minimum standard of care by imposing a responsibility or ‘duty’ on persons in charge of animals.
- Legislation in the Northern Territory and Victoria contains objects around promoting community awareness of the responsibilities for the care and protection of animals.
- Western Australia’s legislation refers to accepted standards of care that reflect community expectations.
- The Australian Capital Territory and New Zealand legislation refers to animal sentience and the intrinsic value of animals.

The trend toward adopting a minimum standard of care is broadly consistent with existing POCTA provisions and could be used to improve a person’s understanding of their legal obligations. However, there may be challenges associated with adopting more subjective

\(^3\) Prevention of Cruelty to Animals Act 1979, Section 3
objects in the new laws, such as reflecting community expectations. Different people will have different expectations for different animals, and these are constantly changing and evolving. Adopting this object may also be at odds with the development of scientifically based welfare outcomes.

**Objects of the ARA**

Box 4: Objects of the ARA

The objects of the ARA are:

1. To protect the welfare of animals used in connection with research by requiring persons or organisations carrying out animal research or supplying animals for research to be authorised under this Act and by regulating the carrying out of animal research and the supply of animals for research by those persons or organisations.
2. That authorisations under this Act may be granted only for recognised research purposes. Recognised research purposes include purposes involving the use of animals for research, teaching, testing and the production of biological products.  

**Objects of the EAPA**

The EAPA does not have an objects clause, however its purpose has been inferred as to maintain a minimum standard of animal welfare and public safety.

1. Is there anything additional to the current objects that should be included in the objects of new animal welfare laws?

**Interaction between the Acts**

The interaction between the three Acts can be confusing and throughout the reform process it may be possible to streamline how these relationships work. In other Australian states and territories and internationally, animal research and animal exhibition laws are sometimes combined with their general animal welfare laws (that is, their equivalent of POCTA), which helps to simplify the framework and reduce duplication across multiple Acts.

There is also an opportunity to make NSW’s laws consistent with other jurisdictions where appropriate. For example, some of the requirements for animal research approvals between states and territories are different, which makes it difficult for researchers working interstate or across jurisdictional boundaries (for example, wildlife monitoring in a National Park which crosses state borders).

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4 Animal Research Act 1985, Section 2A
2. Do you have any comments on the interactions between the Prevention of Cruelty to Animals Act 1979, Animal Research Act 1985, and Exhibited Animals Protection Act 1986?
4 | Defining key terms

In the context of legislation, definitions provide words with particular meanings that may be different to the common meanings of those words. Getting these legal definitions right ensures that the intended scope of the law is clear and is an important element in enforcing specific provisions of the law.

One of the purposes of animal welfare laws is to protect animals from pain and suffering. The notion that some animals can feel pain is widely accepted, however there is no single approach in specifying which animals should be protected, or even what constitutes pain.

**Animal**

In common use, the word ‘animal’ has a very broad, biological definition which extends beyond the application of animal welfare laws in NSW. The existing POCTA definition (see Box 5) specifies which animal groups are protected by NSW animal welfare laws. If a species is not classified within one of these groups, the welfare and cruelty provisions under POCTA do not apply.

**Box 5: Definition of animal (from POCTA):**

(a) a member of a vertebrate species including any:
   (i) amphibian, or
   (ii) bird, or
   (iii) fish, or
   (iv) mammal (other than a human being), or
   (v) reptile, or
(b) a crustacean but only when at a building or place (such as a restaurant) where food is prepared or offered for consumption by retail sale in the building or place.\(^5\)

*Note: ARA and EAPA definitions of animal includes the same groups except crustaceans.*

Cephalopods (including octopuses and squids) are not currently covered by the POCTA definition of animal. Cephalopods are renowned as the most intelligent of the invertebrates and are afforded welfare protections in some other jurisdictions. They are also currently afforded protections through the *Australian code for the care and use of animals for scientific purposes*, which is incorporated by reference into the Animal Research Regulation 2010.

Crustaceans are currently included under the existing definition of animal in POCTA, however protections only apply at certain food-related places such as restaurants. This originally occurred in response to particular welfare concerns arising from some forms of preparing crustaceans for human consumption.

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\(^5\) Prevention of Cruelty to Animals Act 1979, Section 4(1)
Comparison with other jurisdictions

The current definition of animal in NSW is broadly consistent with those of other jurisdictions (see Figure 3). All states and territories and New Zealand capture vertebrate amphibians, birds, mammals and reptiles in their definition, and most include both bony and cartilaginous fish. Cephalopods and crustaceans (including outside of restaurants) are captured by the definition of animal in a range of jurisdictions.

<table>
<thead>
<tr>
<th>Definition of Animal</th>
<th>NSW</th>
<th>ACT</th>
<th>NT</th>
<th>QLD</th>
<th>SA</th>
<th>TAS</th>
<th>VIC</th>
<th>WA</th>
<th>NZ</th>
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<td>✓</td>
<td>✓</td>
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<tr>
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</tbody>
</table>

Figure 3: Interjurisdictional comparison of definition of animal

Consistency

It is recognised that using a consistent definition of animal in all three Acts has clear benefits in terms of understanding obligations and enforceability, however the desire for consistency should not roll back existing protections. For example, the existing additional protection for cephalopods provided under the Australian code for the care and use of animals for scientific purposes should be retained to ensure consistency with the national framework and international research community requirements.

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6 Sourced from each jurisdiction’s animal welfare legislation.
Enforcement

Any change to the definition of animal may affect the enforcement of the legislation. Broadening of the definition would result in a larger total number of individual animals being covered by the animal welfare legislation, which could result in an increase in enforcement workload.

Additionally, a broader range of animal species being covered by the legislation may increase the training requirements of inspectors.

3. Should additional species be included in the definition of ‘animal’ and therefore covered by animal welfare provisions (for example, cephalopods, crustaceans in all situations, other species)? Why?


Cruelty

A primary object of POCTA is to prevent cruelty to animals. It aims to achieve this by providing a broad definition of what constitutes cruelty (see Box 6 below) and by prohibiting specific acts. It also specifies that certain acts can only be performed by a veterinarian.

Box 6: Definition of cruelty (from POCTA)

Any act or omission as a consequence of which the animal is unreasonably, unnecessarily or unjustifiably:

(a) beaten, kicked, killed, wounded, pinioned, mutilated, maimed, abused, tormented, tortured, terrified or infuriated,
(b) over-loaded, over-worked, over-driven, over-ridden or over-used,
(c) exposed to excessive heat or excessive cold, or
(d) inflicted with pain.\(^7\)

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\(^7\) *Prevention of Cruelty to Animals Act 1979, Section 4(2)*
Cruelty and aggravated cruelty offences

POCTA provides for a general cruelty offence and an aggravated cruelty offence. Aggravated cruelty occurs when an act of cruelty results in death, deformity or serious disablement, or the animal is so severely injured, diseased or in such a physical condition that it is cruel to keep it alive.

The POCTA cruelty offences are strict liability offences that do not give any consideration to the state of mind of the person committing the act of cruelty. Intentional and reckless cruelty are separate offences in the Crimes Act 1900, and the POCTA enforcement agencies have the discretion to pursue charges under that Act.

This definition includes provisions whereby the harm inflicted must be unreasonable, unnecessary, or unjustifiable in order to constitute cruelty. This introduces a degree of subjectivity into the definition, whereby an action that might otherwise be considered an act of cruelty is acceptable where it is necessary, reasonable, or justifiable (for example, to prevent a worse welfare outcome from developing). It also necessitates that enforcement agencies must prove that the action was unreasonable, unnecessary or unjustifiable during animal cruelty prosecutions.

Prohibited acts

POCTA includes a range of offences related to certain acts that are prohibited at all times as they are deemed to always result in adverse animal welfare outcomes (see Box 7).

Box 7: Prohibited acts

Prohibited acts include:

- Tethering animals in an unreasonable manner (s10)
- Abandoning animals (s11)
- Performing certain procedures on animals (s12)
- Riding animals not fit to be ridden (s13)
- Poisoning animals (s15)
- Using certain electrical devices on animals (s16)
- Baiting and animal fighting (s18)
- Bull-fighting (s18A)
- Trap-shooting (s19)
- Game parks (s19A)
- Certain animal catching activities (s20)
- Live baiting or coursing (s21)
- Firing (s21A)
- Tail nicking (s21B)
- Steeplechasing or hurdle racing (s21C)
- Poisoning animals (s15)
- Selling severely injured animals (s22)
- Setting certain traps (s23)

With the exception of tethering, the legislation does not provide for these prohibited acts to be considered necessary, reasonable, or justifiable. These specific prohibited act offences accounted for less than 5% of charges in the last 10 years.
Some stakeholders identified that the specific offence of tethering needs further clarification. Similar to the cruelty offence, tethering gives consideration to whether actions were reasonable – it is only an offence to tether an animal for “an unreasonable length of time or by means of an unreasonably heavy, or unreasonably short, tether.”\(^8\) No further guidance is provided. This makes it unclear what is expected of persons in charge of animals, makes it unclear to courts what would constitute a breach of this section, and does not establish a clear pathway to proving the offence for enforcement agencies.

**Comparison with other jurisdictions**

While direct comparisons between jurisdictions can be challenging due to differences in the language and structure of legislation, the NSW Government’s analysis showed that all jurisdictions have similar sets of prohibited acts covering broadly the same activities. As many of the prohibited acts would likely meet the criteria of cruelty or aggravated cruelty offences, the majority of the POCTA prohibited acts would likely still be illegal in other jurisdictions even when not specified as separate offences.

**Streamlining and clarifying the legislation**

As many of these prohibited acts could also be considered acts of cruelty and attract the same penalties as a cruelty offence, there may be better ways in which to organise these prohibited acts to help simplify POCTA.

Where specific prohibited acts are retained as separate offence provisions, they should be clear in their scope and effect, sufficiently evidence-based, and otherwise justify their separation from being considered an example of a cruelty offence (for example, deserving a higher penalty than cruelty). Where these criteria are not met, other prohibited acts could be folded into the existing cruelty offence as a set of specific, prescriptive examples of activities that are never acceptable. This could make the legislation easier to understand for the community, enforcement agencies, and the courts alike.

The reform process is an opportunity to review and more tightly align (or cross-reference) restricted acts of veterinary science (as outlined in the *Veterinary Practice Act 2003*) with the list of certain procedures in POCTA that may only be performed on animals by a veterinarian in prescribed circumstances (see Box 8). This would ensure that list of activities that can only be performed by a veterinarian is consistent and complete.

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\(^8\) *Prevention of Cruelty to Animals Act 1979*, Section 10
Box 8: Procedures that may only be performed by veterinarians

Certain procedures can only be performed by a veterinary practitioner in the prescribed circumstances and in accordance with any conditions specified in the regulations

- dock the tail of a cow, heifer, female calf, or dog (only permissible if performed in the interest of the dog’s welfare),
- operate upon a dog for the purpose of preventing the dog from being able to bark,
- remove one or more of the claws of a cat,
- grind, trim or clip one or more teeth of a sheep,
- perform a clitoridectomy on a greyhound, or
- fire or hot iron brand the face of an animal.9

5. Do you have any comments on how ‘cruelty’ is currently defined within the Prevention of Cruelty to Animals Act 1979?

Failing to provide care

Inadequate care or neglect of an animal is an offence under POCTA, which contains provisions that specify what a person in charge of an animal must do.10 For example, it is an offence under POCTA if a person fails to provide appropriate levels of care, such as:

- proper and sufficient food, drink or shelter
- veterinary treatment where it is necessary
- care, control or supervision
- alleviation of pain
- adequate exercise (for certain animals).11

In some other jurisdictions in Australia and overseas, the responsibilities of the person in charge of an animal are expressed as an ‘obligation’, ‘minimum standard’ or ‘duty of care’ that creates a clear obligation for the owner to provide proactive care. This reflects an approach that promotes and protects welfare, rather than seeking to prevent cruelty only (see Box 9 for Queensland’s approach to establishing a duty of care).

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9 From Prevention of Cruelty to Animals Act 1979, Section 12(2)
10 For more detail, see the Person in Charge section below.
11 Summarised from Prevention of Cruelty to Animals Act 1979, Sections 5, 8, 9
Box 9: Queensland’s approach to duty of care

Duty of care requires that a person take reasonable steps to —

(a) provide the animal’s needs for the following in a way that is appropriate
   (i) food and water;
   (ii) accommodation or living conditions for the animal;
   (iii) to display normal patterns of behaviour;
   (iv) the treatment of disease or injury; or
(b) ensure any handling of the animal by the person, or caused by the person, is appropriate.

In deciding what is appropriate, regard must be had to:

(a) the species, environment and circumstances of the animal; and
(b) the steps a reasonable person in the circumstances of the person would reasonably be expected to have taken.

Examples of things that may be a circumstance include a bushfire or another natural disaster, or a flood or another climatic condition.

The maximum penalty for breaching the duty of care is approx. $40,000 and/or 1 year imprisonment (as compared to the maximum penalty for animal cruelty of approx. $266,900 and/or 3 years imprisonment).\(^\,^{12}\)

Benefits of a minimum standard

A minimum standard could incorporate, and possibly build on, the existing POCTA provisions listed above, and create a single positive legal obligation which is easier to understand and communicate to those responsible for caring for animals. This would support the delivering of POCTA’s objective to promote animal welfare. It would also allow for more tailored and appropriate regulatory responses to drive better animal welfare outcomes.

Developing a minimum standard in POCTA would require extensive consultation with stakeholders, to ensure that the standard is sufficiently general to capture all animals without resulting in unintended consequences. As with Queensland’s approach, the minimum

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\(^{12}\) Summarised from Animal Care and Protection Act 2001 (QLD), Section 17

standard should also give consideration to the impacts of sudden-onset climatic events like floods and bushfires and the affect these events can have on the ability of an individual to meet the minimum standard at that point in time.

Would you support introducing a minimum standard of care into the new animal welfare laws?

Do you have any comments on using existing ‘fail to provide’ provisions under the Prevention of Cruelty to Animals Act 1979 as a basis for a minimum standard of care?

Pain

Pain is described in POCTA, and acts which “inflict (an animal) with pain” can be considered cruelty. It is therefore important to understand what constitutes pain for the purposes of animal welfare laws (see Box 10).

Box 10: Definition of pain (from POCTA)

POCTA defines pain as including suffering and distress.

There is no specific definition of “suffering and distress,” however specific provisions of POCTA consider an animal to be in distress “if it is suffering from exposure to the elements, debility, exhaustion or significant physical injury.”

POCTA’s description of pain – and the indicators of suffering and distress – do not specifically refer to mental or psychological suffering, but also do not specifically exclude it. The identification and measurement of psychological pain is challenging and will be different for different species. This may make it difficult to enforce consistently and objectively.

Other jurisdictions, such as Queensland, Northern Territory, and Western Australia specifically refer to some form of psychological suffering within their legislation, and the OIE’s definition of welfare includes consideration of the mental state of the animal.

Do you have any suggestions about how the definition of pain could be updated?

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14 Prevention of Cruelty to Animals Act 1979, Section 4(2)(d)
15 Prevention of Cruelty to Animals Act 1979, Section 24H(5)
**Person in charge**

The animal welfare enforcement agencies have identified issues regarding the definition of a person in charge of an animal, and the impact it can have on prosecutions.

Currently under POCTA, the person in charge of an animal can include:

- the owner of the animal
- a person who has the animal in the person’s possession or custody, or where the animal is under the person’s care, control or supervision
- where a person caring, controlling or supervising an animal is under the direction of another person, that other person
- in the case of stock animals in saleyards, the owner or lessee of the saleyard.\(^{16}\)

Particular issues have been raised about proving that an individual is the person in charge, both as a component of proving an offence and in enforcing court orders that prohibit a person from being in charge of animals. Other issues have been raised around which individual exercising control over an animal constitutes the person in charge at any point in time in circumstances where multiple people are responsible for an animal (for example, the comparative liability of staff or contractors compared to the owner of an animal), and challenges related to executive liability.

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Do you have any comments on the definition of ‘person in charge’, particularly with regard to circumstances where multiple people may have responsibility for, or control over, an animal?
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**Research**

The definition of research activities in the ARA (see Box 11) captures all research and teaching activities to ensure that there is an appropriate standard of consideration of animal welfare for animals used for research and teaching.

The definition may need refining as it currently captures some activities that may not require the additional oversight that is provided through the research approval processes, where the protections offered by POCTA may be sufficient. Examples of this include puppy schools and animal husbandry education days. This may result in people being discouraged from engaging in certain forms of teaching or conservation work because of unnecessary red tape.

Conversely, the existing definition may not currently capture some activities that should require the additional oversight provided by the research approval process.

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\(^{16}\) Summarised from *Prevention of Cruelty to Animals Act 1979*, Section 4(1)
Box 11: Definition of research (from ARA)

**animal research** means any procedure, test, experiment, inquiry, investigation or study in connection with which an animal is used and, without limiting the generality of the foregoing, includes any procedure, test, experiment, inquiry, investigation or study in the course of which:

(a) an animal is subjected to:
   (i) surgical, medical, psychological, biological, chemical or physical treatment,
   (ii) abnormal conditions of heat, cold, light, dark, confinement, noise, isolation or overcrowding,
   (iii) abnormal dietary conditions, or
   (iv) electric shock or radiation treatment, or

(b) any material or substance is extracted or derived from the body of an animal,

but does not include any procedure, test, experiment, inquiry, investigation or study which is carried out in the course of:

(c) the administration of veterinary treatment to an animal for the purpose of protecting the welfare of the animal, or
(d) the conduct of normal animal husbandry operations.\(^\text{17}\)

10. Are there any activities currently considered as research or teaching activities under the *Animal Research Act 1985* that should be excluded? If so, why?

11. Are there any additional activities that should be considered as research or teaching activities under the *Animal Research Act 1985*? If so, why?

**Exhibit**

This definition of ‘exhibit’ (see Box 12) captures all animal display activities to ensure no cases are unintentionally overlooked. The Exhibited Animals Protection Regulation 2010 prescribes a list of circumstances that do not constitute exhibition of an animal, to limit the number of activities unintentionally captured by the broad definition.

\(^\text{17}\) *Animal Research Act 1985*, Section 3(1)
Box 12: Definition of exhibit (from EAPA)

**exhibit**, in relation to an animal, means the display, or the keeping for display, of the animal for educational, cultural, scientific, entertainment or other prescribed purposes, but does not include the display, or the keeping for display, of an animal solely:

(a) in connection with the sale or intended sale of the animal,
(b) for animal research, within the meaning of the Animal Research Act 1985, or
(c) in circumstances declared by the regulations not to constitute an exhibition of the animal for the purposes of this Act\(^\text{18}\).

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12. Are there any activities currently included in the definition of ‘exhibit’ in the Exhibited Animals Protection Act 1986 that should be excluded? If so, why?

13. Are there any additional activities that should be included in the definition of ‘exhibit’ under the Exhibited Animals Protection Act 1986? If so, why?

**Other**

14. Are there any other terms or concepts used in the existing animal welfare legislative framework that require new or amended definitions?

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\(^{18}\) Exhibited Animals Protection Act 1986, Section 5(1)
5 | Examining compliance powers and tools

POCTA is enforced by RSPCA NSW, Animal Welfare League NSW, and the NSW Police Force, while the ARA and EAPA are enforced by NSW DPI. Each Act provides authorised inspectors with a range of compliance powers and tools.

For the purposes of this issues paper:
- ‘powers’ refers to the things inspectors are authorised to do under an Act, such as in the course of investigating offences (for example, the power to demand the name and address of suspected offenders)
- ‘tools’ refer to the regulatory responses to an offence or suspected offences, which range from warnings and Penalty Infringement Notices (that is, on-the-spot fines) through to prosecution.

At present, the powers, tools and qualification requirements are not consistent across the three Acts.

Powers of inspectors

There are gaps and inconsistencies between the powers available under best practice, modern legislation and those available under POCTA. There are also gaps between powers available under POCTA and those available under the other two Acts.

For example, inspectors authorised under the ARA have limited evidence gathering powers relative to modern legislative standards. ARA inspectors have no powers to take photographs, bring an assistant, or require a person to answer questions. The ARA also lacks clarity about digital documents and information and only refers to hard copy documents. This is confusing, making it hard for the community to understand what powers inspectors have. It can also result in confusion for inspectors themselves, particularly in cases where they are authorised under multiple Acts.

Enforcement tools

The ability to effectively enforce the requirements of legislation is critical to protecting the welfare of animals in NSW. Gaps in the enforcement tools available to inspectors across the three Acts mean that inspectors do not have a graduated set of enforcement tools to support proportionate compliance actions.

In the ARA, for example, the enforcement tools are limited to either prosecution or placing conditions on animal research accreditations or animal supply licences at the time of application or renewal to mitigate the risk of offences occurring. In practice, this means that it can be difficult to deal with some offences under the ARA other than through the court system – which may not always be the most effective way to achieve compliance and improve animal welfare outcomes.

Penalty Infringement Notices, which can sometimes be the most appropriate response to an offence, cannot be issued under the ARA, but can be under POCTA and EAPA.

Should Penalty Infringement Notices be made available under the Animal Research Act 1985?

Disqualification and prohibition orders

Section 31(1)(c) of POCTA allows courts to make orders prohibiting a convicted person from keeping, controlling, influencing, or being involved in the care of an animal. Failure to comply with an order may attract a maximum penalty of $2,750 – but there is no power to seize animals held in contravention of prohibition orders.

The court orders under POCTA are not currently available for offenders prosecuted for the more serious animal cruelty offences under the Crimes Act 1900. Previous consultation\(^\text{19}\) on this issue found there is strong community support (81% of respondents) for closing this gap in the law.

Addressing causes and reducing recidivism

Consideration could also be given to alternative approaches to dealing with offenders and improving animal welfare outcomes. For example, where poor animal welfare situations arise from capability or knowledge gaps of offenders, providing an avenue for inspectors to provide proactive support to prevent poor animal welfare situations from arising, or for courts to direct convicted persons to forms of training could be an effective response, either in addition to existing tools such as seizing animals or issuing penalties, or as an alternative enforcement tool.

Do you have any comments on providing authorised inspectors with powers and tools (for example, being able to check compliance with an existing direction) to provide proactive support to help prevent adverse animal welfare outcomes?

Inspector qualifications

Under the ARA, inspectors must be public servants who are also qualified veterinarians. The nature of animal research – whereby actions or procedures may be permissible under the approval of Animal Care and Ethics Committees that otherwise would not be allowed to occur – justifies the additional requirement for the inspectorate to be appropriately qualified in veterinary science. However, the requirement to be both a public servant and a veterinarian significantly reduces the potential pool of inspectors.

It may be possible to move towards a risk-based approach and remove this dual requirement for lower-impact forms of research (for example, using wildlife cameras to observe animal behaviour or monitor populations). Providing for general (non-veterinarian) inspectors to audit low risk projects could free up time for inspectors with veterinary qualifications to focus on higher risk, high impact projects, leading to shorter audit cycles and increased capacity for proactive compliance activity. In cases where veterinary expertise is required to effectively inspect a lower impact research facility, the Act could allow for an authorised inspector to be accompanied by a registered veterinarian. This would ensure the capability is available as needed without restricting the number of inspectors.

1. Should the current provisions that require inspectors under the Animal Research Act 1985 to be public servants who are also qualified veterinarians be retained, or should they be amended to allow for a more risk-based approach? Please explain your answer.

Stock Welfare Panels

Stock Welfare Panels (SWPs) are an example of an effective alternative approach to managing welfare issues for distressed stock. SWPs follow a structured process set out in POCTA. They operate separately to prosecutions and take a number of steps to redress instances of poor animal welfare prior to taking the final step of seizing or disposing of stock as a last resort. This early intervention approach can prevent situations developing where the condition of the stock deteriorates to such an extent that it is considered cruel to keep them alive.

A SWP consists of a POCTA inspector, a Local Land Services (LLS) representative, a DPI representative, and in most cases includes a representative from the NSW Farmers' Association. The LLS and DPI representatives must have animal welfare or stock management expertise, and at least one member of the SWP must be a veterinary practitioner.

Since the process was established in 2012, SWPs have facilitated better animal welfare outcomes for more than 15,000 animals. The SWP process is well regarded in farming communities and is seen as a flexible tool to address long term welfare issues. SWPs focus on improving outcomes through education and advice, rather than proceeding straight to prosecution.
If education and advice fails to rectify the animal welfare issue, POCTA provides for the seizure and disposal of stock animals through the SWP process only where they are depastured (that is, grazing) on land classed as rateable under the *Local Land Services Act 2013*\(^{20}\). Previous consultation\(^{21}\) showed there is strong community support (75% of respondents) for broadening this provision to include intensively produced livestock (which are not depastured), and to include smaller parcels of land (which are not classified as rateable) – meaning the SWP process would also apply to poultry facilities, piggeries, feedlots and intensive dairies.

This could possibly be further expanded to non-agricultural animal-based businesses, such as puppy breeders. This would require further consideration to ensure sufficiently robust processes are in place to allow individuals the opportunity to remedy animal welfare issues prior to having animals seized.

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\(^{20}\) See *Local Land Services Act 2013* and *Local Land Services Regulation 2014*.

6 | Setting the right penalties

Penalties play an important role in supporting compliance with the law. Penalties should influence the behaviour of individuals and the community by acting as a deterrent to potential offenders and by acting as an appropriate and proportionate response to offences. Animal welfare penalties include court ordered penalties (including financial penalties or imprisonment) and Penalty Infringement Notices (PINs) or ‘on-the-spot’ fines.

The reform project is an opportunity to review all penalties for all offences under the existing animal welfare legislation, relative to each other and to offences in other legislation, to ensure the penalties are proportionate and align with community expectations.

Previous consultation on specific penalties

In 2018 the Government sought feedback from the community on several specific proposals aimed at improving animal welfare in NSW, including increasing penalties for specific animal welfare offences (cruelty, aggravated cruelty and failure to provide offences) and examining different powers and tools to respond to animal welfare issues.

We received over 2,500 responses, and the feedback demonstrated that there is strong support for increasing penalties:

- strong support for increasing the statutory maximum penalties, with 67% respondents believing maximum animal welfare monetary penalties should be increased and 80% believing terms of imprisonment should be increased
- strong support (76% of respondents) for increasing PIN amounts.

Court-ordered penalties

The majority of animal welfare cases are heard in the Local Court, where the maximum term of imprisonment that can be imposed for a single offence is 2 years, or an accumulation of up to 5 years for multiple offences.

POCTA provides that the maximum financial penalty that can be imposed by the Local Court is 200 penalty units ($22,000). Higher penalties can be handed down by the Supreme Court.

While increasing maximum penalties will send a clear signal to the judiciary about public expectations for animal welfare offences, it does not guarantee that higher penalties will be handed down. As well as the maximum penalty, the judge or magistrate must take into account a number of factors when determining a sentence, including:

- the facts and circumstances of the offence
- aggravating and mitigating factors

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23 Prevention of Cruelty to Animals Act 1979, Section 34(2)
- subjective factors about the offender
- relevant sentencing legislation
- relevant case law.

**Penalty Infringement Notices**

A PIN is a fixed financial penalty for an offence prescribed by legislation and issued by an inspector. Not all offences have associated PINs. Schedule 2 of the POCTA Regulation 2012 outlines which specific offences that may be dealt with by way of a PIN, and Schedule 4 of the Exhibited Animals Protection Regulation 2010 does the same for EAPA offences. The ARA does not provide for PINs.

Currently the PIN amounts available under POCTA are either $200 or $500 for individuals, and $1,000 or $1,500 for corporations, depending on the offence. These PINs have not increased since they were introduced in 2005 (however new PIN offences have been added). The current PIN amounts available under the EAPA are either $200 or $500, depending on the offence.

These reforms will include a review of the amounts for all PINs across POCTA and EAPA, going beyond the remit of the initial discussion paper in 2018, which focussed on POCTA PINs only. We will also examine if there are any other offences – including in the ARA – for which a PIN would be an appropriate penalty.

**Other**

20. Are there any specific issues you would like to raise as we review the penalties for all offences under the Prevention of Cruelty to Animals Act 1979, Animal Research Act 1985, and Exhibited Animals Protection Act 1986?
7 | Streamlining the framework

Animal welfare legislation should be simple to understand for anyone who has to interact with it, whether that be the community, inspectors or courts. The number of amendments made to the three Acts since their introduction have resulted in a complex legislative framework that can be difficult to understand. The reform project is an opportunity to identify and remove any unnecessary red tape in the regulatory framework.

Administration and licensing

The ARA and EAPA use licensing to support the regulation of research activities and the exhibition of animals, respectively. The administrative requirements for businesses and individuals to obtain the proper accreditation can be significant, particularly for smaller operators or for activities with a very low risk to animal welfare (for example, using cameras to count animals in the wild).

It may be possible to move towards a risk-based approach to licensing animal welfare related matters, whereby the administrative requirements increase with the risks associated with that type of activity. This approach would have benefits for both the licensee (in the form of reduced red-tape for low risk activities) as well as the regulator (by enabling more effective and efficient use of compliance resources), while also maintaining an appropriate level of oversight for activities that have the potential to impact on the welfare of animals.

There is also an opportunity to review and address some of the complexities in the licence arrangements under the EAPA. There are currently three types of authorities that may be required depending on the type of animals, and whether they are exhibited in fixed or mobile establishments. The distinction between the different types of authorities and the differing requirements can be confusing.

| 21. Would you support consideration of a risk-based approach to licensing under the Animal Research Act 1985 and/or Exhibited Animals Protection Act 1986, where it would not result in weakened protections for animals? Why? |
| 22. Which areas within the animal welfare legislative framework could be improved to reduce unnecessary red tape or make requirements clearer? |

Panels and committees

Statutory panels and committees can play an important role in supporting the effective operation of a regulatory framework, for example through an advisory role to Government. The three animal welfare Acts each refer to such a body. Currently the panels and committees are structured in the following manner:

- Animal Welfare Advisory Council (AWAC) under POCTA
- Animal Research Review Panel (ARRP) under ARA
Exhibited Animals Advisory Committee (EAAC) under EAPA

Animal Welfare Advisory Council (AWAC)

The NSW Government recently reviewed the structure and function of AWAC and has reshaped it to sharpen its focus on independent scientific advice. AWAC will have an important role in supporting the development of the new animal welfare laws.

Animal Research Review Panel (ARRP)

The ARRP comprises 12 members appointed by the Minister for Agriculture and Western NSW, and has equal representation from the research industry, government and animal welfare groups. The panel independently investigates applications and complaints and deals with matters relating to animal research and animal supply in connection with animal research more generally. The ARRP is also able to request the Secretary of the Department of Planning, Industry and Environment to cause inspections relating to animal research and members may accompany inspectors on these inspections.

Exhibited Animals Advisory Committee (EAAC)

The role of the EAAC is to provide advice to the Secretary of the Department of Planning, Industry and Environment to promote a coordinated approach in policy and administration of exhibited animals across government, and to monitor the effectiveness of the scheme governing the exhibition of animals. The EAAC comprises six members representing government, animal welfare organisations and exhibitor organisations.

As the reform process examines what animal welfare legislation should look like, it is an opportunity to review and consider the roles and functions of each of these Panels, to determine what is the most effective model for the future.

23. Do you have any comments on what the role of panels and committees should be in supporting the new animal welfare legislative framework?

Other

24. Do you have any final comments about this reform?
8 | What do you think?

We value your comments on how we can improve our animal welfare framework and look forward to receiving your input into this important process. You can provide your feedback on this issues paper by completing our online survey at: http://www.surveymonkey.com/r/DPIAnimalWelfareIssuesPaper or by sending a written submission to animalwelfare.submissions@dpi.nsw.gov.au.

This round of consultation will close on 21 June 2020.