

Short Title, Commencement, Principal Act

Thank you for the opportunity of commenting on the proposed changes to the *Animal Welfare Act 1993* (Tas) (“the Act”). While recognizing that the *Draft Animal Welfare Act Amendment Bill 2022* (the “Bill”) relates to possible changes to some existing provisions rather than a substantive re-drafting of the whole Act, changing community expectations and significant changes to the natural environment has prompted me to submit a more detailed response. It would be preferable if all of Tasmania's animal welfare laws could be re-examined by the Tasmanian Law Reform Institute or another competent independent legal body, such as one that has animal welfare as its priority. I thank in advance the Tasmanian Animal Welfare Advisory Committee and legislators for their patience and time in considering this submission.

Sentience

Thank you to the government for the proposal to acknowledge sentience in the Animal Welfare Act. While the AWA Draft memorandum explains that the definition of sentience will not be legally binding, such acknowledgment nevertheless contributes to dismantling the Cartesian myth that animals do not feel emotion or pain. The Tasmanian government has the opportunity to make meaningful change by adopting the policy objectives as stated in the animal welfare legislation of the Australian Capital Territory. For example, the recognition that animals have intrinsic value, that the mental welfare of animals is included in the duty of care definition, and the inclusion of a policy statement of animal welfare objectives.

Several overseas jurisdictions are changing the status of animals, with an emphasis on them being living beings rather than mere property.¹ In the United States of America, lawyers act as both direct advocates on behalf of animals and also in the role of amicus to the court.² The state government could reform the property status of animals by giving animals legal personhood. Personhood could be achieved by providing humans with legal title, combined with a transferable equitable title to give the animal equitable ownership in itself. Such a transfer would create a guardianship/custodial relationship.³

Federal Member of Parliament for the Tasmanian electorate of Clark, the Hon. Andrew Wilkie, has called for a national office of animal welfare. In addition, or in the interim, the Tasmanian government should investigate as soon as practicable the creation of an independent statutory body for animal welfare for Tasmania.

Section 3 amended (interpretation)

The expanded definition of ‘dispose’ allows for all opportunities to manage animals.

I support this proposed amendment, and commend the inclusion of "offence likely to be committed". However Section 17 is incomplete if it does not include the mental suffering of animals in Sections 7 and 8 of the Act, and the power of an officer to seize an animal for this reason.

Section 4 amended (care and charge of animals)

Statements that a specified person had, or has, custody, control or possession of a specified animal is admissible as evidence. Onus of proof of animal ownership facilitated.

I support this provision and commend the reversed onus of proof.

¹ See for example from the year 1979, *Corso v Crawford Dog and Cat Hospital Inc* 415 NY S 2d 182 (NY Civ Ct 1979) in Cao, Sharman and White, *Animal Law in Australia* (second edition), LawbookCo. 2015, p. 90

² Animal Legal Defense Fund www.aldf.org

³ Cao, Sharman and White, *Animal Law in Australia* (second edition), Sydney, LawbookCo. 2015, pp. 91,92

Section 4 amended (non-application of Act) Animal research clarifications

Biological experimental research on animals is not valid scientifically.⁴ It is a faulty research method with no greater accuracy than flipping a coin. The ad hoc nature of such experimentation gives more weight to the consideration of the ethical and legal arguments for banning experiments on animals, especially painful and invasive experiments. There should be no exception for research on animals in any of the Part 3 Welfare Provisions of the Animal Welfare Act, with exception for experimental research methods conducted by veterinarian for the purpose of the welfare of an animal.

Regarding animal experimentation, I do not support the non-application of section 10 (baiting and shooting) and section 11 (use of animals to train other animals) of the Act. Section 10 and section 11 either apply in fact, or they do not. If there is no risk of an animal researcher ever being charged under these sections, especially as the National Medical Research Council Australian Code Care and Use of Animals for Scientific Purposes⁵ acts as a defence against cruelty, then it is unclear how the non-application of sections 10 and 11 of the Act makes the Act more consistent. If there is a chance that experimental research does fall under these sections to the degree that the criminal evidentiary burden has been satisfied, then a researcher should be charged. In addition, the researcher can use the Code as a defence to which other members of the public charged with cruelty are not entitled. Experimental animal research should not be made easier in fact, or in appearance. In theory it would be possible to go through all the provisions of the Act and say

⁴ <https://www.aerzte-gegen-tierversuche.de/en/> and <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4594046/> among many others.

⁵ <https://www.nhmrc.gov.au/about-us/publications/australian-code-care-and-use-animals-scientific-purposes>

that each one doesn't apply to animal experimentation, but it does not make sense to do so.

In addition to keeping the application of sections 10 and 11 to experimental researchers, The following are suggested:

- Given that mental suffering is recognized in the Code and that this Code is a defence to cruelty charges, then it makes no sense that mental suffering of animals should not be included in the Animal Welfare Act itself and Tasmania's other animal welfare legislation.
- There may be a public perception of real or perceived appearance of a conflict of interest due to the National Medical Research Council receiving most of their funding from animal research as well as being the authors of the Code overseeing animal welfare standards.⁶
- The state government could consider creating a separate independent statutory body for animal welfare overseeing research on animals, including power to review the decisions of the Animal Ethics Committee. People conducting research on animals would have to apply to this body for a separate licence on a case-by-case basis. Such a licence would allow for decriminalization for researchers, but not a complete exemption, of Part 3 Welfare provisions of the Animal Welfare Act.
- The Tasmanian government to look at adopting provisions from other states, such as Queensland⁷ and Victoria⁸ regarding animal research standards, or a stand alone act governing experimental research, such as exists in NSW.
- If vivisectors can use the Code as a defence to the cruelty provisions, then they must also be legally bound by the Code's obligations regarding animal welfare. Currently animal researchers have it both ways. They are not legally

⁶ Cao, Sharman and White, *Animal Law in Australia* (second edition), Sydney, LawbookCo. 2015, p.286

⁷ Animal Care and Protection Act 2001 (Qld), s 48(1) and s 92

⁸ Prevention of Cruelty to Animals Act 1986 (Vic) s 36

bound by the animal welfare provisions in the Code, but can use the Code as a legal defence, which may erode community trust in science.

- All product and cosmetic testing on animals banned in Tasmania as soon as possible, especially the LD50 Test and the Draize test, skin irritancy tests and the testing of cosmetic and sunscreen products. Such tests are restricted in Queensland and in South Australia, including animals used in teaching and research.⁹
- Greater penalties for people undertaking unauthorized research on animals.
- The penalty provision in the Act section 27 (1) (a) and (b) should be increased to provide an adequate deterrence for unlicensed people.

Section 8 amended (cruelty to animals)

Inclusion of the omitted word ‘may’, removal of redundant reference to the pest register and the ban of use of a pronged collar. Animal cruelty and aggravated cruelty – correction and alternative verdict option

Ban on pronged collars

Thank you for this proposed amendment to ban pronged collars. In addition, there needs to be an amendment to ban electric-shock collars and behaviour modification collars on all animals. The Australian Veterinary Association advises that electric-shock collars should be banned on all animals and does not recommend the use of behaviour modification collars, such as those that use citronella.¹⁰ Electric-shock collars are illegal in New South Wales, South Australia and the Australian Capital

⁹ *Animal Care and Protection Act 2001* (Qld) ss 51 – 98; Part 4 of the *Animal Welfare Regulations 2000* (SA); See Cao, Sharman and White, *Animal Law in Australia* (second edition), Sydney, LawbookCo. 2015, p.285

¹⁰<https://www.ava.com.au/policy-advocacy/policies/companion-animals-dog-behaviour/use-of-behaviour-modifying-collars-on-dogs/>

Territory.¹¹ Electric collars can malfunction, cause injuries and burns, and there are always some animals that cannot learn to avoid the electric shock.¹² While Tasmania is mostly rural, it is geographically small. There is no good reason that farming properties cannot be adequately managed with fences and livestock grates. Electric collars on any animals are unnecessary.

Section 9 amended (aggravated cruelty)

If a person is charged with but not found guilty of an offence under this section the person may be convicted of a lesser offence under section 8 if the evidence in the proceedings on the charge under section 9 establishes that the person committed an offence under section 8.

I support the proposed Draft amendments to this section provided it does not have the effect in practice of discouraging the investigation and prosecution of offences under Section 9. My concern is that prosecutors, judges and magistrates may direct their attention to Section 8 cruelty offences rather than Section 9 aggravated cruelty, due to cultural factors in the legal profession, such as cycles of judicial leniency and weak interpretation of cruelty definitions.¹³ However, if this proposal is a mere procedural formality that will not materially affect the investigation, charging, prosecution, conviction and sentencing of animal welfare crimes under Section 9, then I support the amendment.

In addition, I respectfully ask the AWAC and legislators to consider the following suggested amendment:

¹¹<https://kb.rspca.org.au/knowledge-base/what-is-virtual-fencing-or-virtual-herding-and-does-it-impact-animal-welfare/>

¹²<https://www.abc.net.au/news/2021-05-05/push-to-ban-electric-shock-dog-collars-in-queensland/100115476><https://kb.rspca.org.au/knowledge-base/what-is-virtual-fencing-or-virtual-herding-and-does-it-impact-animal-welfare/>

¹³ The issue of judicial leniency is a specific problem in the area of animal welfare law, but does not always have to include heavy custodial sentences, e.g. there could be a more creative use of community service orders, rehabilitative programs etc... See Cao, Sharman and White, *Animal Law in Australia* (second edition), Sydney, LawbookCo. 2015, pp. 155,156, 183

Section Animal Welfare Act 9(1)(c) an injury to an animal that, either alone or in combination etc...

Include at the end of Section 9(1)(c) "including mental injury to the animal" e.g. acts or omissions that cause, or are likely to cause, psychological trauma to the animal.

Section 16 amended (expanded power to enter, search and inspect premises)

An officer may, without warrant, enter, search and inspect any premises, other than premises or a part of premises being used as a dwelling, if the officer reasonably believes that there is on the premises –

(a) an animal in respect of which an offence under this Act has been, or is being, committed;

or

(b) an animal that is suffering or in need of assistance.

The stated aim for changing this provision to allow officers to enter a property is a much needed reform. However, the aim as stated in the Draft amendments is to help animals in urgent need. There is no sound legal argument such powers cannot be legally extended to dwellings. The High Court of Australia has ruled that the most lawful common purpose to enter residential premises is to speak with the owner or occupier, but it is not the only category of purpose that will imply a licence to enter. Recently the High Court ruled in *Roy v O'Neill* that common sense reinforced by public policy is also a factor for when an officer can enter a dwelling.¹⁴

Given that the Tasmanian government is philosophically and financially committed to testing trespass laws in the High Court, undue concern of trespass laws should not be a factor when drafting animal welfare legislation that has animal welfare as its objective. Ratio from *Halliday's Case*:

¹⁴ [2020] HCA 45, para 14

An approach which requires that the purpose both be legitimate and involve no interference with possession or injury to those present is comprehensible and workable. It requires no fine distinctions to be drawn, unguided, as to what are permissible or impermissible purposes; rather one looks to the effects of the purpose carried out upon the occupier's rights and its impact on those present. (1984) 155 CLR 1 at 7-8.

Specifically the Court has said that there is no requirement for a fine distinction, but rather one looks to the effects of the purpose. Officers being held to the criminal evidentiary burden to prove that an animal was in urgent need of assistance would prevent or curtail potential abuses of this power by officers.

Although domestic animals are currently considered absolute property in Australia,¹⁵ the Tasmanian state government could consider a law such as exists in California that gives animals the status of dependents rather than mere objects. Changing the status of domestic animals this way better reflects growing community sentiment that companion animals are part of the family¹⁶ and give weight to the provision to allow officers to enter a dwelling.

Section 17 amended (expanded power to take possession of animals)

Additionally, an officer may take possession of an animal and detain it in a safe place if the officer is satisfied that –

(a) an offence under section 7 or 8 has been, is being, or is likely to be committed in respect of the animal;

or

(b) the animal requires medical treatment by a veterinary surgeon.

The proposed reform is good but on its own is not enough to achieve the stated objectives without a change of presumption in several areas of Tasmania's animal welfare laws. E.g. AWA section 8(e), where a person has possession or custody of

¹⁵ Cao, Sharman and White, *Animal Law in Australia* (second edition), Sydney, LawbookCo. 2015, p.79

¹⁶<https://aldf.org/article/californias-new-pet-custody-law-differentiates-companion-animals-from-other-types-of-property/>

an animal that is confined or constrained, the animal must be provided with sufficient exercise, and also Animal Welfare (Dogs) Regulations 2016, section 18, “Exercise requirements”.

The requirement in Tasmania's animal welfare legislation to give an animal exercise is, for all practical purposes, currently unenforceable due to the owner/custodian simply saying that they have met the requirement. It is practically impossible to discharge the evidentiary burden that someone has not given an animal exercise. In the Australian Capital Territory, this presumption regarding exercise has been successfully reversed without any undue adverse side-effects.¹⁷ In Tasmania, the *Biosecurity Act 2019* allows for changes in the burden of proof at section 247, therefore changing the burden in other related areas is also feasible.

Another example of where a reversed presumption is needed to achieve the animal welfare aim of the provision is *Animal Welfare (Dogs) Regulations 2016*, section 11 Tethering of Dogs. Section 14(4) Transport of Dogs, leaving a dog unattended in a vehicle.

The above examples strengthen the argument that all of Tasmania's animal welfare laws need to be examined for their efficacy in protecting and promoting the welfare of animals.

Section 17A inserted - Court may order seizure or disposal of animals

A magistrate may only make an order under subsection (1) in respect of an animal if the magistrate is satisfied that, without the order, the welfare of the animal is at risk. The full range of disposal options is available.

17(A)(2) A magistrate may only make an order under subsection (1)...etc...

¹⁷ Animal Welfare Act 1992 (ACT) s6F

It would be helpful to include an additional provision that a magistrate can make an interim order to seize the animal for the sake of the animal's welfare until the material factors pertaining to the animal's welfare can be duly assessed by a veterinarian. If the magistrate's decision for an interim order is subject to an evidentiary standard, it should be on the balance of probabilities, to ensure animals can be protected in situations where expediency for the sake of animal welfare may be required.

Section 24 amended (power to kill animals) – Carcass disposal reduced from 7 days to 48 hours.

I support this amendment.

Section 26 amended (expanded power to require information from interstate residents)

I support the proposed change to this provision. It should be extended to people fleeing to international jurisdictions. If the matter of overseas jurisdictions is a constitutional matter only, then the Tasmanian government should lobby the Federal government to make the requisite changes needed to enable criminal suspects in overseas jurisdictions to be subject to provide information regarding animal welfare.

Section 27 amended (animal research) definitions

Exemptions expanded to include disease surveillance and monitoring, of an animal, that is conducted –

- (i) by a person for the purposes of disease identification or disease management; and**
- (ii) in accordance with recognized methodologies and practices. This is in line with established animal use policy.**

I would add to 27(2)(b)(ii) -

“that do not cause pain and suffering, including mental suffering, to living animals.”

If an animal is a vector for disease and must be destroyed, it must be killed in the most humane way practicable having regard to the welfare of the animal and the safety of people. For example, trapping the animal in a soft-hold leg-trap or other non-painful device, and giving it a lethal drug injection. The specific and laborious targeting of problem species frequently results in more effective eradication and long-term value for money.¹⁸

Economic considerations regarding the monetary cost of killing animals must always be a secondary consideration behind human safety and the humane killing of animals if the problem is to be solved adequately and with community support. Section 27(2)(c) “Exemption for a person who administers veterinary treatment to an animal for the welfare of the animal.” A person who is not a trained and registered veterinarian must be prohibited from administering treatment to an animal unless it is an emergency situation regarding the welfare of the animal.

Section 41B inserted

A person must not intimidate, threaten or abuse an inspector (research) to bring this protection in line with that of an animal welfare officer.

I support giving the powers of welfare officers to people inspecting animal research facilities provided that the same person or people inspecting the facility are independent and not themselves engaged in animal experimentation, and also do not have financial interests in experimental animal research. The same power could be given to officers inspecting slaughterhouses provided that the inspector is independent of the meat and livestock industry and has no financial interest in it.

¹⁸<https://www.abc.net.au/news/2020-09-13/indigenous-cat-hunting-underrated-tool-in-conservation/12642676>; and in Tasmania <https://www.abc.net.au/news/2021-01-07/tasmanian-researcher-tracking-feral-cats-to-help-native-wildlife/13039484>

Section 45 amended (early costs and expenses recovery, including by the Crown)

Supported.

Additional Proposals

In light of the purposes of the Act as stated in its title and interpreted by the courts, and with regard to changing community expectations, it is hoped the Animal Welfare Advisory Committee and the Tasmanian government will consider adopting the following provisions into the *Animal Welfare Act 1993* (Tas):

- Permanently ban the use of electro-mobilization in Tasmania.¹⁹
- Feasibility of adopting strict liability offences as exist in the ACT for e.g. not exercising animals, and not rendering assistance to an injured animal.
- That the confinement of animals be banned with limited exceptions. All confined animals to be given X amount of space, taking the characteristics of the animal into consideration, especially if the animal is never free from the confinement, such as some pet birds, rabbits, aquarium animals etc.... The legislation already allows for this kind of flexibility in the Dog Regulations, e.g. In Section 13(2)(a), Sleeping areas, "...taking into account the characteristics of the dog..." and Section 14(1)(a) "...appropriate for the age, size and physiological status of the dog..."

There is no practical reason such wording cannot be applied to other aspects of the Act. Such a provision would help to discourage people from keeping animals continuously confined for ornamental reasons or as personal status symbols.

¹⁹<https://kb.rspca.org.au/knowledge-base/what-is-electro-immobilisation-and-what-impact-does-it-have-on-animal-welfare/>; Animal Welfare (General) Regulations, Section 8, Use of electrical current.

- Puppy and cat breeding mills should be prohibited. If not banned outright, Tasmania could adopt legislation that exists in Victoria which bans the sale of animals in pet shops unless they are from a registered shelter, rescue group, or pound. Introduce a cap on dog numbers, limit the number of litters a dog can have, and require a mandatory vet health check for every dog prior to breeding and post whelping. Victoria has implemented a public searchable online Pet Exchange Register with a 'breeder ID' number placed in all online adds.²⁰
- Fund animal shelters adequately and make convenience killing of animals illegal.
- Due to perceived and actual conflicts of interest, animal husbandry industries should not be the same organizations determining animal welfare standards. The Department of Natural Resources and the Environment Tasmania (NRE Tas) has the conflicting goals of pursuing profitability for Tasmanian agribusiness while trying to deliver meaningful animal welfare outcomes. An independent department dedicated to animal welfare needs to be adequately funded to adequately inspect factory farms.²¹
- Remove ambiguity in the Tasmanian legislation by explicitly banning ear-cropping, ear removal, debarking, clitoridectomy, declawing, and cosmetic surgery on animals, as prohibited in the ACT. Almost all of these practices are outlawed in NSW and Victoria, and most of these practices are illegal in Qld and South Australia.²²
- Prohibit caged battery hens,

²⁰ www.oscarlaw.org

²¹ Cao, Sharman and White, *Animal Law in Australia* (second edition), Sydney, LawbookCo. 2015, p. 229

²² *Animal Welfare Act 1992* (ACT), s19A; *Prevention of Cruelty to Animals Act 1979* (NSW) s 12; *Animal Care and Protection Act 2001* (Qld) ss 23,24,25,26; *Animal Welfare Regulations 2012* (SA) reg 6. *Prevention of Cruelty to Animals Act 1986* (Vic), ss3, 11A; See Cao, Sharman and White, *Animal Law in Australia* (second edition), Sydney, LawbookCo. 2015, p. 177.

- Make beak cutting of chicken illegal. Ban tail-docking of piglets and make illegal the removal of horns on farm animals without adequate pain relief.
- Stop weak animals, e.g. dairy calves, being sold and traded, as exists in Victoria. *Prevention of Cruelty to Animals 1986 (Vic) s9(1)(g)*
- Ban rodeos. In the alternative if rodeos are not banned, then ban calf-roping at rodeos.²³
- Prohibit mulesing. Impacts of climate change may make mulesing more common in Tasmania.
- Specific and targeted legislation criminalizing video depictions of animal cruelty for pleasure on social media platforms, i.e. Facebook and YouTube. Such a provision is required in light of judicial attitudes such as that of the Supreme Court of the United States of America.²⁴ There are similar examples of judicial attitudes towards animals in Australia that are diametrically opposed to community expectations.²⁵
- ACT law requires people to render assistance to an injured animal.²⁶ While difficult to police in rural Tasmania, such a provision would be easier for the prosecution to prove than trying to prove a driver of vehicle deliberately hit an animal. Such deliberate killing of wildlife with vehicles is not uncommon in Tasmania.
- Invoke shield laws to protect members of the public from prosecution for rescuing unattended animals from vehicles.
- Ban unlawful confinement of an animal as exists in the ACT.²⁷
- Failure to properly groom and maintain an animal as in ACT.²⁸

²³ <https://www.rspca.org.au/media-centre/news/2022/terrifying-and-cruel-more-evidence-ban-calf-roping>

²⁴ *United States v Stevens* 559 US 1 (2010) cited in Cao, Sharman and White, *Animal Law in Australia* (second edition), Sydney, LawbookCo. 2015, p.ix

²⁵ See for example *Joyce v Visser* [2001] TSSC 116; and the notorious Queensland kitten torture case. Cao, Sharman and White, *Animal Law in Australia* (second edition), Sydney, LawbookCo. 2015, p. 155

²⁶ Animal Welfare Act 1992 (ACT) s 10

²⁷ Animal Welfare Act 1992 (ACT) s 9

²⁸ Animal Welfare Act 1992 (ACT) s 6E

- Prohibit cruelty on the basis of cultural, religious, or traditional practices.²⁹
- Stop mass slaughter of native wildlife and native birdlife in Tasmania.
- The state government should formally recognize veterinarians and RSPCA officers as front line workers and give greater community recognition and support for their work.
- Allow RSPCA officers to conduct video surveillance of a premises over a period of time in certain circumstances, and give them adequate funding to do so.

²⁹ Cao, Sharman and White, *Animal Law in Australia* (second edition), Sydney, LawbookCo. 2015, p. 157