

SOCIAL POLICY SCRUTINY COMMITTEE

Written Questions for Witnesses – Public Hearing: Monday 9 April 2018

Department of Primary Industry and Resources

Animal Protection Bill 2018

The Department of Primary Industry and Resources (DPIR or 'the Department') would like to acknowledge the considered contributions to the public consultation of the Animal Protection Bill 2018 ('the Bill') and provide the following response to the questions provided by the Social Policy Scrutiny Committee ('the Committee').

Part 1 – Preliminary matters

1. The NT Cattlemen's Association questioned the change in the title of the legislation noting that "the term 'Animal Protection' suggests that *animal rights* rather than *animal welfare* is the priority of the legislation which changes the intent of the Bill." a. *What was the rationale behind the change in the title of the legislation?*

DPIR Response

The long title of the Bill is... *'An Act to provide for the care and protection of animals and for related purposes.'* Under the proposed objects of the Act, Clause 3(c) states that an object is: *'...to promote community awareness about the responsibilities and legal obligations associated with the care and protection of animals...'* The term '*welfare*' does not appear in the long title or the objects.

A benefit of a new title is assisting to distinguish it from the current *Animal Welfare Act* ('the Act') which came into effect in 2000.

2. Based on scientific evidence, the European Union has recognised the sentience of animals since 2009. In 2015, New Zealand amended its *Animal Welfare Act* to recognise animals as sentient. The Victorian Government is currently reviewing its *Prevention of Cruelty to Animals Act* and has flagged its intention to recognise animal sentience. a. *What consideration was given to recognition of the sentience of animals in the development of the Bill?*

DPIR Response

The formal recognition and acknowledgement of animal sentience does not appear in the objects of any animal welfare/protection legislation currently in force in an Australian state or territory.

DPIR did give due consideration to recognising sentience within the Bill. However the content of the Bill and intention would remain the same with or without that recognition. The Department considered that the adding of sentience as a specific statement did not add to the intent of the legislation or enhance compliance with the legislation.

Please Note: If the Committee is minded to make a recommendation to formally recognise animal sentience, this will require further stakeholder consultation, including evaluation of risks and benefits.

3. While the terms 'harm', 'pain' and 'suffering' are used throughout the Bill, they are not specifically defined in the Bill. Compare for example: in QLD the term 'pain' is defined as including 'distress and mental or physical suffering'; in SA the term 'harm' refers to 'any form of damage, pain, suffering or distress (including unconsciousness), whether arising from injury, disease or any other condition'; in WA the term 'harm' is defined as 'injury, pain and distress evidenced by severe,

abnormal physiological or behavioural reactions'; in the ACT and NSW the term 'pain' includes 'suffering and distress'.

- a. *Given the importance of ensuring that these terms are interpreted appropriately by the Courts, can you explain why they are not defined in the Bill?*

DPIR Response

DPIR acknowledges that only '*serious harm*' is defined within the Bill in Subclause 25(4). The Department agrees to review the use of these terms, and accepts that both '*harm*' and '*suffering*' probably should be defined. There is a need to seek advice from the Office of the Parliamentary Counsel (OPC) to review proposed changes to minimise any unintended consequences in being able to successfully prosecute the Act.

- b. *Clauses 24(2) and 92(1)(c) are limited to instances where it is reasonably believed that the animal has experienced, or has been subjected to, 'undue pain'. Can you explain why the animal's suffering or distress is not considered in these instances?*

DPIR Response

The Department agrees with the comment provided and will seek to have the term '*undue pain*' replaced with the term '*harm*' (noting that the definition of '*harm*' is likely to align with SA legislation (e.g. '*harm*' being defined as '*...any form of damage, pain, suffering or distress*').

4. Compared to equivalent legislation elsewhere in Australia, a number of submissions raised concerns that the definition of the 'meaning of animal' in the Bill is particularly narrow.

- a. *Can you explain why the 'meaning of animal' excludes invertebrate species such as cephalopods; wild fish and crustaceans; and mammals, reptiles and birds that are above the normal mid-point of gestation or incubation for the particular class of reptile, bird or mammal?*

DPIR Response

The 'meaning of animal' under clause 5 of the Bill is similar to that under section 4 of the current Act which has been in operation for 18 years.

With respect to fish, the Bill clarifies that fish only fall within the meaning of animal, in circumstances where a live fish is held in captivity, and is dependent on a person for its food. Similarly, the Bill clarifies that the meaning of animal extends to include live crustaceans, but only if they are in captivity.

While some jurisdictions (e.g. Queensland and New South Wales) have chosen to broaden their definition to encompass fish and crustaceans, these statutes specifically include exemptions from animal welfare provisions for fish and other organisms when undertaking the act of fishing, or dealing with fish (and other water-based organisms) taken while fishing.

The current and proposed definition of animal continues to allow for the protection of a live fish in captivity or dependent on a person for food, or a live crustacean if it is in captivity.

Including fish in the meaning of animal, but then providing a blanket exemption from most provisions of the Act is not the Northern Territory's Government's preferred legislative mechanism.

Please Note: If the Committee is minded to make a recommendation to broaden the meaning of animal, this will require further stakeholder consultation, including evaluation of risks and benefits.

- b. To what extent does the 'meaning of animal' limit the capacity to prosecute practices such as 'shark finning' under the Bill?

DPIR Response

'Shark finning' (the practice of removing fins from live sharks and then dumping them overboard) is prohibited under the *Fisheries Act* and Regulations.

5. Animals Australia submitted that use of the qualifying term 'appropriate' in subclauses 6(1)(a-i) reduces the protective effect of clause 6(1) and enables cruelty to occur provided that it can be 'justified' with respect to the 'circumstances'. a. *What sorts of circumstances are taken into consideration when determining whether something is appropriate to ensure the welfare of the animal?*

DPIR Response

The Department believes this issue is adequately addressed in existing clause 6(2) and 6(3) as outlined below.

Clause 6 - **Minimum level of care for animal**

- (2) *Something is appropriate for an animal if it is appropriate to ensure the welfare of the animal having regard to all relevant circumstances, including the animal's species and the environment in which the animal is kept or lives.*
- (3) *Something is not appropriate for an animal if:*
- (a) *it causes, is likely to cause, contributes to, or is likely to contribute to the animal suffering that is unjustifiable, unnecessary or unreasonable in the circumstances; or*
 - (b) *it is prescribed by regulation as being not appropriate.*

6. The Charles Darwin University Animal Ethics Committee raised concerns that the definition prescribed for 'scientific purposes' in clause 7, in conjunction with the requirement for registration at clause 40, could be interpreted to include the general population performing research-like activities.

- a. *How will professional research be distinguished from other research-like, community engagement activities with animals?*

DPIR Response

The Department is of the view that the intent of the definition of '*scientific purpose*' is to ensure that those in the community who undertake formal (professional) research involving interactions with animals seek and receive appropriate approvals to do so. Education material to be prepared on a new Act will provide clarity on what activities involving animals would and would not constitute use for a scientific purposes, and therefore require or not require registration.

Part 2 Administration

Division 1 CEO

7. Professor Aughterson raised concerns that the CEO's investigatory powers under clause 12 do not have sufficient regard to the rights and liberties of individuals, noting that "provisions of this nature are difficult to challenge and can lead to excessive and unreasonable demands."

In the Department's *Statement of Compatibility with Human Rights*, it is noted that the limitations of the right to be free from self-incrimination (Article 14(3)(g) of the *International Covenant on Civil and Political Rights*) are permissible where protections apply to ensure the exercise of these powers is reasonable and proportionate to achieving the legitimate objective, and adequate safeguards apply to prevent the risk of abuse or arbitrary exercise of discretion.

- a. *What justification is there for abrogating the privilege against self-incrimination and the removal of derivative use immunity?*
- b. *What safeguards apply to prevent the risk of abuse or the arbitrary exercise of discretion which may lead to excessive and unreasonable demands?*

DPIR Response

The Department agrees with Professor Aughterson that, as currently drafted, the CEO's investigate powers under clause 12 of the Bill, resulting in abrogating the privilege against self-incrimination, is difficult to justify. Further, the Department agrees that in clause 12 there should be provisions for inclusion of derivative use immunity. DPIR will consult with both OPC and the Department of Attorney General and Justice to seek advice on the redrafting of this clause.

Division 4 Codes of practice

8. The Animal Law Institute and Lawyers for Animals raised concern that clause 21 undermines the ability of proposed offences in the Bill to change behaviour and conduct and may constitute an inappropriate delegation of administrative powers.
- a. *What was the rationale for the inclusion of this clause rather than allowing a Court to determine what practices constitute cruelty in particular circumstances guided by the definitions set out in the Bill and taking into consideration the usefulness of a code or other guidance materials on a case by case basis?*

DPIR Response

Clause 21 in the Bill is similar to section 79(1)(a) in the current Act which provides a defence if a defendant establishes that the act or omission constituting the offence, or an element of the offence, was undertaken in accordance with an adopted code of practice.

The Department is of the view that codes of practice when followed assist with improving animal welfare outcomes, and assist to provide certainty for those participating in animal-based industries. It is therefore appropriate for anyone undertaking a practice in accordance with an adopted or prescribed code to be afforded a level of protection as outlined below in clause 21 of the Bill. Industry codes are reviewed and updated on a regular basis.

21. Use of codes of practice in proceedings

- (1) *Evidence of compliance or non-compliance with a code of practice adopted or prescribed by regulation is admissible in proceedings as evidence of whether or not a duty or obligation under this Act has been complied with.*
- (2) *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.*

Part 3 Care and protection of animals
Division 1 Obligations and offences

9. Professor Aughterson queried the purpose of the 'duty of care' obligation in clause 22(1) given that the term is not defined in the Bill; neither clause 22(2) nor clause 23 make a link with the duty arising under clause 22(1); and its removal would have no impact on any provisions in the Bill. Compare for example, sections 9(3) and 17 of the *Queensland Animal Care and Protection Act 2001*, or sections 7 and 8 of the *Animal Welfare Act (NT)*.
- a. *In the absence of any indication as to the scope of the duty and consequences of any breach, even it could be determined when a breach arises, can you explain the purpose of clause 22(1)?*

DPIR Response

The department agrees that a change is probably required to current clause 22(1). It is likely that after discussions with OPC on this matter, the clause will be amended to the effect that a person in control of an animal must provide a minimum level of care to the animal.

10. In accordance with the RSPCA Policy A11, *Surgical Modification of Companion Animals*, the Charles Darwin University Animal Ethics Committee noted that it does not support the removal of claws of animals unless it is necessary for the welfare of the animal concerned and is undertaken by a registered veterinarian under appropriate anaesthesia.
- a. *Can you explain why the Bill permits removal of the dew claws of a dog less than 5 days old at clause 24(7)(c)?*

DPIR Response

The Department agrees with the issue raised in the submission and will have clause 24(7)(c) amended to remove the exception for removing dew claws from a dog less than five days old. That is, under the revised clause a person will commit an offence if they remove the dew claws from a dog (irrespective of its age).

As provide for under clause 24(8), the only person to which clause 24(7) will not apply is a veterinarian who believes on reasonable grounds that the procedure (e.g. removing of dew claws) is a reasonable and necessary therapeutic measure for the treatment or welfare of the animal.

- b. *Why does the Bill not require that the removal of dew claws be undertaken by a registered veterinarian under appropriate anaesthesia?*

DPIR Response

With the agreed amendment to clause 24(7)(c) stated above, any removal of dew claws will need to be undertaken by a registered veterinarian under anaesthesia.

11. Given the extreme pain and suffering caused by metal jawed traps, the RSPCA expressed the view that the Bill ought to ban them outright.
- a. *Under what circumstances might the CEO authorise a person to set, use, sell or possess a metal jawed trap?*
- b. *As provided for in clause 29(5)(d), what types of metal traps may be exempted by regulation and on what basis might they be exempted?*

DPIR Response

The Department is of the view that the Bill as drafted provides a degree of flexibility to deal with emergency situations, such as an urgent biosecurity response. For example, in the event of the outbreak of a serious animal disease, particularly where there may be public health implications, there may be a need for an authority to quickly trap animals such as wild dogs as part of a range of other measures to catch and destroy such animals. While it is agreed that the likelihood of such instances is low, retaining the ability to authorise the use of such traps in exceptional circumstances should be retained as a contingency measure.

12. The RSPCA submitted that the exemption from the prohibited activity offences relating to feeding a live animal to a display animal is open to abuse and requires further refinement. It is suggested that the provisions under s 43 of the Queensland legislation are more appropriate as they are more specific and restricted in their scope.

a. Would the operation of clause 32 be unduly affected if the exemption at subclause (6)(b) was amended to refer to display animals that will only eat live food and it is essential for the display animal's survival? If so, how?

DPIR Response

Clause 32(6)(b) in the Bill is based on existing section 21(5)(b) of the current Act. The Department agrees to amend the clause to clarify that the feeding of live food is only in reference to display animals who will only eat live foods, which are essential for the display animal's survival.

13. Unlike equivalent legislation in QLD, SA or NSW, the offence of intentionally attending a prohibited activity does not carry a term of imprisonment.

a. Given that offence provisions which incorporate a term of imprisonment have a greater capacity to deter people from participating in prohibited activities, why is the offence provision at subclause 32(5)(b) limited to a maximum penalty of a \$15,400 fine?

DPIR Response

The Department is of the view that the organising, promoting and participating in a prohibited event are more serious contraventions than being an attendee at such an event. Imposing a term of imprisonment for attendance only is unjustified. The maximum fine stated for attending a prohibited event represents a significant penalty and therefore a strong potential deterrent.

14. Subclause 33(1)(d) relates to the keeping of animals on the same premises as greyhounds 'where the other animal is a species used for the purpose of bleeding a greyhound.' The RSPCA raised concerns that this subclause unduly restricts the operation of the offence. *a. In the absence of a definitive list of animals that are used for the purpose of bleeding a greyhound, would the operation of this clause be unduly affected if it was amended to read 'where the other animal is a species that could be used for bleeding a greyhound'? If so, how?*

DPIR Response

The Department agrees with the point made in the submission and will amend clause 33(1)(d) to clarify that the other animal in question is a species that *could* be used for bleeding a greyhound.

15. The RSPCA, the Animal Law Institute and Animals Australia raised concerns that the Bill restricts a number of offences to where a person commits the act intentionally and thereby fails to acknowledge that where a person is aware of the risk of a consequence, and nonetheless acts, they should be equally culpable.

a. *Can you explain why offences under clauses 23, 24, 27, 28, 30, 31, 32, 69, 70, 92 and 104 do not provide that a person commits an offence if they intentionally or recklessly undertake the prohibited activity?*

DPIR Response

The concern raised in the cited submissions appears based on confusion regarding the operation of the criminal responsibility provisions in Part IIAA of the Criminal Code. There is a conflation of conduct and consequence or result. Whether a person engages in conduct or 'commits an act' intentionally is a different issue from whether they intend or are reckless about the result or consequence of their conduct.

The structure of Part IIAA of the Criminal Code is to keep these elements of the offence separate. Section 43AB of the Criminal Code provides that offences consist of physical elements and fault elements. Each physical element is either ascribed a fault element or it is provided that no fault element applies and strict or (extremely rarely) absolute liability applies. If strict or absolute liability applies to a physical element then that element is proven by its mere commission without the need to prove any 'fault' or mental element. There are many instances of strict liability applying to elements or even whole offences in the Bill.

Section 43AE of the Criminal Code provides that a physical element may be: conduct; the result of conduct; or a circumstance in which conduct or a result of conduct occurs.

Section 43AH(1) provides that a fault element may be: intention; knowledge; recklessness; or negligence. Subsequent sections define these fault elements. Intention is defined in section 43AI. It is (see section 43AM) the default fault element for conduct. Regarding intention as it applies to conduct that simply means that the person meant to engage in the conduct. It does not mean that the person intended a particular consequence or result.

Section 43AK defines recklessness. A person can be reckless as to result or reckless as to circumstance. The definition does not contemplate being reckless as to conduct.

The confusion arises because the conduct and the result of the conduct are disaggregated and each ascribed a separate fault element. When speaking about 'acting recklessly' as a layperson the two elements are conflated.

The appropriate fault element for conduct is intention.

Part 4 Regulation of scientific users of animals **Division 3 Accreditation of animal ethics committees**

16. Clause 51 requires that, in considering an application for registration, the CEO must take into account whether an applicant was involved in a disqualifying event.

a. *Under what circumstances would the CEO grant registration where an applicant had previously been involved in a disqualifying event?*

DPIR Response

In clause 51 of the Bill there is no specific reference to disqualifying events and is concerned with the accreditation of an animal ethics committee, not an application for registration.

In answer to the posed question about what circumstances would the CEO grant a registration/approval to a person who has previously involved in a disqualifying event, the Department is of the view there can be the possibility of extenuating circumstances and this clause should be retained to provide flexibility. However should the CEO make a decision to grant an application for registration in the knowledge that a disqualifying event had taken place, then the CEO would need to justify the circumstances as to why in a formally prepared Statement of Decision as is now common-place in accountable public sector decision-making.

- b. Why does the definition of a disqualifying event not extend to instances 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?*

DPIR Response

Disqualifying events occurring in another jurisdictions can be taken into consideration under the current Bill with respect to the regulation of scientific users. Clause 42(4)(c) of the Bill states that a disqualifying event means: *'... the suspension or cancellation, under a corresponding law...'* The term *'corresponding law'* is define under clause 4 of the Bill and means *'... a law of another jurisdiction that corresponds to this Act, and includes a law of another jurisdiction that is declared by the Regulations to be a corresponding law of the jurisdiction for this Act.'* Under Part 4 – Regulation of scientific users of animals, Division 1 – Preliminary matters, clause 36 defines that an animal welfare offence means: (b) an offence under a corresponding law that is the same as, or similar to, an offence against Part 3 (Care and protection of animals).

17. Animals Australia expressed the view that the Bill makes inadequate provision with respect to the formation and functions of an Animal Ethics Committee.

- a. Was any consideration given to mandating the composition of an Animal Ethics Committee by reference to the 'Australian Code for the Care and Use of Animals for Scientific Purposes' (Scientific Code) as is the case under Division 2 of the Animal Welfare Act 1985 (SA)? If not, why?*

DPIR Response

Clause 8 of the Bill defines the term *'scientific use code'* which is the *'Australian Code for the Care and Use of Animals for Scientific Purposes'*. Clause 36 defines an *'animal ethics committee'* as an animal ethics committee formed under the scientific use code. Under clause 42(1)(c) of the Bill the CEO must not register an applicant unless satisfied that the applicant has the competency to comply with the scientific use code. Further, under clause 47(1)(c), the CEO may take an action if satisfied that a registered person has contravened the scientific use code. Lastly, under clause 61(1)(b), an accredited animal ethics committee must not grant a project approval unless satisfied that the person or persons undertaking the project have the competence to comply with the scientific use code; and in considering an application, under clause 61(2)(a) the committee must take into account the requirements of the scientific use code. The Department is satisfied that the composition of an animal ethics committee under the Bill needs to be in accordance with the scientific use code.

- b. *Other than considering project applications, why are the functions of an Animal Ethics Committee not specifically provided for in the Bill?*

DPIR Response

The Department is of the view that there is not a requirement to specifically list the functions of an animal ethics committee in the Bill itself, as they are already detailed in the scientific use code.

Division 4 Project oversight and code requirements

18. Clause 61(a) requires that an Animal Ethics Committee must not grant a project approval unless satisfied that 'each person involved in undertaking the project is a fit and proper person.' The Charles Darwin University Animal Ethics Committee suggested that this clause requires further clarification as to who constitutes 'each person' involved in undertaking a project.

- a. *How will this provision impact on the current practice whereby assistants and volunteers may participate in research without proving they are a fit and proper person as they are under the direct supervision of a permitted fit and proper person?*

DPIR Response

The Department agrees with the submission that further clarification is likely required. The purpose of this clause is to ensure that the person who is applying for the project approval is a 'fit and proper person' as this person will be supervising the project's activities. It is not the intent for assistants and volunteers to be subject to fit and proper provisions, as they will be under the direct supervision of the project manager. DPIR will discuss with OPC how best to amend the draft Bill to effect this outcome.

19. The Charles Darwin University Animal Ethics Committee and Humane Research Australia questioned the absence of any specific rehoming provisions within the Bill.

- a. *In accordance with the Scientific Code, was any consideration given to the inclusion of a provision at clause 62 whereby it is a condition of project approval that "opportunities to rehome animals should be considered wherever possible, especially when the impact of the project or activity on the wellbeing of the animal has been minimal and their physiological condition and behavioural attributes indicate that they can be introduced to a new environment with minimal, transient impact on their wellbeing"? If not, why?*

DPIR Response

As mentioned earlier, clause 8 of the Bill defines the term 'scientific use code', and clause 36 defines an 'animal ethics committee' as an animal ethics committee formed under the scientific use code. There is no impediment in the Bill preventing an animal ethics committee from including rehoming opportunities in accordance with the scientific use code. The Department did not give specific consideration to rehoming provisions due to the relatively small amount of animal research being undertaken in the Territory.

20. Animals Australia also raised concerns that the emphasis of the Bill tends to be on ascertaining the competency of the person proposing to undertake the project, as opposed to the extent to which the proposed project purports to comply with ethical requirements as detailed in the Scientific Code.

- a. *Can you explain why the Bill does not require that an Animal Ethics Committee must only approve projects that are ethically acceptable and conform to the requirements of the Scientific Code, rather than merely taking the requirements of the Code into account when considering the application?*

DPIR Response

The Department does not agree with the concern raised that the proposed Bill does not adequately take into account the need for a project to conform to the scientific use code. Under clause 61(1)(b) of the Bill an accredited animal ethics committee must not grant a project approval unless satisfied that the person or persons undertaking the project have the competence to comply with the scientific use code. This is an important first step towards ensuring that a project will conform to the scientific use code. The second step is the requirement under clause 61(2)(a) for an animal ethics committee, in considering an application, to also take into account the requirements of the scientific use code. In the Bill as drafted the committee has at its disposal the necessary tools to ensure that proposed projects they approve conform to the requirements of the scientific use code.

Division 5 Other matters

21. Professor Aughterson raised concerns that there is no provision for a person to be heard before an improvement notice is issued. The only available remedy is for the person to seek review of the decision before the NT Civil and Administrative Tribunal.

a. What justification is there for not providing an opportunity for a person to be heard before their legal rights are affected, including exposure to a potential penalty of imprisonment under subclause 76(7)?

DPIR Response

The Department is of the view that an improvement notice issued under clause 75 of the Bill is to improve animal welfare for animals under the care of a registered person, or someone working for that registered person, and is intended to remediate circumstances, in some cases urgently, that are likely to lead to pain and suffering. It gives an opportunity for the registered person to rectify situations. Given the scope of Part 4 of the Act - Regulation of scientific users of animals - the Department is of the view the clause is appropriate. A similar provision to clause 75 is found in section 36G of the *Prevention of Cruelty to Animals Act 1986* (Vic).

Part 5 Monitoring programs and enforcement

Division 3 Functions and powers of authorised officers

22. A number of submissions raised concerns that the Bill's enforcement powers are insufficient to deal with particular issues of animal cruelty such as puppy farms on residential properties and intensive farming involving animals being held in buildings.

a. What is the rationale for the 48 hour notice period in subclause 83(3)?

DPIR Response

Under the current Act section 62(3) – Power of entry – an authorised person must give an occupier 7 days' notice of the authorised person's intention to enter the occupiers premises for the purposes of an inspection, unless the authorised person believes on reasonable grounds that there is in or on the premises an animal (or thing) connected with an offence. Section 62(4) sets out circumstances when lawful entry can take place within a shorter time period.

Under the Bill the period of notice given to an occupier of an intention to enter his/her premises has been reduced from 7 days to 48 hours as detailed in clause 83(3). The Department is of the view that 48 hours is sufficient advanced notice of a planned inspection. However, in circumstances detailed in clause 83(3)(a)-(c), an authorised officer has powers of entry into a premises within a much shorter timeframe, without the consent of the owner or a warrant, should certain conditions be met. In very specific instances where an authorised officer believes on reasonable grounds that the circumstances

are so serious and urgent as to require immediate entry, this power is provided for under clause 83(2)(e).

Clause 20 of draft Bill allows for adopting codes of practice under the Regulations for a variety of practices including for animal production and animal husbandry. The latter term encompasses the breeding and raising of animals which will capture puppy farming activities. A contravention of an adopted code of practice is to be regarded as a breach of a Regulation and thus enforceable with a maximum fine of up to 200 penalty units.

- b. Was any consideration given to the potential benefits of authorising inspectors to perform unannounced checks of premises in relation to monitoring programs for example? If not, why?*

DPIR Response

In all animal welfare legislation there is a need to balance the care and welfare of animals against the right of privacy of a person's premises. The Bill as already drafted has very strong powers of entry that need to be exercised judiciously.

Under the clause 92(1) of the Bill an authorised officer has the power to issue an animal welfare direction to a person in control of an animal if the officer believes on reasonable grounds that one or more adverse circumstance exist and these are detailed in sub-clauses (a) to (f). Some circumstances listed include an animal not being care for properly, or is experiencing undue pain (harm) or it requires veterinary treatment. The issuing of direction would arise from an inspection of a premises and thus forms a monitoring program to ensure the owner of the animal takes the actions specified. Part of the written direction can be a requirement for the owner of the animal to make the animal (and the premises where the animal is being kept) available for inspection. A failure to comply with a direction is an offence with a maximum fine of up to 100 penalty units.

- c. Was any consideration given to allowing authorised officers to carry and use overt surveillance devices (i.e. body worn video cameras) when entering a property? If not, why?*

DPIR Response

The potential for authorised officers to use overt surveillance devices (i.e. body worn video cameras) has been discussed within the Department. Advice received is that issues may arise under the *Surveillance Devices Act* regarding the inadvertent and incidental capture of video images not covered by the warrant issued for the entry. DPIR is continuing to examine how overt surveillance devices may be used as part of future monitoring and compliance activities.

23. Pursuant to clause 83, subclause 88(1) allows an authorised officer to inspect premises 'to the extent reasonably required for the administration, operation and enforcement of the Act.' Subclause 88(2) then lists a number of things that the officer may do during an inspection. While it is presumed that this would be construed subject to the limitation in subclause 88(1), Professor Aughterson raised concerns that there is a risk that officers and the persons affected will construe subclause (2) in isolation.

- a. Given the invasive nature of this clause and the significant interference with individual rights, to avoid any ambiguity or uncertainty has any consideration been given to making it absolutely clear in subclause (2) itself that the inspection, taking of copies of documents and the asking of questions etc. is limited to what is necessary for the purposes of the Act? If not, why?*

DPIR Response

It is correct to construe that the activities listed in clause 88(2) of the draft Bill are explicitly limited by clause 88(1). The only authority upon which an authorised officer can use his or her powers of inspection are for the '... administration, operation or enforcement of the Act' and for no other reason. As the clause is restricting a person's right then it will be read narrowly. The wording of clause 88 in the Bill is more explicitly limiting than section 66 of the current Act. Authorised officers operate under strict operational guidelines developed and overseen by the DPIR's Animal Welfare Branch.

Part 6 – Miscellaneous matters

24. The Northern Land Council raised concerns that, given subclause 110(2), Traditional Owners exercising their traditional rights may be open to prosecution through the operation of clauses 24 and 25. Similarly, Professor Aughterson noted that as a consequence of clauses 20 and 21, subclause 110(2) could serve to indirectly discriminate against Aboriginal people.

- a. *As drafted the Bill is inconsistent with sections 211 and 223 of the Native Title Act 1993 (Cwlth), section 73 of the Aboriginal Land Rights (Northern Territory Act 1976, section 122 of the Territory Parks and Wildlife Conservation Act (NT), section 53(1) of the Fisheries Act (NT) and Article 20 of the United Nations Declaration on the Rights of Indigenous People. How will this impact on the operation of the legislation?*
- b. *Was any consideration given to the inclusion of provisions similar to sections 8 and 41A of the Animal Care and Protection Act 2001 (QLD) regarding the exercise and enjoyment of native title rights and interests? If not, why?*
- c. *In order to avoid uncertainty about the application of the Animal Protection legislation, was any consideration given to the inclusion of a general clause to the effect that 'nothing in this Act affects the rights of Aboriginal people pursuant to the Territory Parks and Wildlife Conservation Act (NT) and the Fisheries Act (NT)? If not, why?*

DPIR Response

Clause 110(2) of the Bill is a replication of existing section 79(2) of the current Act, which has been in effect for the past 18 years. In this time there has been no constitutional challenges to that provision.

The intention of this provision is not to restrict or prevent traditional hunting or fishing from taking place, and it is the Department's view that it does not. While recognising the cultural significance of these activities, it is important that animal welfare legislation does not provide a blanket exemption from possible acts of cruelty and the inhumane treatment of animals. Both the current and proposed provision could be viewed as a 'justifiable regulation' based on the reasoning in the Canadian case of *R v Sparrow* (1990) 70 DLR (4th) 321 SCC.

With respect to traditional hunting practices, the intended focus of government is to be on education to promote the humane dispatching of animals caught to reduce unnecessary further suffering.

The Department notes Professor Aughterson's view that as a consequence of clauses 20 and 21, subclause 110(2) could inadvertently serve to indirectly discriminate against Aboriginal people.

Given the matters raised in submissions received which are summarised by the Committee in Question 24, DPIR will seek an opinion from the Solicitor General to provide guidance on the appropriate drafting of this and related provisions to ensure there are no unintended impacts on tradition hunting and fishing practices.

25. The RSPCA queried whether the powers conferred on courts to make orders under the Bill are sufficient given provisions in equivalent legislation elsewhere in Australia.

- a. *What powers do the Courts have to make orders regarding the seizure or future possession of animals where the defendant is deemed mentally incompetent in relation to the committing of the offence, or is deemed unfit to stand trial?*

DPIR Response

The Department is unaware of any other regulatory statute in the Northern Territory where a person who is found not guilty of an offence, on the ground of mental impairment, or has been deemed unfit to stand trial, can have court orders imposed against that person, the breach of which constitute a criminal offence.

- b. *Was any consideration given to the recognition of prohibition orders made interstate as provided for under section 31AA of the Prevention of Cruelty to Animals Act 1979 (NSW) or section 12A of the Prevention of Cruelty to Animals Act 1986 (VIC)? If not, why?*

DPIR Response

Due to the significantly lower population of the Northern Territory, when compared to other jurisdictions, the Department was of the view that the number of interstate prohibition orders potentially arising would be very extremely low. Under the Bill disqualifying events occurring in another jurisdiction can be taken into consideration with respect to the regulation of scientific users.

- c. *Why does the Bill not provide for a general power for Courts to make any other order regarding the care and control of any animal the defendant has in his or her possession as is the case in other jurisdictions?*

DPIR Response

The Department is of the view that clauses 113 and 114 provide courts with sufficient power to make orders to protect the well-being of animals through seizure and banning possession of animals for periods at the discretion of the court. Under the Bill strong powers exist for the CEO and authorised officers to make orders and issue directions relating to the welfare, protection and control of an animal.

26. A number of submissions raised concerns regarding the leniency of the automatic ban for multiple offences provision at clause 115.

- a. *What is the rationale for limiting the application of this section to a person who is found guilty of 3 or more offences within a period of 5 years or less, rather than 3 or more offences regardless of the timeframe in which they occurred?*

DPIR Response

Clause 115 is in line with other Northern Territory legislation which provides an additional penalty (e.g. the suspension or cancellation of an issued licence) for those convicted of three or more offences within a five-year time period. Clause 114 of the Bill allows for a court to make additional orders, upon finding a person guilty of an offence against the Act, with respect to the future possession of animals. The length of duration of an imposed ban from possessing an animal is at the discretion of the court.

- b. Why does the Bill not provide for indefinite banning orders depending upon the circumstances or seriousness of the offences committed?*

DPIR Response

As mentioned in the above response, clause 114 of the Bill allows for a court to make additional orders, upon finding a person guilty of an offence against the Act, with respect to the future possession of animals. The length of duration of an imposed ban from possessing an animal is at the discretion of the court.

Other Issues

27. Given that the Department has a mandate to ensure the continued growth and success of animal production industries, concern was raised regarding the potential for a conflict of interest to prevent the proper enforcement of the legislation.

- a. Pursuant to clause 117, all prosecutions are to be approved by the CEO. What safeguards are in place to ensure that this does not give rise to a conflict of interest?*

The Administrative orders can be changed at any time.

- b. Since the Animal Welfare Advisory Committee does not have any powers of oversight for compliance with the legislation, what mechanisms are in place to ensure that Departmental compliance is not undermined by a potential conflict of interest?*

DPIR Response

The findings within the Animal Welfare Governance Subcommittee final report in 2011 was that animal welfare should be managed within an agency, and in 2014 the Animal Welfare Branch was transferred to the Department of Primary Industry and Resources. The Department has implemented processes to minimise any conflict of interest and it is managed through the Biosecurity and Animal Welfare Division's regulatory programs, who also investigate any reports of animal welfare breaches within the Department's livestock program on research stations.

28. The Northern Territory Cattlemen's Association queried how the proposed legislation and associated regulations and codes of conduct will interact with the *Livestock Act* and related standards.

- a. Can you clarify, for example, how the Regulations will deal with the administering or laying of poison and the use of electrical devices to ensure consistency with existing provisions under the Livestock legislation?*

DPIR Response

The standards and guidelines adopted under the *Livestock Act* will be consistent with the proposed legislation and associated regulations

29. As drafted, the Bill does not incorporate a specific timeframe within which associated Regulations or Codes of Practice must be established.

- a. Given the importance of the Regulations and Codes of Practice for the operation of the legislation, can you clarify why a timeframe for their introduction is not provided for in the Bill?*

DPIR Response

The Bill will not commence operation until the necessary regulations are finalised. It is anticipated that the drafting of regulations will take approximately six months.

b. Since Codes of Practice detail the minimum standards of care for animals, was any consideration given to the inclusion of a provision for compliance with a code of practice and an offence for failing to comply with a compulsory code requirement such as that provided for in equivalent legislation in QLD or the ACT for example? If not, why?

DPIR Response

As mentioned in the response to Question 22, clauses 20 and 21 of draft Bill allows for adopting codes of practice under the Regulations and for these to be used in proceedings. Compliance with a code of practice may be a defence to a prosecution and non-compliance may be evidence of a breach of duty or obligation but is not of itself an offence.

30. Concern was raised regarding the poor animal welfare practices in remote communities and the ability for the legislation to address this issue.

a. What mechanisms are in place to ensure animal welfare issues are addressed in remote communities and provisions in the legislation are enforced?

DPIR Response

The Department works closely with local communities, local police and Local Government animal regulators to provide education to those in remote areas. Local police have powers under the current Act and (and the new Bill) and are often at the coalface when it comes to addressing animal welfare issues in remote areas. The Department's Animal Welfare Grants program (\$200,000 p.a.) is also a mechanism to promote and improve community animal management practices.

b. How does Animal Protection legislation interact with Local Government Animal Management By-Laws?

DPIR Response

Animal protection legislation and Local Government Animal Management By-Laws focus on separate issues and each represent stand-alone legislation. While the Act and the Bill focus on matters of animal cruelty and welfare, Animal Management By-Laws are targeted towards the registration of animals (e.g. dogs and cats), as well as dealing with dangerous animals and nuisance barking. However both NT and Local Government officers work together to improve education about animal management and exchange information of relevance to assist with enforcing Acts, Regulations and By-Laws.

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