

OBLIGATIONS OF WILDLIFE CARERS UNDER ANIMAL WELFARE LEGISLATION

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Contributing to the conservation of a species through the act of wildlife rehabilitation and release encompasses an inherent obligation to the welfare of the individual animal whilst in care. While this obligation is readily accepted by virtue of the act of 'rehabilitating', it is also statutorily enshrined in the various state and territory animal welfare laws throughout Australia.

Animal welfare legislation has existed for close to 200 years. Originally, the sole aim of this legislation was to provide protection to individual domestic animals from acts of intentional cruelty. The legislation has now evolved to cover all human-animal interactions, especially where such interaction vests in the human, the 'care and control' of the animal. Subsequently, under modern animal welfare legislation, we now have a *proactive* obligation to provide for the needs of animals in our care, in a way that is appropriate to the species concerned. In other words, we have a 'duty of care' towards animals that are subject to our control. And wildlife carers, as with your typical dog owner, have the same duty.

Taking into account some of the differences and similarities of the laws throughout Australia's six states and two territories, this paper will address two pivotal concepts present in animal welfare legislation, namely, the meanings of 'the person in charge', and the 'duty of care'. The paper will then follow with a general overview of the powers of animal welfare inspectors and conclude with exploring the possibility of developing national wildlife rehabilitation standards in the form of codes of practice.

Person in Charge

In an attempt to attribute responsibility and accountability to a person(s) for the proper care of an animal(s), the concept of 'the person in charge' was incorporated into animal welfare legislation. This concept is broadly defined as those who have control of an animal. Therefore, regardless of whether the control is temporary or permanent or if the person is or is not the actual legal owner of the animal(s), if the animal is subject to their control, that person is taken to owe a 'duty of care' to that animal.

Further, in some jurisdictions such as Queensland, Tasmania and NSW, an element of 'care' can also influence whether someone can be classified as the 'person in charge'. Therefore, even if a person did not have complete control over an animal, due to providing a certain degree of 'care', usually in the way of food or treatment of some sort, that person may still be found to be the person in charge and subsequently owe a duty of care.

Duty of Care

The concept of a 'duty of care' has been present in Australia's common law for over 70 years. As defined in the Butterworths Australian Legal Dictionary, it is:

"The obligation owed to anyone whom it is reasonably foreseeable would be injured by the lack of care of that person."

This concept has only recently been incorporated into animal welfare legislation, most obviously in the Queensland *Animal Care and Protection Act 2001* (ACPA). The structure of the ACPA is somewhat different to most other state animal welfare legislation as it distinctively separates the duty of care from its main cruelty offences division. This intentional separation was most likely done to enhance the symbolic and educational effect of the duty of care section. To make it clear that, not only must we

refrain from treating animals in a cruel manner, but we now also have a proactive obligation to provide for the needs of animals that are subject to our control.

The duty of care section of the ACPA was modeled off the internationally recognised standards of animal welfare known as the 'five freedoms'.¹ The five freedoms were developed by the UK Farm Animal Welfare Council and take into account the mental as well as physical dimensions of animal welfare, stating that good animal welfare can be achieved by allowing an animal to have:

- Freedom from hunger and thirst
- Freedom from pain, injury and disease
- Freedom from fear and distress
- Freedom from discomfort
- Freedom to express normal behaviour

The ACPA duty of care section largely reflects the five freedoms by requiring the person in charge to provide appropriate food and water, living conditions, and treatment; and also to ensure that the animal can express normal patterns of behaviour and is handled appropriately. The table below depicts this recognition:

Five Freedoms	ACPA Duty of Care (s17)
Freedom from hunger and thirst	Must provide appropriate food and water
Freedom from pain, injury and disease	Appropriate treatment of disease and injury
Freedom from fear and distress	Appropriate handling
Freedom from discomfort	Appropriate accommodation or living conditions
Freedom to express normal behavior	To display normal patterns of behaviour

The section goes on to state that 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.

All other state animal welfare Acts proscribe the same basic obligations with respect to providing appropriate food, water and treatment. However, the ACPA is unique in its obligations to provide appropriate *accommodation or living conditions* and ability to *display normal patterns of behaviour*. All other states address these obligations as simply providing appropriate *shelter* and *exercise*, effectively restricting the obligations significantly.

Options for Dealing with Breaches

It is inevitable that most long-term wildlife carers, will at some point encounter neglectful and incompetent wildlife rehabilitation practices. When such a situation arises, knowledge of the relevant animal welfare legislation is helpful in deciding what to do. In most cases, the severity of the breach of duty will dictate what course of action is necessary to take. Minor breaches may be rectified by simply educating the person about the appropriate form of care, which may include simply altering the animal's diet or living conditions in some way. These situations can often be quite sensitive so it is always advisable to use tact and diplomacy in giving advice. Documented advice in the form of guides and pamphlets is always preferable as it gives an appearance of impartiality; purely verbal advice can be construed as subjective and may create a higher likelihood of dissent. Ordering or directing a person to do something will almost always result in counter-productive conflict and hostility.

In situations where diplomatic education is ineffective and there has been a breach of duty resulting in the suffering of an animal, it may be necessary to contact animal welfare authorities such as the RSPCA.

¹ *Animal Care and Protection Bill 2001 (Qld) Explanatory Notes*, clause 17

Powers of Animal Welfare Inspectors

The primary objective of an animal welfare inspector is to alleviate and prevent the suffering of animals in accordance with the provisions of the animal welfare Act that appointed them. This objective can be achieved in a number of ways; again, the severity of the breach will dictate what action is necessary to take.

In the context of negligent wildlife caring practices, inspectors are usually faced with well-meaning yet ignorant individuals, and therefore, education is again the preferred choice of action. This is usually resolved with verbal advice however, if a dispute arises as to what is appropriate for the species concerned, inspectors may seek advice from an expert such as a wildlife veterinarian. After receiving advice from an expert the inspector will again attempt to educate the person. If during this process the inspector holds doubts as to the person's willingness or ability to follow the advice, the inspector may take further action depending upon the particular powers afforded to the inspector under the relevant state laws.

In Queensland, the most likely course of action at this point will be the issuing of an Animal Welfare Direction (AWD). AWDs may require a person to care for an animal in a stated way, provide veterinary treatment, and provide or change living conditions and/or diet in a stated way. The grounds for giving, and what can be included in an AWD are very broad, effectively, an inspector's discretion is only limited by what is "reasonable in the interests of the animal's welfare." Failure to comply with an AWD is an offence under the ACPA, usually resulting in the animal's seizure and the commencement of prosecution proceedings. Penalties for breaching AWDs can be up to \$7 500 and 1 year imprisonment. Additionally, inherent in the offence of failing to comply with an AWD is usually a breach of duty of care which can result in fines of up to \$22 500 and 1 year imprisonment. However, this course of action is only ever initiated as a last resort.

National Standards: Codes of Practice

Codes of practice set specific standards that are used as a benchmark on which to assess a particular form of practice or activity. Codes of practice are used in many different areas; there are codes of practice for banking activities, the building and construction industry, television, internet and radio content, there are even codes for bushwalking. However the legal status of these codes can be very different.

In the context of animal welfare, there are national codes of practice for the welfare of animals. In addition to national codes, each state has its own set of codes on specific issues. The legal status of the various codes of practice is determined by its relationship with the relevant animal welfare act. Generally, there are four different types of animal welfare codes:

1. Adopted Codes

Adopted codes are not compulsory however they are used by inspectors to determine whether a person is meeting their duty of care obligations. Most animal welfare Acts provide an explicit exemption for acts done in accordance with an adopted code of practice, which would have otherwise constituted an offence.

2. Compulsory Codes

It is an offence not to comply with any part of a compulsory code. Two common compulsory codes of practice are the *Australian Code of Practice for the Care and Use of Animals for Scientific Purposes* and the *Code of Practice for the Welfare of Animals in Circuses*.

3. Part Compulsory Adopted Codes

Adopted codes that have had specific parts made compulsory through enactment in a regulation.²

4. Codes with no legal status

Codes that have not been recognised by an animal welfare Act at all. These codes have no legal status and are for purely educational purposes only.

² For example see the *Animal Care and Protection Regulation 2002* (Qld), division 2.

Inspectors will refer to codes of practice for guidance when deciding what the appropriate care for a particular animal may be. Without a code of practice, inspectors are left to seek independent expert advice, and it is quite common for this advice to conflict when it comes to the subject of animal welfare.

The adoption of national codes of practice for the caring of wildlife would help to overcome this problem. It would serve as an effective educational tool and provide a clearer direction for fellow wildlife carers and animal welfare inspectors in dealing with those who do not practice appropriate caring methods.

State Animal Welfare Legislation

Australian Capital Territory

- *Animal Welfare Act 1992 No 45*
- *Animal Welfare Regulations 2001 SL No 26*

New South Wales

- *Prevention of Cruelty To Animals (Animal Trades) Regulation 1996*
- *Prevention of Cruelty to Animals (General) Regulation 1996*
- *Prevention of Cruelty To Animals Act 1979 No 200*

Northern Territory

- *Animal Welfare Act 2001*
- *Animal Welfare Regulations*

Queensland

- *Animal Care And Protection Act 2001*
- *Animal Care And Protection Regulation 2002*

South Australia

- *Prevention of Cruelty to Animals Act 1985 No. 106*
- *Prevention of Cruelty to Animals Regulations (No. 2) 2000 No. 10*

Tasmania

- *Animal Welfare Act 1993*
- *Animal Welfare Regulations 1993*

Victoria

- *Prevention of Cruelty To Animals Act 1986 No. 46*
- *Prevention of Cruelty To Animals Regulations 1997 No. 159*

Western Australia

- *Animal Welfare Act 2002*
- *Animal Welfare (General) Regulations 2003*
- *Animal Welfare (Scientific Purposes) Regulations 2003*