



***Submission to the Social Policy Scrutiny Committee Inquiry into
the Animal Protection Bill***

The Animal Law Institute is a not for profit community legal centre that is dedicated to protecting animals and advocating for their interests through the Australian legal system.

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Ms Julia Knight
Committee Secretary

By email: SPSC@nt.gov.au

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Introduction

1. The Animal Law Institute (**ALI**) welcomes the opportunity to make this submission to the Social Policy Scrutiny Committee in response to its inquiry into the Animal Protection Bill (**the Bill**)
2. ALI is a registered charity and a not for profit community legal centre that is dedicated to protecting animals and advocating for their interests through the Australian legal system. ALI is a member of peak bodies, the Victorian Federation of Community Legal Centres and the National Association of Community Legal Centres.

Summary of recommendations

ALI notes the Terms of Reference of the Committee are confined to issues relating to scrutiny of the Bill. ALI confines its submission to the issues detailed in the Terms of Reference.

ALI recommends that:

1. Section 5(1)(b) is amended to provide that any live fish is an animal protected under the Bill, with section 5(2)(a) to be omitted.
2. Division 3, Part 5 of the Bill is amended to:
 - a) remove the proposed 48 hour notice period in section 83(3) and replace with a power to enter any premises, including buildings, at any reasonable time or in the case of an emergency at any time,
 - b) allow entry into residential premises, only with permission of the occupier or with authority of a search warrant, or in the case of an emergency,
3. Section 84 is amended to clarify the consequence of an authorised officer not producing an identity card.

4. Sections 21, 121(g) and (h) require careful scrutiny as they arguably may amount to inappropriate delegations of legislative power.
5. Sections 23, 24, 27, 28, 30, 31, 32, 69, 70, 92, 104 to provide that a person commits an offence if they intentionally or recklessly undertake the prohibited activity.
6. Section 42(4) is amended clarify that where a person has been found guilty of an animal welfare offence, or has been issued a penalty notice for an offence, in another jurisdiction they are disqualified from being a fit and proper person under the Act.

Proposed definition of animal is unnecessarily narrow

Section 5(2) specifically provides that live fish that are not kept in captivity are not afforded the protections from animal cruelty included in the Bill. ALI considers that this creates an arbitrary distinction that does not distinguish between animals based on sentience or capacity to suffer and express higher level emotions, but rather distinguishes between animals based on human ownership.

The proposed Bill provides an opportunity to ensure that the law regulating animal welfare reflects the science on animal welfare, which is clear that fish are sentient, as are several non-vertebrate species.¹ For example, section 3(3) of the *Prevention of Cruelty to Animals Act 1986* (Vic) provides that an animal includes “a live member of a vertebrate species including any...fish or amphibian that is capable of self-feeding”.

Such a definition differentiates between animals based on their cognitive abilities (‘sentience’) rather than whether they are owned. This approach more closely aligns with defining the substance of the law based on an animal’s mental capacities than the unhelpful conception of animals as property. This approach would be consistent with those taken in other jurisdictions which have expressly acknowledged the sentience of animals; these include the European Union and New Zealand.

Section 5(2) is inconsistent with the proposed objects of the Bill (to ensure that animals are treated humanely; and to prevent cruelty to animals) and is likely to create perverse unintended consequences. For example, the proposed Bill would mean that an individual who was involved in “shark finning” (“the practice of cutting the fins from live sharks and

¹ For discussion about sentience in fish, see, Donald Brown, *Sentience and Animal Welfare* (2014, CABI Publishing).

dumping the body”)² would receive a penalty of up to five years imprisonment if the shark was owned by a human but would not commit an offence if the shark was out at sea. The proposed amendment to the Bill would also ensure that cruel practices in fishing would be covered by the proposed Bill, in the same way that animal cruelty offences apply to hunting in other jurisdictions.

ALI supports the removal of the proposed section 5(2)(a), and amendment to section 5(1)(b) to provide that all animals are afforded protection from animal cruelty.

Recommendation 1

Section 5(1)(b) is amended to provide that any live fish is an animal protected under the Bill, with section 5(2)(a) to be omitted.

Authorised officer must have appropriate powers to carry out functions under the Act

Authorised officers are required to undertake functions assigned to the CEO, including the investigation of offences under the Act.

As currently drafted, the enforcement powers are insufficient to deal with particular issues of animal cruelty, including puppy farms on residential properties, intensive farming involving animals being held inside buildings, and allowing persons committing offences up to 48 hours’ notice of impending regulatory action. These deficiencies not only hinder the ability of enforcement officers to prevent animal cruelty, but will also make it more difficult to gather evidence to prosecute misconduct.

For example:

- section 30 of the *Animal Welfare Act 1985* (SA) provides inspectors the power to enter and search premises without a warrant where the inspector “reasonably believes that urgent action is required in order to prevent or mitigate serious harm occurring to an animal.”³
- section 22 of the *Prevention of Cruelty to Animals Act 1986* (Victoria) provides that inspectors may enter onto property without notice where an animal is in pain or has

² Australian Marine Conservation Society, ‘Shark Finning’, 2018, <<https://www.marineconservation.org.au/pages/shark-finning.html>>.

³ *Animal Welfare Act 1985* (SA) s 30(2).

been injured, or has been confined without food or water for 24 hours, or where the animal is likely to be used as a lure.

- equivalent provisions in the New South Wales and Tasmanian acts in effect allow inspection without notice of premises where animals are kept for commercial purposes. There is a Bill currently before the Western Australian Parliament proposing an amendment which if adopted would be of similar effect.

ALI understands that a number of other Northern Territory criminal and regulatory schemes include comprehensive enforcement powers, and ALI considers these should be adopted for the administration of the proposed Act.

ALI proposes that Division 3, Part 5 of the Bill is amended to:

- a) remove the proposed 48 hour notice period in section 83(3) and replace with a power to enter any premises, including inside buildings at any reasonable time or in the case of an emergency at any time,
- b) allow entry into residential premises, only with permission of the occupier or with authority of a search warrant,
- c) allow authorised officers to carry and use overt surveillance devices when entering onto a property (i.e. body worn videos to record the execution of a search)(section 88(2)(d) may need to be broadened to allow for general use of overt surveillance devices).

These kinds of powers have recently been adopted in NSW in response to inadequate powers hindering investigations and prosecutions for animal cruelty offences.⁴

The proposed amendments are consistent with other criminal legislation but are appropriately balanced with the need to ensure property rights of individuals are respected.

The proposed section 84 should also be amended to clarify that only one authorised officer is required to produce their identity card, and that failure to produce the identity card does not by itself affect the lawfulness of any search carried out by the authorised officer.

⁴ See, e.g., *Greyhound Racing Act 2017* (NSW), Part 7.

Recommendation 2

Division 3, Part 5 of the Bill is amended to:

- a) remove the proposed 48 hour notice period in section 83(3) and replace with a power to enter any premises, including inside buildings at any reasonable time or in the case of an emergency at any time,
- b) allow entry into residential premises, only with permission of the occupier or with authority of a search warrant, or in the case of an emergency,
- c) allow authorised officers to carry and use overt surveillance devices when entering onto a property (i.e. body worn videos to record the execution of a search)(section 88(2)(d) may need to be broadened to allow for general use of overt surveillance devices).

Recommendation 3

Section 84 is amended to clarify the consequence of an authorised officer not producing an identity card.

The Code of Practice inappropriately delegates legislative power to the Executive

ALI is concerned that the proposed sections 21, 121(g) and (h) are an inappropriate delegation of legislative power to the Executive, and constitute 'Henry VIII' clauses.⁵ Section 21(2) provides:

Without limiting subsection (1), it is a defence to a prosecution for an offence against this Act if the conduct constituting the offence, or an element of the offence, was in accordance with a code of practice adopted or prescribed by regulation.

Section 21 delegates authority to determine the substance and effect of the law to the Executive. ALI considers that this is an inappropriate delegation and should be removed.

The proposed section 21 amounts to deference to the Executive to determine how the legislative scheme operates, and when changes are required, which in turn poses a challenge to the capacity of Parliament to maintain oversight of the overall legislative

⁵ Henry VIII clauses are provisions in primary legislation that empower subordinate legislation to amend, alter, or in substance repeal provisions of the Act without further parliamentary scrutiny.

scheme.⁶ The effect of this deference is to allow the Executive, not the Legislature, to be the primary policy-making body – allowing the Executive to change how the law operates without parliamentary approval.

Section 21 is particularly concerning because it allows the Executive to prescribe broad codes of practice that will be able to operate as defences to carefully worded offences. While the offences under the Act will be prescriptive as to what conduct is authorised and what conduct is prohibited, the proposed codes of practice are likely to include more general statements and guidance to industry participants. By allowing these codes of practice to be used as a defence to an offence under the Act, the Bill undermines the ability of offences to change behaviour and conduct.

While any regulation prescribing a code of practice could be subject to a disallowance motion,⁷ ALI considers that this parliamentary oversight function is of limited use in a unicameral parliament such as the Legislative Assembly of the Northern Territory.

ALI proposes that section 21 is omitted, with the Bill remaining silent on the effect of codes of practice in prosecutions for offences under the Act. This approach will allow a court to consider the usefulness of a code or other like guidance materials on a case by case basis.

Sub-sections 121(g) and (h) should also be omitted, as they operate in the same way to section 21 by allowing the Executive to determine the substance of the law. Regulation making powers should be limited to procedural matters that are likely to change from time to time, and are better dealt with immediately by the Executive. Determining how the law is intended to operate, including who will be exempt from the operation of serious animal cruelty offences, should always be dealt with by the Parliament.

ALI notes that there are no equivalent provisions allowing regulations in effect to modify the effect of the Act by way of a 'defence' in the cognate New South Wales and Tasmanian Acts.

⁶ Christopher Forsyth and Elizabeth Kong, 'The Constitution and Prospective Henry VIII clauses' (2004) 9 *Judicial Review* 17, 18; see also, Legislative Assembly of Queensland, Scrutiny of Legislation Committee, *Report on the use of 'Henry VII Clauses' in Queensland Legislation*, January 1997.

⁷ Legislative Assembly of the Northern Territory, *Standing Orders*, 21 April 2016, Order 176.

Recommendation 4

Sections 21, 21(g) and (h) require careful scrutiny as they arguably may amount to inappropriate delegations of legislative power.

All offences should include a reckless fault element

The Bill currently restricts a number of offences to where a person commits the act intentionally. For example, section 27 provides that a person commits an offence if the person intentionally administers poison to an animal.

However, ALI notes that where a person is aware of the risk of a consequence, and nonetheless acts that that person should be guilty of an offence. ALI supports amendments to sections 23 (Minimum level of care), 24 (Cruelty to an animal), 27 (Administering poison), 28 (Laying poison), 30 (Electrical devices), 31 (Spurs), 32 (Prohibited activities), 69 (Offences relating to project approval), 70 (Offence to contravene codes), 92 (Animal welfare direction), 104 (Obstruction of designated persons), to provide that a person commits an offence if they intentionally or recklessly undertake the prohibited activity.

Recommendation 5

Sections 23, 24, 27, 28, 30, 31, 32, 69, 70, 92, 104 to provide that a person commits an offence if they intentionally or recklessly undertake the prohibited activity.

Fit and proper person test should be expanded

Section 42 details the factors that the CEO is required to consider in determining whether a person is a fit and proper person, which includes “disqualifying events” detailed at 42(4). ALI supports amendment to section 42(4) to include where a person has been found guilty of an animal welfare offence, or has been issued a penalty notice for an offence, in another jurisdiction.

A person who commits an animal cruelty offence in another jurisdiction should be subjected to the same requirements that a person who commits an offence in the Northern Territory, which should appropriately bar them from being found to be a fit and proper person for the purposes of the proposed Act. The proposed amendment will ensure that where a person has committed an animal welfare offence, regardless of which Territory or State, they will be disqualified from registration under the Act.

Recommendation 6

Section 42(4) is amended clarify that where a person has been found guilty of an animal welfare offence, or has been issued a penalty notice for an offence, in another jurisdiction they are disqualified from being a fit and proper person under the Act.

We thank the Social Policy Scrutiny Committee for considering our submission.

Should the Social Policy Scrutiny Committee have any questions regarding this submission, please do not hesitate to contact The Animal Law Institute via email at policy@ali.org.au.

Yours sincerely

The Animal Law Institute Inc.