

Department of Energy, Environment and Climate Action  
475 Mickleham Rd, Attwood, Victoria, 3049  
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Dear Sir/Madam

## **Consultation – draft Animal Care and Protection Bill**

### **I. Summary**

Thank you for the opportunity to make a submission on the draft Animal Care and Protection Bill. Our submission makes the following key points:

- The current review provides a unique opportunity to modernise Victoria’s animal care and protection regulatory framework by ensuring that animal interests across all policy domains are genuinely considered. The focus of our submission is on this important element of the draft Animal Care and Protection Bill (**‘the Bill’**).
- We support the decision-making principles, which are consistent with the purpose of the Victorian legislation, and the proposed powers for the Minister for Agriculture to request information from public authorities to confirm that they have considered these principles, previously set out in the *Plan for Victoria’s Animal Care and Protection Laws* (**‘the Plan’**).<sup>1</sup>
- While there is little detail on how the Ministerial Guidelines set out in Part 2 of the Bill will operate at this point, we are concerned that this approach will fail to achieve its objectives, undermining the legitimacy of the Victorian animal protection regime.
- Our submission provides guidance for the Department’s consideration of mechanisms aimed at effectively considering animal interests across all policy domains (such as the proposal set out in the Plan, or some version of the Ministerial Guidelines). In particular:
  - Undertaking an Animal Impact Assessment (AIA) will support public agencies, stakeholders and the community in understanding the potential impacts of decisions and policies on animals.
  - Effective governance will ensure that animal interests and the community values are appropriately considered by public agencies and officials exercising powers that impacts on animals.

### **II. Regulation and Public Policy Needs to Account for Animal Interests**

Victoria needs to modernise its regulatory framework by ensuring that it considers animal care and protection across all policy domains. The draft Bill is a step in the right direction but there is a need for systematic reforms.

Australian governments already recognise that animals are sentient via domestic legislation, policy commitments, and in recent trade agreements. The idea that animals have interests, that they should be protected from cruelty, that their welfare is important independently of human

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<sup>1</sup> Victorian Government, *Plan for Victoria’s New Animal Care and Protection Laws* (September 2022) <<https://engage.vic.gov.au/new-animal-welfare-act-victoria>>.

interests, and that they should be afforded certain freedoms, already lies at the heart of the very existence of Victoria's animal protection laws. The proposed Victorian legislation will reinforce the state's commitment to protect animal interests by explicitly recognising the principle of sentience as the foundation of the legislation.<sup>2</sup>

However, it is critical that the Victorian animal protection regulatory framework goes beyond symbolic recognition of sentience, by recognising that animals comprise a particularly vulnerable stakeholder constituency across a range of policy domains.<sup>3</sup> One key reason for animals' vulnerability is the inherent power imbalance in most human-animal interactions. Another is that, notwithstanding the broad fact of human-animal interdependence, animal interests are not reducible to, and often conflict with, the interests of those individuals, or corporate entities, who exploit, or care for, them.<sup>4</sup> In the absence of robust legal and regulatory protections for animals, market forces can lead to worse outcomes for animal stakeholders.

There is increasing interest in the current review, particularly given increasing community concern about the ethical treatment of animals. Community values towards animals both in Australia and internationally are evolving and there is an expectation that societies should treat animals with respect.<sup>5</sup> The Australian community increasingly expects government regulation to protect animals and improve animal welfare.<sup>6</sup> This review provides a unique opportunity for the Victorian government to respond to the legitimate expectation of the community that animals will be treated ethically.<sup>7</sup>

We have seen the Victorian government take a leading role in considering the care and protection of animals in several discrete policy decisions. As our research shows, senior Victorian government officials intervened in the national animal welfare standard setting process to argue for an independent review of the science underpinning the standards.<sup>8</sup> This led to the phase out of battery cages, which cause millions of layer hens to suffer.<sup>9</sup> Another example relates to the routine painful sheep husbandry practice of mulesing. Victoria is the only state in Australia to mandate the use of pain relief for the contentious practice.<sup>10</sup> This review provides an opportunity for the Victorian government to take a leading and proactive

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<sup>2</sup> Department of Energy, Environment and Climate Action Victoria, *Guide to Draft Animal Care and Protection Bill* (December 2023) 16 <<https://engage.vic.gov.au/download/document/33754>>.

<sup>3</sup> Lev Bromberg, 'Evaluating the Legitimacy of Australian Farmed Animal Welfare Standards: Insights from a Multi-Species Account of Law and Policy' (PhD, University of Melbourne, (forthcoming)).

<sup>4</sup> Ani B Satz, 'Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property' (2009) 16 *Animal Law* 65.

<sup>5</sup> see e.g. Futureye, *Commodity or Sentient Being? Australia's Shifting Mindset on Farm Animal Welfare* (Independent Report Commissioned by Australian Department of Agriculture, 2018) <<https://www.sheepcentral.com/wp-content/uploads/2019/05/190129-Commodity-or-Sentient-Being-Australias-Shifting-Mindset-on-Farm-Animal-Welfare-v.-7.0.pdf>>.

<sup>6</sup> See e.g. *ibid*; Alexander Saeri and Emily Grundy, *Australian Animal Welfare Survey 2023: Summary Report* (BehaviourWorks Australia, 2023) <<https://osf.io/bf64u>>; European Commission. Directorate General for Health and Food Safety. and TNS Political & Social., *Attitudes of Europeans towards Animal Welfare: Report*. (Publications Office, 2015) <<https://data.europa.eu/doi/10.2875/884639>> ('*Attitudes of Europeans towards Animal Welfare*').

<sup>7</sup> see e.g. Futureye (n 5); Saeri and Grundy (n 6).

<sup>8</sup> Bromberg (n 3); James Thomas and Alison Branley, 'WA Threatens to Pull out of Review of Chicken Welfare Standards', *ABC News* (Text, 22 December 2017) <<https://www.abc.net.au/news/2017-12-22/western-australia-may-leave-chicken-welfare-review/9283274>>.

<sup>9</sup> Christine Parker and Lev Bromberg, 'National Plan to Allow Battery Cages until 2036 Favours Cheap Eggs over Animal Welfare', *The Conversation* (5 July 2021) <<http://theconversation.com/national-plan-to-allow-battery-cages-until-2036-favours-cheap-eggs-over-animal-welfare-163552>>.

<sup>10</sup> Lev Bromberg, 'Numbing the Pain or Diffusing the Pressure? The Co-Optation of PETA's "Naming and Shaming" Campaign against Mulesing' (2021) 43(3) *Law & Policy* 285 ('Numbing the Pain or Diffusing the Pressure?').

approach by ensuring that public agencies consider affected animal interests across policy domains.

### III. Considering Animal Care and Protection Across Policy Domains

One significant gap in the existing animal protection regulatory framework is the absence of a formal mechanism for scrutinising the impact of public policy on animals. While animal protection regulation typically focuses on specific policy domains — such as farming, research, and the protection of certain species — animals are profoundly impacted by law and policy in myriad ways. The interdependence of human, animal and environmental health and welfare means that laws and policies protecting the interests of one group (e.g. animals) will often further the interests of others (humans, other animals).<sup>11</sup>

There are some encouraging signs that this is beginning to change. The UK’s Animal Sentience Committee, established in 2022, has the role of considering animal welfare implications of UK policy decisions across all policy domains. While it is too early to comment on its effectiveness and operation, there appear to be some parallels between this committee’s function and procedural models of oversight for international human rights compatibility that exist in the UK, Australia and some of its states and territories. These require each new Bill introduced into parliament to be accompanied by a Statement of Compatibility with international human rights and scrutinised by an established parliamentary committee. The Animal Sentience Committee would do something similar for animal interests.<sup>12</sup> The bill proposing the establishment of a committee ‘to assess and report on the animal welfare impacts of policy decisions that have been taken, or which may be taken, by the Government’.<sup>13</sup> The relevant Secretary of State will be required to respond in writing before Parliament.<sup>14</sup> This initiative comprises a potentially powerful accountability mechanism aimed at ensuring that animal interests are considered in the making of public policy and administrative decisions.

We were equally encouraged to see that the Victorian Government recognises the importance of considering affected animal interests across policy domains.<sup>15</sup> The Government recognised that under existing framework there is a lack of obligation for public authorities to consider animal care and protection. The Plan noted that:

while many decisions made by government consider the impact on animals, this is not presently required by law. As a result, decisions can be made under other Acts or policy areas which have different priorities which may not adequately consider the need to minimise impacts on animals, and which may have unintended consequences.<sup>16</sup>

The Government proposed a set of principles — which recognise that animals are sentient beings — which would need to be considered in the making of decisions that affect animals.<sup>17</sup> The Plan made it clear that the decision-making principles would require that:

- Care requirements should be met for animals in the care or control of people

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<sup>11</sup> Saskia Stucki, *One Rights: Human and Animal Rights in the Anthropocene* (Springer International Publishing, 2023) <<https://link.springer.com/10.1007/978-3-031-19201-2>> (‘*One Rights*’).

<sup>12</sup> *Animal Welfare (Sentience) Act 2022*.

<sup>13</sup> Department for Environment, Food and Rural Affairs, *Animal Welfare (Sentience) Bill 2021* (UK) Explanatory Notes 2021 10.

<sup>14</sup> *Ibid.*

<sup>15</sup> Victorian Government (n 1).

<sup>16</sup> *Ibid* 24.

<sup>17</sup> Victorian Government (n 1).

- Unreasonable harm, pain or distress for animals should be avoided
- Where harm, pain or distress cannot be avoided it should be minimised and
- Alternatives that reduce harm, pain or distress should be considered.

These principles would need to be applied by all decision-makers including Ministers, department heads and staff from government departments and public authorities from all portfolios.<sup>18</sup> The government also proposed to include an accountability mechanism, which would provide the Minister for Agriculture with the power to request information from public authorities to confirm that they have considered the impacts of the decision on animals.

We support the approach proposed in the Plan which, in our view, constituted the most systematic approach to date aimed at ensuring that the interests of animals are genuinely considered in policy-making. In particular, we support the decision-making principles, which are consistent with the purpose of the Victorian legislation, and the proposed powers for the Minister for Agriculture to request information from public authorities to confirm that they have considered these principles.

Thus, we are disappointed to see that the Bill has dispensed with this proposal based on ‘further consideration of the technical and practical challenges’ (which were not detailed in the supporting information). We are concerned that this element of the proposed Bill is considerably weaker than the proposal set out in the Plan. This raises the risk that this important reform will ultimately fail to materially impact the lives of animals.

#### **IV. Ministerial Guidelines**

In lieu of the proposal set out in the Plan, the Bill allows the Minister for Agriculture to issue a (non-binding) Guideline to public authorities in relation to the care and protection of animals.<sup>19</sup> While such guidelines may complement the more systematic approach proposed in the Plan, they are not a substitute. Fundamentally, the change risks ‘watering down’ an important commitment that would have helped ensure that public agencies across all policy domains promote, and do not contravene, the proposed legislation.

We appreciate that the Ministerial Guidelines have clarified the scope within which public authorities should consider animal interests. While the approach set out in the Plan referred to decision-making, the Bill makes it clear that Ministerial Guidelines can be issued in relation to public authorities’ functions, duties and powers (including, but not limited to, decision-making), where these impact on animal interests.<sup>20</sup> We also appreciate that the Bill provides a flexible framework within which such Guideline can be issued.<sup>21</sup>

However, as currently drafted, the ambit of these Ministerial Guidelines is too wide, which may cause unnecessary uncertainty for the Minister, public agencies and the community. Additionally, as discussed below, we are concerned about the level of discretion that the Bill vests in the individual Minister. These guidelines need to be closely aligned with the purposes and objects of the new legislation. The scope of clause 14 could be limited by making a link between the guideline, the purposes and objects of the new legislation, and the principle of sentience. The clause could be drafted as follows:

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<sup>18</sup> The one exception is Authorised Officers under the new Act: see *ibid* 24.

<sup>19</sup> Department of Energy, Environment and Climate Action Victoria (n 2).

<sup>20</sup> *Ibid*.

<sup>21</sup> In particular, clauses 11 and 12 of the Bill, which set out the meaning of ‘public authority’ and ‘functions, powers and duties of a public nature’.

*The Minister may issue guidelines for the purpose of assisting public authorities to consider the purposes and objects of this Act, and the principle of sentience under section 6, in the performance of a function or duty or in the exercise of a power, whether under this Act or another Act –*

- a) *that is of a public nature; and*
- b) *that relates to animals.*

Further, there is little detail at this point on how this part of the regulatory framework would operate. In particular, it is unclear how Ministerial guidelines would be developed and who would undertake the impact assessment in practice. Would it be developed by Animal Welfare Victoria staff, by appointed external experts, the existing non-statutory Animal Welfare Advisory Committee, or the statutory Expert Advisory Committee envisioned in clause 309 of the Bill?

## **V. Animal Impact Assessment Requirement Across Emerging and Established Systems**

Considering animal interests across policy domains is unlikely to always be straightforward. However, our view is that this will be necessary to uphold the purpose of the Victorian animal protection framework, underpinned by the foundational principle of sentience.<sup>22</sup> The Victorian community will increasingly expect public agencies to account for animal interests.<sup>23</sup> The following sections set out our recommendations for modifying and implementing Victoria’s animal care and protection regulatory framework, such as the Ministerial Guidelines, in such a way that ensures that animal interests are genuinely considered across all policy domains.

### **i. Adopting a Robust Framework for Animal Impact Assessment**

Evaluating the costs, benefits and impacts of regulation is a critical element of policy-making and regulation. Enshrining the fundamental principle of sentience in legislation recognises that animal interests comprise part of the public interest — or the ‘common good’.

A practical way of ensuring that animal interests are robustly considered would be by undertaking animal impact assessments of laws and policies (AIAs). McCulloch and Reiss have previously argued that such assessments, which would identify harms and benefits for all human and non-human impacted groups, should be mandatory where policies significantly impact on animals.<sup>24</sup> AIAs would need to ensure that the impacts of activities, institutions and systems on animals are systematically identified and robustly considered. AIAs would need to be undertaken both in respect of emerging and established systems, institutions and processes.

### **ii. Undertaking Animal Impact Assessment for Emerging Systems**

Since animals are vulnerable vis-à-vis other stakeholder groups, and in light of the fragmentation of laws<sup>25</sup> and policies<sup>26</sup> relating to animals, there is a risk that impacts of

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<sup>22</sup> Department of Energy, Environment and Climate Action Victoria (n 2) 16.

<sup>23</sup> see e.g. Futureye (n 5).

<sup>24</sup> Steven P McCulloch and Michael J Reiss, ‘The Development of an Animal Welfare Impact Assessment (AWIA) Tool and Its Application to Bovine Tuberculosis and Badger Control in England’ (2017) 30(4) *Journal of Agricultural and Environmental Ethics* 485. Ibid.

<sup>25</sup> Rochelle Morton et al, ‘Assessing the Uniformity in Australian Animal Protection Law: A Statutory Comparison’ (2020) 11(1) *Animals* 35 (‘Assessing the Uniformity in Australian Animal Protection Law’).

<sup>26</sup> Bruce Englefield et al, ‘A Review of Australian Animal Welfare Legislation, Regulation, Codes of Practice, and Policy, and Their Influence on Stakeholders Caring for Wildlife and the Animals for Whom They Care’ (2019) 9(6) *Animals* 335.

emerging systems (and new institutions and processes) on animals will be discounted, or even escape attention of decision-makers altogether.

An example of an emerging system that is already having, and will increasingly have, fundamental impacts on animals is AI.<sup>27</sup> How the impacts of AI on animals will be identified or managed is yet to be considered in any detail in governance policies released to date.<sup>28</sup> Yet, it is critical that regulation, such as Victoria's animal protection laws, ensure that AI systems do not harm animals, such as by enabling or amplifying animal cruelty.<sup>29</sup>

AIAs could comprise an important tool for identifying and addressing potential harms to animals that are emerging in rapidly-developing areas — such as AI governance.<sup>30</sup> A systematic harms framework such as that developed by Coghlan and Parker could be used as a basis for undertaking AIAs in the context of AI law and policy.<sup>31</sup> It is possible that this framework, which draws on animal welfare scientist David Fraser's 'practical' approach to considering animal welfare issues,<sup>32</sup> could be adopted for undertaking AIAs outside the AI policy context.

### iii. Animal Impact Assessment for Established Systems

AIAs can also play a role in ensuring that established regulatory frameworks (such as Victoria's farmed animal welfare regulations) remain appropriate in light of changing circumstances, emerging scientific evidence and evolving community expectations. The Regulatory Impact Statement (RIS) process undertaken as part of developing national farmed animal welfare standards illustrates the vulnerability of animals as a stakeholder constituency under established regulatory frameworks.<sup>33</sup> On the one hand, by considering the potential benefits accruing to animals from more robust standards, the RISs recognise that animal interests comprise part of the public interest. At the same time, by routinely discounting potential benefits to animals associated with higher standards relative to the additional compliance costs, the RISs undermine the interests of animals and fail to account for the evolving societal expectations in relation to ethical animal treatment, posing a social licence threat for animal protection regulators, such as the Agriculture Victoria.<sup>34</sup>

## VI. Accountability for Decisions Affecting Animals

Regulatory accountability is essential for the legitimacy of public agencies and regulatory regimes.<sup>35</sup> Taking animal sentience seriously requires animal interests to be genuinely accommodated within regulatory processes.<sup>36</sup> This involves increasing public agencies' awareness, receptivity and accountability to affected animal stakeholders.

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<sup>27</sup> Simon Coghlan and Christine Parker, 'Harm to Nonhuman Animals from AI: A Systematic Account and Framework' (2023) 36(2) *Philosophy & Technology* 25 ('Harm to Nonhuman Animals from AI').

<sup>28</sup> Christine Parker, Lev Bromberg and Simon Coghlan, 'Artificial Intelligence and Non-Human Animals: A Multi-Species Justice Approach for AI Law and Governance?' in Jane Kotzmann and Joanna Kyriakakis (eds), *A Quiet Crisis: Contemporary Animal Law in Australasia (Forthcoming)* (Federation Press).

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> Coghlan and Parker (n 27); Parker, Bromberg and Coghlan (n 28).

<sup>32</sup> David Fraser, 'A "Practical" Ethic for Animals' (2012) 25(5) *Journal of Agricultural and Environmental Ethics* 721.

<sup>33</sup> Bromberg (n 3).

<sup>34</sup> see e.g. Futureye (n 5); Saeri and Grundy (n 6).

<sup>35</sup> Kathryn Harrison, 'Regulatory Excellence and Democratic Accountability' in *Achieving Regulatory Excellence* (Brookings Institution Press, 2016) 56

<<http://ebookcentral.proquest.com/lib/unimelb/detail.action?docID=4759870>>.

<sup>36</sup> Bromberg (n 3).

Animal interests may need to be represented by accountable human intermediaries, such as experts or advocates whose role it is to translate and represent the interests of animals to decision-makers. The proposed Bill essentially empowers the Minister for Agriculture, in issuing a Guideline, to act as an intermediary for animals.

We are concerned about the level of discretion that the Bill vests in the individual Minister. In particular, the Minister can decide if, and when, to develop a Guideline, and what the content of the guideline will be. There is a risk that the Minister, or Department representatives lack independence from certain regulated industries — or at least there is a perceived lack of independence — which may impact their ability to genuinely represent the interests of animals.<sup>37</sup> Independent governance and administration is necessary to ensure that this framework achieves its objectives, and is seen to be legitimate by stakeholders and the community.

### **About the Authors**

Lev Bromberg is a lecturer and research fellow at the Melbourne Law School, University of Melbourne, undertaking a PhD in the area of animal law and policy.

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<sup>37</sup> see e.g. Jed Goodfellow, ‘Animal Welfare Regulation in the Australian Agricultural Sector: A Legitimacy Maximising Analysis’ (PhD Thesis, Macquarie Law School, 2015).