

18 March 2015

Mr Tim Watling
Committee Secretary
Senate Standing Committee on Rural and Regional Affairs and Transport
PO Box 6100
Parliament House
CANBERRA ACT 2600

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

Dear Mr Watling

Criminal Code Amendment (Animal Protection) Bill 2015

Thank you for the opportunity to provide comments to the Senate Standing Committee on Rural and Regional Affairs and Transport's *Criminal Code Amendment (Animal Protection) Bill 2015* (the Bill) Inquiry.

The Law Council supports efforts to minimise unnecessary cruelty towards animals. However, the Law Council does not support the Bill in its current form as it produces a number of anomalies and unintended consequences and because the necessity of legislating the key offences has not been sufficiently demonstrated.

The Law Council encourages the Committee to consider the Constitutional head of power the Bill seeks to rely upon for its validity.

Protecting animal welfare

The Bill is designed to 'ensure that animals are protected against further unnecessary cruelty caused by a delay in reporting'.¹ However, the Bill may have the unintended consequence of protecting animal enterprises engaging in conduct amounting to malicious cruelty of animals while possibly eroding the freedom of the press and freedom of expression.

Under the Bill, a person recording animal cruelty, such as an investigative journalist, can be criminally liable for a failure to report or for withholding a copy of a recording of animal cruelty.² While there is a good faith defence for ultimately publishing in the public interest (clause 385.15), the Bill still exposes the person who records animal cruelty to the possibility of having to defend a criminal prosecution.

¹ Explanatory Memorandum to the Criminal Code Amendment (Animal Protection) Bill 2015, p. 1.

² Clause 383.5 requires a person within 5 business days after making the record, to give the record to an authority of the Commonwealth, or of the State or Territory in which the activity occurred, with responsibility for enforcing laws relating to animal welfare. Clause 383.15 notes that a reference to a record is treated as including a reference to a copy of the record.

The definition of ‘malicious cruelty to animals’ in the Bill (clause 383.10) is also limited to domestic animals and appears inexplicably narrow.

Criminalising a particular category of witness

While the Explanatory Memorandum understandably notes that the ‘Australian community has no tolerance for malicious cruelty directed at animals’,³ the Bill does not target those who *engage* in malicious cruelty directed at animals, nor those who merely *witness* such conduct, but only those who make *recordings* of acts of cruelty.

There does not appear to be any justifiable public policy reason for only focussing on and criminalising the conduct of this particular category of witness. The Explanatory Memorandum to the Bill does not clarify the rationale for this approach. It is not clear, for example, if the category is targeted because of an underlying suggestion that the witness recording the principal offence must, to some degree, be involved in that offence but is otherwise out of reach of the authorities because of a lack of evidence.

If, as it transpires, a person is involved in both committing an act of cruelty and recording it, the requirement to report that recording would appear to compromise that person’s right to silence and the privilege against self-incrimination.

No obligation on witnesses that do not make a recording

Notably, the obligation to report does not extend to people who witness animal cruelty first-hand (such as a staff member of an animal enterprise or a journalist or animal rights activist who does not make a recording). It is not clear, for example, why a person who makes a recording of an animal enterprise engaging in cruelty towards animals, should be guilty of an offence for failing to report, whereas someone such as a staff member witnessing cruelty directly should not be accountable to a mandatory duty to report the abuse.

If the promotion of animal welfare by mandatory reporting is the primary concern of the legislation, one would expect it to:

- a) impose mandatory reporting obligations upon any person who becomes aware of animal neglect or cruelty; and
- b) provide strong and effective protection for employees who are thereby required to report against the interests of their employer or fellow employees.

Employees are possibly in the best position to know about the treatment of animals in an animal enterprise. The prosecution of any employee who is aware of animal cruelty or neglect in his or her workplace and fails to report it (with appropriate protections for those who do report it) would arguably be more likely to be effective in promoting animal welfare than the legislation in its current form.

While reporting animal cruelty to the relevant authorities in a timely manner is a commendable moral goal, criminalising a failure to report requires further consideration.

³ Ibid.

Presumption of innocence

Under clause 383, persons recording what they believe to be malicious cruelty to an animal or animals, commits an offence if they fail to report the event to the relevant authorities within one business day of the event occurring, and if they fail to provide all recorded material within five business days.

It is a fundamental principle of the criminal law that the presumption of innocence requires the prosecution prove all elements of an offence beyond a reasonable doubt. In limited circumstances, it may be appropriate for a defendant to satisfy an evidential burden in relation to establishing a *defence* as an issue in the trial. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code Act 1995* (Cth) to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

In this context, however, the presumption of innocence may unjustifiably be encroached upon, as the defendant under paragraph 383.5(1)(c) bears an evidential burden in relation to establishing elements of the offence rather than a defence. That is, the defendant would be required to adduce or point to evidence that suggests a reasonable possibility that the requirements of paragraph 383.5(1)(c) are satisfied, namely, that he/she has reported the event to the relevant authorities within one business day of the event occurring and provided all recorded material within five business days.

No requirement for there to be a recording of malicious cruelty to animals

The Bill would effectively enable a person to be fined for failing to report a recording which did not make a visual record of an activity that is malicious cruelty to animals. This may result in the unintended consequence that relevant authorities, such as the RSPCA and law enforcement agencies, would be inundated with footage or photographs of innocuous activities.

Necessity of offences

Clause 385.5 of the Bill would create an offence where a person intends to interfere with the carrying on of an animal enterprise and engages in conduct that destroys or damages property used in carrying on an animal enterprise; or belonging to a person who carries on an animal enterprise; or belonging to a person who is otherwise connected with, or related to, an animal enterprise.

Clause 385.10 would create an offence for causing fear of death or serious bodily injury in a person who carries on an animal enterprise or is otherwise connected with, or related to, an animal enterprise.

The necessity of these broad offences has not been sufficiently justified or the deficiency of current offences of trespass, endangerment of life, destruction of property, harassment, intimidation or the failure to report crimes adequately explained.⁴ This is particularly pertinent given the high and arguably disproportionate penalties these offences may attract, including for aggravated offences under clause 385.20.

⁴ Such as section 316 of the *Crimes Act 1900* (NSW) (concealing a serious indictable offence).

Thank you again for the opportunity to provide these observations. Please contact Natasha Molt on 02 6246 3754 or at Natasha.molt@lawcouncil.asn.au if we can provide any further assistance to the Committee.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M Hagan', written in a cursive style.

MARTYN HAGAN
SECRETARY-GENERAL