



**Animal Defenders
Office ACT**

Using the law to protect animals

www.ado.org.au



**NORTHERN RIVERS
community
legal
centre**



Far West
Community Legal Centre



**LAWYERS FOR
COMPANION ANIMALS**

Submission on the Criminal Code Amendment (Animal Protection) Bill 2015

Committee Secretary
Senate Standing Committees on Rural and Regional Affairs and Transport
PO Box 6100
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Canberra ACT 2600

By email: rrat.sen@aph.gov.au

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About Us

The Animal Defenders Office

The Animal Defenders Office (ADO) is an incorporated, non-profit community legal centre that specialises in animal law. Our mission is to use the law to protect animals, which includes:

- assisting individuals and groups to secure animal interests through existing legal mechanisms;
- increasing public awareness of animal protection matters; and
- working to advance animal interests through law reform.

The ADO has been in operation since December 2013, and has a mandate to consider both local and national animal protection issues. Further information about the ADO can be found at www.ado.org.au

The Northern Rivers Community Legal Centre

The Northern Rivers Community Legal Centre (NRCLC) provides a range of free services to the public including advice, casework and community education on a range of legal matters. We host an Animal Law & Education Project (ALEP) which focuses on raising community awareness and providing education regarding animal law protection issues. ALEP also undertakes law reform activities with the aim of improving animal protection laws, ALEP members include lawyers, law students, farmers as well as companion animal and wildlife carers. For more information: www.northernriversclc.org.au/

The Far West Community Legal Centre

The Far West Community Legal Centre (FWCLC) is a front-line legal service, committed to providing a responsive service to the most vulnerable and financially and geographically isolated people and communities in the Far West NSW who have the least access to justice.

FWCLC supports this submission because we are committed to providing awareness of legal issues and legal rights in the community. We believe that our community has the right to speak out against injustice, and the abuse of animals is an injustice.

Lawyers for Companion Animals

Lawyers for Companion Animals is a private law firm in Australia that provides information and advice on issues relating to companion animals and their welfare.

About this submission

The ADO, NRCLC, FWCLC and Lawyers for Companion Animals appreciate the opportunity to make a submission in relation to the Criminal Code Amendment (Animal Protection) Bill 2015 (the Bill).

As organisations that have law reform within our remit, we would welcome the introduction of legislation designed to enhance protection for animals and strengthen mechanisms for the reporting of animal abuse. Unfortunately, this Bill does not come close to achieving these aims. Our concerns are summarised below.

Failing to report 'malicious cruelty to animals'

Section 383.5 makes it a criminal offence for a person to make a visual record of what they believe to be 'malicious cruelty' to an animal in circumstances where:

- the person fails to report the incident to the relevant authority within one business day; and/or
- the person fails to surrender the visual record to the relevant authority within five business days.

This provision creates a positive legal duty which is both unusual and highly burdensome, and it is difficult to identify any analogous provision in either Commonwealth or state legislation.¹

This is particularly concerning since the provision involves the creation of a criminal offence where the burden of proving the elements of the offence is displaced from the prosecution to the defendant (contrary to s13.1 of the Code).² A criminal conviction attracts consequences that typically extend far beyond the immediate penalty,³ and the Explanatory Memorandum does not include any explanation as to why it is appropriate to impose such onerous obligations and sanctions on members of the community who are not perpetrators of animal abuse, but who merely witness and capture evidence of animal abuse. Similarly, the fact that it is difficult for the prosecution to prove a particular matter is not in itself a sound justification for placing an evidentiary burden on a defendant,⁴ and the explanation provided in the Explanatory Memorandum can only be described as deficient, at best.

Further, since subsection 383.5(2) makes the actual occurrence of animal abuse immaterial, and since reporting is only limited to select authorities, it is difficult to see how this provision aligns with the purported object of the Bill, which is to ensure that animals are protected against 'unnecessary cruelty' and to minimise delays in the reporting of cruelty.⁵ If these intentions are genuinely at the heart of the Bill, then available avenues for reporting of abuse would be widened, and the focus of the provisions would be on the occurrence of actual abuse, and not on the subjective qualities of those who capture evidence of abuse.

Indeed, if the purported purpose of the Bill is to 'enhance' the protection of domestic animals⁶ then it is curious that it only places a reporting obligation on those who capture visual evidence of malicious acts of cruelty, and not on anybody who witnesses or becomes aware of such incidences of cruelty. Similarly, the Explanatory Memorandum states that the Bill is 'designed to minimise unnecessary delays in the reporting of malicious cruelty to animals.' If this actually is the aim of the Bill, the scenario on which it is based must be one where ongoing cruelty is occurring and not being reported. The Bill should therefore focus on those whose primary responsibility is to report the cruelty, such as the operators of the animal enterprises, rather than third parties recording it.

¹ Even in circumstances where mandatory reporting has been introduced, such as in section 124A of the *Domestic and Family Violence Act 2007* (NT), appropriate safeguards have been included such as a defence of 'reasonable excuse'.

² Subsection 383.5(3) provides that the defendant bears an evidential burden in relation to an alleged failure to report malicious cruelty within one day after making the visual record, and an alleged failure to surrender the visual record within five days.

³ Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011 edition), p12.

⁴ *Ibid.*

⁵ Explanatory Memorandum, page 1.

⁶ Chris Back, second reading speech accessed on 24 February 2015 at <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F7b131f75-a581-43c8-8045-70a726332d15%2F0096%22>>

The Bill also has the potential to have far-reaching implications, for which there is no compelling public policy justification. In particular, section 383.5:

- may prevent investigation into systematic animal abuse, which in the past, has proven to be an important impetus for policy and law reform;⁷
- may deter and disincentivise whistleblowing, which is highly important given the nature of the commercial animal industry (which is typically regulated by codes of practice and self-reporting, and involves activities carried out on private land);
- may act to punish members of the public who expose matters that are clearly within the public interest.⁸ As the Hon. Justice Michael Kirby noted in the High Court decision of *Lenah Game Meats Pty Limited v Australian Broadcasting Corporation*, animal welfare issues are legitimate matters of public debate in Australia.⁹

Destroying or damaging property

Section 385.5 creates a new offence for 'engaging in conduct' that destroys or damages property in the following circumstances:

- where that property:
 - is used in carrying on an animal enterprise;
 - belongs to a person who carries on an animal enterprise; or
 - belongs to a person who is otherwise connected with or related to animal enterprise; and
- where the person engaging in the conduct intends that the conduct will interfere with the carrying on of the animal enterprise.

This is an extremely broad provision, and the Explanatory Memorandum does not offer any explanation as to its application, or to the meaning of many of its nebulous terms. For example, it is difficult to draw any clear legal boundary around what it means to engage in conduct that destroys or damages property that belongs to a person who is connected with or related to an animal enterprise, particularly since 'animal enterprise' is defined in the Bill to include a commercial enterprise that stores animals or animal products for, among other things, profit or food.¹⁰ Such an enterprise could presumably include a supermarket, or almost any commercial store that sells meat or dairy products. The definition of animal enterprise also includes, rather curiously, 'any show or similar event intended to advance agricultural arts or sciences', which again casts an extremely broad net in terms of the provision's coverage.

In addition to the raft of problems associated with the application of this provision, the Explanatory Memorandum does not offer any explanation as to why it is necessary to create a new, additional offence relating to property damage (to sit alongside existing property damage offences), or why the imposition of new criminal penalties is warranted or justified. As noted in the Attorney General's

⁷ See for example the recent investigations into the live export of cattle to Indonesia, and live baiting of animals in the greyhound racing industry.

⁸ See for example, *ACCC v Pepe's Ducks Ltd* [2013] FCA 570, where substantiated claims of misleading or deceptive conduct arose from footage taken inside commercial enterprises, which was aired by the media.

⁹ (2001) 208 CLR 199 at 217. In discussing potential restrictions on 'the operation of the representative democracy that is envisaged by the Constitution', Kirby J commented that 'Within that democracy, concerns about animal welfare are clearly legitimate matters of public debate across the nation. ... Many advances in animal welfare have occurred only because of public debate and political pressure from special interest groups. The activities of such groups have sometimes pricked the conscience of human beings' [217].

¹⁰ Criminal Code Amendment (Animal Protection) Bill 2015, section 2.

Guide to Framing Commonwealth Offences, offences of general application in the Criminal Code should be relied on, rather than creating new offences.¹¹

Causing fear of death or serious bodily injury

Notwithstanding its convoluted nature, the new offence provision in section 385.10 can be summarised as follows:

- a person commits an offence (the first person) if they engage in conduct involving threats, vandalism, property damage, criminal trespass, harassment or intimidation in circumstances where that conduct causes another person (the second person) to reasonably fear that ‘any person’ will cause death or serious injury to a ‘targeted person’, being the second person, or their close family member, or their employee or a contractor of the person. This must occur in circumstances where:
 - the second person or the targeted person carries on an animal enterprise; or
 - the second person or the targeted person is otherwise connected with, or related to, an animal enterprise; and
 - the first person intends that the conduct will interfere with the carrying on of the animal enterprise.

The same issues outlined in response to section 385.5 apply to this section, insofar as the provision employs extremely vague terms and concepts, the application of which remain unexplained. For example, the Explanatory Memorandum does not contain any explanation as to what it means to cause another person to reasonably fear that ‘any person’ will cause death or serious injury to them (or to a family member, employee or contractor), or how such a causal link may be established. This is particularly concerning since the provision attracts severe criminal penalties. Similarly, terms such as ‘threats’, ‘harassment’ and ‘intimidation’ are not defined in the Bill.

The aggravated offences proposed in section 385.20 deal with conduct resulting in ‘substantial [or] serious bodily injury to any individual’, or ‘death to any individual’. It is unclear why the Bill deals with such hypothetical conduct when there is no reported case of any harm being inflicted on an individual in the course of gathering evidence about animal cruelty. The proposed creation of new offences and associated harsh penalties in the Commonwealth Criminal Code is therefore disproportionate to the supposed public harm the Bill is intended to address (detering third-party conduct that interferes with an animal enterprise).

The creation of new Commonwealth offence provisions would be duplicative and add an unnecessary degree of uncertainty into the *Criminal Code Act 1995*, due to the poorly conceived nature of the provisions. There is a range of state and territory legislation that adequately and appropriately deals with behaviour of the kind mentioned in sections 385.5 and 385.10, and in the absence of evidence, or indeed, any form of compelling public policy rationale, it is our view that these provisions should not be introduced.

To summarise our position:

- the provisions of the Bill are in clear misalignment with its purported objects;
- the Bill targets those who merely witness and capture evidence of animal abuse, and not those who perpetrate animal abuse;
- the Bill would operate to prevent investigation and exposure of animal abuse, and deter whistleblowers;
- the provisions are convoluted and duplicative of existing legislation, and there is no justification for their introduction.

¹¹ Attorney-General’s Department, Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (September 2011 edition), p14.